

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

App. Case No. 2012-212842

Litchfield Plantation Association, Inc., Joseph E. Johnston, Thomas Eckard, Carol E. Kirby,
Robert F. McMahan, Jr., and Thomas Martin Phillips Appellant,

v.

Litchfield Plantation Company, Inc. Respondent,

AND,

E. Scott Trotter Intervenor.

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SC Court of Appeals

**Record on Appeal
Volume I**

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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2200319

Litchfield Plantation Association Inc Thomas Eckard Robert F McMahan Jr	Joseph E Johnston Carol E Kirby Thomas Martin Phillips	Litchfield Plantation Company Inc	E Scott Trotter
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ 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.
- ☐ **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: _____
- ☐ **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;
Motion for Summary Judgment by Attorney Neill Granted; Attorney Neill to prepare formal order.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

FILED
GEORGETOWN COUNTY, S.C.
2011 DEC -9 PM 3:37
ALMA N. WHITE
CLERK OF COURT

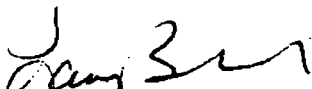
INFORMATION FOR THE PUBLIC

Complete this form before entering the judgment information in the public record. If the judgment is for a sum of money, enter the amount in the box 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.**


Circuit Court Judge

2152
Judge Code

12/9/2011
Date

For Clerk of Court Office Use Only

This judgment was entered on **December 9th, 2011**, and a copy mailed first class or placed in the appropriate attorney's box **December 9th, 2011**, to attorneys of record or to parties (when appearing pro se) as follows:

13th

Robert Francis McMahan Jr. Harris & Graves, PA Post
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


Alma Y. White - Clerk of Court

Court Reporter Kay H. Richardson

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE 15th JUDICIAL CIRCUIT

Litchfield Plantation Association, Inc., Joseph E.)
Johnston, Thomas Eckard, Carol E. Kirby, Robert)
F. McMahan, Jr., and Thomas Martin Phillips,)

Plaintiffs,

vs.

Litchfield Plantation Company, Inc.,

Defendant,

E. Scott Trotter,

Intervenor.

CASE NO: 2011-CP-22-00319

ORDER GRANTING
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT
(Not Ending Action)

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ORDER

This matter came before the Court pursuant to Defendant Litchfield Plantation Company, Inc.'s Motion for Summary Judgment filed on September 9, 2011 and Plaintiffs' Motion for Summary Judgment filed June 7, 2011. Both motions concerned only the Second Cause of Action of Plaintiffs' Complaint in which Plaintiffs petitioned the Court to declare that Defendant's Class B Membership ended as of January 1, 2011. The first of two hearings was held on December 8, 2011. A second hearing was held on April 19, 2013. Present for the hearings on behalf of the Plaintiffs were Robert F. McMahan, Jr. and Douglas C. Baxter. Mark D. Neill was present on behalf of the Defendant, Litchfield Plantation Company, Inc. Robert S. Shelton was present for E. Scott Trotter. After hearing oral arguments from the parties' counsel, reviewing the affidavits and record of the case, and considering legal authorities, the Court hereby GRANTS Defendant's Motion and DENIES Plaintiffs' Motion as follows:

All parties agreed the currently governing documents for Litchfield Plantation Association consist of the 2005 Amendments to the Declaration of Protective Covenants and Bylaws. These documents were filed with the Georgetown County Register of Deeds on May 3, 2005 in Deed Book 1642 at Page 1. The Declaration, on page twenty-five, provides for two classes of membership in the Association, Class "A" and Class "B." Class "A" members included all owners except for the Class "B" Member. Class "A" Members have one vote for each Lot and there is only one vote per Lot. The sole Class "B" Member shall be the Declarant – Litchfield Plantation Company, Inc. The Class "B" Member has the number of votes equal to all Class "A" Members plus one (1) vote.

The Amended Declaration provides the Class "B" membership is terminated and converted to a Class "A" Membership upon the earlier occurrence of the following:

1. An initial period commencing on January 1, 2005 and ending December 31, 2010; provided, this initial period shall be automatically extended for successive periods of five (5) years, provided that in each five-year period prior to the automatic extension the Declarant has sold 100 or more lots, including the number of Lots or Dwelling Units designated in connection with a Bulk Sale, to non-affiliated Owners;
2. When, in its discretion, the Declarant so determines; or,
3. One Hundred Eighty (180) Days after the Declarant has sold 90% of all Lots subject to this Declaration.

There is no evidence that any of the above three scenarios occurred. It is clear that Litchfield Plantation Company, Inc. did not, in its discretion, volunteer to convert its membership or that 90% of all lots have been sold. As to the first scenario, the undisputed evidence shows that Litchfield Plantation Company, Inc. sold 100 or more lots between January 1, 2005 and December 31, 2010. Plaintiffs have not submitted any evidence to show otherwise. Furthermore, the evidence shows that on December 3, 2010, Litchfield Plantation Company, Inc.

filed an "Affidavit of Extension of Class "B" Membership with the Georgetown County Register of Deeds in Deed Book 1591 at Page 131. According to the Amended Bylaws, the condition for automatic five-year (5) extensions of the Class "B" share period is conclusively established by the Declarant recording an affidavit stating the Declarant has sold 100 or more lots to Non-Affiliated Owners in the preceding five (5) years.

The Declaration, on page twenty-eight, requires the Defendant to either pay assessments on all of its unsold lots or to pay the budget shortfall for each fiscal year. The Plaintiffs argued that due to the Defendant's failure or inability to pay budget shortages or assessments, as well as, alleged breaches of its fiduciary duties, Defendant's Class B Membership status should be terminated. The Defendant argued that the relief sought by the Plaintiffs violated the Declaration of Restrictive Covenants and Bylaws for Litchfield Plantation. The Defendant further argued that the Declaration and Bylaws specifically provides the consequences in the event the Class B Member fails to pay the budget shortage or assessments – its voting rights are temporarily suspended.

After acknowledging the relief sought by the Plaintiffs was not provided for in the Declaration and Bylaws, the Plaintiffs argued that the Court had authority to grant equitable relief and terminate the Class "B" Membership. However, in the present case, ordering such equitable relief would not be accordance with South Carolina caselaw. A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property. Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). In Cullen v. McNeal, 702 S.E.2d 378 (Ct.App. 2010), the Court of Appeals applied the rules of contract interpretation in reviewing a declaration of restrictive covenants. "The main guide in contract

interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the [contract]. If a contract's language is clear and capable of legal construction, this [c]ourt's function is to interpret its lawful meaning and the intent of the parties as found in the agreement." Id., quoting Gilbert v. Miller, 356 S.C. 25, 30-31, 586 S.E.2d 861, 864 (Ct.App. 2003). Courts are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. South Carolina Dept. of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008). Under South Carolina law, construction and enforcement of unambiguous contract is question of law for court, and thus can be properly disposed of at summary judgment. Harbour Town Yacht Club Boat Slip Owners' Ass'n v. Safe Berth Management, Inc., 421 F. Supp. 2d 908 (D.S.C. 2006).

This Court finds the 2005 Amended Declaration and Bylaws are clear and unambiguous. Accordingly, this Court has no authority to alter the documents to provide for the relief sought by the Plaintiffs. Furthermore, the Plaintiffs' argument that they have no other effective relief is without merit. Paragraph three on page two of the Bylaws envisions a scenario in which the Declarant is more than sixty days in arrears. The paragraph provides:

During the Class "B" Share Period, the Class "B" member shall have the number of votes equal to all Class "A" members plus one (1) vote. Provided, the Declarant shall not have a vote for any Lot as to which Declarant is more than sixty (60) days in arrears with respect to all money owed to the Association.

During the initial hearing, Plaintiffs asserted that the Defendant has failed to pay the budget shortfall or assessments it owes to the Association. Defendant acknowledged that it owed monies but argued the Association has failed to inform the Defendant the amount of the budget shortfall. The Defendant moved, without objection, that an accounting be performed to determine the current amount of the budget shortfall. The Court held that until the Defendant

paid the current shortfall or assessments on its Lots, as specified and required by the Amended Declaration and Bylaws, the Defendant's voting rights are temporarily suspended. However, the Class "B" Membership period had not been suspended or terminated and the 2005 Amendment and Bylaws remain in full force and effect as to the Class "B" Member's rights and duties.

During the initial hearing, this Court ordered Litchfield Plantation Association, Inc., have an accounting performed to determine the current budget shortfall or monies Litchfield Plantation Company owed that were in arrears. At the second hearing on April 19, 2012, the accounting was presented to the Court. The accounting determined seven items which the Plaintiffs alleged constituted monies owed by Litchfield Plantation Company to the Association in the amount of \$987,895.54. Those seven items included the following:

1. Shortage in Litchfield Plantation Association Budget for April 2010 through December 2011 in the amount of \$119,148.00;
2. Failure to fund Capital Reserve Account per Paragraph 5.8 of the Declaration of Restrictive Covenants in the amount of \$63,966.67;
3. Repairs to a beach house which is a common element in the amount of \$63,911.00.
4. Balance on a Promissory Note dated May 22, 2009 in the amount of \$621,680.67;
5. Balance on a Promissory Note dated June 10, 2009 in the amount of \$88,325.00;
6. Balance on a Promissory Note dated July 21, 2009 in the amount of \$17,887.12;
7. Balance on a Promissory Note dated June 1, 2011 in the amount of \$12,946.48;

As to Item # 1, the budget shortfall, Defendant acknowledged that it owed a budget shortfall and did not object that the budget shortfall amounted to \$119,148.00. However, Defendant argued that it was entitled to a setoff in the amount of approximately \$18,562.50 that was recently paid to the Association from a real estate closing. Additionally, Defendant

acknowledged , as to Item # 6 and Item #7, it owed the calculated balances on the promissory notes. However, Defendant argued that it had not previously been notified that the notes were in default and that because of the preset litigation, it did not know who were the proper board members of the Association to receive payment.

As to the remaining Items identified by the Plaintiffs, Defendant denied those amounts were currently owed by the Defendant to the Association. As to Item #2, Defendant directed the Court to provisions within the Declaration of Restrictive Covenants and Bylaws which indicated the Defendant was not responsible for collecting association dues. Defendant argued if purchasers of property failed to make the required payments to fund the Capital Reserve then the Association should be responsible for collecting those monies. As to Item # 3, the Defendant argued that the costs of repairs to the beach house was disputed and that those costs have not been established and were not in arrears. Also, it appears that the issue is the subject of a subsequently filed lawsuit, Civil Action Number 2012CP22-00341. As to Item # 4 and Item #5, it appears those notes were assigned to a third-party entity and were no longer in possession of the Association. Furthermore, those notes are not currently in default. The Association argued those notes had been improperly assigned by the Interpleader, E. Scott Trotter, and rightfully belonged to the Association. This dispute is also an issue which is the subject of a subsequently filed lawsuit, Civil Action Number 2012CP22-00341.

After hearing oral argument from counsel and reviewing the record, this Court determined that in order to restore its voting rights, the Defendant would be required to pay the current budget shortage of \$119,148.00, the balance on a Promissory Note dated July 21, 2009 in the amount of \$17,887.12 (as of February 6, 2012), with interest accruing thereon of \$1.48 per day, and the balance on a Promissory Note dated June 1, 2011 in the amount of \$12,946.48 (as of

February 6, 2012), with interest accruing thereon of \$1.07 per day. These three items total \$149,981.60 (not including the accruing interest on the notes) and are currently in arrears justifying the current suspension of Defendant's voting rights. Defendant must make payment of these monies to the Association in order to restore its voting rights, which rights are incidental of Defendant's ownership of property and its Class "B" Membership which has not terminated. The Court directs that the monies be paid into the accounts of the Association.

The Court will not address at this time whether or not Defendant's voting rights were properly suspended prior to this current determination of the monies in arrears or whether or not the Defendant is entitled to a set-off or credit for the approximately \$18,562.50 recently paid to the Association from a real estate closing. Furthermore, the Court's decision is not intended to, nor will it prevent, the Association from pursuing its claims that it is owed the monies set forth in Items # 2, 3, 4, and 5. However, at this time, this Court has determined that it has not been conclusively established at this present time that Defendant is liable to the Association for those monies and therefore, those monies are not currently in arrears.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment is hereby GRANTED and Plaintiffs' Motion for Summary Judgment is DENIED. Plaintiffs' Second Cause of Action is hereby DISMISSED. It is FURTHER ORDERED that Defendant's voting rights are suspended until such time as it pays to the Association monies in arrears totaling \$149,981.60, together with any interest accruing on the notes as set forth above.

IT IS SO ORDERED!



Judge Larry B. Hyman
Fifteenth Judicial Circuit

Dated: 5-11-, 2012
Conway, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2200319

Litchfield Plantation
Association Inc
Thomas Eckard
Robert F McMahan Jr

Joseph E Johnston
Carol E Kirby
Thomas Martin Phillips

Litchfield Plantation
Company Inc

E Scott Trotter

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ 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.
- ☐ 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: _____
- ☐ 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:

Plaintiff's Motion for Reconsideration by Attorney McMahan is Denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

FILED
GEORGETOWN COUNTY, S.C.
2012 AUG 17 PM 12:40
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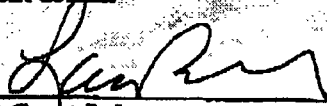
INFORMATION FOR THE JUDGMENT INDEX

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.


Circuit Court Judge

2152

Judge Code

8/16/2012

Date

For Clerk of Court Office Use Only

This judgment was entered on August 17, 2012, and a copy mailed first class or placed in the appropriate attorney's box on August 17, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Francis McMahan Jr. PO Box 2277 Conway, SC 29528

Douglas Charles Baxter PO Box 3646 Myrtle Beach, SC 29578

Mark David Neill PO Box 2810 Murrells Inlet, SC 29576

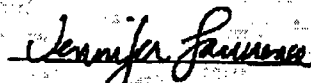
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Howell V. Bellamy Jr. PO Box 357 Myrtle Beach, SC 29578

Robert S. Shelton PO Box 357 Myrtle Beach, SC 29578

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Alma Y. White - Clerk of Court

Court Reporter Kay Richardson

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2200319

Litchfield Plantation Association Inc	Joseph E Johnston	Litchfield Plantation Company Inc	F Scott Trotter
Thomas Eckard Robert F McMahan Jr	Carol E Kirby Thomas Martin Phillips		
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ 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.
- ☐ **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: _____
- ☐ **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 of the Court:

Motion for Protective Order/Shelton

Motion for Temporary Injunction; Lift of Stay/Neill
Proposed Order to be submitted by 9-28-12

FILED
GEORGETOWN COUNTY, S.C.
2012 SEP 20 AM 11:37
ALMA Y. WHITE
CLERK OF COURT

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

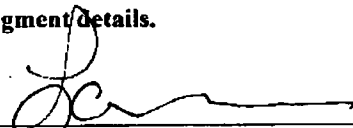
INFORMATION FOR THE JUDGMENT INDEX

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.


Circuit Court Judge

2152

Judge Code

9/20/2012

Date

For Clerk of Court Office Use Only

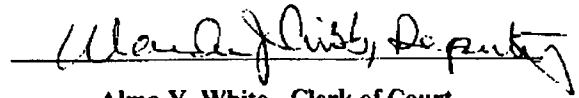
This judgment was entered on September 20, 2012, and a copy mailed first class or placed in the appropriate attorney's box on September 20, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Francis McMahan Jr. PO Box 2277
Conway, SC 29528
Douglas Charles Baxter PO Box 3646 Myrtle
Beach, SC 29578

Mark David Neill PO Box 2810 Murrells Inlet,
SC 29576
Charles Owen Nation II PO Drawer 1657
Georgetown, SC 29442
Howell V. Bellamy Jr. PO Box 357 Myrtle
Beach, SC 29578
Robert S. Shelton PO Box 357 Myrtle Beach,
SC 29578

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Alma Y. White - Clerk of Court

Court Reporter: Brenda Babb

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr., and Thomas Martin Phillips,

Plaintiffs,

vs.

Litchfield Plantation Company, Inc.,

Defendant,

And

E. Scott Trotter,

Intervenor,

) IN THE COURT OF COMMON PLEAS
) FOR THE 15th JUDICIAL CIRCUIT

CASE NO: 2011-CP-22-00319

**ORDER GRANTING Motion for
Temporary Restraining Order**

FILED
GEORGETOWN COUNTY, S.C.
2012 OCT 22 PM 4:44
ALMA Y. WHITE
CLERK OF COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER

This matter came before the Court pursuant to Defendant Litchfield Plantation Company, Inc.'s Motion for Injunctive relief. Present for the hearing held on September 20, 2012 was Attorney Mark D. Neill for the Defendant. Attorneys Robert F. McMahan, Jr. and Timothy W. Bouch were present on behalf of Plaintiffs. The Court has reviewed the record and affidavits files in this matter and has determined that an Order Granting Injunctive Relief is necessary for the following reasons:

A. FINDINGS OF FACT:

(1) The currently governing documents for Litchfield Plantation Association consist of the 2005 Amendments to the Declaration of Protective Covenants and Bylaws. These documents were filed with the Georgetown County Register of Deeds on May 3, 2005 in Deed Book 1642 at Page 1.

- (2) As stated in the Declaration, Litchfield Plantation Association, Inc. is a not for profit corporation and its shareholder members are the owners of lots subject to the Declaration. As stated in Paragraph 5.4 of the Declaration, Membership shall be appurtenant to and may not be separated from ownership of any Lot.
- (3) The Declaration provides for two classes of membership in the Association, Class "A" and Class "B." Class "A" members included all owners except for the Class "B" Member. Class "A" Members have one vote for each Lot and there is only one vote per Lot. The sole Class "B" Member is the Defendant – Litchfield Plantation Company, Inc. The Class "B" Member has the number of votes equal to all Class "A" Members plus one (1) vote.
- (4) Pursuant to the Amendment, the Class B membership terminates and is converted to a Class A Membership after:
- An initial period commencing on January 1, 2005 and ending December 31, 2010; provided, this initial period shall be automatically extended for successive periods of five (5) years, provided that in each five-year period prior to the automatic extension the Declarant has sold 100 or more lots, including the number of Lots or Dwelling Units designated in connection with a Bulk Sale, to non-affiliated Owners.
- (5) On March 9, 2011, the Plaintiffs filed their Complaint in the above captioned matter. The Complaint sought a declaration from the Court that the individual Plaintiffs are the duly elected Board of Governors of Plaintiff Litchfield Plantation Association, Inc. and the Class B period ended on January 1, 2011.
- (6) By way of an Order filed on May 25, 2012, the Court determined that the Class B period did not end. Therefore, the Court dismissed the Plaintiffs' Second Cause of Action.
- (7) By way of the Order filed May 25, 2012, the Court determined that Defendant's voting rights were suspended until it paid certain monies to the Association the Court determined was presently in arrearage.
- (8) The Plaintiffs filed a motion for reconsideration dated June 6, 2012. The Plaintiffs did not ask the Court to reconsider the dismissal of their second cause of action, rather, the Plaintiffs only asked the Court to reconsider the amount of the arrearage the Defendant should pay to have its voting rights deemed restored.
- (9) On August 3, 2012, the Defendant made full payment of the monies the Court determined was in arrearage to the Association. In accordance with the Declaration and Bylaws, Defendant requested that a special meeting of owners be called to remove the individuals (including the Plaintiffs) holding themselves out to be the Governors of the Association and to nominate and elect five individuals to serve as the proper Board. The special meeting was scheduled for August 25, 2012.

- (10) On August 16, 2012, a hearing was held pursuant to Plaintiffs' Motion to Reconsider, during which the Court denied Plaintiffs' motion.
- (11) On or about August 24, 2012, Plaintiffs filed a Notice of Appeal. Plaintiffs did not post any bond.
- (12) The Special Meeting took place on August 25, 2012. A quorum was present.
- (12) During the Special Meeting, Plaintiff McMahon announced that because he had filed a notice of appeal of the court's order, it was his opinion that Judge Hyman's Order was stayed and Litchfield Plantation Company did not have the right to vote on any issues. He and the other Plaintiffs took votes from all the other owners present and determined he and the other Plaintiffs had not been removed as governors. Plaintiff Joe Johnson acknowledged that but for the exclusion of the votes of Litchfield Plantation Company, the current board would have been removed. The purported Board then left even after being informed they were not acting properly and that the special meeting would continue without them.
- (13) After the Plaintiffs left, the Defendant and remaining owners continued on with the special meeting, and nominated and elected five individuals to serve as the proper Board of Governors.
- (14) The five individuals elected to the Board of Governors are John Miller, Carson Benton, Jason Morris, Billy Deagan, and Paul Suter.

B. CONCLUSIONS OF LAW:

The membership of Litchfield Plantation Association, Inc. includes Litchfield Plantation Company, Inc. All members of a non-profit corporation have the same rights and obligations with respect to voting unless the articles or bylaws established classes of membership with different rights or obligations. S.C. Code § 33-31-610. The right to vote is an integral part of ownership in a corporation, and therefore, valuable personal property:

Generally, the right to vote stock at a corporate shareholder meetings is an incident of stock ownership, and while it is to be exercised in the mode and under the restrictions prescribed by the charter and bylaws, it is nevertheless a part of the stockholder's property inherent in the stockholder by virtue of the stockholder's title. There is a general policy against the disenfranchisement of stockholders. The shareholder vote has primacy in the system of corporate governance because it is the ideological underpinning upon which the legitimacy of directorial power rests. The

right to vote is among the most fundamental rights of ownership of voting shares. The right to vote and act in corporate matters is a valuable right which cannot be taken away by the act or failure to act of the corporate officers. 18 A Am. Jur. 2d Corporations § 850. (emphasis added)

The right to vote cannot be separated from the ownership of voting stock without the consent of the legal owner of the stock. 18 C.J.S. Corporations § 456. The right to vote is to be exercised free of duress and intimidation by corporate management. Id. A corporate board of directors may take no action that interferes with the shareholders' exercise of their voting rights without showing a compelling justification for its actions. Id.

In addition to its right to vote as a member of the corporation, the Defendant's voting rights are directly related and arise solely from their ownership of property in Litchfield Plantation. These voting rights provide the Defendant with certain valuable property rights which are only available provided that they own property within Litchfield Plantation. See Am. Condo. Ass'n v. IDC, Inc., 844 A.2d 117, 136-137 (R.I. 2004) *decision clarified on reargument*, 870 A.2d 434 (R.I. 2005); Kelso Woods Ass'n, Inc. v. Swanson, 753 A.2d 894 (P.A. 2000); C.M. King et al v. Oakmore Homes Ass'n, 195 Cal.App. 3d (1987); In re Fentonville Cemetary Ass'n, 238 A.D. 491, 264 N.Y.S. 790 (App.Ct. 1933); McCarthy v. The Homeowners's Ass'n of Tweed Lakes, Inc., 2012 WL 3834033. Therefore the right to its "Class "B" votes is not only a personal right, but a property rights as well.

In the present case, this Court previously determined that once the Defendant paid the arrearage, then its voting rights would be restored. The Plaintiffs filed a Motion to Reconsider contesting the amount of the arrearage determined by this Court. Thereafter, Plaintiffs filed a Notice of Appeal. The Defendant argued that the appeal is not proper because the Order was not a final judgment pursuant to SCACR Rule 201(A). Additionally, the defendant argued even if the Appeal

was not an impermissible interlocutory appeal, the notice of appeal would not serve as an automatic stay. SCACR Rule 241 (b) provides exceptions to the general rule. One of the exceptions is for judgments directing the delivery of personal property and another is for judgments directing the delivery of possession of real property. As set forth above, restoration of the Defendants Class "B" voting rights constitute not only the delivery of personal property under the statute, but real property as well.

This Court finds that the Notice of Appeal filed by Plaintiffs did not result in an automatic stay of the proceedings. S.C. Code Ann. §18-9-150 provides the execution of judgment directing the delivery of documents or personal property shall not be stayed on appeal unless the property is delivered into the Court or the appellant posts a bond. The Supreme Court in Harmna v. Wagner, 33 S.C. 487, 12 S.E. 98 (1890) held where an appeal without bond is taken by the executor from an order appointing a receiver of the personal property of the estate, it does not operate to stay the execution of the order unless the property be brought into court or bond with surety given. Additionally, S.C. Code Ann. §18-9-170 also provides the execution of judgment directing the delivery of possession of real property shall not be stayed on appeal unless a written undertaking be executed on the part of the appellant, with two sureties. Because the Plaintiffs did not file a bond, the notice of appeal did not trigger an automatic stay.

This Court further find that even if the automatic stay was triggered, the Defendant would be entitled to an Order Lifting the Stay in light of the significant property interests affected. The Defendant paid the arrearage of over \$150,000.00 pursuant to this Court' prior Order with the expectation of having its voting rights restored. The Plaintiffs, purportedly on behalf of the Association, accepted the monies and now have control over the monies. Thereafter, Plaintiffs refused to recognize Defendant's voting rights were restored and at the same time, failed to return the

Defendant's monies. These facts certainly present an inequitable situation for the Defendant. Defendant should not be penalized for following this Court's prior Order.

Additionally, not only has the Defendant's fundamental right to vote been impeded by and its payment of over \$150,000.00 taken by the Plaintiffs, Defendant's ability to sell its property within Litchfield Plantation has also been thwarted by the Plaintiffs. As set forth above, the Amended Declaration requires the Defendant to sell 100 lots by December 31, 2015 in order to maintain its Class "B" Membership with superior voting rights. It is axiomatic that a potential purchaser would be less likely to purchase Defendant's property knowing Plaintiffs refuse to recognize the fundamental voting rights connected with the ownership of that property. It is clear that if Defendant's property rights remain in limbo for the duration of this litigation and appeal, Defendant would likely suffer significant damages without any adequate remedy at law.

ACCORDINGLY, I FIND: (1) The filing of the Plaintiffs' notice of appeal did not stay the execution of this Court's prior Order; (2) The Defendant will suffer immediate and irreparable injury, loss, and/or damages without entry of the requested injunctive relief; (3) Any legal remedy would be inadequate. **Defendant's Motion for Injunctive Relief is GRANTED.**

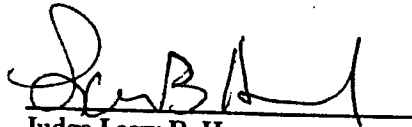
The Plaintiffs, and their agents, including KA Diehl, are prohibited from taking any further action which interferes with the Defendant's voting rights. Because Defendant paid the arrearage as determined by this Court's prior Order, Defendant was entitled to exercise its voting rights at the special meeting. During the special meeting, the Defendant exercised its voting rights and properly removed and elected a new Board of Governors for Litchfield Plantation Association, Inc. The Plaintiffs and their agents, including KA Diehl, are prohibited from taking any action to interfere with the new Board of Governors elected at the special meeting. This Court hereby recognizes John

Miller, Carson Benton, Jason Morris, Billy Deagan, and Paul Suter are now the presently serving Board of Governors for Litchfield Plantation Association, Inc.

The Defendant is required to post a bond of \$ 25,000⁰⁰.

IT IS SO ORDERED!

^{Oct}
Dated ~~September~~ 11, 2012
Georgetown, South Carolina


Judge Larry B. Hyman
Fifteenth Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-22-01265

BDC Capital, Inc., f/k/a)
BDC Capital, LLC,)
Plaintiff)

vs.)

Carriage House Club, Inc.;)
Litchfield Plantation Company,)
Inc.; Mountain View Ventures,)
Inc.; Resources Planning)
Corporation; Louise P. Parsons;)
Litchfield Plantation Hospitality)
Group, LLC; South Carolina)
Department of Revenue; Small)
Luxury Hotels Of The World)
Limited; Murrells Inlet Seafood;)
Litchfield Plantation Association,)
Inc.; E. Scott Trotter; The Scott)
Trotter Company; Litchfield)
Plantation's Country, Inn, Inc.,)
Litchfield Plantation Buyout)
Group, LLC; The Logan Trotter)
Company, LLC; and Waverly)
Creek Realty, LLC,)

Defendants.)

**JUDGMENT OF FORECLOSURE
AND SALE**

FILED
2011 MAR 29 P 12:47
CLERK OF COURT

Pursuant to Rule 53 SCRCP, the above captioned matter was referred to the Honorable Joe Crosby, Master-in-Equity for Georgetown County, to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the case. Any appeal from this order is to the Supreme Court of the State of South Carolina or the South Carolina Court of Appeals as provided by the South Carolina Appellate Court Rules. A copy of the Order of Reference in this matter was recorded on December 21, 2010, a copy being on file herein.

1 of 16

CERTIFIED A TRUE
AND CORRECT COPY
[Signature]
DEPUTY CLERK OF COURT
GEORGETOWN COUNTY, SC

Pursuant to the Order of Reference, a hearing was held on April 19, 2011 in Courtroom 2-C of the Georgetown County Judicial Center. Testimony was taken, which is reported herewith, and from the pleadings, testimony, affidavits of record and such other evidence, I find and conclude as follows:

PROCEDURAL BACKGROUND

1. The Lis Pendens, Civil Action Cover Sheet, Certificate of Exemption, Summons and Complaint were filed on August 12, 2010 and the Affidavit of Non-Eligibility for the Home Affordable Modification Program was filed on October 11, 2010.
2. The Order of Reference was filed on December 21, 2010.

FACTS

3. All parties of record were notified of the time, date and place of the hearing in this matter as evidenced by the Notice of Hearing filed with the Court and reviewed at the hearing.
4. Present at the call of the case on behalf of the Plaintiff were David J. Mills, Esquire and Charles E. McGill, II, Esquire of McNair Law Firm, P.A.
5. Defendants Litchfield Plantation Hospitality Group, LLC; E. Scott Trotter; The Scott Trotter Company; Litchfield Plantation's Country Inn, Inc.; Litchfield Plantation Buyout Group, LLC; The Logan Trotter Company, LLC; Waverly Creek Realty, LLC; Carriage House Club, Inc.; Litchfield Plantation Company, Inc; and Litchfield Plantation Association, Incorporated were represented by Charles O. Nation, II, Esquire of the Nation Law Firm, P.C.

6. As to the Defendant Louise P. Parsons, no evidence was offered to challenge either the authenticity of said Defendant's signatures on the documents set forth in detail herein or their enforceability, thus the Court must rule accordingly.

7. Plaintiff elicited the testimony of John R. Beard, its President. Mr. Beard's testimony authenticated the loan documents described with specificity in this Order; established the indebtedness owed Plaintiff; and established Plaintiffs' entitlement to the award of judgment set forth herein. No witnesses were present or called on behalf of any of the Defendants.

8. Mr. Beard's uncontradicted testimony on Plaintiff's behalf established to the Court's satisfaction, and the Court so finds, as follows: For value received, the Defendants Carriage House Club, Inc. ("Carriage House"), Litchfield Plantation Company, Inc. ("Litchfield Plantation") and Mountain View Ventures, Inc. ("Mountain View") (hereinafter collectively referred to as "Defendant Borrowers") executed and delivered a Promissory Note ("the Note") payable to Plaintiff in the principal sum of One Million Two Hundred Fifty Thousand and No/100 (\$1,250,000.00) Dollars, together with interest at the rate of thirteen (13%) percent per annum, payable monthly in installments of interest-only payments in the amount of Thirteen Thousand Five Hundred Forty-One and 67/100 (\$13,541.67) Dollars. The Note, pursuant to its terms, matured on December 28, 2006. Other terms and conditions are set forth in the Note, a true and correct copy of which was previously attached to the Complaint as Exhibit A and was identified, offered and received into evidence.

9. To better secure the payment of the Note described above, Defendants Carriage House and Litchfield Plantation made, executed and delivered to Plaintiff a

First Mortgage, Security Agreement, and Assignment of Leases and Rents dated December 21, 2005 (hereinafter "Mortgage"), covering the real property in Georgetown County (hereinafter "the Property"), described as follows:

Parcel One:

All that certain piece, parcel or lot of land, with improvements thereon, containing 3.36 acres, situate, lying and being in the County of Georgetown, State of South Carolina, and being shown and delineated as Parcel 1 on that certain plat of survey by Powers and Associates Surveyors, Inc., dated September 18, 2002, and recorded in the Office of the Clerk of Court for Georgetown County in Plat Slide 439 at Page 10, and according to said plat, having the following boundaries and measurements:

Commencing at an iron pin found on the north side of Landings Road at the intersection of Landings Road and All Saints Road and running N 65° 46' 55" W along the northern right-of-way of Landings Road, for a distance of 272.14 feet to an iron pin found; thence turning and running N 30° 49' 20" E, along property of Litchfield Plantation Company, a distance of 213.24 feet to an iron pin found; thence turning and running N 47° 25' 10" W, for a distance of 65.57 feet to an iron pin found; thence N 52° 20' 40" W, for a distance of 150.45 feet to an iron pin found; thence turning and running along property designated as Parcel 2 on said plat the following courses and distances: N 34° 30' 05" E, for a distance of 75.49 feet to an iron pin found; thence S 52° 59' 35" E, for a distance of 84.32 feet; thence N 87° 12' 00" E, for a distance of 7.95'; thence N 35° 47' 10" E, for a distance of 114.50 feet to an iron pin found; thence turning and running along Parcel 3 as shown on said plat the following courses and distances; S 55° 25' 00" E, for a distance of 74.20 feet to an iron pin found; thence S 62° 20' 00" E, a distance of 77.82 feet to an iron pin found; thence S 51° 32' 55" E, for a distance of 225.50 feet to an iron pin found; thence turning and running along the western right-of-way of All Saints Road the following courses and distances: In an arc to the left having a bearing of S 20° 42' 55" W, a radius of 275.0 feet and a chord distance of 126.53 feet to an iron pin found; thence in an arc to the right with a bearing of S 20° 42' 55" W, an arc radius of 225.0 feet and a chord distance of 103.14 feet to a pipe; thence S 33° 57' 05" W, for a distance of 108.60 feet to an iron pin found; thence in an arc to the right S 74° 05' 05" W, a radius of 35.0 feet and a chord distance of 45.12 feet, to the POINT OF BEGINNING, all measurements a little more or less.

TOGETHER with an easement for access, ingress and egress over and across all roads on said plat above including all roads within Litchfield Plantation beginning and/or ending on Kings River Road or other publicly dedicated street adjacent to the development known as Litchfield Plantation.

TMS# 4-413-1.1

Parcel Two:

All those certain, pieces, parcels or lots of land, situate, lying and being in the County of Georgetown, State of South Carolina, and being shown and delineated as Lots 1 and 2, Block H in Litchfield Plantation, as shown in Plat Book W at Page 8, records of Georgetown County, South Carolina.

Together with an easement for access, ingress and egress over and across all roads on said plat above, including all roads within Litchfield Plantation beginning and/or ending on Kings River Road or other publicly dedicated streets adjacent to the development known as Litchfield Plantation.

TMS# 4-184-A-30

Derivation as to Parcels One and Two:

This being a portion of the property conveyed to Litchfield Plantation Company, Inc. by deeds of Louise Price Parsons and Young M. Smith, Jr. dated December 6, 1968 and recorded January 10, 1969 in Deed Book 85 at Page 243 and 246 respectively, records of Georgetown County, South Carolina.

10. Said Mortgage constitutes a first priority lien on the Property and was filed on January 20, 2006 in the Office of the Register of Deeds for Georgetown County, South Carolina, in Mortgage Book 02852 at Page 00037 and rerecorded on February 15, 2006 in Book 02871 at Page 00059. A true and correct copy of the Mortgage was previously attached to the Complaint as Exhibit D and was identified, offered and received into evidence.

11. In conjunction with, as a part of, and to better secure the Note, Defendants Carriage House, Litchfield Plantation, Mountain View and Louise P. Parsons executed and delivered that certain "Security Agreement" which was appended to the Complaint as Exhibit K and was identified, offered and received into evidence at the hearing. The Security Agreement pledged as further security for the Note the items described therein, including all tangible assets, goods, machinery, equipment, furniture and fixtures, together with all accessions, parts and appurtenances thereto, appertaining or attached or kept or used or intended for use in connection therewith including but not limited to the items contained on a 7 page list appended to and incorporated by reference into the Security Agreement as Exhibit A. All of the fixtures and articles of personal property defined as "The Improvements" in Paragraph (b) of the Mortgage, along with all of the items of personal property and other assets described in or attached to and incorporated in the Security Agreement, are hereafter referred to in this Order collectively as "the Collateral."

12. In conjunction with, as a part of, and to better secure the Note, Defendants Litchfield Plantation and Carriage House also executed and delivered that certain "Assignment of Leases, Rents, and Profits", a true and correct copy of which was attached to the Complaint as Exhibit J and was identified, offered and received into evidence at the hearing.

13. In conjunction with, as a part of, and to better secure the Note, Defendants Resources Planning Corporation ("Resources Planning") and Louise P. Parsons ("Parsons") (hereinafter collectively referred to as "Guarantors") each executed and delivered to Plaintiff an Unconditional Guaranty Agreement (hereinafter "Guaranty")

guaranteeing repayment of the Note. True and correct copies of each of the Guarantor's Guarantees were previously attached to the Complaint as Exhibits F and G, respectively, and were identified, offered and received into evidence. Defendants Resources Planning Corporation and Louise P. Parsons are sometimes collectively referred to herein as "Guarantors."

14. The Note was amended by virtue of the Defendant Borrowers' and Guarantors' execution and delivery of that certain "Amendment to Promissory Note and Loan Agreement" effective December 28, 2006. A true and correct copy of the "Amendment to Promissory Note and Loan Agreement" was previously attached to the Complaint as Exhibit B and was identified, offered and received into evidence.

15. Thereafter, the Note was further amended by virtue of the Defendant Borrowers' and the Guarantors' execution and delivery of that certain "First Allonge to Promissory Note" made on February 14, 2008. A true and correct copy of the "First Allonge to Promissory Note" was previously attached to the Complaint as Exhibit C and was identified, offered and received into evidence. Further references to "the Note" in this Order shall mean the Note as amended by the Amendment and First Allonge as described above.

16. Thereafter, on or about January 11, 2008, Plaintiff executed a "Partial Release of Mortgage Lien" releasing a portion of the Property covered by the Mortgage and described as follows:

All that certain piece, parcel or lot of land lying, being and situate in Tax District Number Four, County of Georgetown, State of South Carolina, shown as "R.U.U.D., 1.58 AC." on a plat entitled "MAP OF LITCHFIELD PLANTATION PREPARED FOR LITCHFIELD PLANTATION COMPANY, INC. AND RESOURCES PLANNING CORPORATION", prepared by Powers and Associates Surveyors, Inc., dated February

23, 2005, and filed of record May 3, 2005, in the Office of the Register of Deeds for the County of Georgetown in **Plat Slide 543 at Page 1**; the aforementioned property having such size, shape, dimensions, butts and bounds as shown on or plat referenced above. This property is also shown as Lot Numbers 1 and 2 of Block H, Phase 1, Litchfield Plantation, on a plat entitled "MAP OF LITCHFIELD PLANTATION SHOWING THE SUBDIVISION OF PHASE ONE", prepared by Legare Hamilton, C.E.L.S., dated March 4, 1971, and filed of record in the Office of the Register of Deeds for the County of Georgetown in **Plat Book W at Pages 8 and 9**.

TMS No.: 4-184A-30

17. Said "Partial Release of Mortgage Lien" was filed on January 24, 2008 in the Office of the Register of Deeds for Georgetown County, South Carolina in Book 828 at Page 42. A true and correct copy of the Partial Release of Mortgage Lien was previously attached to the Complaint as Exhibit E and was identified, offered and received into evidence.

18. The February 14, 2008 First Allonge to Promissory Note, among other terms, required Defendant Borrowers to pay the entire balance of principal of the Note remaining unpaid, plus interest accrued thereon, on January 28, 2009. Other terms and conditions were set forth in the Note as amended.

19. Defendant Borrowers and Guarantors are in default under the terms of the Note, the Mortgage, the Security Agreement and the Guarantees by their failure to pay the balance of the Note as it came due and to honor the obligations of the Mortgage, the Security Agreement and the Guarantees. Plaintiff has provided Defendant Borrowers with all notices required by the Note, Mortgage and Guarantees and applicable law.

20. As a result of the default set forth above, Plaintiff placed the Note, Mortgage, Security Agreement, Assignment of Leases, Rents and Profits and Guarantees in the hands of its attorneys for collection by foreclosure. These documents

provide that Plaintiff shall be entitled to recover all costs of collection, including reasonable attorney's fees, in the event the Note, Mortgage, Security Agreement, Assignment of Leases, Rents and Profits and Guarantees are referred to attorneys for foreclosure and collection.

21. As of April 18, 2011, the amount due under the Note and Guarantees is **\$2,051,272.99** as follows:

Principal:	\$1,250,000.00
10% Late Fee:	\$ 125,000.00
(for non-payment at maturity)	
Late Fees:	\$ 1,444.45
Legal Fees as of 04/18/2010	\$ 75,000.00
Retainer for Receiver	\$ 2,000.00
Tax Redemption (2009 Taxes)	\$ 22,398.10
Accrued Interest	\$ 662,673.52

Less:

Rent Payments Received (01/15/2010 – 04/18/2011)	\$ (87,243.08)

TOTAL AMOUNT DUE

\$2,051,272.99

Interest continues to accrue on the unpaid principal at the present per diem rate of One Thousand Three Hundred Ten and 54/100 (\$1,310.54) Dollars per day.

22. By its pleadings and its presentation at the hearing, Plaintiff is seeking foreclosure of the Mortgage and seeks its right to recover a deficiency judgment.

23. At the request of the Plaintiff, the Court also received testimony from Kirk Gruber, CPA or Taylor & Gruber, LLC, the Receiver appointed by "Order Appointing Receiver" dated December 15, 2010, to report on the Receiver's observations concerning the operations conducted upon the Property which is the subject of this foreclosure action.

24. The Court also entertained a motion from attorney Charles O. Nation, II to be relieved as counsel for Defendant Carriage House Club, Inc.

CONCLUSIONS OF LAW

Based on the pleadings, the evidence presented, the testimony received and the arguments of counsel, I conclude Plaintiff should have judgment of foreclosure of the Note, Mortgage and Security Agreement hereinabove described, as well as judgment on the Guarantees, and that the Property and Collateral should be ordered sold at public auction after due advertisement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Mortgage is declared to be first priority mortgage lien upon the Property.
2. That Defendant Borrowers and Guarantors are liable for the aforesaid mortgage debt, together with the costs and disbursements of this action, and judgment shall and hereby is entered as follows:

The principal amount of One Million Two Hundred Fifty Thousand and No/100 (\$1,250,000.00) Dollars, plus a 10% late fee for non-payment of One Hundred Twenty-Five Thousand and No/100 (\$125,000.00) Dollars, plus late fees of One Thousand Four Hundred Forty-Four and 45/100 (\$1,444.45) Dollars, plus attorney's fees of Seventy-Five Thousand and No/100 (\$75,000.00) Dollars, plus a retainer for the Receiver of Two Thousand and No/100 (\$2,000.00) Dollars, plus 2009 Taxes of Twenty-Two Thousand Three Hundred Ninety-Eight and 10/100 (\$22,398.10) Dollars, plus accrued interest of Six Hundred Sixty-Two Thousand Six Hundred Seventy-Three and 52/100 (\$662,673.52) Dollars, for a total due of Two Million Fifty-One Thousand Two Hundred Seventy-Two and 99/100 (\$2,051,272.99) Dollars.

3. In support of its claim of entitlement to attorney's fees, Plaintiff submitted to the Court the Affidavit of Attorney's Fees executed by its counsel, David J. Mills, Esquire. The Court has carefully considered the Affidavit, which addresses each of the

six (6) factors consistently cited by the South Carolina Supreme Court and Court of Appeals in determining the reasonableness of attorney's fees as follows:

- a.) The nature, extent and difficulty of the legal services rendered;
- b.) The time and labor necessarily devoted to the case;
- c.) The professional standing of counsel;
- d.) The contingency of compensation;
- e.) The fee customarily charged in the locality for similar services; and
- f.) The beneficial result obtained.

4. The Court has considered the nature of this foreclosure case, which was rendered more complex by the myriad security documents, amendments, and other transactions between the parties. The Court has carefully considered Plaintiff's Exhibit 12 which sets forth with specificity the legal fees charged by Plaintiff's counsel in prosecuting this matter to conclusion. Moreover, the Court finds and concludes that the professional standing of counsel merits the award in the amount claimed. Contingency of compensation is not a factor in this case, as attorney's fees are not contingency-based. The Court finds and concludes that the fees charged by Plaintiff's counsel are consistent with those customarily charged in Georgetown County, South Carolina for cases of this nature. The Court has also considered the beneficial result obtained with the award of judgment and foreclosure to the Plaintiff. Finally, the Court notes that the fees claimed represent approximately 3.7% of the total amount of the indebtedness established by the Plaintiff in this case, an amount the Court finds per se reasonable.

5. The total amount due under the Note and Mortgage, with interest after the date of this judgment at the rate of seven and one quarter percent (7.25%) per annum

through the date of sale shall be added to the judgment debt to comprise the amount of Plaintiff's debt secured by the Mortgage.

6. That Defendant Borrowers and Guarantors are liable for the aforesaid mortgage debt and shall on or before the date of sale of the Property hereinafter described, pay to Plaintiff, or Plaintiff's attorney, the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

7. That on default of payment at or before the time herein indicated, the Property and the Collateral covered by the Mortgage and Security Agreement as described in the Complaint, as hereinafter set forth, be sold by the undersigned Master-in-Equity at public auction at the Georgetown County Courthouse, in the City of Georgetown, on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on Monday next succeeding such holiday). The sale of the mortgaged Property will be on the following terms, that is to say:

- A. FOR CASH: The undersigned Master will require a deposit of 5% on the amount of the bid (in cash or equivalent) to be paid on the date of the sale, same to be applied on the purchase price only upon compliance with the bid, but in case of noncompliance within thirty (30) days, same to be forfeited and applied to the costs and Plaintiff's debt.
- B. Interest on the balance of the bid shall be paid to the day of compliance at the rate of 7.25% per annum.
- C. The sale of the Property and the Collateral covered by the Mortgage and Security Agreement, more fully described above, shall be subject to taxes and assessments, easements and restrictions of record. The real property sold pursuant to this Order shall be sold subject to such past due or accruing property taxes. Plaintiff shall have the right, but not the obligation, to advance funds to pay the delinquent taxes in which case the Plaintiff shall be entitled to add the amount advanced to the total debt.

D. Purchaser to pay for deed stamps and cost of recording the deed.

8. Plaintiff shall have a deficiency judgment against the Defendant Borrowers and Guarantors.

9. If Plaintiff is the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness of Plaintiff in full, Plaintiff may pay to the undersigned Master-in-Equity only the amount of the costs and expenses crediting the balance of the bid on Plaintiff's indebtedness.

10. That the undersigned Master-in-Equity, will, by advertisement according to law, give notice of the time and place of sale, and the terms thereof, and will execute to the Purchaser, or Purchasers, deed to the Property and Collateral sold. Plaintiff, or any other party to this action, may become a purchaser at such sale, and that if, upon such sale being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within thirty (30) days after date of sale, then the undersigned Master may advertise the said Property and Collateral for sale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured. To the extent that Notices of Sale are published prior to the entry of this Order, such publication is ratified nunc pro tunc.

11. That the undersigned Master will apply the proceeds of the sales as follows:

FIRST: To the costs and expenses of the within action and sale;

NEXT: To the payment of the Plaintiff or Plaintiff's attorney, of the amount of Plaintiff's debt and interest or so much thereof as the purchase money will pay on the same.

NEXT: Any surplus will be held pending further Order of this Court.

12. It is further ORDERED, ADJUDGED AND DECREED that in the event the successful bidder is other than the Defendants in possession herein, the Sheriff of Georgetown County is ordered and directed to eject and remove from the Property the occupant(s) of the property sold, and secure all personal property located thereon, and put the successful bidder or his assigns in full, quiet and peaceable possession of said Property and Collateral without delay, and to keep said successful bidder or his assigns in such peaceable possession except that a valid tenant shall have his/her rights protected pursuant to Protecting Tenants at Foreclosure Act 2009 to the extent such Act is applicable.

11. And it is further ORDERED, ADJUDGED AND DECREED that the Defendants named herein and all persons whosoever claiming under them, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged Property and Collateral so sold, or any part thereof.

12. IT IS FURTHER ORDERED that the deed of conveyance made pursuant to said sale shall contain the names of only the Plaintiff, BDC, Inc., f/k/a BDC, LLC, and the Defendants who were the title holder of the mortgaged Property at the time of the filing of the notice of pendency of the within action, and the name of the grantees, and the Register of Deeds is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

13. IT IS FURTHER ORDERED that the Collateral defined in the Security Agreement dated December 21, 2005 shall be sold by the undersigned Master-in-Equity simultaneously and together with the Property as more fully set forth hereinabove.

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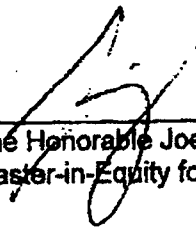
14. IT IS FURTHER ORDERED that Taylor & Gruber, LLC, shall continue to serve in its capacity as the Receiver until such time as the foreclosure sale contemplated herein is complete and the Property is conveyed to the successful bidder. The Receiver shall have unfettered access to all books, records and accounts, including on-line accounts, no less frequently than every two weeks, for the Carriage House restaurant and club and any special events held on the Property. The Court expressed to all present at the hearing its concern for the public in terms of safeguarding monies paid in advance for events on the Property. To address that concern and to ensure full cooperation with the Receiver, the Court orders as follows: In the event that that Receiver, in its sole discretion, is denied access to all books, records and accounts, including on-line accounts, or is otherwise prevented from carrying out its duties set forth in the Order Appointing Receiver dated December 15, 2010 as further clarified herein, then the Receiver may apply directly to this Court and this Court reserves the right, without need of a hearing, to grant such relief as the Court deems proper.

15. IT IS FURTHER ORDERED that Charles O. Nation, II shall be relieved as counsel for Defendant Carriage House Club, Inc.

16. The undersigned Master-in-Equity will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

17. The Court finds and directs that, in the event Plaintiff is not present at the foreclosure sale of the Property in the instant action, the foreclosure sale will be continued until the next regularly scheduled sale day.

IT IS SO ORDERED THIS 29th day of April, 2011 at Georgetown, South
Carolina.



The Honorable Joe M. Crosby
Master-in-Equity for Georgetown County

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Eugene F. McManus, Ruby
G. McManus, Hugh C.
Godefroy, Hope T.
Godefroy, William H.
May, Mary F. May, Edgar
S. Davis, Harold F.
Beal, Jr., Doris N. Beal,
Mary T. Clark, Robert D.
Devereux, Janet W.
Devereux, John W. Hudson,
Suzanne E. Hudson,
Roger W. Allen, Helen T.
Allen, Joyce Barber,
Samuel D. Burns,
Ruth Hammer, James H.
Chapman, Geane M.
Chapman, James L. Dickey,
III, Margaret T. Dieter,
R. Fisher Draper,
Louise L. Draper, Charles
A. Drexel, Francis A.
Drexel, William F.
Fairey, Emma T. Fairey,
Hugh M. Farr, Ella R.
Farr, Bess C. Forshaw,
Karl B. Frazier,
Donald G. Gregg,
Elizabeth L. Gregg,
John P. Hazzard, III,
Helen E. Hazzard, Norah
L. Jones, George R.
Lipscomb, Kathleen W.
Lipscomb, John V. Luck,
Carolyn M. Luck,
Virginia W. Mackey,
Winfred C. Moore,
Adelaide S. Nichols,
Clarence B. Smith,
Nancy K. Smith, Gerard
O. Stuebe, Rolene Stuebe,
Elizabeth P. Van Every,
Mary Elizabeth V. E.
Whitner, Eugene J.
Ziurys, Genevieve Ziurys,
and Milo E. Myers,

Plaintiffs,

IN THE COURT OF
COMMON PLEAS

CIVIL ACTION NO.
84-CP-22-512

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

RECEIVED
CLERK OF COURT
GEORGETOWN COUNTY, SC
JAN 12 1985

CERTIFIED A TRUE
AND CORRECT COPY

Linda L. Lane
DEPUTY CLERK OF COURT
GEORGETOWN COUNTY, SC

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This equity matter came before me for trial in Georgetown. During the trial, which lasted seven days, I had ample opportunity to observe the demeanor of the witnesses and to reach conclusions about their credibility. In addition, each side submitted pre-trial briefs and, at my direction, post-trial proposed findings of facts and conclusions of law and responses thereto. Following my review of those papers, the exhibits and the transcript of record, I held a hearing at which counsel for each side made oral arguments. Based upon all of the foregoing, but with special emphasis on the demeanor and credibility of the plaintiffs' witnesses and lack of credibility of defendants' witnesses, I make the following Findings of Fact and Conclusions of Law. To the extent that a finding is a conclusion or a conclusion is a finding they are adopted as such.

FINDINGS OF FACT

The plaintiffs are property owners at Litchfield Plantation. (the Plantation). Litchfield Plantation Company (the Company) is a South Carolina business corporation and is the owner and developer of the Plantation. Litchfield Plantation Association (the Association) is a South Carolina non-profit corporation which maintains the common plantation elements, all of which are owned by the Company.

A declaration of restrictive covenants (the covenants) pertaining to the Plantation was recorded on

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May 27, 1971. Those covenants were drafted by the Company's lawyers. The covenants were prepared and filed for the purpose of developing the property. The Company intended to develop the property fully when it began its marketing efforts in 1971. The covenants are incorporated by reference in the indenture deeds signed by the Company and each plaintiff or a predecessor in title to each plaintiff. The covenants make all property in the Plantation subject to assessment for maintenance and upkeep of the common plantation elements, except they specifically exempt from assessment in perpetuity all property owned or leased by the Company or the Association and all property owned by their affiliates, subsidiaries or paid employees. The covenants give each property owner the nonexclusive right to use the common plantation elements, but the Company retains fee simple title thereto and all of the benefits and privileges of ownership, such as the right of alienation, the right of use (which it has exercised) and the right to conduct business thereon (which it has also exercised).

The Association by-laws were also drafted by the Company's lawyers. The by-laws give the Company the right to cast 300 votes in the Association meetings, in contrast to one vote for each property owner, for as long as it owns property in the Plantation. The by-laws exempt from assessment in perpetuity property owned by the Company, its successors and assigns, its shareholders, officers and directors. This exemption, coupled with the exemption in

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the covenants, exempts in perpetuity from assessment all property in the Plantation owned by the Company, its successors and assigns, affiliates, subsidiaries, paid employees, shareholders, officers and directors.

Initially, the Company intended to sell between 300 and 350 units, either lots or condominiums, over a period of five to seven years. As of the time of trial, however, only 68 units had been sold. Of those, only 47 are subject to assessment because the owners of the remaining 21 fall within the perpetual exemption provisions.

Adoption of the by-law allowing the Company to cast 300 votes and inclusion of the provisions providing for perpetual exemption from assessment were based upon the continued existence of an active effort by the Company to develop and market the Plantation. Nevertheless, the Company took the Plantation off the market in 1974. Mr. Kidston, vice president of the Company, wrote the exclusive sales agent for the Plantation and said that in 1974 "the Plantation was basically placed in the Firm's inventory of lands for development in the future." He also said in the same letter that "although Litchfield Plantation was and still is a superb and beautiful property, the decision was to wait for the emergence of the local area and appropriate market conditions." The letter is dated October 3, 1984, and those statements were intended as a response to inquiries from potential buyers about why more property had not been sold in the Plantation between 1971 and 1984.

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Defendants' arguments that this interpretation of the letter is erroneous are unpersuasive. Plaintiffs introduced without objection several letters written in the 1980's by defendants' officers which stated that the Company had virtually no property for sale and had not had for more than 10 years. Even though it stopped marketing the Plantation in 1974, the Company has continued to cast 300 votes at Association meetings and has insisted on its exemption from assessments.

Between 1974 and 1978 the Company was unable to convey good title to property as a result of severe financial problems. However, in 1978 those problems were resolved through bankruptcy proceedings. Mr. Lachicotte, a well qualified and extremely credible expert witness on the subject of real estate development in the Waccamaw Neck area, testified that with an appropriate, active marketing effort the Company could have completely developed the Plantation and sold all or nearly all of the initially planned lots and condominiums between 1978 and the time of trial. Instead, the Company sold only 42 lots or condominiums during that time period. Of those, 21 were conveyed to persons whose property is exempt from assessment. Therefore, in the eight years since the end of the bankruptcy proceedings, the Company has made an average of only two and one fourth arms-length sales per year. In contrast, for example, Wachesaw Plantation has sold \$14,000,000 worth of property since December of 1984. This

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lack of sales is the direct result of the Plantation being virtually kept off the market since 1974 and the total lack of a marketing effort. Mr. Arthur was the only prospective purchaser to testify at the trial. He was an independent and credible witness who described the totally ineffective and inactive marketing effort being made by the Company during this period. The Company's own records reflect that it spent virtually no money to market the Plantation. The Company has made no active effort to market the Plantation since 1978 even though the Plantation was extremely marketable beginning in 1978. Instead, as Mr. Kidston said in 1984, the Company has kept the Plantation in the "firm's inventory of property for development in the future."

In each year since 1978 the Company has used its 300 votes to elect a majority of the Association's Board of Governors. Without exception, the directors so elected were officers or shareholders of the Company. Each year the board members elected by the Company presented a proposed budget to the members at the annual meeting. Although at least one plaintiff was on the board each year, he had no input into the budget or the line items included therein. Each year since 1978 over the objection of the plaintiffs the Company used its 300 votes to adopt the proposed budget.

The Association owns no real property, and the management agreements under which it has operated since 1978 permit the payment of taxes and utilities only on property the Association owns. Nonetheless in each year since 1978

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the Association budget has contained line items for property taxes, insurance and utilities on the Company's property. These items are properly Company expenses, not expenses of the Association. Each year through 1984 the Association has paid those expense items. The property taxes paid total \$91,280.00, the insurance premiums paid total \$42,222.00 and the utilities paid total \$169,760.00. For 1985 and 1986 the Association budgeted \$37,800.00 for property taxes, \$17,420.00 for insurance premiums and \$31,900.00 for utilities.

Between August 1, 1978, and October 31, 1984, the Company and the Association operated under an unsigned management agreement. On October 31, 1984, the Association and Resources Planning Corporation entered into a signed management contract. The unsigned contract had no provisions for a management fee above the monthly assessments, but the Association budgets adopted by the Company's 300 votes from 1978 through 1984 contained a line item for management fees. The total management fees paid by the Association directly to the Company to manage the Company's own property were \$135,902.00 between 1978 and 1984. For 1985 and 1986, the Association budgeted \$36,000.00 in management fees to be paid to Resources Planning to manage property owned by the Company. Those payments inure directly to the benefit of the Company since Resources Planning is managing only the Company's property. Assuming the 1985 and 1986 budgeted amounts were paid, and

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no evidence to the contrary was introduced, the taxes, insurance, utilities and management fees paid by the Association since 1978 total \$562,284.00. Those funds were paid by the Association either directly to the Company or for the direct benefit of the Company.

Since 1978, under budgets adopted by the Company using its 300 votes, the Association has operated at a deficit. At the time of trial the estimated cumulative deficit as of October 1986 was \$409,303.00. Each year, the Company loaned the Association money to cover the deficit and took back a series of notes from the Association. There are no resolutions of the Association authorizing the execution of any of those notes. Neither the charter nor the by-laws of the Association authorize it to borrow money. When the amount of money paid by the Association to or for the benefit of the Company, \$562,284.00, is compared with the cumulative loans from the Company, \$409,303.00, it is clear that the Association has paid \$152,981 in its own funds to or for the benefit of the Company.

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The Company has adopted Association budgets containing line items which are properly expenses of the Company and which caused an annual budget deficit, loaned money to the Association to pay a portion of those expenses and taken back notes which it intends to collect. Therefore, the Company is attempting to have the Association pay the Company's bills and, in addition, to get that money back from the Association. This it cannot do.

The covenants reserve to the Company the right to operate a club on the common plantation elements "for the mutual enjoyment of the owners." The Company has exercised its right to do that and has charged the expenses of the club to the Association and given the Association the income from the club operation. The Company has also used American Express mailing lists to solicit members for the club from the general public and charged that expense to the Association.

Based upon the foregoing Findings of Fact, I make the following:

CONCLUSIONS OF LAW

PARTIES

Immediately prior to trial, defendants filed a motion for judgment on the pleadings. They contend that the individual officers and directors are indispensable defendants and that the Association is an indispensable plaintiff. Neither of these propositions is correct.

This case could not have been brought as a derivative suit or in the name of the Association. In Dewing v. Perdicaries, 96 U.S. 193 (1877), the Supreme Court of the United States stated that the corporation is the proper plaintiff when all shareholders have the same interest. The Court held in Dewing that the case was appropriately filed by the individual plaintiff rather than on behalf of the corporation because the corporation had two classes of shareholders who had very different and opposing

interests. Id. at 196-97. That is precisely the situation present here. The Association has two classes of members with very different rights and obligations. The rights, duties and interests of the Company (and its affiliates, directors, employees, etc.) whose property is exempt from assessment are quite different from, and adverse to, the rights, duties and interests of the other members of the Association whose property is subject to assessment. Therefore, the Association would not be a proper party plaintiff.

The directors and officers of the Association need not be defendants in this action. This is an equitable action in which plaintiffs seek a declaratory judgment against the Company, an accounting and injunctive relief from improper actions of the Company. Therefore, the individual officers and directors are not necessary parties.

STATUTE OF LIMITATIONS AND LACHES

Defendants have asserted as defenses laches and the statute of limitations contained in S.C. Code Ann. § 33-13-190(h). Neither is a bar to this action. Section 33-13-190(h) by its terms applies only to actions against directors for damages resulting from violations of certain statutes which are not applicable here; this is an equitable action against the Company. Further, § 33-13-190(h) permits the filing of an action within two years of when the cause of action is, or should have been, discovered. Until October 3, 1984, when Mr. Kidston wrote the sales agent,

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plaintiffs had no way of knowing the Company had taken the Plantation off the market in 1974. The Company had repeatedly told plaintiffs that lots were about to be sold and condominiums were about to be built.

Similarly, proof of laches requires evidence that plaintiffs negligently failed to act for an unreasonably long period of time. Gray v. South Carolina Public Service Authority, 284 S.C. 397, 325 S.E.2d 547, 549 (1985).

Plaintiffs were not negligent; until October 3, 1984, they had no reason to suspect that the Company had taken the Plantation off the market, no way to discover that fact and were told otherwise by the Company. Also, until April of 1983, plaintiffs did not know that the Association debt was owed to the Company and until sometime in 1984, they, having been told otherwise by Mr. Wagner, did not have reason to believe payment of the notes would be expected. Plaintiffs, to the contrary, had been told that the debt entry was merely for bookkeeping purposes. Defendants cannot raise laches as a defense when they repeatedly gave plaintiffs false information in order to pacify them.

This action was filed October 6, 1984. Therefore, this action was timely filed.

FIDUCIARY DUTY OF THE COMPANY

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The plaintiffs contend that the Company stands in a fiduciary relationship with the Association and plaintiffs. The Company has exercised its right to cast its 300 votes in every election of the Association's Board of

Governors and in every vote to approve annual Association budgets and regular and special assessments. Each year, the majority of the persons elected by use of the Company's 300 votes have been officers, directors, employees and/or shareholders of the Company and at times of Resources Planning. They have served on the Board of the Association not in their individual capacity but as agents and representatives of the Company and its interests.

The issue of whether a majority shareholder stands in a fiduciary relationship to minority shareholders in the normal corporate context has not been ruled upon in South Carolina. However, in Burwell v. South Carolina National Bank, 288 S.C. 79, 340 S.E.2d 786, 790 (1986), the Court stated that "[t]he term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him." In Dibble v. Sumter Ice and Fuel Company, 283 S.C. 278, 322 S.E.2d 674 (Ct. App. 1984), the South Carolina Court of Appeals quoted a portion of a circuit court order of Chief Justice Ness. In that order, which was not appealed, then Judge Ness held that the majority shareholders of the Sumter Ice and Fuel Company had a fiduciary duty "to exercise their managerial prerogatives with respect for the interest of minority shareholders." Dibble, 322 S.E.2d at 676.

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Other courts faced with this issue have held that majority shareholders owe fiduciary duties to minority

shareholders. Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919); Mardel Securities, Inc. v. Alexandria Gazette Corp., 320 F.2d 890 (4th Cir. 1963); Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947); Trans World Airlines, Inc. v. Summa Corp., 374 A.2d 5 (Del. Ch. 1977); Efron v. Kalmanovitz., 249 Cal. App. 2d 187, 57 Cal. Rptr. 248 (1967); Baron v. Pressed Metals of America, Inc., 35 Del. Ch. 325, 117 A.2d 357, (1955), aff'd, 35 Del. Ch. 581, 123 A.2d 848 (Sup. Ct. 1956); Weinberger v. Semenenko 36 N.Y.S.2d 396 (1942). As Judge Winter stated in Swinney v. Keebler Co., 480 F.2d 573, 577-78 (4th Cir. 1973):

A dominant or majority stockholder does not become a fiduciary for other stockholders merely by owning stock But majority stockholders who assume the management of the corporation, . . . can be said to stand in fiduciary relation to the minority under certain circumstances.

(Citations omitted).

Condominium developers are also generally held to have fiduciary duties to condominium homeowner associations and their members. In Raven's Cove Townhomes, Inc. v. Knappe Development Co., Inc., 114 Cal. App. 3d 783, 171 Cal. Rptr. 334, 343 (1981), the Court stated that:

Where a developer or sponsor totally dominates the association, or where the methods of control by the membership are weak or nonexistent, 'closer judicial scrutiny may be felt appropriate,' and the principles of fiduciary duty established with business corporations 'may exist for holding those exercising actual control over the group's affairs to a duty not to use their power in such a way as to harm

unnecessarily a substantial interest of a dominated faction.'

quoting with approval Hyatt and Rhoads, Concepts of Liability in the Development and Administration of Condominiums and Homeowners' Associations, 12 Wake Forest L. Rev. 915, 923 (1976).

The Company occupies a position with respect to the Association similar to that of a majority stockholder in a corporation. The Company, through its officers and directors placed on the Association's Board of Governors by virtue of the Company's voting control, and through the use of that voting control to control the financial affairs of the Association, has assumed the management and control of the Association. As the entity controlling and managing the Association, the Company owes a fiduciary duty to the Association and its members. Id.

Budget Line Items

Since the Company stands in a fiduciary relationship to the Association and the plaintiffs, it must be determined what effect that relationship has in this case. As a general rule "anyone acting on a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest except with the full knowledge and consent of the other person." 36A C.J.S. Fiduciary 388 (1961).

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The Company owns the common plantation elements. The Company has used its 300 votes at the annual Association meetings to adopt Association budgets upon which assessments

of property owners other than itself and its affiliates, etc., are based. Those budgets have in the past included expense items for property taxes, utilities, insurance and property management fees pertaining to the common plantation elements even though the Association does not own them. Those expenses relate solely to the common plantation elements and must be borne by the Company as owner. Because the owner has granted the existing and future property owners at the Plantation the nonexclusive right to use the common plantation elements, the owner of the common plantation elements is required to pay those expenses to insure that the property owners' right of use in those elements is protected, not interfered with and meaningful.

The covenants provide that property owners will be liable for assessments for "maintenance and upkeep." The by-laws provide that the members of the Association will be subject to assessment for "maintenance and operation" "in accordance with the recorded covenants." The property report and statement of record provide that the Association will provide for "maintenance" of the common amenities. Thus, purchasers of property at the Plantation are subject to assessment for only maintenance, operation and upkeep.

The Company contends that the budget line items for taxes, insurance and utilities are all maintenance expenses. Under South Carolina law, when a term is ambiguous it is to be construed against the party drafting the instrument. Mid-Continent Refrigerator Co. v. Way, 263

S.C. 101, 208 S.E.2d 31, 33 (1974). A construction against the drafter is especially warranted when the term benefits the drafter. Sample v. Gulf Refining Co., 183 S.C. 399, 191 S.E. 209 (1937). Covenants that impose affirmative obligations on grantees must be "strictly construed and not enforced unless the obligation is imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application." Lovering v. Seabrook Island Property Owners Ass'n, 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986). It was incumbent upon the Company to define the terms "maintenance," "operation," and "upkeep" if the Company wanted them construed broadly enough to include the payment of taxes, insurance and utilities, particularly in the face of the management agreements' provisions with respect to the payment of taxes and utilities. Since the Company did not define those terms, they should be given their ordinary meaning. The Supreme Court of South Carolina has found maintenance to be synonymous with repair. Herbert v. Griffith, 99 S.C. 1, 82 S.E. 986 (1914). Repair does not include taxes, insurance or utilities, Saphir v. Neustadt, 177 Conn. 191, 413 A.2d 843 (1979), and I conclude that maintenance does not either.

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The Association is not obligated to pay taxes, insurance and utilities on the Company's property. Nothing in the covenants or the by-laws requires it to do so. Any agreement to do so would be closely scrutinized because of the self dealing nature of the transaction. No such

agreement exists, and the management contracts provide to the contrary. Therefore, the inclusion of those line items in the Association's budgets since 1978 was improper. It was a breach of the fiduciary duty owed by the Company to the Association and its members for the Company to abuse its voting control of the Association by adopting budgets including those items which directly benefited the Company at the sole expense of the assessment-paying members of the Association. Those line items, property taxes, insurance, utilities and management fees have been paid by the Association to the County, the insurance companies, the utility companies and the Company directly to or for the benefit of the Company. Each was the obligation of the Company as owner of the common plantation elements. The Company has been unjustly enriched by the amounts of those payments.

Carriage House Club

Under the covenants the Company reserves to itself, its successors and assigns, the right to construct, lease, operate and manage any club or other facilities on the common plantation elements "for the mutual enjoyment of the owners." The term "owners" is not defined in the documents. Young Smith, formerly president of the Company, testified the language "for the mutual benefit of the owners" meant that any such club or facility operated by the Company on the common plantation elements was to be operated for the benefit of owners of property in Litchfield

Plantation. This is a reasonable construction of the limiting language. This construction is also consistent with the statements the Company made in its filings with HUD. The covenants say that Litchfield Plantation is to be a community providing the greatest possible degree of beauty and amenity for all the "property owners and inhabitants thereof."

The Company has heretofore charged the expenses of the club and credited the income of the club to the Association. In years in which the club has made a profit, this has mutually benefited the property owners by lowering their assessments. The Company may continue to operate the club and solicit members from the general public, but the use of the club shall be restricted to property owners, members and their guests. A guest is "a person entertained in one's house or at one's table, a person to whom hospitality, as at a home or a club is extended, especially one invited to participate in some activity at the expense of another." Webster's Third New International Dictionary, p. 1008. No property owner(s) or member(s) may use the club on a regular basis in a manner which prevents the use of the club by any other property owner(s) or member(s).

The Company may either keep all of the income from the operation of the club and pay all of the operational expenses of the club itself, or it may allow the Association to receive all of the income from the operation of the club in which case the Association shall pay all of the

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operational expenses of the club. If the income and expenses are respectively credited and charged to the Association, the Company shall pay annually to the Association an amount equal to any deficit in the operation of the club.

Notes

The Association has spent \$562,284.00 since 1978 to pay expenses which are properly those of the Company and which are not properly the subject of assessment under either the covenants or by-laws. However, the Company had loaned the Association as of October, 1984, \$319,760.00. As of October 1985, the estimate was that the cumulative loan through October 1986 would be \$409,303.00. The \$562,284.00 figure includes payments through October of 1986. Therefore, the Company is entitled to an offset in the amount of \$409,303.00. The notes held by the Company from the Association are cancelled. The notes themselves were unauthorized. The Association has no power to borrow money under either its charter or by-laws which are the only documents which can grant powers to the Association.

INVALIDITY OF EXEMPTION OF COMPANY'S PROPERTY FROM ASSESSMENTS

The plaintiffs contend that a combination of circumstances requires that Article 4, Section 2(d) of the Covenants and Article V, Section 1 of the By-laws be declared unconscionable and void. The former exempts in

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perpetuity from the assessments and liens of the Association "all property owned or leased by Litchfield Plantation Company, Inc., and Litchfield Plantation Association, Inc., and all property owned by their affiliates, subsidiaries and paid employees." The latter exempts in perpetuity from assessment and liens all property owned by the Company, its successors and assigns, shareholders, officers and directors.

The plaintiffs contend that this Court should abolish the perpetual exemption, first, because the intentional act of taking the Plantation off the market in 1974 constitutes a radical change of conditions that destroys the purpose of the exemption; second, because it is against the public policy of this State; third, because the Company has breached implied covenants in the contract between the Company and the plaintiffs. I need not reach these issues because I conclude that the combination of (1) the onerous provisions of the covenants and by-laws, (2) the breach by the Company of its fiduciary duty to the Association and its members by the abuse of its voting control in the areas of budgeting and expenditure of funds, and (3) the decision of the Company to halt the development of the Plantation when economic times permitted development while passing all of the operating costs of the common plantation elements to the assessable property owners makes the perpetual exemption unconscionable.

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The Company has effective voting control of the
n for as long as it owns any property in the
. The Company has used this voting control to
ciation budgets that benefit the Company at the
the plaintiffs and that impose upon the
a of which plaintiffs are members expenses that
al obligation of the Company.

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marketing and development of the Plantation by the Company, has failed completely because the Company took the Plantation off the market in 1974.

Thus, the plaintiffs are faced with (1) voting control in the Company, (2) the perpetual exemption from assessment, (3) the decision by the Company in 1974 not to develop the property, (4) the total lack of marketing effort since 1978 when the Plantation became extremely marketable, (5) the imposition by the Company through its voting control of all of the operational costs of the common plantation elements on the assessable property owners while the Company paid no assessments and benefited from appreciation of the Plantation, (6) the absence of a marketing effort since 1978 and (7) the repeated abuse of the voting control by the Company to shift its expenses to the Association which is impermissible self dealing and a breach of its fiduciary duty. This situation is unfair and unconscionable. Additionally, Young Smith testified that the exemption presupposed a continued active marketing effort by the Company. The Company abandoned any such marketing effort when it took the Plantation off the market in 1974. Therefore, the justification for the exemption no longer exists.

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While I cannot force the Company to develop the Plantation, I can fashion a form of relief that gives the Company an incentive to develop the Plantation when economic times permit or to broaden the base of assessable property

if it choses to continue to warehouse the Plantation.
"[T]he law endures no injury, from which damage has ensued,
without some remedy; but directs the application of
principles already established to every new combination of
circumstances that may be presented for decision." Watson
v. American Colony Ins. Co., 179 S.C. 149, 183 S.E. 692,
693-94 (1936). This relief is necessary to effectuate the
purposes expressed in the covenants and the contracts
between the Company and the plaintiffs.

Therefore, beginning on November 1, 1978, the
beginning of the Association's fiscal year, property in the
Plantation owned or leased by the Company is fully
assessable. Property transferred to the Company's
affiliates, subsidiaries or paid employees of the
Association after the date of this order is fully
assessable. That leaves only property owned or leased by
the Association exempt, as it should be. Property in the
Plantation (1) transferred or leased to the Company's
affiliates, subsidiaries, paid employees, shareholders,
officers and directors prior to the date hereof and (2)
property in the Plantation transferred or leased to
affiliates, subsidiaries or paid employees of the
Association prior to the date hereof shall remain exempt so
long as the owner or lessee thereof falls within an
exemption category and provided the documents evidencing the
transfer or lease were recorded prior to the date hereof. I

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cannot affect the rights of persons not parties to this action.

The next issue is on what basis the Company's property should be assessed. I look for guidance from the Horizontal Property Act. South Carolina Code Ann., § 27-31-190 (1976), states that the owners are to contribute to administration and maintenance expenses pro rata in percentages computed according to S.C. Code Ann. § 27-31-60 (1976). That latter section states that a percentage shall be computed when the regime is constituted that is equal in value to the basis of each individual piece of property to the value of the property as a whole. Of course no such percentage was computed for the Plantation when the Association was formed, and no such percentage can be computed today because the Company reserved the right to change the number and type of the units. Therefore, the only way to compute a percentage is to revert to the original development plan of 300-350 units and to presume that the Company initially owned 300 units for purposes of computing the assessment to be paid by the Company. Therefore, the Company should pay to the Association its pro rata share of the taxes, insurance, utilities and management fees paid during each fiscal year beginning with fiscal year 1978-1979 based upon the ratio that the remaining Company assessments bear to 300. For example, on October 31, 1979, the Company had sold 32 units, leaving the Company with 268 assessments, and so on. Based on that formula, the Company

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should pay the Association the following amounts for the respective years.

<u>FYE</u>	<u>No. of units sold</u>	<u>No. of Co. assessments</u>	<u>Co.'s % share</u>	<u>Total of line items</u>	<u>Amount Due Association</u>
10-31-79	32	268	89.3	\$72,904.	\$65,103.27
10-31-80	40	260	86.6	\$64,519.	\$55,916.46
10-31-81	51	249	83.0	\$68,825.	\$57,124.75
10-31-82	56	244	81.3	\$79,072.	\$64,285.54
10-31-83	68	232	77.3	\$75,651.	\$58,503.44
10-31-84	68	232	77.3	\$78,193.	\$60,469.25
10-31-85	68	232	77.3	\$57,900.	\$44,756.70
10-31-86	68	232	77.3	<u>\$65,220.</u>	<u>\$50,415.06</u>
TOTAL				\$562,284	\$456,574.47

The Company has loaned to the Association \$409,303 and it is entitled to an offset against the amount it owes to the Association. Therefore, the Company should pay to the Association the sum of \$47,271.47. Henceforth, the Company should pay one resident or nonresident assessment, as the case may be, for each of those remaining 232 units.

As a unit is sold by the Company, it will be responsible for one less assessment. This will encourage the Company to develop the property and create a broad base to support the operation of the common plantation elements or provide the broad base to support the maintenance and upkeep of the common plantation elements if it continues to warehouse the Plantation. These assessments on the Company's property shall be subject to the covenants and

by-laws, including the provisions therein for liens and judgments in case of non-payment.

REDUCTION OF COMPANY'S 300 VOTES

For the same reasons that I held the exemptions to be invalid, I find invalid the provision of Article III, Section 3, of the by-laws, which grants the Company 300 votes at "all meetings of members [of the Association], said voting power to terminate upon the sale of all of its property within Litchfield Plantation." Further, I hold that the provision in Article III, Section 3, which grants the Company 300 votes in the Association is void because the consideration the Association received for the 300 votes, i.e., the development of the property, has utterly failed.

Tom Wagner testified that the development of the Plantation was the consideration received by the Association for the 300 votes. Young Smith testified that the Company was given 300 votes in contemplation of an aggressive marketing program and because the developer needed to control the Association to maintain the common plantation elements during the sales period. The voting control is unnecessary now because the Company took the Plantation off the market. Also, this control provision was needed to maintain control of the common plantation elements. Since they were never conveyed to the Association and are still owned by the Company, the Company has control over the common plantation elements. It need not control the

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Association in order to control the common plantation elements because it retains fee simple title to them.

Despite the fact that the by-law provision is invalid, it would be unfair to the Company to impose assessments upon it without giving it the right to vote at Association meetings. Therefore, the Company shall have one vote at Association meetings for each assessment it pays beginning with 232 votes (300 initial votes less the 68 units sold as of the time of trial). As the company sells units, either residential lots or condominiums, it shall lose one vote for each unit sold.

COUNTERCLAIMS

Slander

Defendants' first counterclaim against plaintiffs alleges a cause of action for slander. Defendants have characterized this claim as one for slander of title² and

²Slander of title is a false, malicious statement, disparaging a person's title to property and thereby causing him special damage. 53 C.J.S. Libel and Slander § 269 at p. 391. Only a person who has an interest in the property slandered has standing to assert an action for slander of title, id., § 273 at pp. 393-94. Malice is also an essential element; "[t]he action cannot be maintained if the claim was asserted [by a plaintiff] in good faith, and if the act complained of was founded on probable cause or was prompted by a reasonable belief, although the statement may have been false." Id. § 274 at pp. 394-95. Finally, to prove slander of title the Company must prove that it has "sustained pecuniary loss as the direct and natural result of the publication of the words. There can be no right of action when the damages result not from [plaintiffs'] act, but from the voluntary act of [defendant]." Id. § 276 at pp. 395-96 (emphasis added) (footnotes omitted).

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conspiracy to slander.³ In order for the defendants to recover against any plaintiff on this cause of action, they must establish the following elements by a preponderance of the evidence:

First, that a plaintiff made an oral statement which was slanderous;

Second, that the slanderous statement referred to the defendant(s), Neeley v. Winn-Dixie, 255 S.C. 301, 178 S.E.2d 662 (1971);

Third, that the statement made was false;

Fourth, that the statement was made to persons other than the defendant(s) or in a fashion in which it was overheard by other persons at or near the making of the statement. Duckworth v. First National Bank, 254 S.C. 563, 176 S.E.2d 297, 301 (1970);

Fifth, that the defendant(s) suffered special or actual damages as a result of the publication of the slanderous statement;

Sixth, that if the statement was absolutely privileged, it exceeded the scope of the privilege, all doubts being resolved in favor of the privilege, McKesson & Robbins v. Newsome, 206 S.C. 269, 33 S.E.2d 585, 587 (1945);

³The gravamen of a civil conspiracy is not the conspiracy but the underlying tort. Thus, a civil conspiracy is not actionable until the tort actually occurs and some injury results. Todd v. S. C. Farm Bureau Mutual Ins. Co., 276 S.C. 284, 278 S.E.2d 607 (1981). Accord, Ryan (Footnote Continued)

Seventh, that if the statement was qualifiedly privileged, it was made with actual malice. Bell v. Bank of Abbeville, 211 S.C. 167, 44 S.E.2d 328 (1947).

Defendants failed to prove that any plaintiff made any slanderous statement about either defendant. The record contains references to statements made about the Plantation but all are without identification of the speaker. Defendants cannot recover for any slander without evidence attributing the statement to a particular plaintiff.

Further, the evidence indicates that the substance of each statement made about the Plantation is in fact true. Truth is a complete defense to a slander action. It is not necessary for the plaintiffs to show that the statement was absolutely true; substantial truth is all that is required. Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 221 S.E.2d 770 (1976).

Where the language in issue is not slanderous per se,⁴ the words are only actionable upon plaintiff's proof of special damages. Special damages are damages computable in

(Footnote Continued)
v. Eli Lilly & Co., 514 F. Supp. 1004, 1012 (D.S.C. 1981),
Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942).

⁴When words cannot be interpreted to have an innocent meaning, they are slanderous per se. Jackson v. Record Publishing Co., 175 S.C. 211, 178 S.E.833 (1935). A statement is slanderous per se when it falsely charges the commission of a crime, the contraction of a contagious disease, adultery, a want of chastity or professional unfitness. Smith v. Phoenix Furniture Co., 339 F. Supp. 969, 971 (D.S.C. 1971).

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letter at issue in State v. Drake was privileged. Each plaintiff is a member of the Association and any statements made during any meeting of the Association were made to other members of the Association about Association business and matters of concern to its members. I hold that any statements introduced at trial made at an Association meeting are absolutely privileged and cannot therefore be the basis for a slander action.

Statements made during the Association meetings, if not absolutely privileged, are certainly qualifiedly privileged.⁵ In a similar factual context, a New York court has held that communication among members of a tenants' association about a matter of concern to the tenants was privileged. Erdberg v. Freeman, 90 Misc. 2d 797, 396 N.Y.S.2d 315 (1977). In determining whether or not a communication was qualifiedly privileged, reference must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a

⁵Occasions of privilege are recognized for slander of title, as for libel or slander.

A communication disparaging another's title or property is qualifiedly privileged if the publication was honestly made by the defendant, believing it to be true, and there was a reasonable occasion or exigency in the conduct of his own affairs in matters where the interest was concerned, which fairly warranted the publication.

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53 C.J.S. Libel and Slander, § 272 at pp. 396-97.

a dollar amount. Smith v. Phoenix Furniture Co., 339 F. Supp. at 971. Special damage must consist of some provable material loss to the defendant as a result of the injury to its reputation. Wardlaw v. Peck, 282 S.C. 199, 318 S.E.2d 270, 275 (Ct. App. 1984). Defendants have not proved any special damages which either of them has suffered.

In addition to the defense of truth and the absence of any special damages, plaintiffs assert the defense of privilege. An absolute privilege attaches to statements made in judicial proceedings, whether or not voluntarily made and whether made by affidavit or in a deposition. Prosser & Keeton, The Law of Torts, § 114 "Absolute Privilege" at pp. 816-17 n.16 (5th ed. 1984). This principle is well established in South Carolina. See Corbin v. Washington Fire & Marine Ins. Co., 278 F. Supp. 393 (D.S.C. 1968), aff'd 398 F.2d 543 (4th Cir. 1968), and cases cited therein.

The Supreme Court of South Carolina has also held that an absolute privilege attaches to statements made in situations other than judicial proceedings. For example, in State v. Drake, 122 S.C. 350, 115 S.E. 297 (1922), the Court held that a letter written by a member of a Masonic Lodge to the master of the lodge about lodge business and published to the brethren of the lodge was privileged. Defendants rely upon statements made at Association meetings as a basis for their slander claim. Statements made during meetings of the Association are privileged for the same reasons that the

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communication and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made in order to protect such common interest is privileged by reason of the occasion. A qualified "privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits."

Prentiss v. Nationwide Mutual Ins. Co., 256 S.C. 141, 143, 181 S.E.2d 325, 327 (1971), citing, Duckworth v. First National Bank, 254 S.C. 563, 176 S.E.2d 297 (1970). The defendants have the burden of proving abuse of the privilege. Duckworth, supra. All evidence indicates that the statements made at Association meetings fall well within these parameters.

The effect of plaintiffs' proof of a qualified privilege is to cast upon the defendants the necessity of showing malice in fact - that is, that the plaintiff(s) were actuated by ill will, spite, grudge, or some ulterior motive in what they said, with the malicious and wanton design to injure the defendants. The existence of actual malice is a question which the trier of fact must determine. Montgomery Ward & Co. v. Watson, 55 F.2d 184 (4th Cir. 1932), Bell v. Bank of Abbeville, 208 S.C. 490, 38 S.E.2d 641 (1946). Defendants must prove such actual malice by clear and convincing evidence. Jones v. Garner, 250 S.C. 479, 158 S.E.2d 909 (1968). Language which shows anger or intemperance is not malicious. Malice implies an intention

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to do unjustifiable harm. Where the language and the circumstances are as consistent with the nonexistence of malice as with its existence, a finding of no malice is proper. Montgomery Ward & Co. v. Watson, 55 F.2d at 188. I find no evidence in the record of malice on the part of any plaintiff.

Proof of damages is an essential element of defendants' claims. Only damages which are the direct and natural result of the slander may be recovered as compensatory damages. Further, evidence of damages must be sufficient for me to determine the amount of damages suffered "with reasonable certainty or accuracy." Gray v. Southern Facilities, Inc., 256 S.C. 558, 183 S.E.2d 438 (1971). "Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." Id. at 444. An example is Brown v. National Home Insurance Company, 239 S.C. 488, 123 S.E.2d 850 (1962), where an insurance agent sued over a defamatory letter which was sent to the State Insurance Commissioner. At trial the agent produced no evidence that he had lost any customer or client as a result of the letter. Since the letter caused the agent no legal damage, the South Carolina Supreme Court held that the trial judge should have directed a verdict for the defendant. Similarly, defendants in this case have not proved that they have suffered any damages whatsoever. There is no proof of even one sale lost as a result of any statement, slanderous or otherwise, published by any

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plaintiff. The defendants offered no testimony to show that a prospective purchaser did not purchase, or delayed in purchasing, a unit in the Plantation because of any statement of a plaintiff. Thus, there is no evidence that any plaintiff was responsible for the lack of sales in the Plantation. The lack of sales was the direct result of the Plantation being taken off the market in 1974.

In conclusion, no plaintiff has published any slanderous statement about either defendant or about the Plantation under any circumstances that would not be privileged. Neither defendant has suffered any damage as the result of any statement or act by any plaintiff. Plaintiffs are entitled to a judgment in their favor on defendants' first counterclaim.

Abuse of Process

In their second counterclaim the defendants have alleged that certain of the plaintiffs have abused the legal process. The defendants allege in their second counterclaim which was filed on December 10, 1985:

That the following Plaintiffs, Eugene F. McManus, Ruby G. McManus, Hugh C. Godefroy, Hope T. Godefroy, William H. May, Mary F. May, Edgar S. Davis, Harold F. Beal, Jr., Doris N. Beal, Mary T. Clark, Robert D. Devereux, Janet W. Devereux, John W. Hudson and Suzanne E. Hudson, jointly and together instituted the present action and have instituted other actions in the past with the ulterior purpose and motive of financially ruining the Defendants, harassing the Defendants, and sabotaging the sales and marketing efforts of Defendant, Litchfield Plantation Company, Inc., and its agents, servants and employees.

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Defendants' Amended Answer and Counterclaim at paragraph 50. To the extent that these allegations are based upon prior lawsuits which were resolved prior to December 10, 1979, the statute of limitations as pled by the plaintiffs in paragraph 11 of their Reply will bar this claim. This applicable limitation period is six years. S. C. Code Ann., § 15-3-530(5) (Cum. Supp. 1985). Therefore, the following lawsuits brought by the property owners cannot serve as a basis for the defendants' abuse of process counterclaim:

Olin C. Gochenour et al. v. Litchfield Plantation Company, Inc., filed September 27, 1974;

Olin C. Gochenour et al. v. Litchfield Plantation Company, Inc., et al., filed June 11, 1975; or,

Edgar S. Davis et al. v. Litchfield Plantation Company, Inc., et al., Civil Action No. 75-CP-22-51, resolved by the Order of the Honorable James H. Price, Jr., on July 19, 1978.

During the last six years there have only been three lawsuits which could possibly give rise to the defendants' abuse of process counterclaim.⁶ Each of these lawsuits was instituted by either the Company or the Association. Although the defendants contend that the

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⁶These three suits are Litchfield Plantation Company, Inc. v. Litchfield Plantation Horizontal Property Regime I, Civil Action No. 83-CP-22-254, Litchfield Plantation Company, Inc. v. Litchfield Plantation Horizontal Property Regime II, Civil Action No. 83-CP-22-255 and the twenty-nine lawsuits consolidated under the caption Litchfield Plantation Association Inc. v. Roger W. Allen et al., Civil Action No. 83-CP-22-55.

counterclaims for accounting which were asserted in those suits can provide a basis for their abuse of process claim, they have cited no cases for that proposition.

However, regardless of whether the counterclaims can provide a basis for the defendants' abuse of process claim, the defendants have to meet their burden of proof to prove an abuse of process claim. In order to prove an abuse of process a party must show "first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693, 694 (1967). The mere filing of a pleading does not constitute an abuse of process. Bell Lines, Inc., v. C. F. Strickland, 254 S.C. 148, 173 S.E.2d 788 (1970). Even if an action is commenced with an ulterior motive or bad intentions, that does not constitute an abuse of process. Huggins, supra. The focus in abuse of process action is on the use of the process after it has been filed. Scott v. McCain, 275 S.C. 599, 274 S.E.2d 299 (1981). As the Court stated in Huggins, there must be "a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." Huggins, 153 S.E.2d at 694. In this

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case the defendants have failed to introduce any evidence of extortion or improper negotiations.⁷

The defendants also alleged in their abuse of process counterclaim

That the aforementioned Plaintiffs' actions in commencing the present litigation and in raising the spurious issues contained therein were done maliciously, willfully and intentionally in order to gain a collateral advantage and coerce these answering Defendants to waive, change or modify certain provisions of the Declaration of Restrictive Covenants for Litchfield Plantation, the By-Laws of Litchfield Plantation Association, Inc. and/or the Management Agreement of Litchfield Plantation Association, Inc.

Defendants' Amended Answer and Counterclaim at paragraph 51.

I ruled at trial that this claim was premature, Nevertheless, these allegations are not sufficient to state a claim for abuse of process since the plaintiffs' main relief requested in this lawsuit is to change certain provisions of the covenants and the by-laws. There is nothing collateral about the plaintiffs' desires to change these documents. It is clear that plaintiffs' claim and

⁷Even if the Association has proved an abuse of process claim against the 14 named counterclaim defendants based on the lawsuits consolidated under Allen, the Association has proved no damages therefrom. The Association still would have had to defend the accounting counterclaims asserted by the other 15 parties to the Allen suit. Therefore, the action of the 14 named counterclaim defendants herein could not have been the cause in fact of any damages; but for their action, the Allen counterclaim would still have been prosecuted by the other 15 defendants in that action.

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request for relief cannot be the basis for an abuse of process claim:

whenever an injury results from the issuance of judicial process in civil actions, the person procuring its issuance incurs no responsibility, provided he acts in honest conviction that the remedy is necessary to the enforcement of a legal right.

72 C.J.S. Process § 120(a) (1951). The plaintiffs in this case believe that their legal rights have been infringed upon and that the remedies requested in their Second Amended Petition are necessary to protect their legal rights. Therefore, the plaintiffs have not abused any process in the case at bar.

The defendants have also presented evidence that they contend shows that the plaintiffs tried to secure the collateral advantage of changing the documents in the prior lawsuits. Of course the plaintiffs were not parties to the two lawsuits brought by the Company against Horizontal Property Regimes I and II. These Regimes were and are independent entities under the law, and the plaintiffs in this suit are not liable for the actions of the Regimes.

The defendants have not produced any evidence that these plaintiffs attempted to coerce or extort the defendants to change their documents in the negotiations concerning the Allen suit or other any other prior lawsuit. Without any evidence on this critical issue, the abuse of process claim must fail. Therefore, plaintiffs are entitled

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to judgment in their favor on defendants' Second Counterclaim.

LEGAL FEES

The minutes of the October 24, 1985, Association meeting reflect that property owners were told the Association had incurred legal fees of \$25,000 in defending this suit. This lawsuit and the resultant legal fees is the result of actions of the Company, taking the Plantation off the market when economic times permitted development, its breaches of fiduciary duty, breach of its implied duty to develop when economic times permitted and breach of its implied duty of good faith and fair dealing. The Association has been a mere pawn in this process.

Therefore, I hold that all expenses, legal fees and costs incurred by the Association in connection with any phase of this action are the responsibility of the Company. Such legal expenses, including attorney's fees, costs, expert witness fees, etc., shall not be charged to or paid by the Association. The Company shall reimburse the Association for any legal fees, costs, etc., the Association has previously paid in connection with this suit.

THEREFORE, BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS ORDERED that:

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1. All notes and any other indicia of indebtedness of Litchfield Plantation Association, Inc., to Litchfield Plantation Co., Inc. are hereby declared cancelled, null, void and unenforceable.

2. The Company shall pay to the Association the sum of \$47,271.74 with interest from the date hereof.

3. The exemption from assessments contained in Article 4, Section 2(d), of the covenants and the exemption from assessments contained in Article V, Section 1, of the by-laws are void as of the date of this order except as to property owned or leased by the Association and as to property transferred by deeds or leases recorded prior to the date hereof to owners or lessees who fall within the original exemption provisions but only so long as the property is owned or leased by someone within the categories of those exemptions.

Any lot or condominium unit sold or leased after the date of this order shall be assessable irrespective of the identity of the purchaser or lessee.

4. Litchfield Plantation Co, Inc. shall from and after the date hereof pay resident or non-resident regular and special assessments, as the case may be, to the Association. The number of such assessments shall be 232. As the Company sells units, either residential lots or condominiums, it shall be responsible for one less assessment for each unit sold.

5. In view of the fact that the Company is no longer exempt from assessments, the Association may in the future assess for the payment of taxes, insurance, utilities and management fees related to the common plantation elements.

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6. Litchfield Plantation Company, Inc., and Litchfield Plantation Association, Inc., shall not permit, and are hereby enjoined from permitting, the use of the Carriage House Club by any persons who are not members of the club or property owners at the Plantation or guests (as heretofore defined) of members of the Club or property owners at Litchfield Plantation. Should the Company allow the association to receive the income from the Carriage House Club and charge the expenses of the club to the Association, the Company shall pay the Association annually an amount equal to any deficit in the club operation.

7. The provision in Article III, Sec. 3 of the By-laws of Litchfield Plantation Association which grants Litchfield Plantation Company 300 votes in all meetings of the Association until it sells all of its property in the Association is hereby declared void. As of the date of this order, the Company shall have one vote in the Association for every assessment it pays beginning with 232 votes. As the Company sells units, either residential lots or condominiums, it shall lose one vote for each unit sold.

8. The Association shall not pay any attorney's fees and/or costs incurred in the defense of this lawsuit.

9. Litchfield Plantation Co., Inc. shall reimburse the Association for all attorney's fees and costs the Association has paid in connection with the defense of this lawsuit.

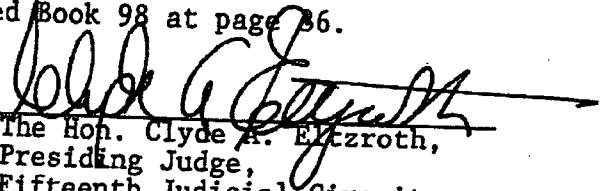
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10. The first and second counterclaims of each defendant are dismissed with prejudice.

11. Plaintiffs shall recover their costs in this action.

12. All motions made before or during trial for costs, attorney's fees, and other sanctions are held in abeyance and shall be considered by the Court at a later date.

13. The Clerk is directed to record a certified copy of this Order in the Deed Book indexed in the Grantor Index under the name of Litchfield Plantation Company, Inc., cross referenced to the Declaration of Restrictive Covenants which are recorded in Deed Book 98 at page 86.


The Hon. Clyde A. Eltzroth,
Presiding Judge,
Fifteenth Judicial Circuit

, S. C.

December, 1986

#43

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN

CIVIL ACTION COVER SHEET

Litchfield Plantation Association, Inc., Joseph
E. Johnston, Thomas Eckard, Carol Kirby,
Robert F. McMahan, Jr. and Thomas Martin
Phillips,

2011- CP -22- 00319

FILED
GEORGETOWN COUNTY, S.C.
2011 MAR -9 P 4:49
ALMA WHITE
CLERK OF COURT

Plaintiff(s),

vs.

Litchfield Plantation Company, Inc.,

Defendant(s)

(Please print)

Submitted By: Robert F. McMahan, Jr.

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NOTE: The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Notice/ File Med. Mal. (230)
☐ Previous Notice of Intent Case #
 20 -CP- -
☐ Other (299)

- Torts - Personal Injury**
☐ Assault/Slander/Label (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

- Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions**
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured
 Settlement Payment Rights
 Application (760)
☐ Other (799)

- Administrative Law/Relief**
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture - Petition (840)
☐ Forfeiture - Consent Order (850)
☐ Other (899)

- Appeals**
☐ Arbitration (900)
☐ Magistrate - Civil (910)
☐ Magistrate - Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Workers' Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Comm. (991)
☐ Other (999)

- Special/Complex/Other**
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of-State Depositions (650)
☐ Motion to Quash Subpoena in
 an Out-of-Country Action (660)
☐ Sexual Predator (510)

Submitting Party Signature:

Date:

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCROC Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et. seq.

SCCA / 234 (4/08)

Page 1 of 2

FOR MANDATED ADR COUNTIES ONLY
Florence, Horry, Lexington, Richland, Greenville and Anderson

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals;
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS
2011-CP-22-00319

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr. and Thomas Martin Phillips,

Plaintiff(s),

vs.

Litchfield Plantation Company, Inc.,

Defendant(s).

Civil Action No.

SUMMONS

Non Jury Trial Request

ALMA Y. WHITE
CLERK OF COURT

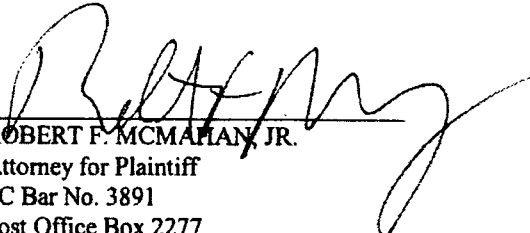
2011 MAR -9 P 4:49 PM

FILED
GEORGETOWN COUNTY, S.C.

TO: THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers at their office, Conway, SC, within thirty (30) days after service thereof exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

HARRIS AND GRAVES, P.A.


ROBERT F. MCMAHAN, JR.

Attorney for Plaintiff

SC Bar No. 3891

Post Office Box 2277

Conway, SC 29528

(843) 234-2390

rfm@harrisgraves.com

Conway, South Carolina

Dated: March 9, 2011

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

2011-CP-22-00319

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr. and Thomas Martin Phillips,

Plaintiff(s),

vs.

Litchfield Plantation Company, Inc.,

Defendant(s).

Civil Action No.

COMPLAINT FOR DECLARATORY
RELIEF
(Non-Jury)

ALMA Y. WHITE
CLERK OF COURT

2011 MAR -9 P 4:50 8

FILED
GEORGETOWN COUNTY, S.C.

1. The plaintiff, Litchfield Plantation Association, Inc., (hereinafter "the Association") is a South Carolina non-profit corporation that is the homeowners association for Litchfield Plantation located in Georgetown County, South Carolina.
2. The plaintiffs' Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips are property owners in Litchfield Plantation and are the duly elected Board of Governors of the Association.
3. The defendant Litchfield Plantation Company, Inc., (hereinafter "the Company") is a South Carolina corporation with its principle place of business in Georgetown County, South Carolina.
4. Litchfield Plantation is a real estate development located in Georgetown County, South Carolina that has been governed for the last 5 years by an Amendment to the Declaration of Protective Covenants, Conditions and Restrictions for Litchfield Plantation (hereinafter the "Covenants") filed in the Georgetown County Clerk of Court Office on May 3, 2005 at Book no 1642, page no 1 et seq. and Bylaws (hereinafter "Bylaws") promulgated thereunder.
5. The Company has been the owner and developer of Litchfield Plantation for 40 years and has exercised control over the Association through its power to control the voting for the directors of the Association for the entire 40 year period.

6. During the year 2010 the President of the Association, E. Scott Trotter (hereinafter "Trotter"), notified the members of the Association by multiple letters that the Association was going to be out of funds going into 2011 and that the Company was unable to fund the deficits in the budget of the Association.
7. As a result of the letters from Trotter concerned property owners met and elected a committee to investigate the financial condition of the Association and meet with the Company.
8. As a result of the committee's investigation it was determined that the following actions had occurred during the time that the Company controlled the Association:
 - a. No federal income tax returns had been filed for the Association for the years 2008 or 2009;
 - b. An amenity of the Plantation was sold for non payment of taxes. That property has now been redeemed;
 - c. Loans were made by the Association to the Company that are secured by collateral that is, in part, worthless;
 - d. A mortgage that was given as collateral for a loan from the Association to the Company was subordinated to a mortgage given by the Company to it's law firm to keep the Company from being sued by the law firm for unpaid legal fees;
 - e. Property was transferred from the Company to the Association that was in a poor state of repair and was subject to a mortgage; and
 - f. Association funds were used to pay expenses of the Company.
9. This action is brought pursuant to the South Carolina Uniform Declaratory Judgments Act, SC Code Ann § 15-53-10 et seq. (1976).

FOR A FIRST CAUSE OF ACTION

10. Pursuant to Article 2, Para 2.4 of the Covenants, the governing body of the Association is deemed to be the Board of Governors, selected as provided in the Bylaws.

11. Pursuant to Article VII, section 1 of the Bylaws, the Board of Governors shall consist of five (5) members.
12. Pursuant to Article VII, section 7 of the Bylaws, the Board of Governors is required to be elected by written ballot.
13. Pursuant to Article VII, Section 8 of the Bylaws, the term of each Governor's service extends until the next annual meeting and thereafter until his or her successor is elected or appointed and qualified, or until he is removed in a manner elsewhere prescribed.
14. The Board of Governors of the Association has had only two members since 2009. Those members were Trotter and Jeffrey W. Van Treese (hereinafter "Van Tresse").
15. Since 2009, Trotter and Van Treese were also officers or board members of the Company
16. Since 2009 Trotter has been the President of the Association.
17. South Carolina law as found at SC Code Ann § 33-31-803 requires that all Boards of Directors for non-profit corporations consist of at least 3 members.
18. Pursuant to Article VI, Section 4 of the Bylaws, the annual meeting of the Association shall be held on the second Tuesday in November of each year. The election of the Board of Governors is held at the annual meeting.
19. No annual meeting has been held by the Association in the years 2009 or 2010. Trotter refused to schedule an annual meeting when requested to do so in February, 2011.
20. On February 26, 2011, a Special Meeting of the Members (hereinafter "Special Meeting") was held pursuant to Article VI, section 5 of the Bylaws to remove the existing members of the Board of Governors and to elect a new Board of Governors.
21. At the Special Meeting, the existing members of the Board of Governors who consisted of Trotter and Van Treese were removed by written ballots cast by a majority vote of the members pursuant to Article VII, sec. 3 of the Bylaws.

22. At the Special Meeting, a majority of the members by written ballot elected a new Board of Governors that consists of Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips.
23. The Company did not cast a written ballot for either removal of the existing members of the Board of Governors nor did the Company cast a written ballot for election of the new Board of Governors at the Special Meeting.
24. The Company refuses to recognize and acknowledge that Joseph E. Johnston, Thomas Eckard, Carol Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips constitute the Board of Governors of the Association.
25. The Association, Joseph E. Johnston, Thomas Eckard, Carol Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips hereby request that this Court declare Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips to be the lawful and duly elected Board of Governors of the Association.

FOR A SECOND CAUSE OF ACTION

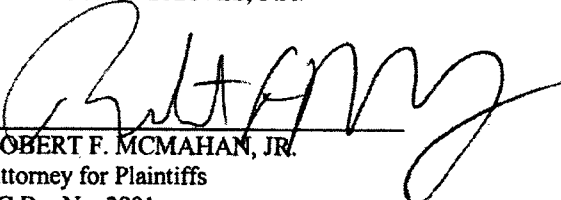
26. Plaintiffs reallege herein the preceding allegations of this Complaint.
27. Pursuant to Article 5, Section 5.5 of the Covenants, the ability to levy assessments and the voting rights of the members of the Association and Company are determined by whether the "Class B" period is in effect.
28. Pursuant to Article 5, Section 5.8 of the Covenants, during the Class B period, the Company has to make an election annually to either pay assessments on its unsold Lots or pay the "shortage" for each fiscal year.
29. The term "shortage" is defined as the difference between the income and revenue received by the Association from member assessments and other income and the amount of expenditures incurred by the Association for the fiscal year.
30. Pursuant to Article 5, section 5.11 of the Covenants, during the "Class B" period, the Association is limited in the amount of annual assessments that can be levied.

31. Pursuant to Article 5, section 5.11 of the Covenants and longstanding practice of the Association, the date on which the annual assessments are due is April 1 of each year.
32. On January 1, 2011, the Association was out of money and unable to pay its financial obligations.
33. On January 1, 2011, the Company was unable to pay the "shortage" and was unable to pay assessments on its property.
34. On or about January 1, 2011 the Association issued an assessment to the members to raise additional funds before the annual assessment date of April 1.
35. The decision to make the assessment in January 1, 2011 was made by Trotter and Van Treese in their capacity as Governors of the Association.
36. The reason that the Association accelerated the assessment from April 1 to January 1, 2011 was that the Association was out of money and the Company was unable to either pay the shortage or pay assessments on its property.
37. The actions taken by Van Treese and Trotter to accelerate the assessment from April 1, 2011 to January 1, 2011 are invalid due to the lack of the required members on the Board pursuant to SC Code Ann § 33-31-803 and due to both Trotter and Van Treese having conflicts of interest between their positions as directors of the Association and their positions as directors of the Company.
38. The money raised by assessments levied by the Association on January 1, 2011 is not sufficient to pay the expenses of the Association for the year 2011.
39. While the Class B period is in effect the Association is not allowed to levy another general assessment in 2011 to raise money to pay the Association's financial obligations for 2011 pursuant to the provisions of the Covenants.
40. Due to the inability of the Company to pay the "shortage" or assessments on its property and due to the Company's numerous breaches of the Covenants as previously described herein and due to the breaches of fiduciary duties owed by the Company to the Association and the

mismanagement of the affairs of the Association by the Company as set forth in paragraph 8, the plaintiffs petition the Court for a declaration that the "Class B" period as defined by the Covenants ended as of January 1, 2011.

WHEREFORE, having fully set forth their complaint against the defendant, the plaintiffs' hereby petition the Court for a declaration that the duly elected and constituted Board of Governors of Litchfield Plantation Association consists of Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips and further petition the Court for a declaration that the Class B period as set forth in the Covenants expired on January 1, 2011 for the costs of this matter and for such other and further relief as the Court deems fit and proper.

HARRIS AND GRAVES, P.A.



ROBERT F. MCMAHAN, JR.

Attorney for Plaintiffs

SC Bar No. 3891

Post Office Box 2277

Conway, SC 29528

(843) 234-2390

rfm@harrisgraves.com

Conway, South Carolina

Dated: March 9, 2011

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr., and Thomas Martin Phillips,

Plaintiffs,

vs.

Litchfield Plantation Company, Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE 15th JUDICIAL CIRCUIT

CASE NO: 2010-CP-22-00319

2011

DEFENDANT'S ANSWER

FILED
CLERK OF COURT

2011 APR 29 P 4:11 05

FILED

TO: ROBERT F. MCMAHAN, JR., COUNSEL FOR PLAINTIFFS

The Defendant, Litchfield Plantation Company, Inc., by and through its undersigned attorney,
would respectfully show unto this Honorable Court as follows:

FIRST DEFENSE

1. That each and every allegation of the Plaintiffs' Complaint which is not hereinafter specifically admitted is denied, and the Defendant demands strict proof thereof.
2. Defendant admits the allegations contained in Paragraph 1 of Plaintiffs' Complaint.
3. Defendant is without sufficient knowledge to form a belief as to the allegations contained in Paragraph 2 and therefore denies the same and demands strict proof thereof.
4. Defendant admits the allegations contained in Paragraph 3 of the Plaintiffs' Complaint.
5. As to the allegations of contained in Paragraph 4, Defendant admits only that Litchfield Plantation is a development located in Georgetown County. As to the remaining allegations, Defendant craves specific reference to the Amendment to the Declaration.
6. As to the allegations contained in Paragraph 5 of Plaintiffs' Complaint, Defendant admits only that is the owner and developer of Litchfield Plantation.

7. Defendant is without sufficient knowledge to form a belief as to the allegations contained in Paragraphs 6, 7, and 8 of the Plaintiffs Complaint, and therefore denies same and demands strict proof thereof.
8. Paragraph 9 of Plaintiffs' Complaint is a pleading paragraph and does not require a response; however should it be deemed otherwise, the answering Defendant denies the allegations contained therein and demands strict proof thereof.
9. As to the allegations of contained in Paragraphs 10, 11, 12, and 13, the Defendant craves specific referenced to the Covenants and Bylaws referenced therein.
10. As to the allegations of Paragraphs 14, 15, and 16, Defendant is without sufficient knowledge to form a belief and therefore denies same and demands strict proof thereof.
11. Paragraph 17 of Plaintiffs' Complaint is a pleading paragraph and does not require a response.
12. As to the allegations of Paragraph 18, Defendant craves specific reference to the Bylaws referenced therein.
13. As to the allegations of Paragraphs 19, 20, 21, 22 of the Plaintiffs' Complaint, Defendant is without sufficient knowledge to form a belief and therefore denies same and demands strict proof thereof.
14. Defendant denies the allegations contained in Paragraphs 23, 24, and 25 and demands strict proof thereof.
15. Paragraph 26 of Plaintiffs' Complaint is a pleading paragraph and does not require a response; however should it be deemed otherwise, the answering Defendant denies the allegations contained therein and demands strict proof thereof.
16. As to the allegations of contained in Paragraphs 27, 28, 29, 30, and 31, the Defendant craves specific referenced to the Covenants and Bylaws referenced therein.
17. As to the allegations of Paragraphs 32, 33, 34, 35, 36, 37, 38, and 39 of the Plaintiffs' Complaint, Defendant is without sufficient knowledge to form a belief and therefore denies same and demands strict proof thereof.
18. The allegations of Paragraph 40 are denied and strict proof demanded thereof.

SECOND DEFENSE

19. Each and every allegation alleged above is repeated verbatim herein.
20. The Complaint must be dismissed pursuant to SCRCP Rule 12(b)(6) for failure of the pleading to state facts sufficient to constitute a cause of action.

THIRD DEFENSE

21. Each and every allegation alleged above is repeated verbatim herein.
22. Defendant pleads condonation as a complete and affirmative defense.

FOURTH DEFENSE

23. Each and every allegation alleged above is repeated verbatim herein.
24. Defendant pleads contributory negligence as a complete and affirmative defense.

FIFTH DEFENSE

25. Each and every allegation alleged above is repeated verbatim herein.
26. Defendant pleads laches as a complete and affirmative defense.

SIXTH DEFENSE

27. Each and every allegation alleged above is repeated verbatim herein.
28. Defendant pleads Plaintiffs' own comparative negligence as a defense.

SEVENTH DEFENSE

29. Each and every allegation alleged above is repeated verbatim herein.
30. Defendant pleads Statute of Limitations as a complete and affirmative defense.

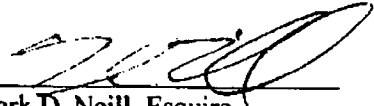
EIGHTH DEFENSE

31. Each and every allegation alleged above is repeated verbatim herein.
32. Defendant pleads the intervening acts of others as a complete and affirmative defense.

WHEREFORE, having fully answered the Complaint of the Plaintiffs, the Defendant prays that:

1. This action be dismissed with prejudice, with all costs assessed against the Plaintiffs;
2. For a judgment against the Plaintiff in the amount of all reasonable attorneys fees and costs incurred in the defense of this action; and
3. For such other and further relief in as this Court deems just and proper.

NEILL LAW FIRM, PA


Mark D. Neill, Esquire
P.O. Box 2810
Murrells Inlet, SC 29576
(843) 651-8580
Attorney for Defendant
Litchfield Plantation Company, Inc.

Dated: 4/25, 2011
Murrells Inlet, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE 15th JUDICIAL CIRCUIT

CASE NO: ~~2010~~-CP-22-00319

2011

Litchfield Plantation Association, Inc., Joseph E.)
Johnston, Thomas Eckard, Carol E. Kirby, Robert)
F. McMahan, Jr., and Thomas Martin Phillips,)

Plaintiffs,)

DEFENDANT'S AMENDED
ANSWER AND
COUNTERCLAIM

vs.)

Litchfield Plantation Company, Inc.,)

Defendants.)

ALMA Y. WHITE
CLERK OF COURT

2011 MAY 27 11:04 AM

FILED
GEORGETOWN COUNTY, S.C.

TO: ROBERT F. MCMAHAN, JR., COUNSEL FOR PLAINTIFFS

The Defendant, Litchfield Plantation Company, Inc., by and through its undersigned attorney, would respectfully show unto this Honorable Court as follows:

FIRST DEFENSE

1. That each and every allegation of the Plaintiffs' Complaint which is not hereinafter specifically admitted is denied, and the Defendant demands strict proof thereof.
2. Defendant admits the allegations contained in Paragraph 1 of Plaintiffs' Complaint.
3. As to the allegations contained in Paragraph 2, Defendant denies that the Plaintiffs are the duly elected Board of Governors of the Association and demands strict proof thereof.
4. Defendant admits the allegations contained in Paragraph 3 of the Plaintiffs' Complaint.
5. As to the allegations of contained in Paragraph 4, Defendant admits that Litchfield Plantation is a development located in Georgetown County. As to the remaining allegations, Defendant craves specific reference to the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions for

Litchfield Plantation.

6. As to the allegations contained in Paragraph 5 of Plaintiffs' Complaint, Defendant admits only that is the developer of Litchfield Plantation. As to the remaining allegations, Defendant asserts that the original Declaration of Restrictive Covenants was filed in January 1971 and that Defendant has acted in accordance with the Declaration and all amendments thereto in exercising its rights as the Declarant.
7. As to the allegations of Paragraph 6, Defendant admits only that Trotter sent correspondence to property owners notifying them of budget deficits. In correspondence dated April 30, 2010, Trotter stated "LPC is no longer able to fund the budget deficits going forward." In correspondent dated November 19, 2010, Trotter stated "as in each prior year the annual assessments received are less than the annual expenses of the Association for the current fiscal year and it appears LPC will not be able to fund the operating shortfall for this fiscal year due to the lack of real estate sales and operating income."
8. Defendant is without sufficient knowledge to form a belief as to the allegations contained in Paragraph 7 of the Plaintiffs Complaint, and therefore denies same and demands strict proof thereof.
9. The allegations of Paragraph 8 of the Plaintiffs' Complaint, are denied and strict proof demanded thereof.
10. Paragraph 9 of Plaintiffs' Complaint is a pleading paragraph and does not require a response; to the extent the paragraph may assert any derelict on the part of the Defendant, the allegations contained therein are denied and strict proof demanded thereof.
11. As to the allegations of contained in Paragraphs 10, 11, 12, and 13, the Defendant craves specific referenced to the Covenants and Bylaws referenced therein.
12. The allegations of Paragraphs 14, 15, and 16 are denied and strict proof demanded thereof.
13. Paragraph 17 of Plaintiffs' Complaint is a pleading paragraph and does not require a response; to the extent the paragraph may assert any delict on the part of the Defendant, the allegations contained therein are denied and strict proof demanded thereof.
14. As to the allegations of Paragraph 18, Defendant craves specific reference to the Bylaws referenced therein.
15. As to the allegations of Paragraphs 19 of the Plaintiffs' Complaint, Defendant is currently without sufficient knowledge to form a belief and therefore denies same

and demands strict proof thereof.

16. Defendant denies the allegations contained in Paragraphs 20, 21, and 22 and demands strict proof thereof.
17. As to the allegations contained in Paragraphs 23 Defendant admits that it did not cast a written ballot and further asserts that the meeting was not properly noticed, that a required quorum was not present, and the required number of votes were not cast to elect the Plaintiffs.
18. The allegations of Paragraph 24 are admitted and Defendant further asserts that the Plaintiffs were not properly elected in accordance with the Declaration of Restrictive Covenants and Amendments thereto.
19. Defendant denies the Plaintiffs are entitled to the relief requested in Paragraph 25 of the Complaint.
20. Paragraph 26 of Plaintiffs' Complaint is a pleading paragraph and does not require a response; to the extent the paragraph may assert any delict on the part of the Defendant, the allegations contained therein are denied and strict proof demanded thereof.
21. As to the allegations of contained in Paragraphs 27, 28, 29, 30, and 31, the Defendant craves specific reference to the Covenants and Bylaws referenced therein.
22. As to the allegations of Paragraphs 32, 33, 34, 35, 36, 37, and 38, of the Plaintiffs' Complaint, Defendant is without sufficient knowledge to form a belief and therefore denies same and demands strict proof thereof.
23. As to the allegations of contained in Paragraph 39, the Defendant craves specific reference to the Covenants and Bylaws referenced therein.
24. The allegations of Paragraph 40 are denied and strict proof demanded thereof.

SECOND DEFENSE

25. Each and every allegation alleged above is repeated verbatim herein.
26. The Complaint must be dismissed pursuant to SCRCP Rule 12(b)(6) for failure of the pleading to state facts sufficient to constitute a cause of action.

THIRD DEFENSE

- 27. Each and every allegation alleged above is repeated verbatim herein.
- 28. Defendant pleads contributory negligence as a complete and affirmative defense.

FOURTH DEFENSE

- 29. Each and every allegation alleged above is repeated verbatim herein.
- 30. Defendant pleads the intervening acts of others as a complete and affirmative defense.

FIFTH DEFENSE

- 31. Each and every allegation alleged above is repeated verbatim herein.
- 32. Defendant pleads laches as a complete and affirmative defense.

SIXTH DEFENSE

- 33. Each and every allegation alleged above is repeated verbatim herein.
- 34. Defendant pleads Plaintiffs' own comparative negligence as a defense.

SEVENTH DEFENSE

- 35. Each and every allegation alleged above is repeated verbatim herein.
- 36. Defendant pleads Statute of Limitations as a complete and affirmative defense.

EIGHTH DEFENSE AND COUNTERCLAIM **(Declaratory Judgment)**

- 37. Each and every allegation alleged above is repeated verbatim herein.
- 38. That defendant, through its counterclaim, seeks a declaratory judgment regarding the rights and obligations of the parties.
- 39. That this action is brought pursuant to S.C. Code Ann. §§ 15-53-10 et seq., and S.C. R. Civ. P. 57, seeking this Court's declaration of the relative rights and obligations of the parties here, under the terms and provisions of the Declaration of Restrictive Covenants and Amendments thereto.

40. Upon information and belief, holders of at least five percent (5%) did not call the Special Meeting as alleged by the Plaintiffs. Furthermore, upon information and belief the Plaintiffs did not properly notice the meeting in accordance with the Declaration of Restrictive Covenants and Amendments thereto.
41. Upon information and belief, there was not the required number of property owners in accordance with the Declaration of Restrictive Covenants and Amendments thereto to take any action.
42. The Defendant is entitled to an Order by the Court declaring that the Plaintiffs are not the duly elected Board of Governors for the Association and that they have no authority to act as such. The Defendant is further entitled to an Order declaring that any monies collected by the Plaintiffs holding themselves out as the Board of Governors is the property of the Association and should be accounted for.

NINTH DEFENSE AND COUNTERCLAIM
(Injunctive Relief)

43. The allegations contained in paragraphs above are incorporated by reference herein.
44. The Plaintiffs are entitled to injunctive relief and request an Order requiring the Defendants to immediately:
 - a. Dissolve the Current Board of Directors as established in the Complaint; and
 - b. Turn over any and all property, documents and records in the Control of the Plaintiffs to the Litchfield Plantation Company;
45. The damages the Plaintiffs have and will incur cannot be adequately measured and irreparable mischief will be done if injunctive relief is not immediately granted.
46. Accordingly, Plaintiffs are entitled to an Order of Injunction, as well as, all costs of this action, including reasonable attorney fees and costs.

TENTH DEFENSE AND COUNTERCLAIM
(Absence of Necessary Parties)

47. The allegations contained in paragraphs above are incorporated by reference herein.
48. That upon information and belief, the Defendant has made numerous assignments of the Declarant Rights and Class "B" voting rights to third parties who have purchased property from the Defendant or loaned monies to the Defendant which were secured by properties located within Litchfield Plantation.

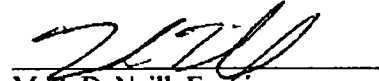
49. That said parties holding an assignment or collateral assignment of the Declarant's rights and Class "B" voting rights have a property interest in the rights which the Plaintiff seeks to avoid, and are therefore necessary parties to this action.
50. Therefore, the Defendant, and all necessary parties are entitled to an order joining any persons or entities deemed to be necessary parties to this action.

WHEREFORE, having fully answered the Complaint of the Plaintiffs, the Defendant prays that:

1. That the Plaintiffs' causes of action be dismissed with prejudice, with all costs assessed against the Plaintiffs;
2. As to the Defendant's Counterclaim for Declaratory Judgment, for an Order by the Court declaring that the Plaintiffs are not the duly elected Board of Governors for the Association and that they have no authority to act as such. The Defendant is further entitled to an Order declaring that any monies collected by the Plaintiffs holding themselves out as the Board of Governors is the property of the Association and should be accounted for.
3. As to the Defendants Counterclaim for Injunctive Relief, the Plaintiffs pray for an Order of Injunction, as well as all costs of this action, including reasonable attorneys fees and costs.
4. As to the Defendants Defense and Counterclaim to add Necessary Parties, for an order adding any and all parties who hold an interest in the Declarant's Rights and Class B voting rights under the Covenants and Restrictions.
5. For a judgment against the Plaintiffs in the amount of all reasonable attorneys fees and costs incurred in the defense of this action;
6. For such other and further relief in as this Court deems just and proper.

SIGNATURE PAGE TO FOLLOW

NEILL LAW FIRM, PA



Mark D. Neill, Esquire
P.O. Box 2810
Murrells Inlet, SC 29576
(843) 651-8580
Attorney for Defendant
Litchfield Plantation Company, Inc.

Dated: May 24, 2011
Murrells Inlet, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
Litchfield Plantation Association, Inc., et al)
☐ Plaintiffs)
v.)
Litchfield Plantation Company, Inc.)
☒ Defendant)

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT
CASE NO. 2011-CP-22-00319

**MOTION INFORMATION FORM
AND COVER SHEET**

check box above indicating submitting party

Name, SC Bar No. & Address of Plaintiff's attorney		Name, SC Bar No. & Address of Defendant's attorney	
SC Bar #		Robert S. Shelton, Esq. SC Bar	
P O Box 357, Myrtle Beach, SC 29578		P O Box 357, Myrtle Beach, SC 29578	
Telephone:	Fax:	Telephone: 843-448-2400	Fax: 843-448-3022
E-Mail:	Other:	E-Mail:	Other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>SCRCP Rules 19 and 24 Motion for Joinder and Intervention</u>			
Estimated Time Needed: <u>15</u> Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion Type			
☒ Written motion attached ☐ Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for Defendant		Date submitted <u>29 July 2011</u>	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: <u>\$25.00</u>			
☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse of Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions			
Name of Court Reporter: _____			
☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order.		JUDGE	
☐ Other: _____		CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ (print name)		<u>DATE FILED</u>	
☐ MOTION FEE COLLECTED: _____			
☐ CONTESTED - AMOUNT DUE: _____			

FILED
GEORGETOWN COUNTY, S.C.
JUL 29 PM 4:04
ALMA Y. WHITE
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
C/A NO. 2011-CP-22-00319

Litchfield Plantation Association, Inc.,)
Joseph E. Johnston, Thomas Eckard, Carol)
E. Kirby, Robert F. McMahan, Jr. and)
Thomas Martin Phillips,)

Plaintiffs)

vs.)

Litchfield Plantation Company, Inc.,)

Defendant.)

FILED
GEORGETOWN COUNTY, S.C.
2011 JUL 29 PM 4:04
ALMA Y. WHITE
CLERK OF COURT

SCRCP RULES 19 AND 24
MOTION FOR JOINDER
AND INTERVENTION

**TO: ROBERT F. MCMAHAN, JR, ESQUIRE, ATTORNEY FOR PLAINTIFFS,
AND MARK D. NEILL, ESQUIRE, ATTORNEY FOR DEFENDANT.**

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys will move before the Presiding Judge of the Fifteenth Judicial Circuit for the County of Georgetown at such time as counsel can be heard for an Order directing that **E. Scott Trotter, now or formally a member of the Association** (hereinafter "Trotter") be Joined and permitted to Intervene in the present action pursuant to SCRCP Rules 19(a) and 24(a) as a necessary party in the present action. The grounds for this Motion are as follows:

1. Pursuant to its Complaint, the Litchfield Plantation Association (hereinafter "LPA") held a Special Meeting (hereinafter "Special Meeting") February 26, 2011 to "remove" Trotter and Jeffrey W. Van Tresse (hereinafter "Van Tresse") from the Board of Governors of LPA.
2. Upon information and belief, the Special Meeting was improperly noticed.

3. Upon information and belief a quorum was not present at the LPA Special Meeting.
4. Upon information and belief the ballot used to record votes to remove Trotter and Van Tresse from the Board was worded and framed to deny and prevent any votes to be cast to keep Trotter on the Board.
5. Upon information and belief, the reported number of votes to remove Trotter and Van Tresse from the Board was inaccurate and impossible to achieve by the members in attendance at the Special Meeting.
6. Prior to the Special Meeting, the Class B Share Period was in effect, thereby allowing Litchfield Plantation Company, Inc. (Hereinafter "LPC") as the Declarant, to exercise its rights to "disapprove actions of the board or committees" and LPC exercised this right at the Special Meeting
7. Prior to the LPA Special Meeting, the Class B Share Period was in effect, thereby allowing LPC to exercise its right that as the Class B Member and the Declarant, LPC "shall have the number of votes equal to all the Class A members plus one (1) vote."
8. As the Governor of LPA on December 23, 2010 Trotter and VanTresse had the right to and did change the commencement date of the fiscal year.
9. The assessment collected for the LPA 2010/2011 fiscal year (April 1, 2010 thru December 31, 2010) was sufficient to pay all outstanding expenses of the 2010-2011 Operating Budget and LPC was not in default of its obligation to pay any shortfall.

Accordingly, pursuant to SCRPC Rules 19(a) and 24(a) Trotter hereby moves for an Order of this Honorable Court directing that Trotter be Joined and permitted to Intervene in the present action to inquire as to the validity of the Special Meeting and any actions purported to have been taken during the Special Meeting.

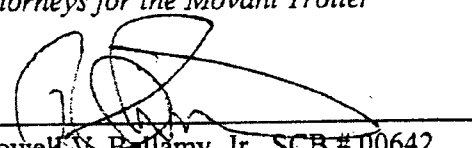
Pursuant to Rule 11(a) of the *South Carolina Rules of Civil Procedure*, the undersigned states that any consultation with opposing parties to resolve the matter contained in the Motion would serve no useful purpose.

YOU WILL PLEASE TAKE NOTICE that the undersigned will at the same time move the Court for such other and further relief as may be just and proper.

**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**

1000 29th Avenue North
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400

Attorneys for the Movant Trotter



Howell V. Bellamy, Jr., SCB # 00642
Robert S. Shelton, SCB # 68543

Myrtle Beach, South Carolina

July 29, 2011.

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

Litchfield Plantation Association, Inc., Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips,
☒ Plaintiffs,

CASE NO. 2011-CP-22-00319

**MOTION INFORMATION FORM
AND COVER SHEET**

vs.

Litchfield Plantation Company, Inc.,
☐ Defendant.

check box above indicating submitting party

Name, SC Bar No. and Address of Plaintiffs' Attorney
Robert F. McMahan, Jr.
Harris and Graves, P.A.
Post Office Box 2277
Conway, SC 29528
Telephone: (843) 234-2390 Fax: (843) 234-9970
E-Mail: rhm@harrisgraves.com Other: SC Bar 3891

Name, SC Bar no. and address of defendant's attorney
telephone: fax:
e-mail: other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

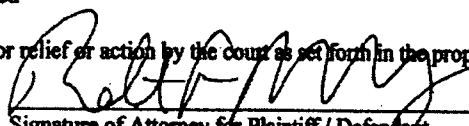
Estimated Time Needed: One hour

Court Reporter Needed: Yes

SECTION II: Motion Type

- ☒ Written motion attached
☐ Form Motion -

I hereby move for relief or action by the court as set forth in the proposed order.


Signature of Attorney for Plaintiff / Defendant

June 7, 2011
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy ☐ Motion for Execution (Rule 69, SCRCP)
☐ Motion for Publication
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other:

ALMA Y. WHITE
CLERK OF COURT

2011 JUN 07 AM 10:31

FILED
GEORGETOWN COUNTY, S.C.

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by: Linda L. Lane
(print name)

DATE FILED

6/7/11

- ☐ MOTION FEE COLLECTED: \$25
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr. and Thomas Martin Phillips,

Plaintiff(s),

vs.

Litchfield Plantation Company, Inc.,

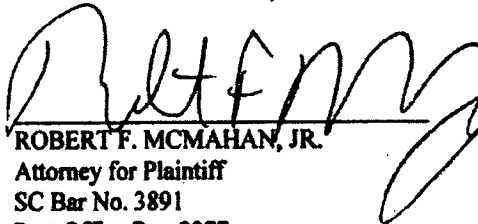
Defendant(s).

Civil Action No. 2011-CP-22-00319

**PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT**

The plaintiffs hereby move pursuant to SCRCivP 56 (a) for summary judgment. The plaintiffs move that the Court issue an Order granting summary judgment (1) recognizing Joseph E. Johnston, Thomas Eckard, Carol E. Kirby and Robert F. McMahan, Jr. as the current duly elected members of the Board of Governors of Litchfield Plantation Association; (2) declaring that the Class B share period described in the Amendment to the Declaration of Protective Covenants Conditions and Restrictions for Litchfield Plantation expired on January 1, 2011, and (3) dismissing the Defendant's counterclaims. The grounds for this motion appear in the Memorandum filed herewith.

HARRIS AND GRAVES, P.A.



ROBERT F. MCMAHAN, JR.

Attorney for Plaintiff

SC Bar No. 3891

Post Office Box 2277

Conway, SC 29528

(843) 234-2390

rjm@harrisgraves.com

Conway, South Carolina

Dated: June 6, 2011

FILED
GEORGETOWN COUNTY, S.C.
2011 JUN 08 AM 10:31
ALMA Y. WHITE
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Litchfield Planation Association, Inc., et al.

Plaintiff,

vs.

Litchfield Plantation Company, Inc.

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-22-319

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Robert F. McMahan, Bar No. _____ Address: P.O. Box 3891, Conway, SC 29528 Phone: _____ Fax _____ E-mail: _____ Other: _____		Defendant's Attorney: Mark D. Neill, Bar No. #14273 Address: P.O. Box 2810, Murrells Inlet, SC 29576 Phone: 843-651-8580 Fax 843-651-8586 E-mail: mneill@neilllawfirm.com Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Notice of Motion and Motion for Summary Judgment Estimated Time Needed: _____ Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☒ Plaintiff / ☒ Defendant 9/9/11 Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$ _____ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ Sexually Violent Predator Act ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____ ☐ State Agency v. Indigent Party ☐ Post-Conviction Relief ☐ Motion for Execution (Rule 69, SCRCP)			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION Collected by: <u>VC</u> Date Filed: <u>9-9-11</u> ☒ MOTION FEE COLLECTED: \$ <u>25</u> ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr., and Thomas Martin Phillips,

Plaintiffs,

vs.

Litchfield Plantation Company, Inc.,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE 15th JUDICIAL CIRCUIT

) CASE NO: 2011-CP-22-00319

) MOTION FOR SUMMARY
) JUDGMENT

FILED
CLERK OF COURT
2011 SEP -9 A 10:55
ALMA WHITE

TO: ROBERT F. MCMAHAN, J.R., COUNSEL FOR PLAINTIFFS AND ALSO A PARTY
PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant, Litchfield Plantation Company, Inc., by and through its undersigned counsel, will move before the presiding Judge of the Fifteenth Judicial Circuit, at some time and place as determined by the Court, for an Order pursuant to SCRPC, Rule 56, Granting Summary Judgment in its favor. In support of this motion, the Defendant shows the following to the Court:

1. No genuine issue of material fact exists and that the Defendant is entitled to judgment as a matter of law as to the Plaintiffs Second Cause of Action in which Plaintiffs seek a Declaration from the Court that the Class B period set forth in the 2005 Amendment to the Declaration of Restrictive Covenants for Litchfield Plantation Association ceased on January 1, 2011.
2. The pleadings, discovery responses, affidavits, Declaration and Amendments, Bylaws, as well as, legal memoranda, prove the Class B period did not terminate. In fact, the Class B period presently continues.

WHEREFORE, the Defendant moves that the Court enter Summary Judgment in favor of the Defendant and for such other and further relief in favor of the Defendant as the Court deems just and appropriate. The undersigned, pursuant to *SCRCP*, Rule 11, hereby certifies consultation with opposing counsel was not required prior to filing this motion.

NEILL LAW FIRM, PA


Mark D. Neill, Esquire
P.O. Box 2810
Murrells Inlet, SC 29576
(843) 651-8580
Attorney for Defendant
Litchfield Plantation Company, Inc.

Dated: September 8, 2011
Murrells Inlet, South Carolina

NEILL LAW FIRM

MARK D. NEILL
PHONE: (843) 651-8580
FACSIMILE: (843) 651-8586
MNEILL@NEILLLAWFIRM.COM

WWW.NEILLLAWFIRM.COM

671 JAMESTOWNE DRIVE
SUITE 207
POST OFFICE BOX 2810
MURRELLS INLET, SC 29576

September 9, 2011

Robert F. McMahan, Jr., Esq.
Harris & Graves
P.O. Box 3891
Conway, SC 29528

Re: Litchfield Plantation Association, Inc., et al. vs. Litchfield Plantation Co., Inc.
Case No: 2011-CP-22-319

Dear Mr. McMahan:

Enclosed herewith please find a copy of Defendant's Notice of Motion and Motion for Summary Judgment which was filed with the Court regarding the above referenced matter. I have also enclosed a Certificate of Mailing.

Please do not hesitate to contact me should you have any questions.

With kindest regards, I am,

Sincerely,


Mark D. Neill

MDN/lah
Enclosures

Cc: Charles Owen Nation II, Esq., (w/encl.)
Howell V. Bellamy, Jr., Esq., (w/encl.)
Robert S. Shelton, Esq., (w/encl.)

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN) IN THE COURT OF COMMON PLEAS
C/A NO. 2011-CP-22-00319

Litchfield Plantation Association, Inc.,
Joseph E. Johnston, Thomas Eckard, Carol
E. Kirby, Robert F. McMahan, Jr. and
Thomas Martin Phillips,

Plaintiffs

vs.

SUMMONS

Litchfield Plantation Company, Inc.,

Defendant,

and

E. Scott Trotter,

Intervenor.

FILED
GEORGETOWN COUNTY, S.C.
2011 SEP 23 AM 9:18
ALMA Y. WHITE
CLERK OF COURT

**TO: ROBERT F. MCMAHAN, JR, ESQUIRE, ATTORNEY FOR PLAINTIFFS,
AND MARK D. NEILL, ESQUIRE, ATTORNEY FOR DEFENDANT.**

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their office at 1000 29th Avenue North, Myrtle Beach, South Carolina 29577, and to file your answer with the Clerk of Court for Horry County, all within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, Intervenor E. Scott Trotter in this action will apply to the Court for judgment by default for the relief demanded in the Complaint and a judgment will be rendered against you.

Respectfully submitted,

**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**
1000 29th Avenue North
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
Attorneys for Intervenor Trotter



Howell V. Bellamy, Jr., SCB # 00642
Robert S. Shelton, SCB # 68543

Myrtle Beach, South Carolina

September 6, 2011.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) C/A NO. 2011-CP-22-00319

Litchfield Plantation Association, Inc.,
Joseph E. Johnston, Thomas Eckard, Carol
E. Kirby, Robert F. McMahan, Jr. and
Thomas Martin Phillips,

Plaintiffs

vs.

COMPLAINT

Litchfield Plantation Company, Inc.,

Defendant,

and

E. Scott Trotter,

Intervenor.

FILED
GEORGETOWN COUNTY, S.C.
2011 SEP 23 AM 9:18
ALMA Y. WHITE
CLERK OF COURT

TO: ROBERT F. MCMAHAN, JR, ESQUIRE, ATTORNEY FOR PLAINTIFFS,
AND MARK D. NEILL, ESQUIRE, ATTORNEY FOR DEFENDANT.

Intervenor E. Scott Trotter (hereinafter "Trotter") complaining of Plaintiffs
Litchfield Plantation, Inc., Joseph E. Johnson, Thomas Eckard, Carol E. Kirby, Robert F.
McMahan, Jr., and Thomas Martin Phillips, would respectfully show and allege unto this
Honorable Court as follows:

FIRST CAUSE OF ACTION
(Declaratory Judgment)

1. Pursuant to its Complaint, the Litchfield Plantation Association, Inc. (hereinafter
"LPA") held a Special Meeting (hereinafter "Special Meeting") February 26, 2011 to

"remove" Trotter and Jeffrey W. Van Treese (hereinafter "Van Treese") from the Board of Governors of LPA.

2. Upon information and belief, the Special Meeting was improperly noticed.
3. Upon information and belief a quorum was not present at the LPA Special Meeting.
4. Upon information and belief the ballot used to record votes to remove Trotter and Van Treese from the Board was worded and framed to deny and prevent any votes to be cast to keep Trotter on the Board.
5. Upon information and belief, the reported number of votes to remove Trotter and Van Treese from the Board was inaccurate and impossible to achieve by the members in attendance at the Special Meeting.
6. Prior to the Special Meeting, the Class B Share Period was in effect, thereby allowing Litchfield Plantation Company, Inc. (hereinafter "LPC") as the Declarant, to exercise its rights to "disapprove actions of the board or committees" and LPC exercised this right at the Special Meeting
7. Prior to the Special Meeting, the Class B Share Period was in effect, thereby allowing LPC to exercise its right that as the Class B Member and the Declarant, LPC "shall have the number of votes equal to all the Class A members plus one (1) vote."
8. As Governors of LPA on December 23, 2010, Trotter and Van Treese had the right to and did change the commencement date of the fiscal year.

9. The assessment collected for the LPA 2010/2011 fiscal year (April 1, 2010 thru December 31, 2010) was sufficient to pay all outstanding expenses of the 2010-2011 Operating Budget and LPC was not in default of its obligation to pay any shortfall.
10. Intervenor Trotter therefore invokes the equitable jurisdiction of this Court and the provisions of the Uniform Declaratory Judgment Act, Sections 15-53-10 through 15-53-140 of the *South Carolina Code of Laws*, 1976, as amended, and ask the Court to inquire into this matter and to enter a declaratory judgment pursuant to Sections 15-53-20 and 15-53-30 of the *South Carolina Code of Laws*, 1976, as amended, finding the following:
 - a. The Special Meeting was improperly held;
 - b. The vote taken at the Special Meeting was ineffective;
 - c. The officers of Litchfield Plantation Association, Inc. Board of Governors remain as they were prior to the Special Meeting;
 - d. Awarding E. Scott Trotter the costs and fees associated with this action; and,
 - e. For such other and further relief as this Honorable Court deems just and proper.

WHEREFORE, Intervenor Trotter, having complained of Plaintiffs, prays for an award of: declaratory judgment; attorney fees; the costs associated with this action; and such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,

**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**

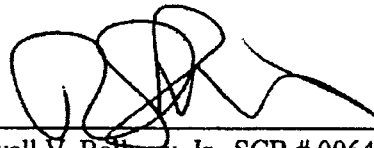
1000 29th Avenue North

Post Office Box 357

Myrtle Beach, SC 29578-0357

(843) 448-2400

Attorneys for Intervenor Trotter

A handwritten signature in black ink, appearing to be 'HVB', written over a horizontal line.

Howell V. Bellamy, Jr., SCB # 00642

Robert S. Shelton, SCB # 68543

Myrtle Beach, South Carolina

September 6, 2011.

STATE OF SOUTH CAROLINA)

COUNTY OF GEORGETOWN)

Litchfield Plantation Association, Inc., et al.)

Plaintiff(s))

vs.)

E. Scott Trotter)

Intervening Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVER SHEET

2011 - CP - 22 - 00319

(Please Print)

Submitted By: Robert S. Shelton

Address: The Bellamy Law Firm

P.O. Box 357

Myrtle Beach, SC 29578

SC Bar #: 68543

Telephone #: (843) 448-2400

Fax #: (843) 448-3022

Other: (843) 916-7163

E-mail: rshelton@bellamylaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR (Proof of ADR/Exemption Attached).

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	☐ Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	☐ 20____-CP-_____	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice / File Med Mal (230)	☐ Personal-Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation
		☐ Other (399)	☐ Other (499)

Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Penden (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Transfer of Structured Settlement	☐ Other (899)	☐ Worker's Comp (960)
	☐ Payment Rights Application (760)		☐ Zoning Board (970)
	☐ Other (799)		☐ Public Service Commission
	Special/Complex/Other		☐ Employment Security Comm
☐ Environmental (600)	☐ Pharmaceuticals (630)		☐ Other (999)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		
☐ Medical (620)	☐ Out of State Deposition (650)		
☒ Other (699)	☐ Motion to Quash Subpoena in		
	☐ an Out-of-County Action (660)		
	☐ Sexual Predator (510)		

Declaratory Judgment

Submitting Party Signature: _____

Date: 09/21/11

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 41, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et seq.

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) FOR THE 15th JUDICIAL CIRCUIT

COUNTY OF GEORGETOWN

)

CASE NO: 2011-CP-22-00319

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr., and Thomas Martin Phillips,

)

)

)

)

Plaintiffs,

)

)

vs.

)

)

Litchfield Plantation Company, Inc.,

)

)

DEFENDANT LITCHFIELD
PLANTATION COMPANY
INC.'S ANSWER TO
INTERVENOR'S COMPLAINT

Defendant.

)

)

And

)

)

E. Scott Trotter,

)

)

Intervenor,

)

)

TO: HOWELL V. BELLAMY, JR. AND ROBERT S. SHELTON, COUNSEL FOR
INTERVENOR AND TO ROBERT F. MCMAHAN, COUNSEL FOR PLAINTIFFS

The Defendant, Litchfield Plantation Company, Inc., by and through its undersigned attorney,
would respectfully show unto this Honorable Court as follows:

FIRST DEFENSE

1. That each and every allegation of the Intervenor's Complaint which is not hereinafter specifically admitted is denied, and the Defendant demands strict proof thereof.
2. As to the allegations of Paragraph 1, Defendant admits only that a meeting of property owners was held on February 26, 2011 and that one of the apparent reasons for the meeting was the intent of certain property owners, including the individual Plaintiffs, Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr., and

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2011 OCT 24 PM 2:22
CLERK OF COURT

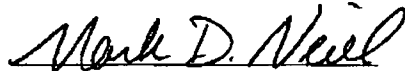
Thomas Martin Phillips, to remove E. Scott Trotter and Jeffrey W. Van Treese from the Board of Governors.

3. The Defendant concurs with the allegations set forth in Paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of Intervenor's Complaint.
4. Paragraph 10 is a pleading paragraph and/or calls for legal conclusions of which the Defendant is not required to admit or deny.

WHEREFORE, having fully answered the Intervenor's Complaint, the Defendant prays that:

1. The Court look into the matters set forth in the Intervenor's Complaint and issue an Order accordingly;
2. The action brought by the Plaintiffs be dismissed with prejudice, with all costs assessed against the Plaintiffs;
3. For a judgment against the Plaintiffs in the amount of all reasonable attorneys fees and costs incurred in the defense of this action, as well as, the relief sought in Defendant's Second Amended Answer and Counterclaims; and,
4. For such other and further relief in as this Court deems just and proper.

NEILL LAW FIRM, PA



Mark D. Neill, Esquire

P.O. Box 2810

Murrells Inlet, SC 29576

(843) 651-8580

Attorney for Defendant

Litchfield Plantation Company, Inc.

Dated: Oct 21, 2011
Murrells Inlet, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FOR THE 15th JUDICIAL CIRCUIT

COUNTY OF GEORGETOWN)

CASE NO: 2011-CP-22-00319

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr., and Thomas Martin Phillips,

Plaintiffs,

DEFENDANT'S SECOND
AMENDED ANSWER AND
COUNTERCLAIM

vs.

Litchfield Plantation Company, Inc.,

Defendant,

E. Scott Trotter,

Intervenor.

FILED
2011 OCT 24 PM 2:26
CLERK OF COURT

TO: ROBERT F. MCMAHAN, JR., COUNSEL FOR PLAINTIFFS

The Defendant, Litchfield Plantation Company, Inc., by and through its undersigned attorney, would respectfully show unto this Honorable Court as follows:

FIRST DEFENSE

1. That each and every allegation of the Plaintiffs' Complaint which is not hereinafter specifically admitted is denied, and the Defendant demands strict proof thereof.
2. Defendant admits the allegations contained in Paragraph 1 of Plaintiffs' Complaint.
3. As to the allegations contained in Paragraph 2, Defendant denies that the Plaintiffs are the duly elected Board of Governors of the Association and demands strict proof thereof.
4. Defendant admits the allegations contained in Paragraph 3 of the Plaintiffs' Complaint.

5. As to the allegations of contained in Paragraph 4, Defendant admits that Litchfield Plantation is a development located in Georgetown County. As to the remaining allegations, Defendant craves specific reference to the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions for Litchfield Plantation.
6. As to the allegations contained in Paragraph 5 of Plaintiffs' Complaint, Defendant admits only that is the developer of Litchfield Plantation. As to the remaining allegations, Defendant asserts that the original Declaration of Restrictive Covenants was filed in January 1971 and that Defendant has acted in accordance with the Declaration and all amendments thereto in exercising its rights as the Declarant.
7. As to the allegations of Paragraph 6, Defendant admits only that Trotter sent correspondence to property owners notifying them of budget deficits. In correspondence dated April 30, 2010, Trotter stated "LPC is no longer able to fund the budget deficits going forward." In correspondent dated November 19, 2010, Trotter stated "as in each prior year the annual assessments received are less than the annual expenses of the Association for the current fiscal year and it appears LPC will not be able to fund the operating shortfall for this fiscal year due to the lack of real estate sales and operating income." However, the Association did not run out of funds and there was no deficit for the year 2010.
8. Defendant is without sufficient knowledge to form a belief as to the allegations contained in Paragraph 7 of the Plaintiffs Complaint, and therefore denies same and demands strict proof thereof.
9. The allegations of Paragraph 8 of the Plaintiffs' Complaint, are denied and strict proof demanded thereof.
10. Paragraph 9 of Plaintiffs' Complaint is a pleading paragraph and does not require a response; to the extent the paragraph may assert any derelict on the part of the Defendant, the allegations contained therein are denied and strict proof demanded thereof.
11. As to the allegations of contained in Paragraphs 10, 11, 12, and 13, the Defendant craves specific referenced to the Covenants and Bylaws referenced therein.
12. The allegations of Paragraphs 14, 15, and 16 are denied and strict proof demanded thereof.
13. Paragraph 17 of Plaintiffs' Complaint is a pleading paragraph and does not require a response; to the extent the paragraph may assert any delict on the part of the Defendant, the allegations contained therein are denied and strict proof demanded thereof.

14. As to the allegations of Paragraph 18, Defendant craves specific reference to the Bylaws referenced therein.
15. As to the allegations of Paragraphs 19 of the Plaintiffs' Complaint, Defendant is currently without sufficient knowledge to form a belief and therefore denies same and demands strict proof thereof.
16. Defendant denies the allegations contained in Paragraphs 20, 21, and 22 and demands strict proof thereof.
17. As to the allegations contained in Paragraphs 23 Defendant admits that it did not cast a written ballot and further asserts that the meeting was not properly noticed, that a required quorum was not present, and the required number of votes were not cast to elect the Plaintiffs or remove the current board members.
18. The allegations of Paragraph 24 are admitted and Defendant further asserts that the Plaintiffs were not properly elected in accordance with the Declaration of Restrictive Covenants and Amendments thereto.
19. Defendant denies the Plaintiffs are entitled to the relief requested in Paragraph 25 of the Complaint.
20. Paragraph 26 of Plaintiffs' Complaint is a pleading paragraph and does not require a response; to the extent the paragraph may assert any delict on the part of the Defendant, the allegations contained therein are denied and strict proof demanded thereof.
21. As to the allegations of contained in Paragraphs 27, 28, 29, 30, and 31, the Defendant craves specific reference to the Covenants and Bylaws referenced therein.
22. The allegations of Paragraphs 32, 33, 34, 35, 36, 37, and 38 are denied and strict proof demanded thereof.
23. As to the allegations of Paragraphs 34, 35, 36, 37, and 38, of the Plaintiffs' Complaint, Defendant is without sufficient knowledge to form a belief and therefore denies same and demands strict proof thereof.
24. As to the allegations of contained in Paragraph 39, the Defendant craves specific reference to the Covenants and Bylaws referenced therein. Any assertion that contradicts the specific wording of the Covenants and Bylaws is denied.
25. The allegations of Paragraph 40 are denied and strict proof demanded thereof.

SECOND DEFENSE

- 26. Each and every allegation alleged above is repeated verbatim herein.
- 27. The Complaint must be dismissed pursuant to SCRCP Rule 12(b)(6) for failure of the pleading to state facts sufficient to constitute a cause of action.

THIRD DEFENSE

- 28. Each and every allegation alleged above is repeated verbatim herein.
- 29. Defendant pleads contributory negligence as a complete and affirmative defense.

FOURTH DEFENSE

- 30. Each and every allegation alleged above is repeated verbatim herein.
- 31. Defendant pleads the intervening acts of others as a complete and affirmative defense.

FIFTH DEFENSE

- 32. Each and every allegation alleged above is repeated verbatim herein.
- 33. Defendant pleads laches as a complete and affirmative defense.

SIXTH DEFENSE

- 34. Each and every allegation alleged above is repeated verbatim herein.
- 35. Defendant pleads Plaintiffs' own comparative negligence as a defense.

SEVENTH DEFENSE

- 36. Each and every allegation alleged above is repeated verbatim herein.
- 37. Defendant pleads Statute of Limitations as a complete and affirmative defense.

EIGHTH DEFENSE

- 38. Each and every allegation alleged above is repeated verbatim herein.
- 39. Defendant pleads Estoppel as a complete and affirmative defense.

NINTH DEFENSE AND COUNTERCLAIM
(Declaratory Judgment)

40. Each and every allegation alleged above is repeated verbatim herein.
41. That Defendant, through its counterclaim, seeks a declaratory judgment regarding the rights and obligations of the parties.
42. That this action is brought pursuant to S.C. Code Ann. §§ 15-53-10 et seq., and S.C. R. Civ. P. 57, seeking this Court's declaration of the relative rights and obligations of the parties here, under the terms and provisions of the Declaration of Restrictive Covenants and Amendments thereto.
43. Upon information and belief, holders of at least five percent (5%) did not call the Special Meeting as alleged by the Plaintiffs.
44. Furthermore, the notice of the meeting was not properly provided to the property owners in accordance with the Declaration of Restrictive Covenants and Amendments thereto.
45. Upon information and belief, there was not the required number of property owners attending the meeting in accordance with the Declaration of Restrictive Covenants and Amendments thereto to take any action.
46. Upon information and belief, the ballots used were improperly worded in order to achieve the result desired by the Plaintiffs.
47. Upon information and belief, the ballots were not properly counted at the meeting.
48. The Defendant is entitled to an Order by the Court:
 - a. Declaring that the meeting was not properly noticed, that the required quorum of owners was not present, and that the Plaintiffs were not duly elected Board of Governors for the Association.
 - b. Declaring the Plaintiffs do not have authority to act as Governors of the Association.
 - c. Declaring that any monies collected by the Plaintiffs holding themselves out as the Board of Governors is the property of the Association and should be accounted.
 - d. Declaring the Plaintiffs individually liable for all damages the Association and property owners have suffered as a result of Plaintiffs' unauthorized actions.

TENTH DEFENSE AND COUNTERCLAIM
(Injunctive Relief)

- 49. The allegations contained in paragraphs above are incorporated by reference herein.
- 50. The Plaintiffs are entitled to injunctive relief and request an Order requiring the Defendants to immediately:
 - a. Dissolve the Current Board of Directors as established in the Complaint; and
 - b. Turn over any and all property, documents and records in the Control of the Plaintiffs to the Litchfield Plantation Company;
- 51. The damages the Defendant has and will incur cannot be adequately measured and irreparable mischief will be done if injunctive relief is not immediately granted.
- 52. Accordingly, Defendant is entitled to an Order of Injunction, as well as, all costs of this action, including reasonable attorney fees and costs.

ELEVENTH DEFENSE AND COUNTERCLAIM
(NEGLIGENCE)

- 53. The allegations contained in paragraphs above are incorporated by reference herein.
- 54. The Plaintiffs have breached their duties to their fellow Litchfield Plantation property owners, including the Defendant, in the following particulars:
 - a. Improperly noticing the attempted special meeting;
 - b. Conducting a meeting to which proper notice was not provided;
 - c. Not providing notice of the meeting to all owners;
 - d. Conducting the meeting without the required quorum of owners present;
 - e. Using improperly worded ballots;
 - f. Improperly counting the ballots;
 - g. Holding themselves out as the duly elected Board of Governors.
- 55. The Plaintiffs' actions contradicted the Covenants and Restrictions for Litchfield Plantation to which the Plaintiffs contractually agreed to adhere.
- 56. As a result of the Plaintiffs' actions, the property owners of Litchfield Plantation have been damaged in that upon information and belief, property values have decreased and the Association has incurred un-necessary expenses which will be passed down to all owners.

57. The Defendant is entitled to an Order against the individual Plaintiffs for all damages suffered as a result of their negligence.

TWELFTH DEFENSE AND COUNTERCLAIM
(Breach of Fiduciary Duties)

58. The allegations contained in paragraphs above are incorporated by reference herein.
59. In the event the Court determines the Plaintiffs were properly elected to the Board of Governors, the Plaintiffs breached the following duties to the Defendant and other owners:
- h. The duty to use ordinary care and prudence in managing the property and financial affairs of the community;
 - i. The duty to treat members fairly;
 - j. The duty to act reasonably in the exercise of its discretionary powers;
 - k. The duty to provide members reasonable access to information about the association, the common property, and the financial affairs of the association.
60. Upon information and belief, had the individual Plaintiffs not breached their duties, the Association would not have incurred as many expenses and liabilities.
61. The expenses of the Association passes down to the property owners, including Defendant, either by paying increased assessments on lots or the payment of increased budget shortfalls.
62. The Defendant is entitled to an Order against the individual Plaintiffs for all monies it has or will have to pay as a result of Plaintiffs breach of duties.

THIRTEENTH DEFENSE AND COUNTERCLAIM
(Ultra Vires Actions)

63. The allegations contained in paragraphs above are incorporated by reference herein.
64. The Plaintiffs, in the manner of noticing the meeting, voting on issues and appointment of governors, as well as, the management of the association, have not acted within the scope of authority defined by the Declaration of Restrictive Covenants and Bylaws for Litchfield Plantation.
65. As a result, the association has incurred un-necessary costs and obligations and property values have decreased. Property owners have incurred additional expenses and assessments have been made against their property.

66. The Defendant is entitled to an Order against the individual Plaintiffs for all monies it has or will have to pay as a result of Plaintiffs breach of duties.

FOURTEENTH DEFENSE AND COUNTERCLAIM
(Absence of Necessary Parties)

67. The allegations contained in paragraphs above are incorporated by reference herein.
68. That upon information and belief, the Defendant has made numerous assignments of the Declarant Rights and Class "B" voting rights to third parties who have purchased property from the Defendant or loaned monies to the Defendant which were secured by properties located within Litchfield Plantation.
69. That said parties holding an assignment or collateral assignment of the Declarant's rights and Class "B" voting rights have a property interest in the rights which the Plaintiff seeks to avoid, and are therefore necessary parties to this action.
70. Therefore, the Defendant, and all necessary parties are entitled to an order joining any persons or entities deemed to be necessary parties to this action.

FIFTEENTH DEFENSE AND COUNTERCLAIM
(Interference with Prospective Contractual Relations)

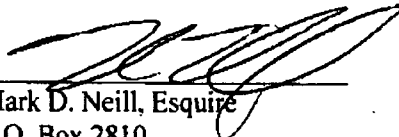
71. The allegations contained in paragraphs above are incorporated by reference herein.
72. The Plaintiffs were aware that Defendant was in the process of marketing for sale its property interests in Litchfield Plantation.
73. One such third party interested in purchasing the property rights from the Defendant was US Development, LLC.
74. The Plaintiffs intentionally interfered with the Defendant's ability to enter into a contract to sell its property interests by: conducting an improper meeting, improperly electing themselves to the Board of Governors, acting as the Board of Governors without authorization, and filing a lawsuit claiming the Defendant's "Class B" membership has terminated.

75. As a result of Plaintiffs' actions, the marketability of Defendant's property interests has been negatively impacted.
76. As a direct result of the Plaintiffs' actions, US Development, LLC is no longer willing to enter into a contract with the Defendant.
77. The Defendant is entitled to an Order against the individual Plaintiffs for actual and punitive damages.

WHEREFORE, having fully answered the Complaint of the Plaintiffs, the Defendant prays that:

1. That the Plaintiffs' causes of action be dismissed with prejudice, with all costs assessed against the Plaintiffs;
2. As to the Defendant's Counterclaim for Declaratory Judgment, for an Order by the Court declaring that the Plaintiffs are not the duly elected Board of Governors for the Association and that they have no authority to act as such. The Defendant is further entitled to an Order declaring that any monies collected by the Plaintiffs holding themselves out as the Board of Governors is the property of the Association and should be accounted for.
3. As for the Defendants' Counterclaims for Negligence, Breach of Fiduciary Duties, Ultra Vires Actions, and Intentional Interference with Prospective Contractual Relations, the Plaintiffs pray for an Order awarding actual and punitive damages, as well as all costs of this action, including reasonable attorneys fees and costs.
4. As to the Defendants' Counterclaim for Injunctive Relief, the Plaintiffs pray for an Order of Injunction, as well as all costs of this action, including reasonable attorneys fees and costs.
5. As to the Defendants Defense and Counterclaim to add Necessary Parties, for an order adding any and all parties who hold an interest in the Declarant's Rights and Class B voting rights under the Covenants and Restrictions.
6. For a judgment against the Plaintiffs in the amount of all reasonable attorneys fees and costs incurred in the defense of this action;
7. For such other and further relief in as this Court deems just and proper.

NEILL LAW FIRM, PA



Mark D. Neill, Esquire
P.O. Box 2810
Murrells Inlet, SC 29576
(843) 651-8580
Attorney for Defendant
Litchfield Plantation Company, Inc.

Dated: October 21, 2011
Murrells Inlet, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-22-319

Litchfield Planation Association, Inc., et al.)

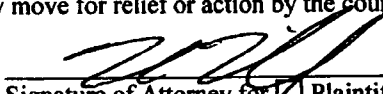
Plaintiff,)

vs.)

Litchfield Plantation Company, Inc., et al.)

Defendant.)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Robert F. McMahan, Bar No. _____ Address: P.O. Box 3891, Conway, SC 29528 Phone: _____ Fax _____ E-mail: _____ Other: _____		Defendant's Attorney: Mark D. Neill, Bar No. #14273 Address: P.O. Box 2810, Murrells Inlet, SC 29576 Phone: 843-651-8580 Fax 843-651-8586 E-mail: mneill@neilllawfirm.com Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Defendant's Motion for Temporary Injunction Estimated Time Needed: 30 min. Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☒ Plaintiff / ☒ Defendant Date submitted: 11/7/11			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$ _____ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____ FILED GEORGETOWN COUNTY, S.C. 2011 NOV - 7 PM 1:50 A. M. Y. WHITE CLERK OF COURT			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION Collected by:  Date Filed: 11/7/11 ☐ MOTION FEE COLLECTED: \$ 25 ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr., and Thomas Martin Phillips,

Plaintiffs,

vs.

Litchfield Plantation Company, Inc.,

Defendant,

And

E. Scott Trotter,

Intervenor,

) IN THE COURT OF COMMON PLEAS
) FOR THE 15th JUDICIAL CIRCUIT

) CASE NO: 2011-CP-22-00319

) Defendant's Motion for
) Temporary Injunction

FILED
GEORGETOWN COUNTY, S.C.
2011 NOV -7 PM 1:50
ALMA Y. WHITE
CLERK OF COURT

TO: THE PLAINTIFFS NAMED ABOVE:

NOTICE AND MOTION FOR TEMPORARY INJUNCTION

YOU WILL PLEASE TAKE NOTICE THAT the Defendant, Litchfield Plantation Company, Inc., will move the Court, pursuant to Rule 65 of the South Carolina Rules of Civil Procedure, to enter a temporary injunction providing the following relief:

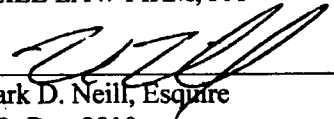
- (1) Prohibiting Plaintiffs from taking any action to prevent the Defendant from attending a meeting of property owners scheduled for November 19, 2011;
- (2) Prohibiting Plaintiffs from taking any action to prevent the Defendant from exercising its Class B Voting Rights at the meeting;
- (3) Prohibiting Plaintiffs from taking any action to prevent the Defendant from participating in any manner at the meeting, including nominating individuals to the Board of Governors for Litchfield Plantation Company or voting on any issues.

- (4) Prohibiting the Plaintiffs from taking any action which prevants the Defendant from exercising its right of disapproval as provided in the Covenants and Restrictions and By-laws.

The moving Defendant offers the affidavits that have been filed in the above captioned matter in support of the motion, as well as, the parties' pleading and memoranda of law. The Defendant will suffer immediate and irreparable injury, loss, and/or damages without entry of the requested injunctive relief. Any legal remedy would be inadequate. In contrast, if the requested relief is granted, the Plaintiffs will not be harmed or damaged. Counsel for the Defendant certifies he attempted to resolve this matter with the Plaintiffs prior to filing this motion.

WHEREFORE, the Defendant moves the Court to award the relief requested above, as well as, the costs incurred in filing the motion, including reasonable attorney fees, and any other and such further relief deemed appropriate by the Court.

NEILL LAW FIRM, PA


Mark D. Neill, Esquire
P.O. Box 2810
Murrells Inlet, SC 29576
(843) 651-8580
Attorney for Defendant
Litchfield Plantation Company, Inc.

Dated: 11/4, 2011
Murrells Inlet, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE CIRCUIT COURT FOR THE

Litchfield Plantation Association, Inc.,

Plaintiff,

vs.

Litchfield Plantation Company, Inc.;
Louise P. Parsons; South Carolina
Department of Revenue; BDC Capital,
Inc. FKA BDC Capital, LLC; Allan L.
Kidston; First National Bank of South
Carolina; Lawrence A. Shapiro; Info
Quest, Inc.; Small Luxury Hotels
of the World Limited; and Litchfield
Plantation Buyout Group, LLC.

Defendant(s).

CIVIL ACTION COVERSHEET

CP-

2012CP2200341

FILED
GEORGETOWN COUNTY, S.C.
2012 APR 10 AM 11:02
ALMA Y. WHITE
CLERK OF COURT

Submitted By: Robert F. McMahon, Jr.
Address: P.O. Box 2277
Conway, SC 29528

SC Bar #: 3891
Telephone #: 843-234-2390
Fax #: 803-790-1277
E-mail: rfm@harrisgraves.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this Cover Sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- () JURY TRIAL demanded in complaint (X) NON-JURY TRIAL demanded in complaint
() This case is subject to ARBITRATION pursuant to Circuit Court Annexed Alternative Dispute Resolution Rules.
() This case is subject to MEDIATION pursuant to the Circuit Court Annexed Alternative Dispute Resolution Rules.
(X) This case is exempt from ADR (Proof of ADR/Exemption Attached).

NATURE OF ACTION: (check one box below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
() Construction (100)	() Dental Malpractice (200)	() Assault/Slander/Libel (300)	() Claim & Delivery (400)
() Debt Collection (110)	() Legal Malpractice (210)	() Conversion (310)	() Condemnation (410)
() Employment (120)	() Medical Malpractice (220)	() Motor Vehicle Accident (320)	(X) Foreclosure (420)
() General (130)	() Previous Notice of Intent	() Premises Liability (330)	() Mechanic's Lien (430)
() Breach of Contract (140)	Case No. 20 CP	() Products Liability (340)	() Partition (440)
() Other (199)	() Notice/File Med Mal (230)	() Personal Injury (350)	() Possession (450)
	() Other (299)	() Wrongful Death (360)	() Building Code Violation (460)
		(X) Other (399)	() Other (499)
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
() PCR (500)	() Death Settlement (700)	() Reinstate Driver's License (800)	() Arbitration (900)
() Madamus (520)	() Foreign Judgment (710)	() Judicial Review (810)	() Magistrate-Civil (910)
() Habeas Corpus (530)	() Magistrate's Judgment (720)	() Relief (820)	() Magistrate-Criminal (920)
() Other (599)	() Minor Settlement (730)	() Permanent Injunction (830)	() Municipal (930)
	() Transcript Judgment (740)	() Forfeiture-Petition (840)	() Probate Court (940)
	() Lis Pendens (750)	() Forfeiture-Consent Order (850)	() SCDOT (950)
	() Transfer of Structured Settlement	() Other (899)	() Worker's Comp (960)
	Payment Rights Application (760)		() Zoning Board (970)
	() Other (799)		() Public Service Commission (990)
Special/Complex/Other	() Pharmaceuticals (630)		() Employment Security Comm (991)
() Environmental (600)	() Unfair Trade Practices (640)		() Other (999)
() Automobile Arb. (610)	() Out-of-State Depositions (650)		
() Medical (620)	() Motion to Quash Subpoena in		
() Other (699)	Out-of-County Action (660)		
	() Sexual Predator (510)		

Submitting Party Signature:

Date: April 9, 2012

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10, et seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville, Hampton,
Horry, Jasper, Lexington, Pickens (Family Court Only), Richland Union and York

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN
ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.**

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suite" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special Proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals;
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Litchfield Plantation Association, Inc.,

Plaintiff,

vs.

Litchfield Plantation Company, Inc.;
Louise P. Parsons; South Carolina
Department of Revenue; BDC Capital,
Inc. FKA BDC Capital, LLC; Allan L.
Kidston; First National Bank of South
Carolina; Lawrence A. Shapiro; Info
Quest, Inc.; Small Luxury Hotels
of the World Limited; and Litchfield
Plantation Buyout Group, LLC.,

Defendant(s).

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.

2012 CP 2200341

CERTIFICATE OF
EXEMPTION/WITHDRAWAL
FROM ARBITRATION

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE:

_____ monetary relief requested exceeds \$25,000;

_____ this is a class action;

_____ there is a substantial claim for injunction or declaratory relief requested in this case

X this case involves (check one or more of the following)

_____ title to real estate;

_____ wills, trusts and decedents' estates;

X mortgage foreclosure;

_____ partition;

_____ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

_____ monetary relief requested in this case is unspecified but exceeds \$25,000;

_____ this case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue;

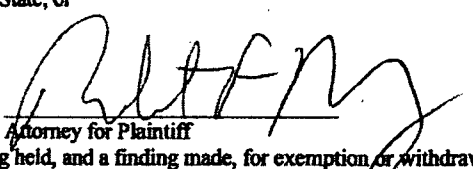
_____ this action is appellate in nature;

_____ this is a post-conviction relief matter;

_____ this is a forfeiture proceeding brought by the State; or

_____ this is a contempt of court proceeding.

Date: April 2, 2012


Attorney for Plaintiff

*Note: Motion must be presented to the court, a hearing held, and a finding made, for exemption or withdrawal from arbitration for "strong and compelling reason" sought pursuant to Rule 1(d), Rules of Circuit Court Arbitration.

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Litchfield Plantation Association, Inc.,

Plaintiff,

vs.

Litchfield Plantation Company, Inc.;
Louise P. Parsons; South Carolina
Department of Revenue; BDC Capital,
Inc. FKA BDC Capital, LLC; Allan L.
Kidston; First National Bank of South
Carolina; Lawrence A. Shapiro; Info
Quest, Inc.; Small Luxury Hotels
of the World Limited; and Litchfield
Plantation Buyout Group, LLC.,

Defendant(s).

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.

2012CP02200341

SUMMONS AND NOTICES

Foreclosure of Real Estate
Mortgage (Non-Jury)

Deficiency Demanded

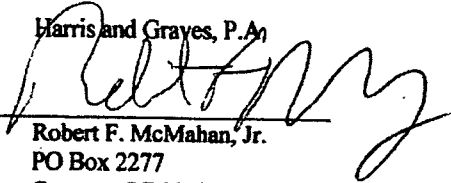
FILED
GEORGETOWN COUNTY, S.C.
2012 APR 10 AM 11:03
ALMA Y. WHITE
CLERK OF COURT

TO THE DEFENDANT(S) NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the persons whose names are subscribed below at PO Box 2277, Conway, SC 29528, within thirty (30) days after the service hereof, exclusive of the day of such service, except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, or otherwise appear and defend, the Plaintiff in this action will apply to the Court for relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Complaint.

YOU WILL ALSO TAKE NOTICE that, pursuant to Rule 53(b) *South Carolina Rules of Civil Procedure*, as amended effective September 1, 2002, the undersigned attorneys, on behalf of the Plaintiff herein, will seek a general Order of Reference to the Master-in-Equity or Special Referee for Georgetown County, South Carolina, which order shall, pursuant to the Rule 53(b) *South Carolina Rules of Civil Procedure*, specifically provide that the Master-in-Equity or Special Referee is authorized and empowered to enter a final judgment in this action, with any appeal from the final judgment entered by the Master-in-Equity or Special Referee directly to the Supreme Court or to the Court of Appeals, whichever is appropriate.

April 9, 2012

Harris and Grayes, P.A.
By: 
Robert F. McMahan, Jr.
PO Box 2277
Conway, SC 29528
(843) 234-2390
Attorney for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Litchfield Plantation Association, Inc.,

Plaintiff,

vs.

Litchfield Plantation Company, Inc.;
Louise P. Parsons; South Carolina
Department of Revenue; BDC Capital,
Inc. FKA BDC Capital, LLC; Allan L.
Kidston; First National Bank of South
Carolina; Lawrence A. Shapiro; Info
Quest, Inc.; Small Luxury Hotels
of the World Limited; and Litchfield
Plantation Buyout Group, LLC.,

Defendant(s).

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.

2012CP2200341

COMPLAINT
(Non-Jury)

ALMA Y. WHITE
CLERK OF COURT

2012 APR 10 AM 11:03

FILED
GEORGETOWN COUNTY, S.C.

Litchfield Plantation Association, Inc. (the "Plaintiff"), complaining of the above-captioned Defendant(s), alleges as follows:

1. The Plaintiff is a non-profit corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Georgetown County, South Carolina.
2. The Plaintiff is the owner and holder of four Promissory Notes and Mortgages covering real property, which is the subject of the foreclosure action herein, located in the County of Georgetown, State of South Carolina and this Court has proper jurisdiction over the subject matter and the parties of this action.
3. The Defendant Litchfield Plantation Company, Inc., is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina which owns property, does business, and maintains agents, employees, and its principal place of business in Georgetown County, South Carolina. Litchfield Plantation Company, Inc., is the original developer of Litchfield Plantation located in Georgetown County, South Carolina and incorporated the Plaintiff in 1971 to be the homeowners association for Litchfield Plantation.
4. The Defendant, Louise P. Parsons, is upon information and belief, a citizen and resident of the State of Florida, and is named herein by virtue of her interest in a mortgage upon the subject property dated April 21, 2011, and recorded August 10, 2011, in Book 1728, at Page 127, in the Office of the Register of Deeds for Georgetown County.
5. The Defendant, South Carolina Department of Revenue, is named as a Defendant

because it has, or may claim an interest in the subject property by virtue of those certain Tax Liens filed against Defendant Litchfield Plantation Company, Inc. in the amount of \$518.81, Tax Lien Number 3-51297870-4, recorded in the Office of the Register of Deeds for Georgetown County on September 19, 2011, in Book 11MS22, at Page 1052; and in the amount of \$666.19, Tax Lien Number 3-51329407-2, recorded in the Office of the Register of Deeds for Georgetown County on December 21, 2011, in Book 11MS22, at Page 1888.

6. The Defendant, BDC Capital, Inc. f/k/a BDC Capital LLC Inc. (hereinafter "BDC Capital"), upon information and belief, is a corporation organized and existing pursuant to the laws of the Commonwealth of Virginia, and is named herein by virtue of pending action against Defendant Litchfield Plantation Company, Inc. Civil Action Number 2010-CP-22-01265 in the Georgetown County public records.

7. The Defendant, Allan L. Kidston, upon information and belief, is a resident of the State of Massachusetts, and is named herein by virtue of that judgment against Litchfield Plantation Company, Inc. in JR Number 2010-CP-22-01527, and in the pending Civil Action Number 2011-CP-22-00528.

8. The Defendant, First National Bank of South Carolina (hereinafter "First National") is, upon information and belief, a financial institution providing such services in the State of South Carolina, and is named herein by virtue of that pending action against Litchfield Plantation Company, Inc. in Civil Action Number 2010-CP-22-01839.

9. The Defendant, Lawrence A. Shapiro, upon information and belief, is a citizen of the Commonwealth of Virginia, and is named herein by virtue of that pending action against Litchfield Plantation Company, Inc. in Civil Action Number 2010-CP-22-01967.

10. The Defendant, Info Quest, Inc., upon information and belief, is a corporation organized and existing pursuant to the laws of the State of South Carolina, and is named herein by virtue of that judgment in the amount of \$4,793.28 against Litchfield Plantation Company, Inc. filed June 8, 2011, JR No. 2011-CP-22-00752.

11. The Defendant, Small Luxury Hotels of the World Limited, upon information and belief, is a hotel chain providing such services in Georgetown County, State of South Carolina, and is named herein by virtue of that judgment in the amount of \$28,370.60 against Litchfield Plantation Company, Inc. filed January 31, 2008, in JR No. 2007-CP-22-00254.

12. The Defendant, Litchfield Plantation Buyout Group, LLC, upon information and belief, is a limited liability company organized and existing pursuant to the laws of the State of South Carolina, and is named herein by virtue of an Assignment of Promissory Notes, Guarantees and Mortgages (hereinafter the "Assignment") filed in the Georgetown County Register of Deeds on April 27, 2011 in book 1675, page

100. The Assignment is void for lack of consideration. The Assignment is also void for lack of authority for the signatory to execute the Assignment.

13. Plaintiff, in compliance with The Supreme Court of South Carolina *Administrative Order Re: Mortgage Foreclosures and the Home Affordable Modification Program ("HMP")*, 2009-05-22-01, filed May 22, 2009, asserts that the loan subject to this action is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac, nor is the Plaintiff a servicer who has signed an agreement to participate in the HMP.

14. Plaintiff, in compliance with The Supreme Court of South Carolina *Administrative Order Re: Mortgage Foreclosures Actions*, signed May 2, 2011, certifies that the Mortgaged Property that is subject to this action is not owner-occupied.

15. Based upon a search of the public records of Georgetown County, all persons or entities having an interest or lien or possible claim in or upon the subject property that is subordinate to the lien of the Plaintiff as of the date and time of the filing of the Lis Pendens herein have been made defendants.

16. Any Defendant(s) herein described as judgment creditors, by filing of said judgments, have designated their attorney entering the judgment as their agent for service of process under the provisions of §15-35-840 of the *South Carolina Code of Laws* (1976 as amended).

**FOR A FIRST CAUSE OF ACTION
(Foreclosure of Mortgage and Security Agreement)**

17. The allegations of the preceding paragraphs are reasserted and incorporated herein as if restated verbatim.

18. For valuable consideration given, Litchfield Plantation Company, Inc., executed and delivered to Litchfield Plantation Association, Inc. ("Plaintiff"), certain Secured Promissory Notes, one dated May 22, 2009 in the principal sum of Five Hundred and Seventy Thousand and 00/100 (\$570,000.00) Dollars, with interest accruing pursuant to the terms contained therein, one dated the 1st day of June, 2010, in the principal sum of Fifty thousand and 00/100 (\$50,000.00) Dollars, with interest accruing pursuant to the terms contained therein, one dated June 10, 2009, in the principal sum of Seventy Five Thousand and 00/100 (\$75,000.00) Dollars, with interest accruing pursuant to the terms contained therein, one dated July 21, 2009 in the principal sum of Twenty Thousand and 00/100 Dollars (\$20,000.00), ("Notes"). Litchfield Plantation promised to repay the Plaintiff the amounts advanced under the Notes.

19. Subsequent to the execution of the Notes, and to better secure the repayment of the Notes and the debts evidenced thereby, Litchfield Plantation Company, Inc. executed and delivered unto the Plaintiff, a certain Mortgage dated the 1st day of June, 2010 ("Mortgage"), covering a number of various properties, to which the following described property ("Mortgaged Property") is the subject of this action:

All that certain piece, parcel or lot of land lying, being and situate in Tax District Number Four, County of Georgetown, State of South Carolina, shown as "7.35 AC." on a plat entitled "MAP OF LITCHFIELD PLANTATION COMPANY, INC. AND RESOURCES PLANNING CORPORATION," prepared by Powers and Associates Surveyors, Inc. dated February 23, 2005, and filed of record May 3, 2005, in the Office of the Register of Deeds for the County of Georgetown in Plat Slide 543, at Page 1 through 3, and more particularly shown on that plat entitled "Plat of 7.35 acres in Litchfield Plantation, Waccamaw Neck" surveyed for Litchfield Plantation Company, Inc., prepared by Powers Land Surveying, dated June 7, 2011, and recorded in Plat Slide 735, at Page 7B, in the Office of the Georgetown County Register of Deeds, State of South Carolina.

Being a portion of TMS No. 4-413-1

20. Thereafter, the Mortgage was recorded on June 1, 2010, in Mortgage Book 1487, at Page 258 in the Office of the Georgetown County Register of Deeds.

21. The above-referenced instruments constitute a first lien on the Mortgaged Property.

22. Pursuant to the terms of the Mortgage, any sums paid by the Plaintiff for inspecting and securing the Mortgaged Property, for fire and other hazard insurance, taxes and assessments for the Mortgaged Property, and any costs of collection, including reasonable attorney's fees, are secured by the Mortgage.

23. The payments due on the Note and Mortgage are in default. Although demand for payment thereof has been made and the Plaintiff, as present lienholder, after providing all required notices, elects to, and does declare the entire balance due and payable, and that there is due and owing on the Notes as of April, 9, 2012 the sum of Seven Hundred and Thirty Four Thousand Six Hundred and Twenty Four Dollars and Forty Nine Cents (\$734,624.49), together with interest as provided at the rate set forth in the Notes from to the date of payment, and also for the costs and disbursements of this action, including attorney's fees.

24. Pursuant to §37-3-105, *South Carolina Code of Laws* (1976 as amended), the mortgage lien, which is subject to this action, is a first lien on real estate and is not a 'consumer loan' for the purposes of the South Carolina Consumer Protection Code. Any notices of right to cure have been given as required.

25. Pursuant to its rights under the Notes and Mortgage, Plaintiff has and does hereby elect to declare the total unpaid balance of principal and interest on the Notes due and payable and does hereby elect to foreclose the Mortgage on the Mortgaged Property, reserving however, any and all rights and remedies the Plaintiff may have under the Notes and Mortgage.

26. The Plaintiff has placed this matter with the undersigned attorneys for collection.

27. The Plaintiff does not waive and specifically demands personal judgment against Litchfield Plantation for amounts due on the Notes and Mortgages, with the right to enter personal judgment for any deficiency remaining after the sale of the Mortgaged Property.

**FOR A SECOND CAUSE OF ACTION
(Appointment of Receiver)**

28. The allegations of the preceding paragraphs are reasserted and incorporated herein as if restated verbatim.

29. It is further provided in the loan documents that in the event of default, the Plaintiff shall be entitled to the immediate appointment of a receiver to take possession and control of the subject properties and to secure and manage the same, and to collect any and all rents, income, revenue, earnings, issues and profits therefrom.

30. Plaintiff is informed and believes that it is entitled to the appointment of a Receiver, to secure and protect the subject properties, together with any and all rents and profits accruing therefrom.

**FOR A THIRD CAUSE OF ACTION
(Breach of Fiduciary Duty)**

31. On or about December 29, 2010, Litchfield Plantation Company, Inc. deeded to the Plaintiff a beach house on Pawleys Island, South Carolina. The beach house was a common amenity of the Plaintiff.

32. Litchfield Plantation Company, Inc. owed a fiduciary duty to the Plaintiff when it deeded the beach house to the Plaintiff to ensure that the beach house was in a good state of repair or to provide the Plaintiff with funds necessary to bring the beach house to a standard of reasonably good repair.

33. Litchfield Plantation Company, Inc. breached its fiduciary duty to the Plaintiff by transferring the beach house to the Plaintiff when it was in a poor state of repair and by failing to provide the Plaintiff with funds to bring the beach house to a standard of reasonably good repair.

34. Plaintiff has been damaged by Litchfield Plantation Company, Inc.'s breach of its fiduciary duty and is entitled to judgment against Litchfield Plantation Company, Inc. for the cost of bringing the beach house to a standard of reasonably good repair.

**FOR A FOURTH CAUSE OF ACTION
(Breach of Covenants and Fiduciary Duties)**

35. Pursuant to section 5.5 of the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions for Litchfield Plantation, Litchfield Plantation Company had complete control of the affairs of the Plaintiff from the enactment of the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions until February 26, 2011. Due to Litchfield Plantation Company's right to control the Plaintiff and Litchfield Plantation Company's actual control of the Plaintiff during that

time, Litchfield Plantation Company owed fiduciary duties to the Plaintiff to avoid conflicts of interest and act in good faith and with due care to protect the Plaintiff's interests and collect monies due to the Plaintiff.

36. Pursuant to the provisions of Section 5.18 of the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions for Litchfield Plantation, Litchfield Plantation Company, Inc., was required to collect a working capital contribution from each person who purchased lots or bulk sales and was required to pay one third of a working capital contribution into the Plaintiff's Reserve Account.

37. Litchfield Plantation Company, Inc. contends it sold 101 lots to lot owners from and after the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions were enacted through December 31, 2010.

38. Litchfield Plantation Company, Inc. willfully beached its fiduciary duties to the Plaintiff by either

- a. failing to collect the moneys from the buyers of its lots to be placed into the Plaintiff's Reserve Account, or
- b. by collecting the moneys from the buyers of its lots and failing to place the same into the Plaintiff's Reserve Account.

39. Litchfield Plantation Company concealed its failure to pay the money collected from the buyers of lots by failing to submit budgets showing the amounts in the reserve account and by refusing to have annual meetings of the Plaintiff's membership.

40. Plaintiff has been damaged by Litchfield Plantation Company's breach of its fiduciary duty and is entitled to judgment against Litchfield Plantation Company Inc. for that beach for actual and punitive damages as found by the Court.

**FOR A FIFTH CAUSE OF ACTION
(Breach of Covenants)**

41. Pursuant to Section 5.8 of the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions, Litchfield Plantation Company, Inc. is required to pay the shortage in the Plaintiff's budget for each fiscal year until the Class B share period ends.

42. Litchfield Plantation Company, Inc. contends that the Class B share period is still in effect but has failed to pay the shortage in the Plaintiff's budget and is in breach of its obligation to the Plaintiff to pay the shortage in the Plaintiff's budget.

43. Plaintiff has been damaged by Litchfield Plantation Company, Inc is breach of its obligation to pay the shortage in the Plaintiff's budget and it entitled to judgment against Litchfield Plantation Company, Inc. for damages for Litchfield Plantation Company, Inc breach of it's obligation to pay the shortage in the Plaintiff's budget.

**FOR A SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty)**

44. Pursuant to section 5.5 of the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions for Litchfield Plantation, Litchfield Plantation Company had control of the affairs of the Plaintiff from the enactment of the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions until February 26, 2011. Due to Litchfield Plantation Company's right to control the Plaintiff and Litchfield Plantation Company's actual control of the Plaintiff during that time, Litchfield Plantation Company owed fiduciary duties to the Plaintiff to avoid conflicts of interest, and act in good faith and with due care with respect to the Plaintiff's interests.

45. Litchfield Plantation Company exerted its control over the Plaintiff and took money from the Plaintiff for use in paying the expenses of Litchfield Plantation Company and in return gave the Plaintiff various Notes.

46. The decision to take the Plaintiff's money was made by Board Members who were officers and directors of both Litchfield Plantation Company and the Association who had conflicts of interest and who were because of those conflicts of interest were prohibited from voting to take the Plaintiff's money for the use and benefit of Litchfield Plantation Company.

47. The decision to take the Plaintiff's money in exchange for the \$75,000.00 Note, the \$50,000.00 Note and the \$20,000 Note referenced in paragraph 18 above were made by a Board elected by Litchfield Plantation Company that consisted solely of two (2) members both of whom were officers and directors of Litchfield Plantation Company. The Covenant that govern the Plaintiff require that its Board contain five (5) members. The decision by Litchfield Plantation Company to take those moneys was illegal and invalid due to a lack of a valid board for the Plaintiff, lack of a quorum for the Board of the Plaintiff and the conflict of interest of the members elected to the Plaintiff's Board by Litchfield Plantation Company.

48. Litchfield Plantation Company concealed its decision to take the Plaintiff's money in exchange for the \$75,000.00 Note, the \$50,000.00 Note and the \$20,000 Note referenced in paragraph 18 from the Plaintiff's property owners by failing to submit budgets showing those transfers and by refusing to have annual meetings of the Plaintiff's membership.

49. The Notes given by Litchfield Plantation Company to the Plaintiff were commercially unreasonable in that they only paid interest at the Prime Rate at a time when Litchfield Plantation Company was in poor financial condition and was a poor credit risk. Notes given by Litchfield Plantation Company to other lenders in arm's length transactions carried interest at rates of 13% and 16% due to its poor financial condition and poor creditworthiness.

50. The Notes given by Litchfield Plantation Company to the Plaintiff were commercially unreasonable in that they did not provide periodic payments and tied up the Plaintiff's funds for a long period of time.

51. The money taken by Litchfield Plantation Company was in direct violation of the section 5.17 (B) of the Covenants that provides that the "Revenues of the Association may be expended to pay costs and expenses of only the Association".

52. The Plaintiff has been damaged by Litchfield Plantation Company's self dealing, conflicts of interest, failure to exercise due care in protecting the Plaintiff's interests and breach of fiduciary duties in connection with the money taken by Litchfield Plantation Company by being deprived of funds in which to operate and by not being given an appropriate rate of interest on the money commensurate with the risk of the loans and is entitled to actual and punitive damages from Litchfield Plantation Company.

WHEREFORE, having fully set forth its Complaint, the Plaintiff prays that this Honorable Court inquire into the matters set forth herein and that:

1. The amount due upon the Notes and Mortgage held by the Plaintiff be ascertained and determined under the direction of this Court, together with attorneys' fees and costs of this action;
2. The Plaintiff's Mortgage be declared a first lien and that the Plaintiff has a judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees and for the costs of this action.
3. The Mortgaged Property be sold under the direction of this Court, the equity of redemption be barred, and the proceeds of sale be applied as follows:

First, to the costs and expenses of the within action and sale;

Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with the attorney's fees as aforesaid; and

Third, the surplus, if any, be distributed according to law.

Fourth, the Plaintiff to have judgment against Litchfield Plantation Company, Inc. for the full amount found to be due on the Plaintiff's Notes and Mortgages, with the right to enter personal judgment against Litchfield Plantation Company, Inc. for any deficiency in this action remaining after the sale of the Mortgaged Property;

4. An Order be entered directing and empowering the Sheriff of Georgetown County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the Mortgaged Property should the same become necessary.

5. An Order be entered for the ejectment of the Defendants in possession herein and all persons claiming thereunder and the removal therefrom of all furnishings, fixtures and items not subject to the lien of the Plaintiff's Mortgage, which personal property, if not removed shall be deemed abandoned and

shall be removed by the Plaintiff or its agents from the Mortgaged Property by placing said property on the public street or highway or by any other means, including by force, if necessary.

6. An Order granting the appointment of a receiver should it become necessary, to secure and supervise the rental of the property to be foreclosed with the authority to take possession thereof and collect rents, issues and profits thereon during the pendency of this action and to hold the same as further security for Plaintiff's debt;

7. An Order to be entered for reimbursement of all costs of inspecting and securing the property incurred by the Plaintiff as a result of the delinquency; and

8. The Defendant(s), and all persons whomever claiming by and through said Defendant(s), be forever barred of right, title and interest of, in and to the Mortgage Property and Collateral, and each and every part thereof; and

9. Judgment for actual damages on the Plaintiff's Third Cause of Action; and

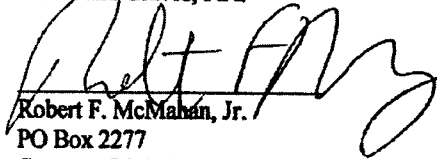
10. Judgment for actual and punitive damages on the Plaintiff's Fourth Cause of Action; and

11. Judgment for actual damages on the Plaintiff's Fifth Cause of Action; and

12. Judgment for actual and punitive damages on the Plaintiff's Sixth Cause of Action; and

13. An Order be entered for such other and further relief as this Court may deem just and proper.

Harris and Graves, P.A.



Robert F. McMahan, Jr.

PO Box 2277

Conway, SC 29528

(843) 234-2390

Attorney for Plaintiff

Date: April 9, 2012

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Litchfield Plantation Association, Inc.,

Plaintiff,

vs.

Litchfield Plantation Company, Inc.;
Louise P. Parsons; South Carolina
Department of Revenue; BDC Capital,
Inc. FKA BDC Capital, LLC; Allan L.
Kidston; First National Bank of South
Carolina; Lawrence A. Shapiro; Info
Quest, Inc.; Small Luxury Hotels
of the World Limited; and Litchfield
Plantation Buyout Group,

Defendant(s).

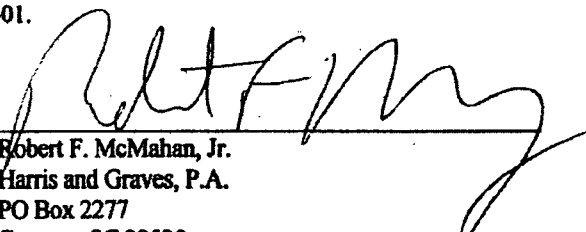
IN THE COURT OF COMMON PLEAS
CASE NO.

**CERTIFICATE OF EXEMPTION FROM
ADMINISTRATIVE ORDER**

2011-05-02-01

(Non-Owner Occupied dwelling)

The undersigned attorney for the Plaintiff has reviewed one or more of the following records: tax records, affidavits of service or non-service, other documents or information provided by the Plaintiff or other persons with knowledge as to the occupancy status of the dwelling that is the subject of the above-captioned action. Upon information and belief, the dwelling is not "Owner-Occupied" as defined by South Carolina Supreme Court Administrative Order 2011-05-02-01.



Robert F. McMahan, Jr.
Harris and Graves, P.A.
PO Box 2277
Conway, SC 29528
(843) 234-2390
Attorney for Plaintiff

Columbia, South Carolina
April 9, 2012

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

Litchfield Plantation Association, Inc.,

Plaintiff,

vs.

Litchfield Plantation Company, Inc.;
Louise P. Parsons; South Carolina
Department of Revenue; BDC Capital,
Inc. FKA BDC Capital, LLC; Allan L.
Kidston; First National Bank of South
Carolina; Lawrence A. Shapiro; Info
Quest, Inc.; Small Luxury Hotels
of the World Limited; and Litchfield
Plantation Buyout Group, LLC.,
Defendant(s).

LIS PENDENS

2012CP220341

ALMA Y. WHITE
CLERK OF COURT

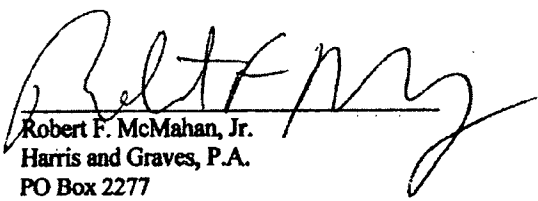
2012 APR 10 AM 11:02

FILED
GEORGETOWN COUNTY, S.C.

NOTICE IS HEREBY GIVEN THAT an action has or will be commenced in this Court upon complaint of the above-named Plaintiff against the above-named Defendants for the foreclosure of a certain mortgage of real estate given by Litchfield Plantation Company, Inc. to Litchfield Plantation Association, Inc., dated June 1, 2010, and recorded June 1, 2010, in Book 1487, at Page 258, in the Office of the Register of Deeds for Georgetown County. The real property covered and affected by the said mortgage and by the foreclosure thereof were, at the time of the making thereof and at the time of the filing of this notice, described as follows:

All that certain piece, parcel or lot of land lying, being and situate in Tax District Number Four, County of Georgetown, State of South Carolina, shown as "7.35 AC." on a plat entitled "MAP OF LITCHFIELD PLANTATION COMPANY, INC. AND RESOURCES PLANNING CORPORATION," prepared by Powers and Associates Surveyors, Inc. dated February 23, 2005, and filed of record May 3, 2005, in the Office of the Register of Deeds for the County of Georgetown in Plat Slide 543, at Page 1 through 3, and more particularly shown on that plat entitled "Plat of 7.35 acres in Litchfield Plantation, Waccamaw Neck" surveyed for Litchfield Plantation Company, Inc., prepared by Powers Land Surveying, dated June 7, 2011, and recorded in Plat Slide 735, at Page 7B, in the Office of the Georgetown County Register of Deeds, State of South Carolina.

Being a portion of TMS No. 4-413-1


Robert F. McMahan, Jr.
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PO Box 2277
Conway, SC 29528
(843) 234-2390
Attorney for Plaintiff

April 9, 2012

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Litchfield Plantation Association, Inc.,

Plaintiff,

vs.

Litchfield Plantation Company, Inc.; Louise P.
Parsons; South Carolina Dept. of Revenue; BDC
Capital, Inc., f/k/a BDC Capital, LLC; Allan L.
Kidston; First National Bank of South Carolina;
Lawrence A. Shapiro; Info Quest, Inc.; Small
Luxury Hotels of the World Limited; and
Litchfield Buyout Group, LLC,

Defendants,

) IN THE COURT OF COMMON PLEAS
) FOR THE 15th JUDICIAL CIRCUIT

) CASE NO: 2012-CP-22-00341

) Answer of Litchfield Plantation
) Company, Inc.

FILED
GEORGETOWN COURT
2012 JUN -1 PM 1:36
ALMA Y. WHITE
CLERK OF COURT

ANSWER OF LITCHFIELD PLANTATION COMPANY, INC.

The Defendant, Litchfield Plantation Company, Inc., answering the Complaint of the Plaintiff, alleges and would show as follows:

FOR A FIRST DEFENSE

1. That each and every allegation of the Plaintiff's Complaint which is not hereinafter specifically admitted is denied and the Defendant demand strict proof thereof.

FOR A SECOND DEFENSE

2. The Defendant admits the allegations contained in paragraph 1.
3. The allegations of Paragraph 2 are denied and strict proof demanded thereof.
4. The Defendant admits the allegations contained in paragraph 3.

5. The Defendant does not have sufficient knowledge to admit or deny the allegations contained in Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, or 15.
6. The allegations of Paragraphs 13, 14, and 16 call for conclusions of law to which the Defendant is not required to admit or deny.
7. Paragraph 17 is a pleading paragraph requiring no response from the Defendant. To the extent it asserts any delict on the part of the Defendant, those allegations are denied and strict proof demanded thereof.
8. As to the allegations of Paragraphs 18, 19, 20, Defendant craves specific reference to the referenced Notes and Mortgage. Defendant denies any interpretation or characterization of those documents that may conflict with the actual terms and conditions set forth within those documents.
9. The allegations of Paragraph 21 call for conclusions of law to which the Defendant is not required to admit or deny.
10. As to the allegations of Paragraph 22, Defendant craves specific reference to the referenced Mortgage. Defendant denies any interpretation or characterization of those documents that may conflict with the actual terms and conditions set forth within those documents.
11. The allegations of Paragraph 23 are denied and strict proof demanded thereof.
12. The allegations of Paragraph 24 call for conclusions of law to which the Defendant is not required to admit or deny.
13. As to the allegations of Paragraph 25, Defendant craves specific reference to the referenced Notes and Mortgage. Defendant denies any interpretation or characterization of those documents that may conflict with the actual terms and conditions set forth within those documents.

14. Paragraphs 26, 27, and 28 are pleading paragraphs requiring no response from the Defendant.
To the extent it asserts any delict on the part of the Defendant, those allegations are denied and strict proof demanded thereof.
15. As to the allegations of Paragraph 29, Defendant craves specific reference to the referenced Notes and Mortgage. Defendant denies any interpretation or characterization of those documents that may conflict with the actual terms and conditions set forth within those documents.
16. The allegations of Paragraph 30 are denied and strict proof demanded thereof.
17. As to the allegations of Paragraph 31, Defendant craves specific reference to the referenced Deed. Defendant denies any interpretation or characterization of the document that may conflict with the actual terms and conditions set forth within the document.
18. The allegations of Paragraphs 32, 33, 34, 35, and 36 are denied and strict proof demanded thereof.
19. As to the allegations of Paragraph 37, Defendant admits that it has sold more than 100 Lots from January 1, 2005 through December 31, 2010.
20. The allegations of Paragraphs 38, 39, and 40 are denied and strict proof demanded thereof.
21. As to the allegations of Paragraph 41, Defendant craves specific reference to the Amended Declaration and denies any interpretation or characterization of the document that may conflict with the actual terms and conditions set forth within the document.

The allegations of Paragraphs 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52 are denied and strict proof demanded thereof.

FOR A THIRD DEFENSE

22. The Defendant reiterates and re-alleges all of the foregoing allegations and defenses as if fully repeated herein.
23. The Complaint fails to state facts sufficient to constitute a cause of action and must be dismissed pursuant to SCRCP Rule 12 (b)(6).

FOR A FOURTH DEFENSE

24. The Defendant reiterates and re-alleges all of the foregoing allegations and defenses as if fully repeated herein.
25. Some or all of Plaintiff's causes of action and allegations are barred by the Statute of Limitations.

FOR A FIFTH DEFENSE

26. The Defendant reiterates and re-alleges all of the foregoing allegations and defenses as if fully repeated herein.
27. Defendant pleads Laches as a complete and affirmative Defense.

FOR A SIXTH DEFENSE

28. The Defendant reiterates and re-alleges all of the foregoing allegations and defenses as if fully repeated herein.
29. Defendant plead Plaintiff's unclean hands as a complete and affirmative defense.

FOR A SEVENTH DEFENSE

30. The Defendant reiterates and re-alleges all of the foregoing allegations and defenses as if fully repeated herein.
31. Defendant pleads Plaintiff's contributory negligence as a complete and affirmative defense.

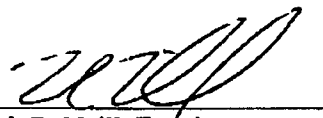
FOR A EIGHTH DEFENSE

32. The Defendant reiterates and re-alleges all of the foregoing allegations and defenses as if fully repeated herein.
33. Defendant pleads Plaintiff's comparative negligence as a complete and affirmative defense.

FOR A NINTH DEFENSE

34. The Defendant reiterates and re-alleges all of the foregoing allegations and defenses as if fully repeated herein.
35. Defendant pleads payment as a complete and affirmative defense.

NEILL LAW FIRM, PA



Mark D. Neill, Esquire
P.O. Box 2810
Murrells Inlet, SC 29576
(843) 651-8580
Attorney for Defendant
Litchfield Plantation Company, Inc.

Dated: 5/30, 2012
Murrells Inlet, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE

☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

Litchfield Plantation Association, Inc., Joseph E. Johnston, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr. and Thomas Martin Phillips,

CASE NO. 2011-CP-22-00319

☒ Plaintiff(s),

**MOTION INFORMATION FORM
AND COVER SHEET**

vs.

Litchfield Plantation Company, Inc.,

☐ Defendant(s).

check box above indicating submitting party

name, SC Bar no. and address of plaintiff's attorney

Robert F. McMahan, Jr.

Harris and Graves, P.A.

Post Office Box 2277

Conway, SC 29528

telephone: (843) 234-2390

Fax: (843) 234-9970

e-mail: rfm@harrisgraves.com

other:

name, SC Bar no. and address of defendant's attorney

telephone:

fax:

e-mail:

other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Plaintiff's Motion for Reconsideration

Estimated Time Needed: 30 minutes

Court Reporter Needed: (YES) / NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion -

I hereby move for relief or action by the court as set forth in the proposed order.

[Signature]
Signature of Attorney for Plaintiff / Defendant

6-6-12
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act

☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

FILED
CLERK OF COURT
2012 JUN -6 PM 4:49

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE _____

CODE: _____

Date: _____

CLERK'S VERIFICATION

Collected by: Vickie Tompkins

(print name)

DATE FILED

6-6-12

☒ MOTION FEE COLLECTED: \$25

☐ CONTESTED - AMOUNT DUE: _____

ACCOUNTINGSTATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr. and Thomas Martin Phillips,

Civil Action No. 2011-CP-22-00319

Plaintiff(s),

**PLAINTIFFS' MOTION FOR
RECONSIDERATION**

vs.

Litchfield Plantation Company, Inc.,

Defendant(s).

E Scott Trotter,

Intervenor.

FILED
2012 JUN -6 PM 4:59
CLERK OF COURT

The Plaintiffs hereby move pursuant to SCRCivP 59(e) that The Honorable Larry B. Hyma reconsider his Order Granting Defendant's Motion for Summary Judgment dated May 11, 2012, filed May 25, 2012 written notice of which was received by the Plaintiffs on May 29, 2012.

PROCEDURAL HISTORY

At a hearing held on December 8, 2011 the Court orally required that the Plaintiff, Litchfield Plantation Association (hereinafter the "Association") provide an Accounting to the Defendant setting forth what the Association contended was owed by the Defendant (see Transcript of ruling attached hereto as Exhibit A). The purpose of that accounting was to determine what amount the Defendant had to pay in order to restore its Class B voting rights. On February 6, 2012 the Association served the Accounting that is attached hereto as Exhibit B together with the cover letter attached hereto as Exhibit C on the Defendant. The Defendant never filed any objections to the Accounting. The Court had a hearing in this case on April 19, 2012 on outstanding motions. There was no motion scheduled to be heard on April 19, 2012 relating to the Accounting. At the hearing on April 19, 2012 the Court took up the issues

relating to the Accounting at the Defendant's request even though there was no notice to the parties that the issues were to be ruled upon at the April 19, 2012 hearing.

At the April 19, 2012 hearing the Defendant for the first time asserted that it contested certain items in the Accounting. The Association requested that the Court schedule an evidentiary hearing on those contested issues which was refused by the Court. The Court then heard oral argument on the contested issues in the Accounting and issued an Order dated May 11, 2012 that resolved the contested issues in the Accounting.

DISCUSSION

It is axiomatic that due process requires notice to a party that a matter is to be heard. It is also established law that summary judgment cannot be granted when there are genuine issues of material fact. In this case there was no notice to the Association that the Accounting was contested or that issues relating to the Accounting were to be decided at the April 19, 2012 hearing. Nor was there any procedure to resolve any factual issues in the Accounting provided by the Court in its ruling at the December 8, 2011 hearing. The lack of notice and any procedure to resolve the disputed issues in the Accounting deprived the Association of due process under the law. The Court then proceeded to resolve the following disputed factual issues in the Accounting in the hearing and its Order dated May 11, 2012 unfavorably to the Association.

Failure to Fund Reserve Account

One element of the Accounting concerned the failure to fund the reserve account of the Association by the Defendant. Section 5.18 of the Covenants sets forth the following:

Each Lot Owner purchasing from the Declarant, or a Lot Owner purchasing a Lot from a Bulk Sale, shall pay the Association a working capital contribution equal to 12 months of base assessments for each Lot sold after this Declaration is recorded. Each such working capital contribution shall be paid to the Association at the time of closing. One-third (1/3) of each Working Capital Assessment shall be deposited in the Association's Reserve Account...

On September 26, 2011 the Defendant filed an affidavit of E.Scott Trotter who was the Defendant's former president. (Copy attached as Exhibit D). In paragraph 19 of the Trotter affidavit it asserts that 101 lots were sold. In paragraph 23 of that affidavit Trotter describes a handout that he

provided to the Association's members on behalf of the Defendant while he was still the Defendant's president. The handout is attached to the Trotter affidavit and admits on page 8 of that handout that "The Declarant has an obligation to fund a reserve account with deposits equal to one-third of each Working Capital Assessment collected." The handout further states "The Reserve Account following the transfer of 101 Lots from the Declarant should contain a total of \$63,966.67,..." That affidavit and handout is an admission by the Defendant pursuant to SCREvid 801 (d) (2) that the amount listed on the Accounting for the Reserve Account is owed and is sufficient evidence to create a genuine issue of material fact on that issue.

Beach House Repairs

The Accounting also contains an item for beach house repairs. In Goddard v. Fairways Dev. Gen. Part. 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) and in Concerned Dunes West Residents, Inc., v. Georgia Pacific Corp., 349 S.C.251, 562 S.E.2d 633 (S.C. 2002) both the South Carolina Court of Appeals and the South Carolina Supreme Court held that a developer of a property owners association owes a fiduciary duty to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard. The obligation to turn the common areas over in good repair or to provide funds sufficient to effectuate any repairs is "...at the time of transfer..." according to the Supreme Court in Concerned Dunes West Resident, supra, 349 S.C. at 260.

In this case the Defendant turned over a beach house to the Association. That beach house is a common area pursuant to the Covenants. At the time of the transfer the beach house was not in good repair. That was also admitted in the handout attached to the affidavit of the Defendant's former president, E. Scott Trotter that the Defendant filed with this Court. Pages 7 and 8 of the handout describe that the beach house was turned over to the Association on December 29, 2010 and admits that the Association and its members "...have a right to commence a civil action to extent that the Beach House is not in good repair, and LPC has not provided the funds necessary to bring the Beach House up to a standard of reasonably good repair,..." The handout further describes a estimate prepared by a

contractor to bring the beach house into "good condition." That estimate was in the amount of \$42,556.00 and was included in the Accounting. The Association disagrees with the Defendant's position as to the scope of the work needed to bring the beach house up to a state of good repair and included in the Accounting other estimates for a total of \$63,911.00.

Balance due on Promissory Notes Dated May 22, 2009 and June 10, 2009

The Defendant has taken money belonging to the Association on 4 separate occasions. On each occasion the Defendant gave promissory notes back to the Association. Two of those notes were admitted by the Defendant to be in default (ie. the note dated July 21, 2009 with the current balance of \$17,887.72 and the note dated June 1, 2011 with the current balance of \$12,946.48). On the date of the last note, the Defendant gave a mortgage that secured the obligation to repay all of those notes. That mortgage was drafted by the Defendant and is entitled Commercial Mortgage of Real Property and Security Agreement for Four (4) Loans (hereinafter the "Mortgage") and is attached hereto as Exhibit E. Paragraph 3.01(e) of the Mortgage entitled Event of Default states

"The term Event of Default, wherever used in this Mortgage shall mean any one or more of the following events:...

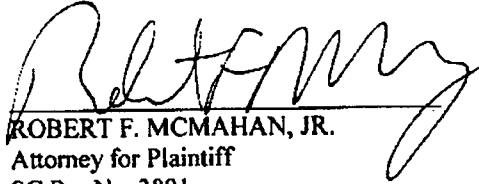
e. A default in either of the Promissory Notes shall constitute a default in the Notes and a default in this Mortgage."

The term "Notes" is defined on page 2 of the Mortgage as all four notes that the Mortgage secures.

Notice of the default was given by the Association to the Defendant in the letter dated February 6, 2012 that transmitted the Accounting to the Defendant (copy attached hereto as Exhibit C). Thus the finding in the Court's Order dated May 11, 2012 that the two (2) Notes dated May 22, 2009 with the current balance due of \$621,680.67 and June 10, 2009 with the current balance due of \$88,325.00 are not currently in default is directly contrary to the Mortgage that was prepared by the Defendant and the letter notifying the Defendant of that default. Based upon the foregoing the Plaintiffs request that the Court reconsider the Order of May 11, 2012 and grant the Plaintiffs an evidentiary hearing with proper notice before determining the amount that the Defendant owes before restoration of its Class B voting rights.

Respectfully submitted,

HARRIS AND GRAVES, P.A.



ROBERT F. MCMAHAN, JR.

Attorney for Plaintiff

SC Bar No. 3891

Post Office Box 2277

Conway, SC 29528

(843) 234-2390

rfm@harrisgraves.com

Conway, South Carolina

Dated: 6-6-12

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Litchfield Planation Association, Inc., et al.

Plaintiff,

vs.

Litchfield Plantation Company, Inc., et al.

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2011_CP-22-319

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Robert F. McMahan, Bar No. _____ Address: P.O. Box 2277, Conway, SC 29528 Phone: _____ Fax _____ E-mail: _____ Other: _____		Defendant's Attorney: Mark D. Neill, Bar No. #14273 Address: P.O. Box 2810, Murrells Inlet, SC 29576 Phone: 843-651-8580 Fax 843-651-8586 E-mail: mneill@neilllawfirm.com Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Defendant's Motion For Temporary Injunction/Lift of Stay Estimated Time Needed: 30 min. Court Reporter Needed: ☒ YES ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☐ Plaintiff ☒ Defendant <u>9/7/12</u> Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION Collected by: <u>SP</u> Date Filed: <u>9/7/12</u> ☐ MOTION FEE COLLECTED: \$ 05 ☐ CONTESTED - AMOUNT DUE: \$			

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Litchfield Plantation Association, Inc., Joseph E.
Johnston, Thomas Eckard, Carol E. Kirby, Robert
F. McMahan, Jr., and Thomas Martin Phillips,

Plaintiffs,

vs.

Litchfield Plantation Company, Inc.,

Defendant,

And

E. Scott Trotter,

Intervenor,

) IN THE COURT OF COMMON PLEAS
) FOR THE 15th JUDICIAL CIRCUIT
)
)
)

CASE NO: 2011-CP-22-00319

Defendant's Motion for
Temporary Injunction/ Lift of Stay

FILED
CLERK OF COURT
2012 SEP - 7 AM 8:34

TO: THE PLAINTIFFS NAMED ABOVE:

MOTION FOR TEMPORARY INJUNCTION OR IN THE ALTERNATIVE, AN ORDER
LIFTING THE AUTOMATIC STAY

YOU WILL PLEASE TAKE NOTICE THAT the Defendant, Litchfield Plantation Company, Inc., will move the Court, on September 20, 2012 at 9:30 a.m., pursuant to Rule 65 of the South Carolina Rules of Civil Procedure, to enter a temporary injunction prohibiting the Plaintiffs from continuing to interfere with its voting rights and property rights with regards to Litchfield Plantation and Litchfield Plantation Association, Inc. The Defendant will show:

- (1) The currently governing documents for Litchfield Plantation Association consist of the 2005 Amendments to the Declaration of Protective Covenants and Bylaws. These documents were filed with the Georgetown County Register of Deeds on May 3, 2005 in Deed Book 1642 at Page 1.

- (2) The Declaration provides for two classes of membership in the Association, Class "A" and Class "B." Class "A" members included all owners except for the Class "B" Member. Class "A" Members have one vote for each Lot and there is only one vote per Lot. The sole Class "B" Member is the Defendant – Litchfield Plantation Company, Inc. The Class "B" Member has the number of votes equal to all Class "A" Members plus one (1) vote.
- (3) On March 9, 2011, the Plaintiffs filed their Complaint in the above captioned matter. The Complaint sought a declaration from the Court that the individual Plaintiffs are the duly elected Board of Governors of Plaintiff Litchfield Plantation Association, Inc. and the Class B period ended on January 1, 2011.
- (4) By way of an Order filed on May 25, 2012, the Court determined that the Class B period did not end. Therefore, the Court dismissed the Plaintiffs' Second Cause of Action.
- (5) By way of the Order filed May 25, 2012, the Court determined that Defendant's voting rights were suspended until it paid certain monies to the Association the Court determined was presently in arrearage.
- (6) The Plaintiffs filed a motion for reconsideration dated June 6, 2012. The Plaintiffs did not ask the Court to reconsider the dismissal of their second cause of action, rather, the Plaintiffs only asked the Court to reconsider the amount of the arrearage the Defendant should pay to have its voting rights deemed restored.
- (7) On August 3, 2012, the Defendant made full payment of the monies the Court determined was in arrearage to the Association. In accordance with the Declaration and Bylaws, Defendant requested that a special meeting of owners be called to remove the individuals (including the Plaintiffs) holding themselves out to be the Governors of the Association and to nominate and elect five individuals to serve as the proper Board. The special meeting was scheduled for August 25, 2012.
- (8) On August 16, 2012, a hearing was held pursuant to Plaintiffs' Motion to Reconsider, during which, the Court denied Plaintiffs' motion.
- (9) On August 24, 2012, Plaintiffs emailed to Defendant's counsel a copy of a Notice of Appeal dated August 23, 2012.
- (10) On August 25, 2012, during the special meeting Plaintiffs claimed their notice of appeal acted as an automatic stay. Plaintiffs refused to acknowledge Defendant's voting rights, determined that they were still in charge of the Association, and left before the Defendant could nominate and vote for governors. After the Plaintiffs left, the Defendant continued on with the special meeting, voted to remove the individuals claiming to be board members, and elected five individuals to serve as the proper Board of Governors.

The Defendant will further show the Notice of Appeal filed by the Plaintiffs is improper and does not act as an automatic stay. Plaintiffs are attempting to use the appellate process to intentionally and recklessly interfere with the Defendant's right to vote as a shareholder and to deprive the Defendant of its property rights. The Defendant offers the affidavits that have been filed in the above captioned matter and attached hereto in support of the motion, as well as, the parties' pleadings and memoranda of law.

The Defendant will suffer immediate and irreparable injury, loss, and/or damages without entry of the requested injunctive relief. Any legal remedy would be inadequate.

The Defendant is entitled to an Order finding: (1) that the Plaintiffs appeal does not act as an automatic stay of the Order; (2) granting injunctive relief restraining the Plaintiffs and its agents from not recognizing the newly elected Board of Governors, or (3) in the alternative, in the event the Court determines that the Plaintiffs' notice of appeal was proper and that the proceedings are automatically stayed under the general rule, the Defendant seeks an Order, pursuant to SCACR Rule 241, to lift the automatic stay.

WHEREFORE, The Defendant moves the Court to award the relief requested above, as well as, the costs incurred in filing the motion, including reasonable attorney fees, and any other and such further relief deemed appropriate by the Court.

NEILL LAW FIRM, PA



Mark D. Neill, Esquire
P.O. Box 2810
Murrells Inlet, SC 29576
(843) 651-8580
Attorney for Defendant
Litchfield Plantation Company, Inc.

Dated: September 6, 2012
Murrells Inlet, South Carolina

State of South Carolina) In the Court of Common Pleas
County of Horry) Fifteenth Judicial Circuit
2011-CP-22-00319

Litchfield Plantation)
Association, Inc., Joseph E.)
Johnston, Thomas Eckard, Carol)
E. Kirby, Robert F. McMahan, Jr.)
and Thomas Martin Phillips,)

Plaintiffs,)

Vs.)

Transcript of Record

Litchfield Plantation Company,)
Inc.,)

Defendant.)
_____)

September 8, 2011
Georgetown, South Carolina

B e f o r e:

The Honorable Larry B. Hyman, Judge

A p p e a r a n c e s:

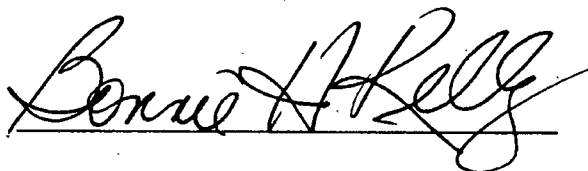
Robert R. McMahan, Jr., Esquire
Mark D. Neill, Esquire
Robert S. Shelton, Esquire
Charles O. Nation, Esquire

Bonnie H. Kelly
Circuit Court Reporter

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Circuit Court for Horry County, South Carolina, on the 8th day of September, 2011.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

A handwritten signature in cursive script, reading "Bonnie H. Kelly", written over a horizontal line.

Bonnie H. Kelly,
Official Court Reporter

Columbia, South Carolina

July 17, 2012

State of South Carolina) In the Court of Common Pleas
County of Horry) Fifteenth Judicial Circuit
2011-CP-22-00319

Litchfield Plantation)
Association, Inc., Joseph E.)
Johnston, Thomas Eckard, Carol)
E. Kirby, Robert F. McMahan, Jr.)
and Thomas Martin Phillips,)

Plaintiffs,)

Vs.)

Transcript of Record

Litchfield Plantation Company,)
Inc.,)

Defendant.)
_____)

November 8, 2011
Georgetown, South Carolina

B e f o r e:

The Honorable Larry B. Hyman, Judge

A p p e a r a n c e s:

Robert R. McMahan, Jr., Esquire
Mark D. Neill, Esquire
Robert S. Shelton, Esquire
Charles O. Nation, Esquire

Bonnie H. Kelly
Circuit Court Reporter

I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO.</u>
Motion/Mr. Neill	5
Response/Mr. McMahan	7
Reply/Mr. Neill	9
Response/Mr. McMahan	10
Reply/Mr. Neill	12
Response/Mr. McMahan	13
Decision by the Court	14
Motion/Mr. McMahan	16
Response/Mr. Neill	16
Decision by the Court	16
Motion/Mr. Nation	18
Response/Mr. Neill	19
Decision by the Court	20
Motion/Mr. Neill	20
Response/Mr. Nation	20
Reply/Mr. Neill	21
Response/Mr. Nation	22
Decision by the Court	23
Motion/Mr. McMahan	23
Response/Mr. Neill	23
Decision by the Court	24
Certificate Page	25

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EV.</u>

NO EXHIBITS INTRODUCED

1 MR. MCMAHAN: Your Honor, when I filed my motion, I
2 filed a memorandum in support that had some exhibits. I
3 don't know if you have it before you, but I have a copy if
4 you do not, because the exhibits might be something ---

5 THE COURT: Did you send it to me --

6 MR. MCMAHAN: Your Honor, we filed that ---

7 THE COURT: I have it.

8 MR. MCMAHAN: --- in June.

9 THE COURT: Okay.

10 MR. MCMAHAN: He has some other motions before we get
11 to the summary judgement.

12 THE COURT: Okay.

13 MR. MCMAHAN: Including one of mine.

14 THE COURT: I think I allowed Mr. Trotter to intervene
15 earlier this week; is that correct?

16 MR. MCMAHAN: That's correct, Your Honor.

17 THE COURT: And what then was left for us to do today?

18 MR. MCMAHAN: Your Honor, there are three discovery
19 motions, one of which is mine; one of which is Mr.
20 Neill's; one of which is Mr. Nations's.

21 THE COURT: Okay.

22 MR. MCMAHAN: And then my motion for summary judgement
23 addressed two separate issues, one of which Mr. Trotter
24 had some interest in, and one of which Mr. Bellamy
25 apparently said he didn't.

1 So you said that you would go forward and hear the
2 second part of ---

3 THE COURT: All right.

4 MR. MCMAHAN: --- of my summary judgement motion
5 today.

6 THE COURT: Okay.

7 MR. MCMAHAN: And that's what's pending.

8 THE COURT: All right. Is it appropriate to take that
9 up when we have these outstanding motions to compel? I
10 mean, are we going to need further ---

11 MR. NEILL: That's going to be one of the things ---

12 THE COURT: --- discovery or what?

13 MR. NEILL: --- we're going to address first, Judge,
14 because that's one of the serious issues in this case.

15 THE COURT: We need to address ...?

16 MR. NEILL: The -- probably the discovery issues
17 first, because that's ---

18 THE COURT: All right. Well, let's hear you then, Mr.
19 Neill. You -- you seem to think that yours is real
20 important. Let's see.

21 MR. NEILL: My motion, Judge, is actually a protective
22 order that we filed back in May. You may recall when my
23 client -- my clients purchased Litchfield Plantation
24 Company back in April, and we had that status conference
25 with you, the in camera review, and issued the order.

1 And that order was due, because we were -- in our
2 inability to obtain our company documents from Mr.
3 Trotter, who was the previous president of the company,
4 and Mr. Nations who was the previous attorney --

5 THE COURT: And I think I took care of that.

6 MR. NEILL: You did.

7 THE COURT: Okay.

8 MR. NEILL: And that order provided that Mr. Nations
9 was going to produce those documents. I think it was like
10 August -- August 7th or something like that.

11 THE COURT: Right.

12 MR. NEILL: In fairness to Mr. Nation, that order
13 didn't -- really didn't get signed until like the 16th or
14 the 17th.

15 So I've been working with Mr. Nation for the last few
16 weeks in getting those documents together. He's been kind
17 enough to assemble a lot of those documents for me, kind
18 of put summaries together with them so that I can easily
19 understand them. And we actually discarded that process
20 of exchanging those documents yesterday.

21 Apparently there's some 20 boxes of these documents,
22 all that pertain to the Litchfield Plantation Company, the
23 Litchfield Plantation Association, and Litchfield
24 Plantation in general.

25 So when we got into this action, immediately we got

1 hit with discovery, we got hit with a request to take Mr.
2 Trotter's deposition. I filed this motion for protective
3 order, in that I couldn't defend my clients without
4 documents that actually belonged to our company

5 In a drastic measure prior to your ruling, I had
6 issued subpoenas to Mr. Nation and Mr. Trotter, and
7 obviously we have now resolved the issue with Mr. Nation.

8 And we're just looking for a protective order that
9 kind of protects us til I can get all these documents from
10 Mr. Nations, we have at least a little bit of time to
11 review these documents, find out what's going on --

12 THE COURT: And your discovery addresses those
13 documents or requires those documents; is that correct?

14 MR. MCMAHAN: Your Honor, my -- understand that there
15 are two separate basises for our claim for relief as far
16 as the voting rights.

17 One of the basises for relief has to do with non-
18 payment. And that is the only basis for our summary
19 judgement motion.

20 The other basis for relief has to do with breach of
21 fiduciary duty and mismanagement of the corp -- of the
22 homeowners association while it was under the control of
23 Mr. Neill.

24 That is the basis of all of my discovery really. I
25 mean, there is no -- the payment issue is not an issue

1 that -- where there is a factual dispute. And in fact,
2 payment is an affirmative defense that has to be pled
3 under our South Carolina Rules. And Mr. -- an answer
4 submitted by the company and Mr. Neill does not plead
5 payment.

6 In other words, they've basically have not even raised
7 the issue that they have made the payments that we're here
8 about.

9 So I am prepared to go forward today with our motion
10 solely based on the fact of the financial default and the
11 lack of the payment.

12 The -- actually all of this discovery that I see,
13 depending upon your ruling today, we may not need. If you
14 rule in our favor today, the discovery that we're now
15 seeking really only goes to another independent ---

16 THE COURT: What are you looking for?

17 MR. MCMAHAN: We are looking for the declare --
18 declaration that the Class B voting rights have expired as
19 a result of their non-payment in January 1 of this year,
20 period.

21 THE COURT: All right. Now, who would have that?

22 MR. MCMAHAN: At discovery we have had any -- we've
23 asked for all sorts of information, but it really relates
24 to the mismanagement issues.

25 THE COURT: Is that a finding you want me to make, or

1 is there a declaration that has been executed by the board
2 of directors or something of that nature?

3 MR. MCMAHAN: No, sir. It's a finding we want you to
4 make based upon the record and the affidavits that are
5 submitted to you.

6 THE COURT: All right. Let me hear you, Mr. Neill.

7 MR. NEILL: Judge, one -- I think Bob misspoke. The -
8 - the actions that they're looking to set aside -- the
9 Class B voting rights -- took place prior to my company's
10 taking over of the company. They were looking to set
11 aside the Class B voting rights as of January 1, 2010,
12 which would have been during Dr. -- Mr. Trotter's reign.

13 One of the issues that they're raising has to do with
14 whether there is a surplus that was due at that time.
15 They basically said on January 1, 2010, there was a
16 surplus, Litchfield Plantation Company didn't pay it,; and
17 therefore, those Class B rights are terminated.

18 Now, we've got a lot of legal arguments that go down
19 that road as to whether that happened or not. But one of
20 the central issues to that is: Was there a surplus or --
21 yeah, a surplus that was due from the Litchfield
22 Plantation Company on January 1?

23 We think there's serious issues of fact related to
24 whether one even existed at that particular period of
25 time. Certainly the financials statements, which Mr.

1 Trotter and Mr. Nations have which relate to the operation
2 of the HOA and the company, will help show whether there
3 was even a surplus due from Litchfield Plantation Company.

4 THE COURT: Well, isn't that a question that still --
5 that has to be resolved, a factual question before ---

6 MR. MCMAHAN: Your Honor ---

7 THE COURT: --- on your motion for summary judgement?

8 MR. MCMAHAN: And that's why there are affidavits that
9 have been filed to -- attached to our memorandum, Your
10 Honor.

11 And understand this, that even though Mr. Neill has
12 filed a motion for protective order to say he doesn't have
13 to answer discovery, he did seek discovery from us. And
14 he did ask us for all of the documents and asked us
15 voluminous interrogatories, all of which we responded to
16 three months ago.

17 THE COURT: Okay. What do you want from him?

18 MR. MCMAHAN: What I -- what I want from him is
19 actually dependent upon your ruling on a motion for
20 summary judgement. If I am not allowed -- if we -- if you
21 rule against us for the motion for summary judgement, when
22 we filed this action, we served with the interrogatories,
23 request for production of documents and a 30(b)(6)
24 deposition notice of his client.

25 And all of that relates to the mismanagement issues

1 about how they ran this homeowners association while they
2 had control of it. There's a completely separate basis of
3 the summary -- of the action, and the only basis for our
4 summary judgement motion is that when the homeowners
5 association ran out of money in December 31st, and they
6 had to go to the homeowners and ask for more money on
7 January 1st, that that in itself, that one set of facts,
8 gives rise to the relief that we seek.

9 And that fact is something -- that all the records
10 that we have from the homeowners association showing they
11 ran out of money -- and also we have an affidavit from Mr.
12 Trotter that is pending before you -- it's the same
13 affidavit that you actually saw on Tuesday, Your Honor --
14 addresses that directly.

15 And we've been served with no counter affidavits.
16 They've had three months after they received all of our
17 documents to do whatever discovery that they wanted to do,
18 based upon what we have already produced, and they've done
19 nothing. They've not served me with any affidavits; they
20 have not sought any discovery other than what they sent to
21 me in May, which I responded to in two weeks.

22 THE COURT: And precisely, what are you seeking in the
23 way of a partial summary judgement? What finding ---

24 MR. MCMAHAN: A declaration that the Class B voting
25 rights for Litchfield Plantation Association have expired

1 because they were unable to make payments that were
2 required on January 1 of this year.

3 THE COURT: All right. Now, tell me, Mr. Neill, is
4 there any question ---

5 MR. NEILL: There is, Your Honor.

6 THE COURT: --- that the payments were not made ---

7 MR. NEILL: There are ---

8 THE COURT: --- and their rights have expired?

9 MR. NEILL: There are huge questions, Judge, just in
10 the documents I have received from Mr. McMahan. I have
11 one financial statement that shows on December 31st, 2010,
12 there was a \$35,000 surplus in the HOA.

13 I also have additional -- additional memorandums from
14 Scotty Trotter ---

15 THE COURT: Have you provided that to him in response?

16 MR. NEILL: I'm sorry?

17 THE COURT: Have you provided any of that in response?

18 MR. NEILL: No, Judge. This came from his discovery.

19 I can't give him my discovery, because I don't have my
20 documents from the former attorney and the former
21 president of the company.

22 I'd love to respond to him, but I got to have the
23 documents in order to do that.

24 MR. MCMAHAN: Your Honor, those motions -- the case
25 has been pending six months. The motions been pending for

1 three. They've had all of our responses for three.

2 You know, summary judgement, they have to come forward
3 to show there was some factual dispute. There -- there's
4 something to try.

5 And there is no factual dispute based upon the
6 evidence that's been filed. I have no idea what Mr. Neill
7 is claiming ---

8 THE COURT: Well, Mr. Neill, doesn't this -- this
9 issue need to be resolved one way or another --

10 MR. NEILL: Yes, sir.

11 THE COURT: --- by November the 19th?

12 MR. MCMAHAN: It does, Your Honor, because that's the
13 next homeowners meeting, and that's when we need to be
14 able to determine what the voting rights of the parties
15 are at the regularly scheduled homeowners meeting coming
16 up; which is why we have pushed this thing so quickly and
17 given him everything so quickly.

18 And the fact that the defendant is unable to -- for
19 some reason -- the orders that you signed back at the
20 status conference says they were supposed to have all the
21 records by August 17th. That would have been 20 days ago.

22 And so he's had plenty of time to come up with an
23 affidavit if he thinks there's some factual issue. They
24 have produced nothing, and we have affidavits in the
25 records, sworn affidavits, to show that there was a

1 default; there's no question about the fact that they had

2 ---

3 THE COURT: All right. Mr. ---

4 MR. MCMAHAN: --- to issue an additional assessment.

5 THE COURT: Mr. Neill, tell me exactly how long it's
6 going to take for you to produce a counter affidavit or a
7 counter exhibit showing me that there is some issue of
8 fact?

9 MR. NEILL: I think Mr. Nations could probably help us
10 with that, Judge. It all depends on when Charles can get
11 me all those documents. And then I would probably need --
12 given the volume of the documents, maybe a week or two
13 weeks to review them. So not -- not very long.

14 (Brief pause.)

15 THE COURT: I tell you what I'm going to do: I'm
16 going to give you until September the 26th, which will be
17 a Monday -- it is a chambers week -- to provide me with a
18 counter affidavit or an exhibit. That will give you
19 essentially 20 days to determine -- I mean, to help me
20 determine whether or not there's an issue.

21 I want yours by five o'clock on Friday. I want copies
22 to be provided to counsel. And you then, Counsel, will
23 have until Wednesday at five to respond to it. Okay?

24 (No audible response.)

25 THE COURT: And I will make a -- a ruling at that time

1 on the motion for summary judgement

2 MR. NEILL: I'm sorry. Which Friday was that, Judge?
3 The one before ---

4 (The Court confers briefly with his law clerk.)

5 THE COURT: It's -- we have a term of -- or an admin
6 week beginning September the 26th.

7 (The Court confers briefly with his law clerk.)

8 THE COURT: Okay. I want you to have it to me by five
9 o'clock on Monday, the 26th.

10 And then, Counsel, I'm going to give you two more ---

11 MR. NEILL: Monday, the 21st? I'm sorry. You mean
12 the 21st, Judge.

13 THE COURT: Is it the 21st or 26th?

14 LAW CLERK: Monday's the 26th of --

15 MR. NEILL: I'm just trying -- which day do you want
16 me to produce the affidavit? Was it -- is it the 21st?

17 THE COURT: The 26th of September, Monday, five
18 o'clock.

19 MR. NEILL: Okay.

20 THE COURT: I'm going to give counsel two more days to
21 respond. It must be by -- by five o'clock be in counsel's
22 hand too.

23 MR. NEILL: Okay.

24 THE COURT: And I'll make a ruling. Okay?

25 MR. NEILL: Okay.

1 MR. MCMAHAN: All right. Your Honor, in which case we
2 have more discovery motions that have to be heard.

3 THE COURT: That need to be heard now.

4 MR. MCMAHAN: Yes, sir.

5 THE COURT: Okay. All right.

6 MR. MCMAHAN: Your Honor, at the time that I filed the
7 summons and complaint and the -- I also served on the
8 defendant interrogatories/document production requests;
9 and noticed a 30(b)(6) deposition.

10 (Hands documents to the Court.)

11 Mr. MCMAHAN: These are copies.

12 THE COURT: All right.

13 MR. MCMAHAN: We've received no response in six
14 months. And we believe that if the defendant is going to
15 contest this factual issue, that they should provide me
16 responses to all of these discovery responses and produce
17 a witness for the 30(b)(6) deposition.

18 THE COURT: All right. Counsel, we've been going on
19 for six months here. Why -- why can't we get answers to
20 the interrogatories?

21 MR. NEILL: Documents, Judge. I don't have the
22 documents. How can I defend my client if I don't ---

23 THE COURT: Well, you're going to have to go through
24 them in the next three weeks. So let's put a deadline,
25 same deadline to have a response.

1 MR. NEILL: Okay.

2 THE COURT: Okay.

3 MR. MCMAHAN: And as far as the 30(b)(6) witness, Your
4 Honor?

5 THE COURT: And how long will it take you to identify
6 a 30(b)(6) witness?

7 MR. NEILL: Oh, that probably won't take us too long,
8 Judge. I mean -- I would just ---

9 (The Court and Mr. Neill talking simultaneously.)

10 THE COURT: Can you do it in two weeks?

11 MR. NEILL: --- not have the deposition taken until
12 after we've had a chance to review the documents.

13 THE COURT: Can you do it in two weeks from -- from
14 today's ---

15 MR. NEILL: Oh, absolutely. We can identify someone
16 within two weeks.

17 THE COURT: All right. Counsel, if you would prepare
18 an order in keeping with what I have ruled here today.
19 All right.

20 MR. MCMAHAN: Thank you, Your Honor. I think there
21 was actually one more motion Mr. Nations filed.

22 THE COURT: All right. Then Mr. Nation has a motion
23 in regard to what?

24 MR. NATION: It's a -- it's the very tail of the -- of
25 what was disposed of in your chambers from an order for

1 which I'm very appreciative.

2 I made another motion which I'm not sure Mark wants to
3 handle today with regard to discovery from Mr. Trotter
4 but, Your Honor, the -- the reason that the documents were
5 not delivered earlier to Mr. Neill, obviously, is based on
6 their obligation and my need for proof -- and I very much
7 thank you for the order that documented that question.

8 You're talking about five years of boxes and
9 documents. I've started that process and I will cooperate
10 with Mr. Neill to give him whatever he needs to answer Mr.
11 McMahan's questions with regard to discovery and the rest.

12 I filed a motion for protective order which led to an
13 order which got me ---

14 THE COURT: Okay.

15 MR. NATION: --- to -- to -- to give over to Mr. Neal
16 what he needs. And the question of my expense and time
17 and effort, Your Honor, was not addressed in the order.
18 The order was prepared, handed up to the Court in camera.
19 I understand that.

20 I don't think -- I know I didn't have an opportunity
21 to look at it. And -- and the question really is whether
22 or not Litchfield Plantation Company as a client that I
23 had all of their -- not all of their records, but a lot of
24 records, five years worth of things -- which needs to be
25 culled and sorted out -- happy to do that and pass it to

1 Mr. Neill -- whether or not compensation's owed to me and
2 my firm for the effort ---

3 THE COURT: Isn't that company defunct now?

4 MR. NEILL: No, Your Honor, no. My -- my clients
5 bought it with purpose of restructuring the debt and
6 company ---

7 THE COURT: Well, are your clients going to pay him?

8 MR. NEILL: What's that?

9 THE COURT: Are you clients going to pay him for doing
10 this work, sorting through it and all?

11 MR. NEILL: Well, they'd rather not, Judge.

12 THE COURT: Well, then, you know, he can just bring
13 the boxes and hand them to you.

14 MR. NEILL: He could do that, Judge, and that will be
15 fine.

16 THE COURT: Well, Mr. Nation, if I were you and they
17 weren't going to compensate me, I'd bring them and hand
18 them over and say, "Here you are."

19 MR. NATION: I just -- I'm not trying to be
20 unreasonable, Your Honor, with regard to compensation
21 question. There is an obligation to turn over documents
22 in -- in some reasonable format so that he'll understand
23 better. Of course, I -- I'm -- I'm trying to do the duty
24 -- my duty as an Officer of the Court to a fellow brother
25 with regard to making sure he understands the work

1 product. At the same time, it's difficult to do that if
2 I'm not going to be compensated so ...

3 THE COURT: Well, I understand that. And he tells me
4 that his clients aren't willing to -- to compensate you.
5 I don't know if I have authority in this circumstance to
6 order them to do it. But if they're not going to
7 compensate you, if I were you I'd just bring them and say,
8 "Here they are," and let Mr. Neill worry about it.

9 I think when -- as this deadline nears, they may
10 decide that they need the help -- your help in going
11 through it. All right.

12 MR. NATION: Thank you, Your Honor.

13 THE COURT: Uh-huh.

14 MR. NEILL: There's one other issue, Judge, that we
15 haven't addressed, and that was when I issued the subpoena
16 to Mr. Nations, I also issued a subpoena to Scotty Trotter
17 as well, which Charles has filed a motion for protective
18 order with regard to that subpoena.

19 Yes, I -- I'm very happy to have Charles's documents,
20 but I also want any other documents that Scotty Trotter,
21 past president, has in his possession as well.

22 THE COURT: Who represents Mr. Trotter?

23 MR. NEILL: Mr. Nations does.

24 MR. NATION: Past -- you know, with regard to the
25 documents, Your Honor, anything that has to do with

1 Litchfield Plantation Company, obviously, that is covered
2 under the order already issued.

3 I understood Mr. Neill's request to Mr. Trotter for --
4 for documents. He was acting as a developer of -- of the
5 real property -- real properties owned by Litchfield
6 Plantation Company. A variety of agreements were entered
7 into by Mr. Trotter, and his companies were marketing and
8 development.

9 There is a document now in possession of Mr. Neill
10 which outlines obligations -- financial obligations for
11 the reimbursement of work product that goes, obviously, to
12 development.

13 If Mr. Neill is not looking for documents owned by Mr.
14 Trotter or his companies which relate to the development
15 and future development at Litchfield, everything else has
16 been handled in the previous order issued by the Court.

17 MR. NEILL: Judge, I mean, if we just can get a
18 statement that all the documents in Mr. Trotter's
19 possession are the same as what are in Mr. Nations's
20 possession, I think that will be fine.

21 What I'm concerned about though and what I think I'm
22 kind of hearing is -- is that there were numerous
23 agreements that Mr. Trotter -- Mr. Trotter was doing a lot
24 of self-dealing within this -- with -- between his
25 companies and the Litchfield Plantation Companies. And

1 they want to kind of protect these self-dealing documents.
2 They want to say, Well, you know, those really belong to
3 my company. Even though Litchfield Plantation Company may
4 be a party to them, we don't want to disclose them.

5 Obviously we're entitled to those and anything that he
6 has in his possession in regards to the Litchfield
7 Plantation Association, because he was the -- the
8 president of that board as well.

9 MR. NATION: I'm not -- Your Honor, with regard to
10 Litchfield and Litchfield Plantation Association
11 documents, that's not an issue.

12 I'll give you an example of what Mr. Trotter is trying
13 protect. He would hire, for instance, an engineering firm
14 in -- in -- in Myrtle Beach that is now, I think, gone
15 under. Spent maybe \$120 to \$140,000 to do a water and
16 sewer development plan. Those documents were paid for by
17 Mr. Trotter and under agreements to be reimbursed by
18 Litchfield Plantation Company.

19 Litchfield Plantation Company doesn't even want to pay
20 me to produce the documents, but wants to take work
21 product, paid for and owned by Mr. Trotter, for
22 development at Litchfield. And those are the types of
23 documents I'm trying to protect, documents for which Mr.
24 Trotter has paid for out of his own pockets to develop the
25 property for the benefit -- mutual benefit, clearly -- for

1 Mr. Trotter and Litchfield.

2 Now, obviously, who knows when that development will
3 ever occur, if it does occur.

4 THE COURT: Well, I'm going to allow him to -- to get
5 the documents with a caveat the documents shall not be
6 used for any purposes other than this litigation. Okay.

7 They shall not be used for future development or
8 otherwise. And at the end of this litigation, will be
9 returned to Mr. Trotter. Okay.

10 MR. MCMAHAN: One last issue, Your Honor. Mr. --
11 because of Mr. Neill's protective order, our subpoena and
12 notice of the deposition of Mr. Trotter was postponed.
13 Are we now free to go forward with that deposition?

14 THE COURT: I see no reason why you cannot.

15 MR. MCMAHAN: Thank you, Your Honor.

16 MR. NEILL: I would just ask that it happens after the
17 documents are produced and we've had the chance to review
18 them, Judge, so that they would not happen until after the
19 26th.

20 MR. MCMAHAN: Don't have a problem with that, Judge.

21 THE COURT: No problem.

22 MR. MCMAHAN: If they give us another affidavit for
23 Mr. Trotter, I certainly would like to take his deposition
24 before we have any consideration of the motions.

25 MR. NEILL: Obviously, I'm going to have a problem

1 with that, Judge. I mean, we've got give a rebuttal after
2 they do and it may come from Mr. Trotter. I don't know at
3 this point. Depends on what the documents tell me.

4 THE COURT: Well, I'll deal with that if the problem
5 arises. Okay.

6 MR. MCMAHAN: Thank you, Your Honor. But the 26th,
7 I'm allowed to take his deposition.

8 THE COURT: Right.

9 MR. MCMAHAN: Thank you, Your Honor.

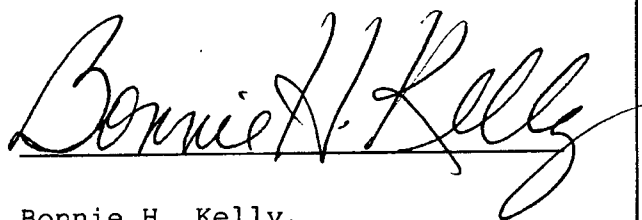
10 THE COURT: Okay, gentlemen. Thank you.

11 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Circuit Court for Horry County, South Carolina, on the 8th day of November, 2011.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

A handwritten signature in cursive script, reading "Bonnie H. Kelly", written over a horizontal line.

Bonnie H. Kelly,
Official Court Reporter

Columbia, South Carolina

July 17, 2012

ORIGINAL

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2011-CP-26-00319

LITCHFIELD PLANTATION)
ASSOCIATION, INC.,)
JOSEPH E. JOHNSTON,)
THOMAS ECKARD, CAROL E.)
KIRBY, ROBERT F.)
MCMAHON, JR. AND THOMAS)
MARTIN PHILLIPS,)

Plaintiffs,)

Transcript of Record

vs.)

December 8, 2011

LITCHFIELD PLANTATION)
COMPANY, INC.,)
)
Defendant.)

B E F O R E:

Honorable Larry B. Hyman
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S:

Robert F. McMahan, Jr., Esquire
Attorney for Plaintiff

Mark David Neill, Esquire
Attorney for Defendant

Kay H. Richardson, CVR
Circuit Court Reporter

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E X H I B I T S

<u>No.</u>	<u>ID</u>	<u>EV</u>
(There were no exhibits marked during the hearing.)		

1 (December 8, 2011.)

2 THE COURT: Let's see what we have here this morning.
3 Litchfield Plantation versus Litchfield Plantation Company.
4 Mr. Baxter, Mr. Chandler, Mr. Corrigan, Mr. Bellamy, Jr.;
5 everybody here? Okay. Whose motion is it?

6 MR. NEILL: My motion, Your Honor.

7 THE COURT: All right, Mr. Neill.

8 MR. NEILL: May I approach, Your Honor?

9 THE COURT: Certainly.

10 MR. NEILL: I'm just going to go ahead and hand you up
11 just a short memorandum that kind of summarizes everything up.

12 THE COURT: Thank you.

13 MR. NEILL: Judge, this is the kind of document
14 intensive, so I'm gonna kind of be going back and forth giving
15 you stuff as we go along, to just kind of help things along.

16 THE COURT: All right.

17 MR. NEILL: This lawsuit involves Litchfield Plantation.
18 Litchfield Plantation is a development located in Litchfield
19 Beach. It is really an extraordinary development. It's
20 located on the Intracoastal Waterway; it's a historic rice
21 plantation, old oak trees, those type things.

22 THE COURT: I'm familiar with it.

23 MR. NEILL: What's unusual about this development is that
24 about half of it, more than half of it is still undeveloped.
25 It's probably about the only parcel of undeveloped land down

1 there. And like any other development, it is formed through
2 covenants and restrictions and bylaws that were filed. What's
3 a little bit unusual about this particular one is back in
4 2005, they went back and did a revision of those covenants and
5 restrictions and bylaws whereby the Litchfield Plantation
6 Company, who is the developer, and Litchfield Plantation
7 Association who runs -- who is responsible for the
8 association, and one hundred percent of the owners got
9 together and amended these things. The only time that I know
10 of that probably this has ever been done. And like any of
11 these documents, it gave the developer certain rights and it
12 gave them declarant's rights and what they call Class B voting
13 rights, which I'm sure Your Honor is familiar with. Of
14 course, this gave them control over architectural design and
15 those type of things. It also gave them voting control over
16 who was elected to the board of directors, the Class B votes
17 basically were the total number of the A votes plus one.

18 What happened here was that in January of this year, it's
19 kind of uncontradicted that the Litchfield Plantation Company
20 started to run into some financial problems. The market had
21 taken a toll on it and the company had gone into decline. At
22 that point, it's the belief of my clients the five plaintiffs
23 got together and saw an opportunity to try and take control of
24 homeowner's association, seeing that the company was in
25 decline and may not be able to defend itself. In doing so,

1 they called a special meeting. They had a special meeting,
2 which we believe is in direct violation of the covenants and
3 restrictions -- and we're gonna get to that as we go along --
4 where they elected themselves, the five board members, what
5 they call the board of governors, which governs the
6 association, and also declared the Class B voting rights of
7 the declarant were thereby terminated as of December 31st of
8 2010. What they weren't expecting at that time was that
9 another entity came in and bought Litchfield Plantation
10 Company and they came in and bought the Litchfield Plantation
11 Company with the idea of coming in and restructuring the
12 company. This new group had the means and the ability to
13 restructure the debt and the problems that the company was
14 having. When this was realized, this action followed. This
15 was an action, it's a declaratory judgment action brought by
16 these five plaintiffs, also claiming as an act on behalf of
17 the association declaring them to be the board of the
18 association and asking the Court to declare that the Class B
19 voting rights of the developer had now been terminated as of
20 December 31st, 2010.

21 What I'm gonna do, Your Honor, is I'm gonna kind of deal
22 with those arguments separately. The first one we're gonna
23 deal with as them as the board. As Your Honor knows any
24 meeting is ---

25 MR. MCMAHAN: Your Honor, I hate to interrupt counsel but

1 counsel's motion here for summary judgment has nothing to do
2 with the board. He only moved for summary judgment on the
3 Class B share period and did not move for summary judgment on
4 the first cause of action. So everything that is being brought
5 up about the board election is not the subject of this motion
6 that he filed.

7 MR. NEILL: Your Honor, it's important because at that
8 meeting, that's where they declared that the Class B voting
9 rights were ---

10 THE COURT: All right. I'll take it for historical
11 information.

12 MR. NEILL: The first thing, Judge, luckily for us, we
13 have these covenants and restrictions and bylaws that lay out
14 all the rules as to how all this is to take place. Okay. The
15 first thing I'm gonna pass up to Your Honor is the bylaws for
16 the association. The bylaws for the association give us the
17 rules by which a special meeting can be called.

18 THE COURT: All right. Now, these say amended and
19 restated bylaws. Were these -- when were these enacted and by
20 ---

21 MR. NEILL: These are the ones that all of the homeowners
22 and everyone agreed to back in 2005.

23 THE COURT: All right.

24 MR. NEILL: So, these effectively rescinded any prior
25 ones and are the current ones that everyone is operating under

1 today.

2 THE COURT: Okay. All right.

3 MR. NEILL: Okay.

4 THE COURT: This was when the company was strong and
5 everybody agreed?

6 MR. NEILL: This was back in 2005 and all of the
7 homeowners, a hundred percent of them, signed signature sheets
8 that went and were an attachment to this when it was filed
9 with the Register of

10 THE COURT: Okay.

11 MR. NEILL: So, there's no question of that happening.

12 If you turn to tab number one that I have marked there,
13 Judge, it's on page 11, paragraph number three, it says notice
14 of meeting. It says written notice of each meeting of the
15 members shall be given or at the direction of the secretary or
16 persons authorized or qualified to call a meeting by mailing a
17 copy of such notice with proper postage affixed, at least
18 fourteen days but not more than thirty days before such
19 meeting to each member entitled to vote at the meeting.

20 South Carolina law is clear on this subject and I've got
21 -- article to pass up to you and it states when a time or
22 manner of giving notice to the meetings is prescribed by the
23 constitution, articles of the association or bylaws of an
24 association, it is essential to the validity of the acts done
25 at a meeting that the notice thereof shall be given in the

1 mode prescribed. Failure to give proper notice will render
2 the proceedings at a meeting invalid.

3 THE COURT: Thank you.

4 MR. NEILL: Now, we just looked at the bylaws and we know
5 what the rules are. They say we've got to give notice by
6 mail, we've got to give at least fourteen days, no longer than
7 thirty days. The various affidavits submitted to the Court --
8 there were basically three affidavits submitted to the Court,
9 all three of which dealt with how they gave notice for this
10 particular meeting.

11 The first affidavit deals with that of Capers Johnson and
12 it says that in February 2011 -- and by the way, the meeting
13 took place on February 26th of 2011 -- I oversaw the
14 notification of the property owners of the special meeting of
15 the members of Litchfield Plantation scheduled for February
16 26th, 2011. I sent notice to all property owners whose email
17 addresses I had at the time of each notice. For those
18 property owners whose email address I did not have, notice was
19 given by either hand-delivery or by U.S. Mail itself, Cookie
20 Laday, I'm not sure if I'm saying that right, Carol Kirby,
21 Maria Cartwright, Ricky Bruce and Joe Johnston. The second
22 affidavit you have there, Your Honor, is that of Joseph
23 Johnston. And paying attention to paragraph number two, it
24 says on February 15th, 2011, in accordance with the amended
25 and restated bylaws of the association, I personally delivered

1 signed and dated notices for a special meeting of members for
2 the association from thirteen members of the association to
3 Scott Trotter, who was the president of the association who
4 was also the president of the Litchfield Plantation Company.
5 As you'll notice that February 15th notice was only allowing
6 eleven days before the meeting and would not meet the
7 requisite required of the necessary fourteen days. In
8 addition to that, the next affidavit of Carol Kirby in
9 paragraph number three that says I personally sent by email or
10 hand delivered -- and I'll skip through the middle part. The
11 part that's important is Allan Kidston, February 15th, 2011,
12 Allan Kidston was also an officer of the Litchfield Plantation
13 Company and also they did not receive the fourteen days notice
14 as required under the special amendments. For those reasons,
15 we feel that the notice that was given for that meeting was
16 improper and that the effect of that meeting should not be
17 given substance.

18 But more importantly, Your Honor, the Class B voting
19 rights, the Class B voting rights are of course what allows
20 the developer the right to control over the property so that
21 he can properly develop it and can sell it off in the future.
22 Once again, they declared on their own, December 31st of 2010,
23 that the Class B voting rights had been terminated, okay, and
24 if you'll look ---

25 THE COURT: At the special meeting?

1 MR. NEILL: Correct, at the special meeting. If we look
2 to the covenants and restrictions -- that's a copy of it, Your
3 Honor -- this was actually specifically dealt with in the
4 covenants and restrictions, so we don't have to guess. All we
5 have to do is follow what the covenants and restrictions say.
6 If you'll turn to tab number two that I have there which is
7 page twenty-five, this is the paragraph that deals with under
8 what circumstances do the Class B voting rights get
9 terminated. It spelled it out specifically. And of course at
10 first they spell out that the declarant has the Class A votes
11 plus one vote. And it says that Class B membership shall
12 cease and be converted to a Class A membership upon the
13 earlier of the following: One, an initial period commencement
14 on January 1, 2005 and ending December 31st, 2010, provided
15 this initial period shall be automatically extended for in
16 excess of periods of five years provided that in each five-
17 year period prior to automatic extension, the declarant has
18 sold one hundred or more lots including the number or dwelling
19 units designated in connection with a bulk sale of non-
20 affiliated owners. Numbers two and three, which basically
21 says that when they gave -- when they give those rights over
22 or if they've sold ninety percent of the lots under this
23 declaration, there's no dispute that those two didn't come
24 into play. Okay. So, we're just dealing with number one. If
25 you jump back to page twenty-six, it says the condition for

1 automatic five-year extension of the Class B share period
2 provided in B1, that's the paragraph we just talked about,
3 shall be conclusively established by the declarant recording
4 an affidavit stating the declarant has sold one hundred or
5 more lots to non-affiliated owners in the proceeding five
6 years. A copy of such recorded affidavit shall be provided to
7 the association.

8 So basically what this statement -- I'm paraphrasing,
9 Judge -- is that the Class B voting rights run until December
10 31st, 2010. They're extended another five years if an
11 affidavit is filed by them saying they've sold a hundred lots.
12 Then the same thing will happen again in 2015. If they've
13 sold a hundred lots between that five-year period, they can
14 extend it again.

15 Well, on December 3rd of 2010, the developer did just
16 that. They filed an affidavit ---

17 THE COURT: Where was the filing?

18 MR. NEILL: When was it?

19 THE COURT: Where?

20 MR. NEILL: The Georgetown Register of Deeds.

21 THE COURT: Okay. All right.

22 MR. NEILL: They filed an affidavit which extended these
23 rights. So they complied with what they had to do in order to
24 sell -- continue these rights for another five years. There's
25 no other provision in here that says that these Class B voting

1 rights are terminated in any other action that they take.
2 They only specified three specific events by which that would
3 take place. One of the contentions that the Plaintiffs have
4 in this case is that at some point, we don't know when, we're
5 not sure how much, they say a shortfall occurred which my
6 client was obligated to pay. We don't dispute that if there
7 is a shortfall, we're obligated to pay it. Okay. But what
8 they contend is that the moment we didn't pay that, our Class
9 B voting rights went away, that that very next day, they're
10 gone.

11 THE COURT: All right. Describe shortfall to me. A
12 shortfall in ---

13 MR. NEILL: Shortfall is ---

14 THE COURT: --- association dues or what?

15 MR. NEILL: The way this thing is set up is that they had
16 an amount set into the amended declaration that says that the
17 homeowners -- as long as the Class B period was in effect, the
18 homeowners would pay \$1800 a year and that was gonna be
19 adjusted for inflation, I think it was maybe like five percent
20 increase per year. So what they do is there would be
21 operating expenses for the association and whatever those
22 operating expenses were, they would deduct out the \$1800 they
23 collected from all the homeowners and then they would pay the
24 shortfall. Okay. And their argument is that the second we
25 didn't pay that shortfall, those rights automatically went

1 away. That there was no other redress that was provided for
2 in these covenants and restrictions. Well, if Your Honor will
3 turn to tab number three for me in the covenants and -- in the
4 bylaws, I'm sorry, the bylaws, you will see that they
5 contemplated this exact same scenario under paragraph three at
6 the bottom, voting rights, states during the Class B share
7 period, the Class B member shall have the number of votes
8 equal to all Class B members plus one vote provided the
9 declarant shall not have a vote for any lots on which the
10 declarant is more than sixty days in arrear with respect to
11 all monies owed to the association. So, the remedy they
12 provided wasn't that the Class B voting rights are gone, it
13 just says that if a sixty-day period goes by and you don't pay
14 your dues, your voting rights are suspended until you catch up
15 with those payments which would be the same result if any
16 other homeowner within Litchfield Plantation would have. This
17 was further supported by an affidavit of Robert Dibble.
18 Robert is the attorney who represented the association in the
19 negotiation of these covenants. And I'm not sure if Your
20 Honor knows Robert, he was a long-time attorney with the
21 McNair Law Firm down here in Georgetown and is very well
22 respected. And if you look at his affidavit, primarily,
23 starting at paragraph eight, page two, he deals with this
24 topic and whether or not -- what was the remedy if the
25 Litchfield Plantation Company did not pay a shortfall. It

1 says one on of the issues discussed by me and Mr. Van Treese,
2 Mr. Van Treese was representing the Litchfield Plantation
3 Company at the time, was the termination of the Class B
4 membership of Litchfield Plantation Company. So, on behalf of
5 Litchfield Plantation Associated Incorporated, I wanted the
6 Class B of Litchfield Company, Inc. terminated in the event
7 the Litchfield Plantation Company, Inc. failed to pay dues,
8 assessments for the budget shortfall. Mr. Van Treese on
9 behalf of Litchfield Plantation Company refused to agree to
10 this request. And seriously -- and serious and sometimes
11 acrimonious negotiations, Mr. Van Treese and I agreed that
12 Class B membership would only be terminated in the event of
13 the three scenarios which are set forth of pages twenty-five
14 and twenty-six of the amendments. Okay. So, I don't really
15 know if this really comes into play because all you got to do
16 is really look at the clear terms of what the agreement says
17 and it provides only under these three circumstances but it's
18 just further proof that they never envisioned nor did the
19 covenants and restrictions warrant that their Class B voting
20 rights would be terminated in the event that they didn't make
21 a shortfall.

22 Now, you might be saying why is this important. It's
23 important because of the reason my client bought the
24 Litchfield Plantation. Their whole purpose in buying the
25 company was to go in there, restructure the debt and make it

1 financially sound. The problem we've got is since they will
2 not recognize our voting rights, they have taken over control
3 of the board. They have taken control over the architectural
4 review board. And the other problem is that by terminating
5 the Class B voting rights now they say instead of us having to
6 pay the shortfall, we have to pay regular dues just like
7 everyone else and all they do is take the acreage, divide it
8 into fourth-acre lots and for every quarter-acre you've got to
9 pay dues just like everybody does. You can only imagine, it
10 is next to impossible to get a lender or anyone to restructure
11 that debt when you are not in control over what can be built
12 there, how it can built and to know that there's gonna be this
13 entity there that's gonna interfere with that process and
14 that's why it is critically important to us, Judge. We want
15 to have the ability to go in there and do that.

16 THE COURT: Are they being assessed \$7200 an acre for the
17 undeveloped land?

18 MR. NEILL: They are now, yes, sir. They've started
19 doing that since they declared the Class B voting rights
20 terminated. We've been starting to get invoices from them for
21 those amounts. And of course, we're not gonna pay those until
22 we know that if we pay a shortfall, we're gonna get those
23 rights back. That's why it's important. We've already had
24 three deals, three deals that were ready to close that had
25 they closed, would've ensured the financial stability of the

1 Association for years to come and would have taken care of all
2 these problems but the problem is is that they won't tell us
3 what the shortfall is, they won't tell us if one existed, they
4 won't tell us what that amount is and they won't tell us that
5 if we pay it, we'll get our rights back. That's why it's
6 important. Instead what they've been doing is specially
7 assessing all of the homeowners and getting them to pay these
8 bills instead of doing the right thing and telling us what the
9 shortfall is so that we can restructure the debt, pay it and
10 continue on.

11 The other thing that's important that I think the Court
12 needs to understand is that there are numerous mortgages
13 between Litchfield Plantation Company and the Association. If
14 what they achieve is correct, the properties that are in
15 foreclosure now due to these debt problems will never get
16 restructured and those notes which amount to somewhere in the
17 \$800,000 range will be extinguished and the homeowners will be
18 forced to pay those bills as well. There will be a special
19 assessment in the future to cover that \$800,000 loss. You
20 know, my client is trying to get in there, do the right thing,
21 he does want -- he wants to pay; if there's a shortfall he
22 wants to pay it but he needs to know what it is so he can pay
23 it, get his voting rights back so that he can deal with this
24 property. Because without these Class B voting rights,
25 there's no developer nor any bank that will give them any

1 money to develop this property so that it can later be sold
2 and that would be to the benefit of all the homeowners. We
3 feel like this was an opportunity by these five board members
4 to try and make it so that this land could never be developed.
5 That's why we're seeking an order today and all I'm asking you
6 to do is follow the covenants and restrictions, you know,
7 follow them and then probably get an order saying that we need
8 to do an accounting to find out what the shortfall is and
9 restore our Class B voting rights. Once we're told what the
10 amount is, we've got sixty days to pay it. If we don't, we
11 lose our voting rights and if in five years, guess what, we
12 don't sell a hundred lots, those rights are gonna go away.
13 But we want the opportunity to pay that shortfall, get those
14 rights back so that we can develop this property and that's
15 what we're asking the Court for today and I don't think
16 there's any issues of fact that involve this whatsoever. All
17 we have to do is follow the covenants and restrictions which
18 says that if there is a shortfall, we have the right to know
19 what it is, we have the opportunity to pay it and, if we don't
20 pay it within sixty days, our voting rights are suspended.
21 Class B voting rights are not terminated which is what they
22 want. They don't want us ever coming back and being able to
23 develop and sell this land.

24 THE COURT: Tell me what you pray for in your motion?

25 MR. NEILL: We're looking for an order granting summary

1 judgment to us that the Class B voting rights are still in
2 effect.

3 THE COURT: As to that issue?

4 MR. NEILL: Correct.

5 THE COURT: All right.

6 MR. NEILL: That way, we can probably get an accounting
7 done, find out what that amount is and given the opportunity
8 to pay these so we can continue to develop this property.

9 THE COURT: All right.

10 MR. NEILL: Thank you, Judge.

11 THE COURT: Okay. Ladies, gentlemen, who will speak for
12 the opposing parties or do I hear from everyone? How are we
13 gonna do this?

14 MR. MCMAHAN: Your Honor, I believe I'm the only one who
15 will be speaking for the Plaintiffs in this case.

16 THE COURT: Very well.

17 MR. MCMAHAN: Doug Baxter is only here because about a
18 month ago, Mr. Neill amended his answer and counterclaims for
19 a second time and asserted personal counterclaims against the
20 board members for damages and the E&O carrier appointed Doug
21 to represent us in these counterclaims.

22 THE COURT: All right. That's another issue, though;
23 it's not before us.

24 MR. MCMAHAN: That is, that is completely another issue,
25 Your Honor.

1 THE COURT: Okay.

2 COURT REPORTER: Your name, please.

3 MR. MCMAHAN: Robert McMahan.

4 Your Honor, I'm gonna start kind of from scratch here
5 because I know you also have pending before me my motion for
6 summary judgment which has not yet been ruled upon.

7 We filed this action to terminate the class -- to have
8 the declaration that the Class B voting rights were terminated
9 on two different grounds. One of the grounds was the
10 financial default of the defendant.

11 THE COURT: The shortfall.

12 MR. MCMAHAN: The shortfall. The homeowners are only
13 allowed to be assessed a certain amount of money per year.
14 That assessment date is April 1 of every year. That is set
15 forth on the bylaws that is set -- has been practiced the last
16 five years every since this homeowners association's documents
17 were amended in 2005. On April 1, 2010, the homeowners ---

18 THE COURT: Let me just -- and I don't mean to interrupt
19 but just let me ask you something.

20 MR. MCMAHAN: Yes, sir.

21 THE COURT: It would seem that the bylaws set forth the
22 remedy for termination of the Class B voting rights. Three
23 scenarios, you've described a shortfall, wouldn't a remedy in
24 that case be the remedy that would be available under contract
25 law. That is sue them over it.

1 MR. MCMAHAN: Well, Your Honor, that's the problem in
2 part. And understand that there are two separate bases for
3 which we believe that the Class B voting rights have been
4 extinguished.

5 THE COURT: Okay.

6 MR. MCMAHAN: The covenants which establish the Class B
7 voting rights contain no remedy set forth in those covenants
8 for the breach of their financial obligations. And we believe
9 that that -- their complete financial default coupled with
10 their breach of fiduciary duties to the association should
11 give rise to a declaration that the shortfall had -- that the
12 Class B voting rights and been extinguished. Mr. Neill has
13 not addressed the other set of issues that we believe give
14 rise to this. Understand, Your Honor, that this homeowners
15 association has been under control of the defendant at the
16 time that the shortfall occurred. Their assertion that they
17 had no ability to determine the amount of the shortfall is
18 absolutely ludicrous given the fact that at the time the
19 shortfall occurred on January 1 of 2010 that their president
20 of their company, Mr. Scott Trotter was also president of our
21 association. I have filed, of course, an original brief, Your
22 Honor, and that brief has a number of affidavits attached to
23 it. I don't know if the Court has that before them or not.

24 THE COURT: I do.

25 MR. MCMAHAN: And in that affidavit of Mr. Scott Trotter,

1 he sets forth that he was president of Litchfield Plantation
2 Company and that he was both president of Litchfield
3 Plantation Association at that time. He sent letters to the
4 homeowners over the course of the year alerting them to the
5 fact that the company was basically going broke and that they
6 were going to be unable to pay their share. And as a result
7 of that, he assessed then homeowners of January 1 of 2010 that
8 -- for an amount of money sufficient to cover their shortfall.
9 The homeowners didn't have control of the homeowners
10 association at that point in time, Mr. Trotter did and Mr.
11 Trotter was the president of the defendant at that particular
12 time. The backdrop of all this, Your Honor, is that this
13 company that Mr. Neill represents, and I understand that his
14 buyer only came in in April but this company has a long
15 history of abusing this homeowners association before any of
16 this took place. They have taken over \$700,000 worth of the
17 homeowners association money and used it to fund their own
18 operation. The money that was taken is something that the
19 homeowners association is not allowed to do by their
20 covenants. The covenants set forth the purposes of the
21 homeowners association. Lending money is not one of them.
22 The covenants and bylaws also state that the only
23 authorized use of the homeowners association money is to fund
24 the expenses of the homeowners. They in effect have used the
25 homeowners association money as a piggy bank from which they

1 can use to take money to fund their own operations. This is
2 why the homeowners association doesn't have any money. And as
3 you'll see from the affidavit of John Boselli, when the
4 homeowners were actually given control of the homeowners
5 association in June of this year, the reserve account had \$600
6 in it and virtually no money in the bank.

7 Now, we don't just say that their financial default is
8 the only reason for their inability to -- for the declaration
9 that the Class B period ends but also because of their breach
10 of fiduciary duties to the homeowners association. This is
11 truly the fox in charge of the hen house here. They are doing
12 everything they can to keep their company afloat at the
13 expense of us and they've admitted that. This is an admission
14 in their own pleadings. They filed an affidavit of Mr. Scott
15 Trotter which he cites a handout that he gave to the
16 homeowners in February and in that handout it describes all of
17 these notes and mortgages. If you take a look at the notes
18 and mortgages, Your Honor, you will see that they are
19 unusually favorable to the company. They take this money from
20 the homeowners association and only charge a prime rate of
21 interest with no interim payments.

22 THE COURT: Let me just ask you one thing and I want to
23 make sure that, Mr. McMahan, that I'm understanding that
24 you're telling me. If we suppose for argument sake that
25 everything you're telling me is true.

1 MR. MCMAHAN: Yes, sir.

2 THE COURT: That this group, this company, while it was
3 in charge of the board raided the homeowners funds, that
4 they've breached their fiduciary duty, if they did all those
5 things, all of those things, don't the bylaws though which
6 were amended in 2005 say we take your Class B rights upon the
7 occurrence of A, B or C, that's what we do, and aren't you
8 creating a new remedy here? Of course, if those things are
9 true, you certainly or your property owners certainly have a
10 cause of action and a remedy for damages against this company?
11 If those things are true, I'll be the first to say yes, you
12 do, but aren't you asking the Court to step outside the
13 articles and to give you this new remedy or this equitable
14 remedy of taking their Class B voting rights from -- how do I
15 do that? I mean, how does this Court, especially on summary
16 judgment say what you've done is so egregious that in addition
17 to money damages or whatever, I'm gonna take your Class B
18 rights as well and I'm gonna give them to someone else; how do
19 I do that?

20 MR. MCMAHAN: Your Honor, the South Carolina Supreme
21 Court has ruled and held that the legal remedy has to be just
22 as efficient as the equitable remedy. And if you look at the
23 brief that I submitted the other day -- I hand-delivered a
24 copy to the Court -- there are three cases cited from the
25 State Supreme Court. And in this case, a legal remedy is

1 worthless, the company is broke. They have no money.

2 THE COURT: But don't they have a bunch of property
3 though?

4 MR. MCMAHAN: That's secured by mortgages, all of which
5 are in foreclosure. They -- there's no equity left in that
6 property. As a matter of fact, if you'll look at the brief
7 that I submitted with my motion for summary judgment you will
8 see a listing of all the properties that are in foreclosure,
9 what properties have already been sold, Your Honor.

10 THE COURT: If that were true, why would this company
11 even care what we did?

12 MR. MCMAHAN: Your Honor, quite frankly, we have no idea;
13 we don't understand that either.

14 MR. NEILL: Like I said, Judge, because we are trying to
15 restructure this. We are trying to make this company viable
16 again but this is what's holding us up. This is the only
17 thing ---

18 THE COURT: I mean, just the mechanics of it, the fact
19 that we have this dispute would suggest to me, Mr. McMahan,
20 that there's got to be some value there, there's got to be
21 something or we wouldn't be fighting about it.

22 MR. MCMAHAN: And, Your Honor, that's what we don't
23 understand. They have not done anything to resolve any of the
24 foreclosures. Every one of them is continuing to go along.
25 They -- obviously, they have a right to finish the -- solve

1 those foreclosures simply by paying the debts and they have
2 not done that. You know, the Court has held in Millken, the
3 Court has held in Watson and the Court has held in Chisolm,
4 that if the legal remedy has not effective -- that it is not
5 an effective remedy, then an equitable remedy is appropriate.
6 And it's in fact a predecessor to yourself who has heard other
7 -- another case about this same company abusing this
8 homeowners association, Judge, Alfred Eltzroth in 1986, and
9 the order is pending before you, also found that their conduct
10 was unconscionable, that they had breached their fiduciary
11 duties and that the only appropriate remedy was an equitable
12 remedy.

13 THE COURT: But think about this, what is Mr. Neill
14 asking me to do? Mr. Neill is asking me to declare that the
15 present board's actions, its self-help in abolishing the Class
16 B rights was appropriate. I'm not -- he's not asking me to
17 say that this Court couldn't do it in an appropriate case;
18 what Mr. Neill is asking this Court to do is say, Judge, we
19 simply want you to say, hey, you just can't do this back in
20 2010, December 2010, you just can't call a meeting and if A, B
21 or C hasn't occurred, terminate our rights.

22 MR. MCMAHAN: Well, Your Honor, Mr. Neill's statement of
23 this is not exactly correct. The meeting had nothing to do
24 with the termination of the Class B rights. The meeting was
25 called because they were operating this board illegally for

1 two years. The documents require that there be a five member
2 board. They required that there be a homeowners association
3 meeting in November of every year and they did not have one in
4 2009, they did not one in 2010. They refused to have one when
5 requested in early 2011. The homeowners utilizing the
6 procedures set forth in the bylaws called a special meeting
7 and the bylaws say that if five percent of the homeowners are
8 -- issue a declaration that there should be a special meeting,
9 that meeting is called.

10 THE COURT: How about your notices on this meeting?

11 MR. MCMAHAN: Well, Your Honor, this ---

12 THE COURT: Isn't there a problem with those notices?

13 MR. MCMAHAN: --- prejudiced by the defendant not putting
14 in a summary judgment motion and the grounds that he's now
15 asserting to the Court. There is a state statute which I do
16 not have right now before me but it says that if you attempt a
17 meeting and you do not object to the notice that you have
18 waived the right to complain about the notice. I can get you
19 the citation. I didn't bring it with me today because Mr.
20 Neill's motion does not say anything about the ---

21 THE COURT: What percentage of the homeowners attended?

22 MR. MCMAHAN: Almost all of them. I mean, we had ---

23 THE COURT: Well how about those who didn't?

24 MR. MCMAHAN: We don't know how many, I mean, that motion
25 -- all of that information, Your Honor, will be available when

1 the hearing on that motion is set. But that meeting was not
2 called to have anything to do with the Class B period. That
3 meeting was called because -- to have the two existing members
4 who were operating this homeowners association in violation of
5 the covenants removed and to elect a new board. We didn't ---

6 THE COURT: Is that what the notice said?

7 MR. MCMAHAN: Excuse me?

8 THE COURT: Is that what the notice said?

9 MR. MCMAHAN: Absolutely, Your Honor, the affidavit of
10 ---

11 THE COURT: Well, how did the bylaws get amended then if
12 that wasn't even in the notice?

13 MR. MCMAHAN: I'm sorry, Your Honor, the bylaws were
14 amended in 2005.

15 THE COURT: I understand, okay. I'm sorry. I thought
16 Mr. Neill said, and maybe I misunderstood him -- I thought he
17 said that in 2010, the bylaws were amended to abolish Class B
18 rights.

19 MR. MCMAHAN: No, sir.

20 THE COURT: Are you saying that Class B rights are still
21 in existence?

22 MR. MCMAHAN: Your Honor, the documents have not been
23 changed. We are petitioning this Court for an order pursuant
24 to its equitable jurisdiction to declare that they have been
25 abolished. The bylaws -- we have made no changes to the

1 bylaws. The bylaws -- I'll give you a brief history, Your
2 Honor.

3 In 1984, an action was commenced here in Georgetown
4 seeking a declaration that the defendant had breached their
5 fiduciary duties and that they could no longer assess property
6 owners and build up debt against the property that would be
7 used to send the homeowners -- basically to foreclose them
8 out. That resulted in an order of Judge Eltzroth, which I
9 submitted with my brief. After that hearing, the covenants
10 were amended in 1988. Those covenants established a period of
11 developer control. At the point in time that that period of
12 developer control ended, these new covenants were then amended
13 and brought into place in 2005. At the time that these
14 covenants were brought into place in 2005, a new set of bylaws
15 was also created for the association in 2005. So, these
16 documents that we're talking about were created primarily
17 actually as a result of what had happened in 1988. And these
18 documents are the ones that create the right to call a special
19 meeting. These rights -- documents were also the ones that
20 established the cap on what the homeowners were allowed to be
21 assessed. Now, the homeowners have made no changes to these
22 documents. We have not amended the bylaws, we have not
23 amended the covenants. What we are working from are the
24 covenants and bylaws that existed as of 19 -- 2005.

25 THE COURT: Let me ask, under what authority then is the

1 homeowners association refusing to allow the Class B voters to
2 vote?

3 MR. MCMAHAN: Well, two -- Your Honor, to begin with, in
4 the meeting of February of 2010 -- 2011, I'm sorry, this year,
5 they did not cast a vote. In other words, the documents
6 require that a written ballot be cast and a written vote be
7 submitted. None was done. That's not disputed. So, whether
8 or not they had a right to vote in February of 2011 or not is
9 really not relevant because they never even chose to cast a
10 ballot that is required by the document.

11 THE COURT: Were they told that they could?

12 MR. MCMAHAN: That they -- their president was there,
13 Your Honor. I mean, he certainly knew ---

14 THE COURT: Well, that's not responsive to my question.

15 MR. MCMAHAN: Your Honor, we did not tell them what they
16 could or could not do. Their president that came to the
17 meeting, he spoke at the meeting, he attended the meeting, he
18 never objected to -- any way to the notice. And understand,
19 the only entity that seems to now object to the way the
20 meeting was noticed is the defendant and the defendant has
21 waived its rights to object to notice by attending the meeting
22 without objecting to the meeting and they attended the meeting
23 without even voting at all, so under the documents, that issue
24 never even came up in that meeting. Now, we just had a
25 meeting about two weeks ago in which all of this came up again

1 but that's not the subject of this motion. And to get back to
2 where we are, the Court has held that when the equitable
3 remedy is the only appropriate remedy, this Court has the
4 power to do something about it and that's what we are seeking
5 in our motion for summary judgment that it's still pending
6 before you.

7 THE COURT: Mr. McMahan, I'm still at a loss. Are you
8 telling me that Class B voting rights still exist and if we
9 had a meeting tomorrow, if their assessments were current,
10 they could vote?

11 MR. MCMAHAN: No, sir. We don't believe so. We believe
12 ---

13 THE COURT: Because you unilaterally terminated them?

14 MR. NEILL: Your Honor, we actually had a meeting
15 yesterday in which we casted our votes and they refused to
16 accept our votes.

17 THE COURT: Well, that's what I want know, Mr. McMahan
18 and you -- I'm not sure you're giving me a straight answer.

19 MR. MCMAHAN: Yes, sir.

20 THE COURT: Have you terminated their voting rights are
21 not?

22 MR. MCMAHAN: Well, Your Honor, understand this, we filed
23 this action for a court declaration of whether the voting
24 rights should be terminated.

25 THE COURT: Okay.

1 MR. MCMAHAN: We have not unilaterally done anything. We
2 believe legally they were terminated when they went into
3 financial default as of January 1 against the backdrop of all
4 the breach of fiduciary duties that they have had. We have
5 not unilaterally done a thing. We believe that they are
6 terminated because of their misconduct and so that's what we
7 have asked the Court for a ruling on.

8 THE COURT: Let me ask you this, I look at the bylaws,
9 specifically Section Three which is on page two and this is
10 what it says, it says during the Class B share period, the
11 Class B members shall have the number of votes equal to all
12 Class A members plus one vote. So, I would assume for that,
13 whatever Class A members there are, if they're -- and Class A
14 is a homeowner as I understand; is that correct?

15 MR. MCMAHAN: That's correct, Your Honor.

16 THE COURT: If there are a hundred homeowners, okay, then
17 there would be 101 Class B votes, is that what's contemplated
18 there?

19 MR. MCMAHAN: That is contemplated, Your Honor.

20 THE COURT: All right. And then it says provided the
21 declarant shall not have a vote for any lot as to which the
22 declarant is more than sixty days in arrears with respect to
23 all money owed to the association. Now, you wouldn't -- if
24 you have a lot, whether you build on it or not, you're
25 assessed, right, if you have a lot that's in the property?

1 MR. MCMAHAN: That's correct.

2 THE COURT: Okay. So, then wouldn't the declarant also
3 have Class A's and Class B's?

4 MR. MCMAHAN: Well, Your Honor, the way the documents are
5 written is that once the Class B period has ended, the
6 declarant's rights would convert to a Class A rights and they
7 have a vote for every piece of property that they own as long
8 as they pay their assessments.

9 THE COURT: Okay. Well, then does -- it says though
10 during the Class B share period, during that period, the Class
11 B members shall have the number of votes equal to all Class A
12 members plus one vote provided, provided -- that tells me that
13 provided that during the Class B period, the declarant shall
14 not have a vote for any lot as to which the declarant is more
15 than sixty days in arrears with respect to all money owed the
16 association. Now, I would assume that the properties that the
17 declarant or the majority of the properties that the declarant
18 would own would be the undeveloped property; is that correct?

19 MR. MCMAHAN: It's all ---

20 THE COURT: It's all unsubdivided, right?

21 MR. MCMAHAN: Some are -- I believe some might be.

22 THE COURT: All right. And the -- of course, the reason
23 being that you don't get taxed for individual lots by
24 Georgetown County if you have it in bulk, right? Okay. So, I
25 don't understand Number Three. If we're in the Class B voting

1 rights period and the declarant has Class B rights and it owes
2 money -- say it owns some lots that are in what would normally
3 be Class A areas; do you follow me?

4 MR. MCMAHAN: Yes, sir.

5 THE COURT: And it owes money on those lots -- what are
6 we talking about with Section Three, I'm not clear at all as
7 to what Section Three means.

8 MR. NEILL: It's that shortfall, Judge. That's basically
9 what it talks about is if we didn't pay the shortfall, our
10 voting rights get suspended within sixty days.

11 THE COURT: The shortfall doesn't really have anything to
12 do with any particular lot, does it?

13 MR. NEILL: No, it does not. It looks at the development
14 as a whole. It basically takes the operating expenses of the
15 association ---

16 THE COURT: I mean, from what I understand, there's a
17 hundred lots over here that are in a subdivision or -- we'll
18 call it a subdivision -- the declarant still owns five, okay,
19 everybody including the declarant is assessed \$1800 a year.
20 Follow me? Okay. The declarant has failed to pay his on his
21 three lots, okay, just assume that's the case scenario. The
22 money that they -- well, let's assume first that he has paid
23 -- operating expenses are X, you've collected Y. My
24 understanding of the shortfall is the difference in X and Y is
25 what the homeowners association is going to send over to the

1 declarant and say, by the way, we have a shortfall of X
2 dollars. Okay? You owe us \$50,000 that we had a shortfall
3 on. And by the way, you owe us for \$1800 times three, what's
4 that \$5400, you owe us \$5400 as a regular assessment on the
5 lots you own in the subdivision. Is that -- is that how it
6 would work?

7 MR. NEILL: You were close until you got to the end.

8 MR. MCMAHAN: No, sir, that is not ---

9 MR. NEILL: The lots still get individually assessed.
10 They are just responsible for that shortfall and that's the
11 way all the developments around here work.

12 THE COURT: Okay.

13 MR. NEILL: They don't get an assessment but in lieu of
14 paying because they couldn't -- they can elect that, hey, I
15 just want to pay assessments like everybody else and if they
16 make that election, they pay -- and if there's a shortfall
17 then all the owners share but while the developer is in
18 control and has the Class B voting rights it's in lieu of
19 paying regular assessments.

20 THE COURT: Okay, Well, I'm just trying to figure what
21 it says here, so ---

22 MR. NEILL: And I think I might be able to help on a
23 couple of the arguments that Mr. McMahan presents. There is a
24 South Carolina Court of Appeals Case called South Carolina
25 Department of Transportation vs. M & T Enterprises and it

1 states, Courts are without authority to alter and unambiguous
2 contract by construction or to make new contracts for parties.
3 That's what they're asking you to do. They don't like that.
4 they don't have a remedy under the bylaws so they want you --
5 they're asking you to write provisions into it that allow them
6 to terminate the Class B ---

7 THE COURT: And Mr. McMahan, that's what concerns me.

8 MR. MCMAHAN: And, Your Honor, the problem is is that
9 there is no remedy set forth in the covenants for their
10 failure to pay. The documents simply do not have a remedy
11 period.

12 MR. NEILL: There is, Judge, it suspends their voting
13 rights if they're more than sixty days in arrears. That's the
14 remedy, that's the only remedy.

15 MR. MCMAHAN: Your Honor, but we disagree. That -- we
16 believe that that provision in the bylaws in somewhat
17 inartfully drafted and it only applies to if they haven't paid
18 their assessments on their lots. However, they don't pay
19 assessments on their lots at all during the Class B period if
20 they so elect. If you'll turn to the affidavit of Carol Kirby
21 that was attached to my original Memorandum in support of my
22 motion for summary judgment and look at Exhibit B.

23 THE COURT: The affidavit of ---

24 MR. MCMAHAN: Carol Kirby. It is actually -- number
25 four, attachment four on my original memo, Exhibit -- subtab

1 B.

2 THE COURT: I have number four or tab four, just let me
3 back up here, maybe I'm looking at the wrong side.

4 MR. MCMAHAN: My original memorandum, Your Honor, on the

5 ---

6 THE COURT: I'm not sure which one I have. This one was
7 filed December the 6th.

8 MR. MCMAHAN: No, sir. There's one that I filed when I
9 originally made my summary judgment in June of this year, the
10 one that ---

11 THE COURT: I have Carol Kirby's ---

12 MR. MCMAHAN: There's a second -- that's the second
13 affidavit of Carol Kirby. The first affidavit of Carol Kirby
14 was in response -- submitted with my motion. I can submit --
15 show you a copy of it if you'd like but it should be in the
16 file.

17 THE COURT: How about just read it ---

18 MR. NEILL: If you'd -- could save us some time ---

19 THE COURT: Pardon?

20 MR. NEILL: Instead of looking for that affidavit, I want
21 to get back to the bylaws again. And guess what, they define
22 lot; so we know what lot means, a contiguous parcel of
23 property whether improved or unimproved other than common area
24 or common property of the condominium regime or property
25 dedicated to public which may be independently owned and

1 conveyed and which is intended to be developed. The terms
2 shall include by way of illustration but not limitation,
3 condominium units, cluster homes, patio or zero lot homes,
4 single-family detached homes with a separate private lot as
5 well as vacant land intended for development.

6 THE COURT: All right. Okay.

7 MR. NEILL: So, it's already been defined in the
8 covenants and restrictions, Your Honor.

9 THE COURT: All right.

10 MR. MCMAHAN: And, Your Honor, understand that ---

11 THE COURT: Tell me about Ms. Kirby's depo -- affidavit.

12 MR. MCMAHAN: Your Honor, I'm gonna hand up the ---

13 THE COURT: Okay, if you would. Let me see this one
14 right here.

15 MR. MCMAHAN: That is probably the latest, if was filed
16 -- I believe that it is in June -- no ---

17 THE COURT: I've got a four ---

18 MR. MCMAHAN: One was filed in June, Your Honor.

19 THE COURT: The one that I have seen, Mr. McMahan is the
20 one that has -- that's attached to the December the 6th ---

21 MR. MCMAHAN: There was an earlier filing, Your Honor.
22 When we filed our motion for summary judgment there was a
23 memorandum and I believe that's in the file. It should be a
24 thick -- it's thick with multiple tabs.

25 THE COURT: Okay. All right. I'm sorry. I do have that

1 one. I thought it was a duplicate of what I was looking at.
2 All right. And you're directing me to tab number 4.

3 MR. MCMAHAN: 4B.

4 THE COURT: 4B.

5 MR. MCMAHAN: Now, in tab 4B, what you will see are the
6 documents that were given to the homeowners at the last
7 regularly scheduled homeowners' meeting that was conducted by
8 Litchfield Plantation Company in -- Litchfield Plantation
9 Association. And in that you will see there are a couple of
10 things of interest. One of which is that the declarant's
11 obligations for assessments in the declaration, if you turn it
12 over ---

13 THE COURT: Uh-huh (affirmative response).

14 MR. MCMAHAN: They state that they are going to elect to
15 pay the shortfall instead of paying the assessments. In what
16 is -- see Article 5.8, the last sentence at the end there, it
17 is not a combination for the declarant, page one of three on
18 the very last paragraph.

19 THE COURT: Page one of page three on document entitled
20 Maintenance and Operation Fees, Fiscal Year.

21 MR. MCMAHAN: May I approach, Your Honor. I can point it
22 to you. I know this is kind of a confusing record.

23 THE COURT: I have B.

24 MR. MCMAHAN: Yes, sir. If you'll go back to 4B to the
25 first page.

1 THE COURT: Isn't that what I have here, 4B, first page.

2 MR. MCMAHAN: Oh, yes, sir, at the very bottom.

3 THE COURT: All right.

4 MR. MCMAHAN: In that, the declarant makes an election to
5 either pay assessments or pay the shortfall. It is not a
6 combination of the two. They -- if they have lots, then they
7 -- they could elect to pay assessments on their lots or they
8 could elect to pay the shortfall and this is borne out by the
9 documents themselves. And if you'll look at the bylaws about
10 lots, they never pay both assessments and a shortfall, it's
11 one or the other. And they have to make this election on a
12 yearly basis. An election is required to be made by the
13 defendant. And the last time that they made that election
14 formally to the homeowners was on this particular date in
15 2008. However, the affidavit of Scotty Trotter, who is also
16 attached to the same document that you have there, which is
17 number one -- I'm sorry, his affidavit is tab number 3, you
18 will see there that he has always -- paragraph five, that they
19 have always made the election to pay the shortfall instead of
20 paying the assessments.

21 THE COURT: Okay.

22 MR. MCMAHAN: And so that is their common practice and
23 that is also what is required by the documents. So, in this
24 case, they couldn't do either. If you look at that affidavit
25 of Mr. Trotter, what you will see is he admits that in

1 December of 2010, they realized that they could not pay either
2 one of them and that therefore they assessed the homeowners
3 early, which is above the cap that is set forth in the
4 documents. And these documents have no remedy in their -- for
5 their failure to pay. You know, simply saying that they can't
6 vote, that's not a legal remedy. It doesn't say ---

7 THE COURT: But you have a legal remedy. Anytime anybody
8 by contract owes you money, you can sue them for it.

9 MR. MCMAHAN: But, Your Honor, not if we're in control --
10 not in control of the homeowners association.

11 MR. NEILL: I think if you put a lien against the
12 property ---

13 MR. MCMAHAN: --- homeowners association, you're leaving
14 the decision about whether to enforce that remedy up to the
15 people who owe the money. It's truly the fox being in charge
16 of the hen house.

17 MR. NEILL: And the owners would have a chance to sue the
18 HOA for breach of its fiduciary duties.

19 MR. MCMAHAN: But that is no effective remedy to sue our
20 own homeowners association for money because they cannot pay
21 it. Our homeowners association has no money, Your Honor, and
22 they have no money. You know, this company is basically
23 defunct and this is a death spiral for this company. They're
24 going down and they're trying to figure out some way of saving
25 it and that's fine, we're happy for them to develop the real

1 estate. Nobody wants to stop them from doing that. We have a
2 fully functional architectural review board that has new
3 construction under way right now and if they want to develop
4 real estate, that is not a problem. But if you put these
5 people back in control of our homeowners association, what
6 you're effectively saying is that the people who have taken
7 and looted the homeowners association now have the right to
8 control whether or not they ever pay it back but whether any
9 legal remedy will be asserted. They'll simply allow the
10 statute of limitations to expire and they won't assert any
11 claim whatsoever. And to say that they didn't know how much
12 the shortfall is is ridiculous. At the time the shortfall
13 occurred, Mr. Trotter was their president and he was in
14 control of their homeowners association. Not only that ---

15 THE COURT: Who are the people now?

16 MR. NEILL: Your Honor, this is where this gets ludicrous
17 because we're not in sole control of the homeowners
18 association. We keep tying the Litchfield Plantation together
19 -- and Litchfield Plantation Association together. All we
20 have is voting rights. We have voting rights to cast fifty-
21 one percent of the votes. Okay. The board, based on the
22 voting that we submitted yesterday at the meeting was three
23 people that we elected and two other homeowners that they
24 appointed to the board. So it's not like there is just one
25 person in control of this whole thing. You know, there's

1 gonna be watchdog. If the HOA doesn't do what they're
2 supposed to -- it's like another other HOA, if they don't
3 enforce the covenants, the owners can enforce them. You know,
4 there are lots of remedies here. If we don't pay our dues,
5 they can file liens, they can file lawsuits, they can try and
6 collect them no different than any other owner does.

7 THE COURT: Who is we now?

8 MR. NEILL: What's that?

9 THE COURT: Who is your company now?

10 MR. NEILL: Litchfield Plantation Company, Your Honor.

11 THE COURT: I mean, we have -- I understood it was bought
12 by different principals now.

13 MR. NEILL: It was, Your Honor. It was bought by Mr.
14 John Miller and some investor partners of his. Like I said,
15 their goal was just to recapitalize the company, that's what
16 we're trying to do here but that's what -- they don't want
17 that because they want to be in control of all this. We want
18 to get -- pay the shortfall, get our rights back but -- if I
19 showed up today and said, I want to pay the shortfall, there's
20 not one person that can tell me what that shortfall is. In
21 the discovery ---

22 THE COURT: Mr. McMahan says he can. Tell him what the
23 shortfall is.

24 MR. NEILL: Discovery admits it, that they've never even
25 attempted to try and calculate what the budget shortfall is;

1 they've never tried. It says the exact amount of the
2 shortfall cannot be calculated, his own words in the
3 discovery.

4 MR. MCMAHAN: Your Honor, you have to understand that
5 we're not talking about two separate shortfalls. There was
6 the shortfall that occurred in January 1 of 2011. At that
7 point in time, the board for Litchfield Plantation Association
8 consisted of two members. Those two members were Scott
9 Trotter and Jeff Van Treese. It's in Mr. Scotty Trotter's
10 affidavit. There were no homeowners on that board. They had
11 been acting with a two-person board for two and half years.
12 The documents require a five-percent board. They refused to
13 have homeowners association meetings to even elect a new board
14 that is valid. And at the time that this occurred, Mr.
15 Trotter who was their president and they installed him as our
16 president was the one, only one who had access to those
17 records of this homeowners association, the only one who knew
18 what the finances were. And if you will look at the affidavit
19 attached to my initial filing that's before you of Mr.
20 Trotter, what you will see is that there are three letters
21 attached there that he sent to our homeowners saying, we're
22 gonna run out of money and we can't pay our share. And the
23 only people that had a right to do -- any knowledge about it
24 was their president. But more importantly even this summer
25 ---

1 THE COURT: Let's put the shoe on the other foot.
2 Suppose I were a homeowner there and I was unable to pay my
3 assessment, are you gonna take away my Class A rights forever?

4 MR. MCMAHAN: Actually, Your Honor, there is a provision
5 in the ---

6 THE COURT: I mean, you lose them while you're in arrears
7 but are you gonna take them away forever?

8 MR. MCMAHAN: No, sir. There is a provision in these
9 documents that says if you have not paid, you cannot vote for
10 ---

11 THE COURT: I understand that but do you think it would
12 be appropriate for your association to say, okay, Lot Number
13 47 now and forever more will not have any voting rights as a
14 Class A member of this association?

15 MR. MCMAHAN: Certainly not, Your Honor, because that one
16 ---

17 THE COURT: Well, isn't that what you're doing here?

18 MR. MCMAHAN: But it's a different situation completely.
19 Lot 47, as a Class A member, Your Honor, does not have the
20 right to control this homeowners association. It has no right
21 of control whatsoever. They get a lien on their property,
22 they lose their one vote until they catch up and that's just
23 the way it is. This company has total control of our
24 homeowners association and this is the company that basically
25 has been robbing us blind and they've taken over \$700,000 from

1 our homeowners association and used it for their own purposes,
2 all of which is illegal.

3 THE COURT: I understand they don't get to vote until
4 they pay their arrearage and you get to control the homeowners
5 association one hundred percent. If they haven't paid, they
6 don't get to vote. But what you're talking about is taking
7 the voting rights away forever and I don't think you can do
8 that. Don't let them vote until they pay their arrearages,
9 don't let them vote until they pay their shortages or their
10 shortfall; that's what the articles say. But can you deprive
11 them -- it's a property right, can you deprive them of it
12 forever; just like could you deprive a Class A or a homeowner
13 who gets behind because of financial difficulty, can you say
14 whenever you get caught up, we're still not gonna let you --
15 we can still enforce a lien against your property for your
16 assessment, we can make you pay your assessment, we can sell
17 your property, which you could do anyway, we're gonna sell
18 your property if you don't catch this up and, by the way,
19 because you have been in arrears in the past we're just gonna
20 terminate the voting right for Lot 46 or whatever -- Lot 46 or
21 whatever in the future and don't come back to any meetings
22 because we're not gonna let you vote because you just haven't
23 been paying up like you should? Could you do that?

24 MR. MCMAHAN: Certainly not as to an individual
25 homeowner, Your Honor, but as to the declarant who has special

1 obligations to this homeowners association, we believe you
2 have the right to do it. I obviously cannot. This is
3 certainly up to the Court.

4 THE COURT: Isn't that -- that's back to my question;
5 isn't that what you've done?

6 MR. MCMAHAN: We have not done anything, Your Honor. We
7 simply had a special meeting that is allowed by the property
8 owners to elect a proper board.

9 THE COURT: All right.

10 MR. MCMAHAN: And when we elected a proper board, we took
11 the position that we don't believe the Class B rights still
12 exist.

13 THE COURT: So, Mr. McNeill [sic], why are we here?

14 MR. NEILL: We're here, Judge because ---

15 THE COURT: They're saying -- they're saying that you --
16 they're still there, the rights ---

17 MR. NEILL: Well, then why were they denied yesterday,
18 Judge? That's what I want to know.

19 MR. MCMAHAN: No, Your Honor, we don't believe that they
20 should be valid because of their default but that's not to say
21 we have the right to declare it, that's why we've asked the
22 Court to do that.

23 THE COURT: All right.

24 MR. NEILL: That's what they've asked the Court to do,
25 Judge, and that's what my summary judgment motion is based

1 upon is that the Court cannot do that. The covenants and
2 restrictions control, they lay out the procedures of what's
3 supposed to be done. The Supreme Court case that says if the
4 contract is clear, we're not supposed to be rewriting
5 contracts, the courts don't have the power to do that. We're
6 just asking the Court to follow the contract, to follow the
7 covenants, that's all; that's all we want.

8 THE COURT: Okay.

9 MR. MCMAHAN: Your Honor, the Supreme Court says you can
10 do it.

11 THE COURT: Anything further, Mr. McMahan?

12 MR. MCMAHAN: Yes, Your Honor, there is. They have
13 submitted an affidavit from a Mr. Bob Dibble, who was the
14 former attorney for the homeowners.

15 THE COURT: All right.

16 MR. MCMAHAN: In that affidavit, he has made certain
17 assertions that he had a agreement with the other side when
18 they negotiated these covenants that the Class B voting rights
19 can only be extinguished under one of the three scenarios set
20 forth ---

21 THE COURT: I'm not putting any, any particular
22 importance on that document. I'm looking at the bylaws. I
23 think they speak for themselves.

24 MR. MCMAHAN: Thank you, Your Honor. The only thing that
25 I would say then, Your Honor, is this, is that, you know, this

1 country went to seek its independence in 1776 because of
2 taxation without representation. We are now being asked to
3 pay without control. We're being -- our money is being taken
4 from us without control.

5 THE COURT: But won't you have absolute control if -- if
6 they don't have their -- you entered into a contract that --
7 where you agreed that's how it would be as long as they paid
8 their assessments and that's what you bargained for and if
9 they haven't lived up to their end of the bargain, you get to
10 take away their rights, albeit temporarily. They're not paid
11 up now, they got no voting rights, apparently, and you're in
12 charge. While you're in charge, file liens against this
13 property for any shortfalls, bring an action against them for
14 money damages for whatever they owe you. You're in charge, do
15 it if they haven't paid. Why can't you do that?

16 MR. MCMAHAN: Your Honor, we believe that it's kind of an
17 elusive remedy because going -- putting liens against their
18 property makes no sense. Their lien -- their property is
19 totally mortgaged up.

20 THE COURT: Yeah, but you can make them sell it and you
21 could get it out of their names.

22 MR. MCMAHAN: Well, Your Honor, it's in foreclosure sale
23 and there's more debt on it than the property is ever worth.
24 They will never collect -- the homeowners will never ---

25 THE COURT: It looks like it's gonna go away.

1 MR. NEILL: The bottom line is, Judge, is it only matters
2 if we pay it. If we don't pay them, guess what, everybody's
3 rights are suspended, we'll never get to vote. But what
4 they're worried about is that once we know what the amount is
5 and we can restructure this debt and we restructure this
6 company and pay them, guess who gets our voting rights back,
7 we get our voting rights back. That's what they don't like.
8 That's why this matters. That's why their regular remedies
9 aren't good enough for them because they want us to pay and
10 then not have control over the development that we're trying
11 to develop. That's what they want and that's the only time it
12 will matter.

13 MR. MCMAHAN: And, Your Honor, to say that they don't
14 know how much the assessed shortfall is, that's ludicrous.
15 There was a meeting in June of this year in which they were
16 told that the shortfall was \$160,000 from that point to the
17 end of the ---

18 THE COURT: There you got it.

19 MR. MCMAHAN: Plus what was the shortfall from last year.

20 THE COURT: Well, how much was that?

21 MR. MCMAHAN: Well, we've given them a number, the only
22 thing we have not calculated is there is an offset that they
23 were due that we didn't give them but we have not formally
24 calculated because the offset occurred when they had control
25 of our homeowners association.

1 MR. NEILL: Judge, why don't we just do an accounting;
2 would that be okay? The judge can order -- you can order an
3 accounting, we'll do an accounting and we'll figure out what
4 that number is and then we have a number we can work on, very
5 simple.

6 THE COURT: Well, I want to resolve the issue ---

7 MR. NEILL: Yeah, well, that's what I mean, if we do the
8 accounting ---

9 THE COURT: --- today.

10 MR. NEILL: --- we resolve it, we get some hard numbers,
11 we've got some numbers and then we know what we can deal with
12 and we can move forward and then that would be wonderful.

13 MR. MCMAHAN: And then we're still left with the \$720,000
14 that was taken ---

15 MR. NEILL: There are promissory notes for all those
16 monies and a schedule of payments as to when those payments
17 are supposed to be made so -- those are not shortfall
18 payments.

19 MR. MCMAHAN: They are now in default, Your Honor.

20 MR. NEILL: They're not in default, Your Honor.

21 MR. MCMAHAN: There is one note for \$50,000 that went
22 into default on June 1st of this year after this lawsuit was
23 started.

24 THE COURT: Well, doesn't -- under voting rights, doesn't
25 it say that declarant shall not have a vote for any lot which

1 could be undeveloped land as to which the defendant -- the
2 declarant is more than sixty days in arrear with respect as to
3 which is in arrear as respect to all monies owed to the
4 association.

5 MR. NEILL: Correct, Your Honor. And if there's a
6 promissory note that says we owe monies, that would kick in
7 but if the monies aren't due yet because payment time hasn't
8 reached, we certainly don't owe that money.

9 MR. MCMAHAN: Your Honor, they are four notes they have
10 cross default provisions and one of them came into default in
11 June of this year which means that all notes are now in
12 default.

13 THE COURT: Well, then you -- Mr. McNeill [sic] might
14 have a problem. I have looked at the articles. I think it's
15 very clear as to under what conditions the voting rights can
16 be terminated. I think it's by everybody's estimation clear
17 that there were -- that there was a shortfall. Whether or not
18 Mr. McNeill's [sic] client intends or can catch that up, I
19 don't know whether they can or not. Mr. Neill, you tell me
20 they can.

21 The issue before me, though, is whether or not this Court
22 under the circumstances of this case can issue an order
23 determining that as a matter of law these rights are
24 terminated. I cannot do that; that's what Mr. McMahan has
25 asked me to do. Mr. Neill has asked me to issue an order to

1 the contrary, that being that they are not automatically
2 terminated or not terminated -- I don't know whether they've
3 terminated or not. Mr. McMahan tells me they haven't but I
4 just don't know.

5 **RULING OF THE COURT:**

6 THE COURT: Mr. Neill, I'm going to rule in your favor.
7 If you would, prepare me an order to that effect and I want in
8 that order to require an accounting within sixty days of all
9 funds which are due to the association by your company,
10 everything that is in arrears. That should clear it up. If
11 you don't pay it, you don't vote.

12 MR. MCMAHAN: Your Honor, would you please instruct Mr.
13 Neill to put in the order that their voting rights are
14 suspended until they have caught up all amounts paid.

15 THE COURT: If there's an arrearage, you are suspended,
16 Mr. Neill, I think that's clear.

17 MR. NEILL: Well, that's the issue. We don't know what
18 the amount of that is, so it's not like I can pay those
19 tomorrow and get ---

20 THE COURT: Well, in sixty days, I want an accounting
21 from the other side ---

22 MR. NEILL: Right, that's what ---

23 THE COURT: --- saying what you owe.

24 MR NEILL: Right, right.

25 THE COURT: And I'm sure that there's gonna be a dispute

1 over that but I want to know -- I want to bring it to a head
2 right now.

3 MR. NEILL: What I'd like to do is have our voting rights
4 restored until such time as they can tell us what the amount
5 is that's owed.

6 THE COURT: I'm not gonna do that because it's clear to
7 me that there is a shortfall and for me to give you voting
8 rights over that shortfall would be in violation of the terms
9 of these articles as well. What's good for the goose is good
10 for the gander. So if we're gonna rely on the articles, we're
11 gonna rely on them fully.

12 Thank you, Gentlemen.

13 MR. MCMAHAN: Thank you, Your Honor.

14

15 (Adjourned.)

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C E R T I F I C A T E

ORIGINAL

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the motion hearing held in the case of Litchfield Plantation Association, Inc., et al. versus Litchfield Plantation Company, Inc., held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on December 8, 2011.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson

Official Court Reporter

July 3, 2012.

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

IN COURT OF COMMON PLEAS
2011-CP-22-00319

Litchfield Plantation)
Associates, Inc., et al.,)
)
 PLAINTIFFS,)
vs.)
)
Litchfield Planation)
Company,)
)
 DEFENDANT.)

TRANSCRIPT OF RECORD

April 19, 2012
Georgetown, South Carolina

BEFORE:

The Honorable Larry B. Hyman, Jr., Judge

APPEARANCES:

BY: Robert F. McMahan, Jr, Esquire
Douglas C. Baxter, Esquire
Attorneys for Plaintiffs

BY: Mark D. Neill, Esquire
Attorney for Litchfield Planation Company

BY: Robert S. Shelton, Esquire
William H. Monckton, IV, Esquire
Attorneys for E. Scott Trotter

BRENDA R. BABB
Circuit Court Reporter

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1 The Court: Litchfield Plantation, okay, and it
2 looks like we've got nine motions on that and so that the
3 Clerk can keep up with what we're doing let's try to take
4 them in the order they're filed unless you attorneys tell
5 me that there's some that may, motions that may make other
6 motions moot.

7 Mr. McMahan: Judge, there is a mootness with
8 three motions on the same issue. Mine is the oldest which
9 was filed last June and there is my motion for summary
10 judgment. There's Mark's motion for summary judgment and
11 then I filed a separate motion for summary judgment on the
12 grounds of mootness.

13 The Court: All right, I see there's some
14 discovery motions as well. I tell you what, I see here we
15 have a motion to dismiss and a partial summary judgment due
16 to mootness, that was filed January of 2012, but you tell
17 me there's something older than that.

18 Mr. McMahan: Yes, sir, there's one filed in
19 June of 2011.

20 The Court: I see one in --

21 Mr. McMahan: That is my motion for summary
22 judgment.

23 The Court: June of 2011 that's the last one
24 that's on here, that would be number eleven, we'll take
25 that one up first then.

1 Mr. McMahan: Thank you.

2 Mr. Neill: Judge, actually if I could have just
3 one second, there's another issue, I think, that covers
4 this whole thing that we need to deal with and you may
5 remember it from the last time we were here. We have my
6 motion for summary judgment with regards to the termination
7 of the Class B voter rights and Your Honor ruled that those
8 rights had not been terminated. We presented an order
9 which we passed up to you which we haven't gotten signed
10 back yet. We had an issue between myself and Mr. McMahan -
11 --

12 The Court: How long ago was that order signed?

13 Mr. Neill: It wasn't signed, we've sent it to
14 you a couple of times, Judge. It's been probably six
15 months.

16 The Court: Well that order is lost somewhere
17 then.

18 Mr. McMahan: Your Honor, it was sent by email
19 at the end of December. I also sent an email objecting to
20 the order because it differed from what you had said in
21 Court. I believe Mr. Neill's wife, who's also an attorney,
22 sent a follow up email to you and that would have been in
23 early January of this year and there's never been a
24 response to that, any of those emails or that order.

25 The Court: Taylor is looking for it now.

Motions - April 19, 2012

5

1 Mr. McMahan: Late December or early January.

2 Mr. Neill: Judge, if I may?

3 The Court: Yes, you have a hard copy of it? I
4 apologize, gentlemen, somehow that has fallen through the
5 cracks. Well that's the motion that's item number 11, is
6 it not?

7 Mr. McMahan: No, sir, Your Honor, that motion
8 that I filed in June is a two-part motion and as you may
9 remember that motion was scheduled to be heard by you in
10 September; and what happened was that Scott Trotter
11 intervened in the action on a late basis solely on one
12 issue which was the board election in February of 2011.
13 You deferred hearing that motion because Mr. Trotter had
14 simply just intervened but heard one half of that motion
15 which was the Class B rights, so the remainder of one half
16 of my motion from June 2011 has never been heard and that
17 has to do with the composition of the board.

18 The Court: Okay.

19 Mr. McMahan: And that would be oldest pending
20 motion.

21 The Court: All right, have you, counsel, had an
22 opportunity to look at this order here?

23 Mr. McMahan: Yes, sir, and I essentially sent
24 you an email stating my objections to it and I think this
25 is, even though it's not on your roster certainly the

1 issues in that order you anticipated to be raised at this
2 point because you had requested that we provide an
3 accounting to the defendant which we did at your request.
4 It was in the transcript and so we went ahead and gave them
5 that and that accounting we're actually not sure what their
6 position is regarding the accounting but we don't believe
7 that that order accurately states what you ruled in Court
8 nor do we believe that that order is proper for a couple of
9 different reasons.

10 The Court: Okay, all right. Why don't we do
11 this, why don't we hear your objections to the proposed
12 order on the first half then we'll move on to the second
13 half of the, of that motion, okay.

14 Mr. McMahan: Thank you, Your Honor, if you turn
15 to tab nine ---

16 Mr. Neill: Judge, I'm sorry to interrupt, I'm
17 just trying to cut it short if I can. We've got that
18 accounting now and because we have this accounting giving
19 basically all the costs that they claim are owed what may
20 be best because obviously we don't have a dispute with
21 regards to the Class B voting rights were terminated. It's
22 clear that that's what Your Honor ordered they were not, so
23 after that took place basically the HOA, despite our
24 request, had never provided us with an accounting of what
25 we owed them. They say it was, you owe us money, you can't

1 exercise your Class B voting rights, that's the end of it.
2 We sent discovery ---

3 The Court: And you were trying to find out what
4 it was.

5 Mr. Neill: Right, so Your Honor ordered an
6 accounting, I have that accounting now, okay? What I'm
7 thinking that we could try to shortcut some of this is if
8 we can kind of go through and address this accounting, we
9 can figure out what numbers are legitimate, which numbers
10 are not, and then my clients are prepared to pay that money
11 to restore their voting rights which renders the remaining
12 portion of this case moot because then we get what we need
13 cause the rest of the case deals with who's the board and
14 whatever the board is now, That would actually set a
15 dollar figure that says this is what you owe the HOA which
16 we can finally pay to get our rights back. That's where
17 the problem is, we've been trying to exercise our rights
18 and we ask them how much do we owe you and they say well
19 we've never bothered to figure it out. Now we've got this
20 accounting that tells us, I have some issues with the
21 accounting because it doesn't comply with what's in the
22 covenants and restrictions and if we deal with those issues
23 and come up with that number we may not even have to get
24 into any of the rest of this.

25 Mr. McMahan: Well, Your Honor, there are other

1 issues in this case that don't have anything to do with the
2 accounting and the board election at the time is certainly
3 is still an issue regardless. In addition, Mr. Neill has
4 sued the board members personally and they're three motions
5 here about his counterclaim suing the board members
6 personally which is why Doug Baxter is here because there's
7 coverage in the triggered coverage and so Doug is in for
8 the carrier. So the accounting issue certainly will
9 resolve part of the case but certainly not all of the case
10 unless they're willing to drop the counterclaims against
11 the board members and the homeowners association.

12 Mr. Neill: And that may be the case. If we
13 have this figure and we have the Judge's order saying this
14 is the figure, we may not have to worry about those
15 counterclaims at this point.

16 The Court: Do you gentlemen need a status on
17 this?

18 Mr. McMahan: Yes, probably, Your Honor.

19 The Court: Is that what you need before we
20 argue your motions, ya'll need a status on it?

21 Mr. Neill: Judge, what I really need to get is
22 a number. The problem we've got is, as we talked about
23 last time, Litchfield Plantation Company is, we're doing a
24 debt restructure with this company. In order for us, this
25 is the last piece of the puzzle we need to restructure the

1 debt over there, is we need to know what is it that we owe
2 the HOA so we can get our voting rights back so that we can
3 do this debt restructuring; because a debt restructuring
4 will not go through with us not being in control of the
5 development rights for that property. So that's what I
6 really need right now is I need that number so that we can
7 go ahead and pay it and get back in control.

8 The Court: What's in dispute?

9 Mr. McMahan: I don't know, Your Honor, they
10 haven't told us.

11 Mr. Neill: And that's why I'm ready to go
12 through with it, Judge.

13 The Court: All right, well let's hear --

14 Mr. McMahan: The accounting is in tab one of
15 the notebook, Your Honor.

16 Mr. Neill: And, Judge, I can hand them up to
17 you, I've got them in order, if it makes it easier for you.

18 Mr. McMahan: My cover letter sending the
19 accounting to Mr. Neill you had requested me to do that in
20 sixty days which I did, the accounting follows that with
21 the pleading showing all the amounts that are due.

22 The Court: All right.

23 Mr. Neill: Okay, Judge, and what I'm going to
24 do is I think the easiest way to do this is go down it line
25 by, line item by line item and if you have, it looks like

1 this, Judge, it's kind of a chart, kind of breaks down what
2 they claim is owed to the HOA.

3 The Court: All right, is that in their
4 documents? Is that what I have right here?

5 Mr. McMahan: The accounting is, yes.

6 Mr. Neill: Yeah, I think it would be easier ---

7 The Court: Okay, all right, good, all right.

8 Mr. Neill: We finally have received the number
9 from the HOA as to regards to what the shortfall was. That
10 is that 119,148 number, okay? The issue, of course ---

11 The Court: And essentially that's what the
12 Class B has to pay.

13 Mr. Neill: Correct, that's right, Judge.
14 Now, the issue that we have with regards to this is they
15 did it wrong. Now luckily the accountant that they had do
16 it did it right; they just chose the wrong number. The
17 amended bylaws for Litchfield Plantation are very clear,
18 calculation of the shortfall based on a cash basis. The
19 accountant who did the deficit funding shortfall actually
20 calculated it two ways, one on accrual basis, one on a cash
21 basis. Not surprisingly the HOA picked the higher of the
22 two numbers and sent that to us as the accounting. We
23 didn't get this number initially when they sent us the
24 accounting, we had to get the backup documents behind it to
25 show it.

1 The Court: So basically you're saying that the
2 true numbers should be 102,463?

3 Mr. Neill: Correct, that's right, Judge, yeah.

4 The Court: And it's not a matter of the
5 beginning numbers so much as it is a way that you look at
6 those numbers?

7 Mr. Neill: That's right, Judge, and they, and
8 they specifically provide in the bylaws how we're supposed
9 to look at them.

10 The Court: All right, tell me about that. He
11 says that, you know, what we're looking at here is the
12 difference of less than \$17,000 and we have the, the, the
13 issue resolved?

14 Mr. McMahan: Your Honor, we don't believe this
15 was all because the accountant himself is given an opinion
16 that the proper number is the \$119,000 number.

17 The Court: Have you seen this?

18 Mr. Neill: I have, Judge.

19 Mr. McMahan: And the accountant went through,
20 and here was a problem, to calculate the shortfall on a
21 cash basis was an incredible amount of work for the
22 accountant. He had to go through a year and a half of
23 checks, receipts, payments, and everything that was done.
24 So what he did was he went through the statements that were
25 done on an accrual basis and then looked at the statements

1 and reached a determination of what actually should be
2 adjusted to take into account a cash basis which saved
3 thousands of dollars worth of accounting time in order to
4 establish how much money was actually owed. So Mr. Dietz
5 sends us a letter and says that this, if you look at the
6 last paragraph of his letter, in his professional opinion
7 based upon, and we gave him the covenants, he had
8 everything, the calculation, the sections of the covenants
9 that says how to do it and it's his opinion it's \$119,000.

10 Now if there is a factual dispute as to the
11 amount of this accounting then I'm not sure that this is
12 the proper time and place to resolve that because we have
13 witnesses that we would like to call and at this point in
14 time on a basis for summary judgment I don't think we have,
15 and we don't have the witnesses here, and it's something
16 that, you know, should be resolved. Now we have actually
17 filed a lawsuit to collect this money on behalf of our
18 homeowners association and that lawsuit is a separate
19 action and it also seeks a mortgage foreclosure. It names
20 the defendant as a party, and as with all mortgage
21 foreclosures we are seeking a reference to the Master in
22 Equity here in Georgetown County to calculate and establish
23 the amounts owed which include every element of this
24 accounting. So if they are going to raise factual disputes
25 as to the amount of the accounting or the proper way to do

1 it there has to be an evidentiary hearing for that.

2 The Court: How about that, Mr. Neill, I mean
3 how can I make a ---

4 Mr. Neill: Judge, there is no factual dispute.
5 I'm using their expert, their numbers. I'm not looking
6 behind the numbers. All I see is a chart that says on
7 accrual basis this is what it is and on a cash basis this
8 is what it is and then I look at the bylaws and the bylaws
9 says we have to do it on a cash basis. That's not a
10 factual dispute. I'm not disputing that the 102 is wrong
11 under the cash basis. I'm just saying that's what their--
12 own accountant said was owed under a cash basis which is
13 exactly what the bylaws say. There's not a factual dispute
14 though, Judge.

15 The Court: You know I'm looking at Mr. Deitz's
16 letter here and he seeks to explain his reasoning behind
17 the calculation of the operating fund deficit and he says
18 on a "pure cash basis," "on a pure cash basis the
19 associates had a fund surplus of \$18,887 as of December the
20 31st of 2011", that's on a pure cash basis, and this again,
21 "surplus equals the balance in the association's operating
22 bank account at that date and was from funds accumulated
23 from the period of April 1st of 2010 through December the
24 31st of 2011." So he's saying that on December the 31st of
25 2011 the association had a surplus of almost \$19,000, okay?

1 Then he goes on and he says, however, in order to be "fair
2 the following items must be considered, \$17,627 was
3 expended before December 31st, 2011, for prepaid insurance
4 and other prepaid expenses which benefit future periods."
5 So he's saying we had paid for insurance for a future
6 period. They had paid in advance essentially,
7 "consequently this amount must be added to the surplus at
8 December 21st of 2011." So he said to that \$18,887 we
9 should add 17,627. Then he goes on to say "16,694 of the
10 2012 assessments were received before December 31st of 2011
11 and these funds properly relate to future periods." So
12 that amount should be deducted, so we should take \$18,887
13 which was the balance, add to it \$17,627 which was paid,
14 prepaid insurance, let me put it that way, but "we should
15 subtract \$16,694 which was actually 2012 assessments that
16 we had on hand on December the 31st, that were received
17 early," so we should take that back out.

18 He also says that "\$17,618 of the 2011 expenses
19 were not paid before year end and that these amounts should
20 be consequently deducted from the surplus because they're
21 going to be expenses, and then he says \$121,350 of excess
22 assessments was received," excess assessments, I have never
23 known a HOA to have excess assessments, but they had
24 "excess assessments was received from homeowners before
25 December 31st, 2011, and these funds were improperly

1 assessed to homeowners on July the 1st of 2011, and
2 consequently this amount must be deducted from the
3 surplus." So what they're doing is saying we overcharged
4 the homeowners, right?

5 Mr. McMahan: Not necessarily, not exactly, Your
6 Honor.

7 The Court: Or we've got excess.

8 Mr. McMahan: Here's what happens, these
9 documents have a cap on how much money the homeowners are
10 supposed to be allowed to be assessed in a given year.
11 When the developer ran out of money and the homeowners
12 association was faced with the prospect of having to shut
13 down all services there was a second assessment rendered to
14 the homeowners that was in excess of the cap.

15 The Court: Do they propose to return that or to
16 give a credit for it?

17 Mr. Neill: If, if the developer chooses to pay
18 something certainly that is our intention; but the excess
19 assessment was what the homeowners used to fund the
20 homeowners association because the developer admittedly, by
21 his own statements said they couldn't pay it, and rather
22 than shutting down the gate guards and the security and not
23 being able to have landscaping and insurance and all of the
24 things that homeowners association need, the homeowners
25 voluntarily, we sent an assessment out. We told them we

1 have a choice, we can either pay or we can shut them down,
2 and that was over the cap that was established by the
3 documents.

4 The Court: All right, so, Mr. Neill, if I
5 understand Mr. Deitz, what he's saying is we had \$18,887 on
6 hand and we had paid or prepaid insurance in the amount of
7 \$17,627 so that comes to about, what, about \$37,000,
8 however, however, we had received early assessments, some
9 people had paid early in the amount of 16,600 and, excuse
10 me ---

11 Mr. McMahan: I can explain that, Your Honor, if
12 you'd like me to.

13 The Court: Wait a minute, I got it in my mind
14 just give me a second.

15 Mr. McMahan: Yes, sir.

16 The Court: He says that there was \$16,694 which
17 were assessments that were received early and so you
18 shouldn't count those as your surplus, so that should come
19 off which would bring it back down to around \$20,000, ball
20 park; and also there were \$17,000, \$17,618 that have not
21 been paid that they owe and that that should come off as
22 well which, you know, you bring it down to your actual
23 surplus of about \$3,000 and in addition to that there had
24 been an excess assessment of \$21,000. So if you subtract
25 that the, the homeowners association was about \$119,000 in

1 the hole and that's what Mr. Deitz is saying.

2 Mr. McMahan: That's right.

3 The Court: So your position is it doesn't make
4 any difference what's been paid or what hasn't been paid we
5 just look at what cash is there?

6 Mr. Neill: Well, no, sir, it's the cash set of
7 accounting and I'm not, I'm not saying that there was truly
8 an \$18,000 surplus because that's not the opinion that the
9 accountant gave. He just said when he did these same
10 calculations based on a different set of rules, a cash
11 based accounting, he came up with a deficit of 102, okay?
12 The bylaws are specific, that is the method that must be
13 used in order to determine that shortfall amount, okay?

14 The Court: You know what that kind of sounds
15 like, though, it kind of sounds like you said I took the
16 excess assessment and I subtracted what cash I had left.

17 Mr. Neill: I would agree, Judge, I think that's
18 exactly what he did.

19 The Court: And that's how we get 102.

20 Mr. Neill: Because that's what the bylaws
21 provide.

22 The Court: And you're of the opinion that when
23 you say "on a cash basis" you don't consider how much you
24 still owe for that year, anything like that?

25 Mr. Neill: That's just what the IRS accounting

1 rules are, Judge, I don't make them. I just want them to
2 follow them.

3 Mr. McMahan: Your Honor, let me tell you what
4 happened, we got down to the end of the fiscal year and
5 there wasn't enough money to get us through December and so
6 we went to the homeowners and said we're going to have a
7 hard time paying the salaries for our people at December
8 unless some people who are due, supposed to pay in January
9 send their money early; and they did that because they
10 didn't want to shut down our homeowners association and
11 that's why there's this advanced payment of \$16,000.
12 That's properly not supposed to be in that year; and there
13 needs to be a factual record, if they're going to dispute
14 this accounting then we have to have a hearing where the
15 accountant gets to testify regarding how he did this; and
16 all we're saying is that we don't think this is the proper
17 forum in which to do that. There has to be some ---

18 The Court: And I agree with you, but wouldn't
19 you agree that what we're talking about here is about
20 \$17,000?

21 Mr. Neill: I would, Judge, and that's going to
22 be the next thing, depending on how we deal with these
23 other items this first item may not be a problem.

24 The Court: Well, you know, you're going, it's
25 already the subject of a separate action. If you pay too

1 much you're going to get it back. Looks to me like the
2 homeowners that ponied up an additional \$121,000, that they
3 may be entitled to get a credit back or it looks that way
4 to me.

5 Mr. Neill: They might be, but that's the
6 homeowners association's.

7 The Court: They have ponied up and you're
8 telling me that your Class B shareholders or members
9 shouldn't pony up \$17,000.

10 Mr. Neill: No, sir, I'm not telling you that;
11 I'm just telling you what the rules are ---

12 The Court: I understand.

13 Mr. Neill: --- and, and, and I want them to
14 follow the rules, that's all. I don't want to overpay if I
15 don't have to.

16 The Court: And I think that's an issue, that's
17 an issue for another day. What I'm trying to do here,
18 while this action is pending, is do what I can to make sure
19 everybody is treated fairly. I want you to have your
20 voting rights.

21 Mr. Neill: Right.

22 The Court: But I don't want the, the homeowners
23 association to suffer if, in fact, they are entitled to
24 \$121,000 as opposed to \$102,000. I'm trying to strike a
25 balance here that's the fairest thing I can do right now to

1 preserve this status quo and that's what I want to do. Now

2 ---

3 Mr. Neill: Why don't we deal with the other
4 categories, Judge, because if the other categories play out
5 that may not be a big deal.

6 The Court: Well let's look at them then.

7 Mr. Neill: The second one is a failure to fund
8 a capital reserve account per 5.18 of the covenants and
9 restrictions. That was a restriction that had a provision
10 in it whereby if a purchaser purchases a lot from the
11 developer the purchaser pays a capital contribution into
12 the HOA, okay? At this point I'm not sure whether we know
13 that that's been paid or not, whether those were collected
14 when those lots were sold regardless, but in any event ---

15 The Court: But isn't that a bulk sale
16 purchaser?

17 Mr. Neill: It's the purchaser who pays it, not
18 the developer, not the seller, it's the purchaser's
19 obligation to pay it.

20 The Court: Have there been any?

21 Mr. Neill: Well there's been 101 of them that
22 were required over the last five years, but my point is not
23 really about those. It's the obligation to pay that is on
24 the purchaser, it's not on the seller. It's not on the
25 Litchfield Plantation Company to pay that, it's on the

1 purchaser's obligation to pay it pursuant to the covenant.

2 The Court: All right, sir.

3 Mr. Neill: So that's why we're looking to
4 strike that number off because it's simply not money that
5 we owe. If the owners didn't pay it the HOA needs to get
6 it from them.

7 The Court: Talk to me about that.

8 Mr. McMahan: Yes, Your Honor, first I would
9 direct you, of course ---

10 The Court: All right, first of all let me, let
11 me ask you this, gentlemen, is there any dispute that those
12 hundred and some sales were from a "bulk" sale?"

13 Mr. McMahan: No, I don't believe any of them,
14 well some of them may have been to Mr. Trotter but it
15 doesn't matter, Your Honor. Here's the way it's supposed
16 to work, when the defendant sales real estate they're
17 supposed to collect one years assessment ---

18 Mr. Neill: No, sir, the HOA collects that.
19 Litchfield Plantation Company ---

20 Mr. McMahan: Let me finish, don't interrupt and
21 I'll show you where I'm coming with this. The HOA has no
22 ability to collect money from a real estate sale between
23 the defendant and a third party.

24 The Court: But they certainly do as to a
25 particular lot, they have a right of foreclosure.

1 Mr. Neill: They're required under the statute
2 to provide a certificate.

3 Mr. McMahan: They have admitted that they have
4 the duty to collect that money and I would direct you to
5 tab number eight of the notebook that I provided to you
6 which is the affidavit that was actually submitted by the
7 defendant Scott Trotter in connection with this case and
8 filed with this Court. In paragraph twenty-three of that
9 affidavit, which I believe if you go over on page seven,
10 states on behalf of Litchfield Plantation Company and Mr.
11 Trotter had a handout that he distributed to all of the
12 homeowners. You see where I'm from the highlighted section
13 on the top part. Now that handout, if you turn to the blue
14 tab, is a memorandum that is prepared by Charles Nations
15 [sic] who is the defendant's lawyer at the time.

16 Mr. Neill: Also the attorney for the
17 association, Your Honor.

18 Mr. McMahan: Mr. Nations [sic] and by the
19 defendant for getting this document and memorandum prepared
20 distributing it to the homeowners on behalf of the
21 defendant and filing it with this Court on behalf of the
22 defendant has adopted the contents of that memorandum and
23 that is adopted admission under 801(d)(4) of the Rules of
24 Evidence of South Carolina.

25 Now if you turn over on that memorandum from

1 Charles Nations [sic] to page eight.

2 The Court: To page what?

3 Mr. McMahan: Eight, now you see the highlighted
4 section in the middle.

5 The Court: I do.

6 Mr. McMahan: The first statement says "the
7 declarant, that is the defendant, has an obligation under
8 the covenants to fund the reserve account with deposits
9 equal to one third of the working capital assessments."

10 Now that's their attorney and their admission
11 stating that they had the obligation to fund this working
12 capital assessment and it's never been funded. It's
13 63,000, I took the number that we put in the accounting,
14 Your Honor, directly from Charles Nations' memorandum which
15 is directly from the affidavit filed by this defendant and
16 directly from the memorandum that was distributed on behalf
17 of this defendant to all of the homeowners.

18 The Court: So you're saying that this
19 highlighted section by implication requires ---

20 Mr. McMahan: It's an admission.

21 The Court: --- the collection of the working
22 capital assessment which is the twelve months --

23 Mr. McMahan: One year's assessment.

24 The Court: One year's assessment.

25 Mr. McMahan: One third of which ---

1 The Court: That's due on a bulk sale.

2 Mr. McMahan: Not on a bulk sale on any sale.
3 Any time that they sold a lot whether it would be to Mr.
4 Trotter who bought lots in bulk, I believe, or to an
5 individual homeowners the defendant sold the property, had
6 a real estate closing and the defendant was the one who had
7 the duty, I mean they were fiduciaries, Your Honor, they
8 have absolute control of the homeowners association.
9 Remember they have, they ran the board, they had the voting
10 rights. They control everything about this homeowners
11 association. The same president for the homeowners was the
12 same president for the defendant. There's not an
13 independent entity for the homeowners association to
14 protect itself. They sold 101 lots. They collected this
15 money and they didn't put it into the reserve account and
16 it's established by Charles' own memo which has been
17 adopted as an admission by the defendant. So that's why
18 it's in the accounting and the reserve account is empty
19 when we took over. IT didn't have a dime, no, I think it
20 had less than \$1,000 in it, and so we took that number from
21 their memorandum.

22 The Court: All right, what do you say about
23 that?

24 Mr. Neill: Judge, first of all this memorandum
25 is a memorandum from Charles Nations [[sic], as the

1 attorney for the Board of Governors to the Board of
 2 Governors regarding Litchfield Plantation. He's not acting
 3 in his capacity for Litchfield Plantation Company, okay,
 4 and the last time I checked a memorandum from an attorney
 5 does not have any affect whatsoever to change the
 6 provisions that are provided in Covenants and Restrictions.
 7 You know it's very clear as to what the Covenants provide.
 8 It's the purchaser's obligation to pay that money. It's
 9 the purchaser's obligation to pay it now if it wasn't paid.

10 The Court: Counsel, I just wonder, you know,
 11 was the board just sitting on its hands? I mean if it was
 12 entitled ---

13 Mr. Neill: And that's part of it, too, Judge,
 14 if there was misconduct here remember Litchfield Plantation
 15 Company is an owner, they elect, they cast votes to elect
 16 people, okay? If things were done that were improper they
 17 were done by the Board of Directors for the association.
 18 They need to take legal action against them. We're just an
 19 entity who casts votes to elect people, okay?

20 The Court: Well but let me, let me finish, what
 21 was happening that the, that the board was not doing
 22 anything to collect this, this assessment due, this working
 23 capital assessment, from people who were buying lots? I
 24 mean why wasn't it --

25 Mr. McMahan: We don't believe that's the case,

1 Your Honor. We believe they collected the money and they
2 spent it and they simply did not fund ---

3 The Court: No, I meant the board. I mean
4 doesn't it, wasn't it essentially supposed to go to the
5 Board of Directors for the benefit of the owners of the ---

6 Mr. McMahan: Your Honor, understand that the
7 board here is a fiction. The board that they say they
8 elected consisted of their president and their vice
9 president. That's the only two members of the board at the
10 end of this thing and during the context of all this all of
11 the members of the board that they put on the association
12 board, with the exception of one homeowner for a very short
13 period of time, were officers and directors of the
14 defendant. They would go out and sell real estate; they
15 would collect this money from the people that they sold the
16 real estate to. They simply did not deposit it into the
17 reserve account.

18 The Court: Well where was it supposed to go?

19 Mr. McMahan: It was one-third, the document
20 said that two-thirds of it was supposed to go into the
21 operating account and one-third of it was supposed to go
22 into the reserve account. We didn't count the two-thirds
23 that were supposed to go into the operating account because
24 they were supposed to fund the deficit and so if it went
25 into the operating account it would simply lessen their

1 obligation ---

2 The Court: It was a wash?

3 Mr. McMahan: Right, but the reserve account is
4 a different matter altogether. We have no reserve account
5 and the money that they took from those owners, we can't
6 that money back from those owners

7 Mr. Neill: Judge, there's no evidence that we
8 took any of that money.

9 Mr. McMahan: They collected every bit, we
10 understand, and we've alleged that in the complaint that we
11 filed that will be referred to the Master, that they
12 collected that money and spent it.

13 Mr. Neill: And, Judge, that's a claim.

14 Mr. McMahan: This is a fiduciary duty.

15 Mr. Neill: We'll get to it later.

16 Mr. McMahan: I understand,

17 Mr. Neill: It doesn't affect our voting rights
18 now.

19 The Court: And we're not litigating that, he's
20 just telling me what their claim is, okay?

21 Mr. Neill: And there will be a chance for them
22 to litigate that and if they get a judgment against that
23 and then that actually becomes monies that we owe, then
24 we'll have sixty days to pay it and our voting rights will
25 be suspended again.

1 The Court: What do we need to do to get this
2 association back on track ---

3 Mr. Neill: Let me tell you what we're willing
4 to do.

5 The Court: --- during the pendency of this
6 action,

7 Mr. Neill: Let me tell you what we're willing
8 to do, Judge, okay? Right now we've got a shortfall, we're
9 willing to pay that. I'm pretty sure my clients would say,
10 okay, we'll pay the 119,148, okay.

11 The Court: Okay.

12 Mr. Neill: We've got two notes right now that
13 are due for payment, the two notes on the bottom, 17,887.72
14 and 12,946.48, okay, plus, plus interest.

15 The Court: If you pay that shortfall it should
16 take care of it, shouldn't it?

17 Mr. Neill: That's what we'll do. We'll do it
18 within thirty days and if we do it within thirty days we
19 have an new election, we have a new vote. These other
20 notes that they've got here they don't come due till 2014,
21 but guess what, it benefits the homeowners, too, because if
22 we get in there, get our voting rights back, restructure
23 the cost of our lots they have a chance to actually get
24 that money back to be paid that money. It's a win-win
25 situation for everybody, you know? They've got these other

1 claims that they say we owe the money for. It's not
2 established that those funds are owed. That's the same
3 thing with this beach house. If their litigation is good
4 on that they'll get a judgment against us and if they get
5 it we'll have to pay it or lose our voting rights again.

6 Mr. McMahan: Your Honor, if they get control of
7 the homeowners association the litigation that I have filed
8 will be dismissed because we filed it on ---

9 Mr. Neill: That's not true, so we would have
10 fiduciary obligations.

11 Madam Court Reporter: One at a time, please.

12 The Court: Well wait a minute, wait a minute,
13 wait a minute, did you get everybody's name, Ms. Babb?

14 Madam Court Reporter: I figured it out.

15 The Court: You did, okay, you had asked me to
16 do that and then I was remiss in making sure that was done.

17 Mr. McMahan: And, Your Honor, Mr. Neill's said
18 that the notes are not in default, what I've handed up is a
19 mortgage that they gave us to secure all four of the notes
20 and it states a default in either of the promissory notes
21 shall constitute a default in the notes and a default in
22 the mortgage. This mortgage controls all four of these
23 notes. It's a cross default provision. So when they
24 allowed the two of them to go into default all four of them
25 went into default and that's why the notes amount is on the

1 accounting as amounts due; and remember, Your Honor, with
2 the Court when we ---

3 The Court: But doesn't that get taken care of
4 if they pay up and they pay up the whole amount ---

5 Mr. McMahan: \$900,000.

6 The Court: Well I thought it was 119.

7 Mr. McMahan: That's only one element, that's
8 just the shortfall calculation, Your Honor.

9 The Court: Okay, the \$900,000, I mean are the
10 notes called, are the notes in foreclosure?

11 Mr. McMahan: Yes, sir, and if you look at
12 paragraph one, exhibit number one of my submission to you
13 was a letter that I sent to them calling the notes. All of
14 that has been done and the foreclosure is pending on those
15 notes and the collection action on those notes.

16 The Court: Did you foreclose it?

17 Mr. McMahan: Well we've started the action ---

18 Mr. Neill: This is where we're going to get
19 even more complicated here, okay?

20 First of all these notes were not called until
21 after this accounting had been done, February 6th, okay?
22 We got declaratory judgment action pending as to who the
23 board is, who do we pay to put those, to pay those notes
24 off, who do we pay to protect ourselves. We've got Scotty
25 Trotter who's there saying he's the board. We've got them

1 who say they're the board. I've got to be careful who I
2 pay, so obviously I want to pay that amount and that's what
3 I'm here today to offer. I want to pay those amounts. I
4 want to take those notes out of default and pay them in
5 full, pay them off.

6 The Court: And that's the \$900,000?

7 Mr. Neill: No, just the two notes that are due
8 right now. The other two notes aren't due until 2014. The
9 problem is they want to say, oh, they're cross
10 collateralized. First of all, I don't read that language
11 in here. There's no cross default clauses in any of these
12 notes, okay, none of them, okay, but ---

13 The Court: So you want to pay that in addition
14 to the 119?

15 Mr. Neill: Yes, I want to pay the 17,887 ---

16 The Court: Goodness gracious.

17 Mr. Neill: --- and I want to pay the 1296 and I
18 want to pay the 19, and then if we do that, guess what, the
19 homeowners win because they'll have a chance to collect the
20 rest of the money.

21 The Court: Do you want him to send you a ham
22 with the, with the payment?

23 Mr. McMahan: Your Honor, all we want them to do
24 is to comply with the documents. If you look at tab nine,
25 which is what you based your ruling on when we were in

1 Court last December, they don't get their voting rights
2 back until they have paid all amounts owed to the
3 association.

4 Mr. Neill: All in arrears, Judge, owed in
5 arrears.

6 Mr. McMahan: In this case every amount on this
7 accounting is owed in arrears.

8 Mr. Neill: Here's the next problem, Judge.

9 Mr. McMahan: And then, you know, before we go
10 through and parse it out and distribute there has to be
11 some type of evidentiary hearing about the accounting to
12 figure out what is in arrears. We believe that that
13 accounting, and I bear-boned it, Your Honor, I took only
14 the things that they admitted to or my accountant said,
15 every other item on there were a couple of lines there
16 about the beach house where we had a factual dispute
17 probably; however, in the document that they handed up at
18 the last hearing that said that controlled when they get
19 their money, their voting rights back is when they pay all
20 amounts and that was what you based your ruling on. All
21 amounts is more than the shortfall. All the amounts
22 includes the money they took from us, cause remember these
23 notes, these notes were money that they took from our
24 homeowners association to use to spend to fund up their own
25 business. When all, everything that was on here this

1 reserve the loans that they took, was money that they took
2 that should have gone into our reserve account that they
3 used to fund and spend their own business.

4 The Court: Let's look at this, by your
5 accountant's calculation, and it is disputed I understand,
6 at least as to about \$17,000 of it, by your accountings
7 calculation and they say that they're willing to pay that
8 up, \$119,148 was the shortfall calculated January, excuse
9 me, December 31st of 2011; is that correct?

10 Mr. McMahan: Yes, Your Honor, April through
11 2011.

12 The Court: All right, so and at the end of each
13 year, if I understand it, they're to make up the shortfall,
14 okay, so that's due, right?

15 Mr. McMahan: That's due and actually for this
16 year there will be another shortfall because ---

17 The Court: But that's due in December, correct?

18 Mr. McMahan: Well we had ---

19 The Court: Or whatever your fiscal year is.

20 Mr. McMahan: Right, right. Well there's some
21 dispute about that, too, but I won't go into that now.

22 The Court: Okay, but right now on their, their
23 assessment there's a shortfall and you have a document
24 here, it says "calculation of operating fund deficit
25 funding shortfall \$119," okay, and you're telling me that

1 there are two notes that are presently due. One was due in
2 February of 2012 and has a balance of \$17,887.72 and the
3 other one was due again February 6th of 2012 of \$12,946.48.

4 Mr. Neill: Judge, I think that was the amount
5 due on February 6th. There would be some per diem interest
6 that would be added.

7 The Court: No, no, you're telling me, Mr.
8 Neill, that those are the two notes that are presently due?

9 Mr. Neill: Correct, Your Honor.

10 The Court: Okay, so we're looking at \$30,000?

11 Mr. Neill: Correct. There would be some per
12 diem interest added on between the February 6th and the
13 date that we paid off.

14 The Court: About \$30,000, in the ball park,
15 30,000 may be with change or less. Now but you're saying
16 that you are of the opinion that you're calling a \$621,000
17 note and a \$88,000 note and those notes were dated May of
18 2009 and June of 2009 and you're saying they were due on
19 February the 6th of 2012.

20 Mr. Neill: No, sir, they're not, they're not
21 due until May and June of 2014.

22 The Court: Now were they due or is that the
23 call? Okay, all right ---

24 Mr. Neill: They're not due yet.

25 Mr. McMahan: If you look at the mortgage that

1 they gave us, they wrote it, they drafted it, they say that
2 if one note goes in default they all go into default.

3 Mr. Neill: Judge, here's the other problem.
4 Those two notes right now they don't own them.

5 Mr. McMahan: Well we'll get to that in a
6 minute.

7 Mr. Neill: Those notes ---

8 Mr. McMahan: You stole them from us.

9 Mr. Neill: No, no, no, those notes, those notes
10 were assigned from LPA to the Litchfield Plantation buy out
11 group. I have no opinion at this point whether those notes
12 are, whether those assignments are valid or they are not.
13 All I know is with the Register of Deeds office there are
14 assignments of those notes recorded. I know in this action
15 there has been no contest that those notes are, that those
16 assignments are invalid. They filed a lawsuit last week
17 where he's challenging that, but as of now I get the right
18 to rely on the county documents.

19 The Court: Who owns them?

20 Mr. McMahan: There's a criminal action.

21 Mr. Neill: Rob is going to get to that here
22 when we get done with this, Judge.

23 Mr. McMahan: Your Honor, we believe the
24 assignment was invalid and there's a criminal action
25 pending because of that. There is a General Sessions

1 charge against Rob's individual client for grand larceny.

2 The Court: Well, Mr. McMahan, now do I know
3 somehow your client had the cash?

4 Mr. McMahan: One of these notes is actually the
5 subject of that action.

6 Mr. Neill: And, Your Honor, we filed a motion
7 under Rule 67 to deposit those notes into the Court so they
8 would be kept safe until there is a final determination of
9 who is the rightful owner of those notes.

10 The Court: Well that's a wonderful idea, but
11 let me ask you this, were the two smaller of the notes
12 actually due February 7th?

13 Mr. Neill: No.

14 The Court: Of 2012?

15 Mr. Neill: One, one was due January or, no,
16 January 1st, I believe, of 2010 and the other was due in
17 June of this year, 2012, so they're both past due, Judge.
18 The two smaller notes are past due.

19 The Court: June of this year hasn't arrived
20 yet.

21 Mr. Neill: June of last year, I'm sorry, Judge,
22 June of last year.

23 The Court: Okay, all right, well, counsel, what
24 I want to do is let's get this business continuing here.
25 You know, they're telling me, okay, you should have

1 anticipated receiving the two smaller notes by now.

2 Mr. McMahan: Clearly in default.

3 Mr. Neill: But we don't know who to pay.

4 The Court: They're clearly in default, clearly,
5 clearly. Okay, so let's do what's clearly. They're saying
6 that they're willing, in order to get this thing at least
7 on a temporary basis, resolved and back operating they're
8 willing to pay the notes and the disputed \$119,000,
9 disputed as to the difference between 119 and 102 which
10 they admit they do owe, right?

11 Mr. Neill: Correct, Your Honor.

12 The Court: Okay, all right.

13 Mr. Neill: We're willing, if the ruling of the
14 Court is that we have to pay those two notes plus the 119
15 we'd stipulate to that.

16 The Court: Okay, now tell me what we have
17 before me? You fellows must have read the rule book last
18 week in order to file all of these motions, under, what are
19 you asking me to do here today?

20 Mr. McMahan: Frankly, Your Honor, I don't think
21 this is in the rule book, this is as an occasion of your
22 verbal ruling in December. There's nothing that is in the
23 rule book about the accounting but we believe that if there
24 is a factual dispute as to the accounting there has to be
25 some evidentiary hearing to work this out.

1 The Court: You want me to make the payment of
2 some amount that I deem to be appropriate, a condition upon
3 restoration of the Class B voting rights?

4 Mr. Neill: That's right, that's right, Your
5 Honor, using their numbers, using their numbers.

6 The Court: I just made that ruling. I want you
7 to pay \$17,887.72 for the note that was, that was January
8 note of this year?

9 Mr. Neill: Yes, sir, I'll tell you exactly what
10 they are, that is the July, the 17,887 is the July 21st,
11 2009 note in the original amount of \$20,000.

12 The Court: All right, and then there's a note
13 that was June 1st.

14 Mr. Neill: 2010.

15 The Court: 2000 --

16 Mr. Neill: In the original amount of \$50,000
17 and that balance is 12,000.

18 The Court: You know I don't have a, I'm
19 looking, counsel, at your documents and I have a note dated
20 June 11 or June 1, 2011 being \$12,946.40, is that a
21 misprint?

22 Mr. McMahan: Your Honor, that's just a balance,
23 the face amount of notes were due, the face amount of the
24 notes were and that was just the balance as of the date of
25 the accounting.

1 The Court: All right, so that I clearly
2 understand, the anticipation when all the notes were signed
3 was that the 17,887 would be paid by this date and the
4 12,946.48 would be paid as of this date; is that correct?

5 Mr. Neill: Yes, sir.

6 The Court: Those are the ones that when they
7 were signed there was an expectation on the part of all
8 parties that they would be paid by now, okay, so what I'm
9 going to do is a condition of the restoration of the Class
10 B is require that those to be paid up and the \$119,148 be
11 paid up, okay, and I think what that does is it puts us on
12 a sort of square footing at least as to what was
13 anticipated and expected by everyone as of this date.

14 Mr. McMahan: Your Honor, may we also address
15 the other items in the accounting?

16 The Court: Okay.

17 Mr. McMahan: All right, when you, and I've
18 just, I'm trying to find the capital reserve contribution
19 that they were required to make of the \$63,000 when they
20 collected the money from the property owners and they
21 didn't pay it into the reserve account, is that something
22 that should also be paid?

23 The Court: But doesn't that also go back ---

24 Mr. McMahan: It's already in the other action,
25 Judge, to be dealt with later; it's already in the action.

1 The Court: I understand that, but doesn't it
2 all also wash out eventually if, if it's a, if it's a
3 capital reserve account and there's a shortfall don't they
4 have to pay it up anyway?

5 Mr. McMahan: No, sir, it's a completely
6 separate fund of money. The reserve account is there for
7 capital and a maintenance, not routine maintenance, but
8 major items which is why that account exists and the
9 operating account which funds the day to day operations of
10 the association is a completely separate section.

11 The Court: All right, so that may be funds that
12 on some sort of emergency or major issue basis might be
13 required in the future, okay, and we can revisit that and
14 it's already a part of cause of action.

15 Mr. Neill: We'd have to make that shortfall,
16 Judge.

17 The Court: In fact until an event like that
18 would occur even your folks would not be able to invade
19 that account.

20 Mr. McMahan: Well actually, Your Honor, we have
21 sent, we have just had to make major repairs to a beach
22 house and funded out of the homeowners pockets because of
23 the fact that it was in such poor shape and that also gets
24 down to the next section of the accounting ---

25 The Court: Was that part of that excess

1 assessment?

2 Mr. McMahan: Yes, sir, it came out of the
3 homeowners money, we all did.

4 The Court: Okay, and that was sort of
5 calculated in the ---

6 Mr. McMahan: It was, well we had a budget for a
7 certain amount of money for maintenance and we used it on
8 the beach house this year.

9 The Court: All right, so that was again, part
10 of that calculation where we came up with the 119?

11 Mr. McMahan: But it should have come out of the
12 reserve account.

13 The Court: I understand, I understand.

14 Mr. McMahan: And so that money, the reserve
15 account is there for any unusual expense, whatever,
16 actually I don't do a lot of homeowner association work but
17 they're supposed to have reserve accounts for unusual
18 events and they didn't fund it the way they were supposed
19 to.

20 The Court: And, counsel, what I'm trying to do
21 is make sure the homeowners association can continue to
22 operate. There's going to be all sorts of issues that are
23 going to come up about reserve account. There's going to
24 be issues about whether or not the other notes are due.
25 There are all sorts of other things. I see here about the

1 beach house repairs. There are things like that that we're
2 going to have to talk about, but for right now I just want
3 to establish a baseline, a status quo, if you will, that
4 will allow everything to continue to work until those
5 issues can be resolved at another day, okay?

6 Mr. McMahan: Yes, sir, but, Your Honor, the
7 documents require that they pay all amounts due before they
8 get their voting rights back.

9 Mr. Neill: Amounts due in arrears, Judge, these
10 amounts ---

11 Mr. McMahan: These amounts are in arrears.

12 Mr. Neill: They're not owed, they're claims.

13 The Court: I understand, I understand what
14 arrears means and that's what I'm trying to do. We can
15 wait two years and try to find out what is really arrears
16 and in the meantime if they don't have their voting rights
17 I don't blame them, I wouldn't pay anything if I don't have
18 it. I'm trying to strike a balance here so that we can
19 have them pay up and make a good faith payment of what I
20 consider to be due as of this date, if we had no litigation
21 what, where would we be right now and that's how I'm trying
22 to calculate these amounts so that they can get their
23 voting rights, they can pay in, and then we can proceed
24 with whatever else we have.

25 Mr. McMahan: Your Honor, may we also address

1 the beach house repairs of the accounting?

2 Mr. Neill: And, Judge, going back to the
3 accounting part there's one thing that I left out, it's
4 kind of a no brainer. There was a closing that occurred
5 recently that paid monies back towards what was owed on
6 that, that shortfall that they called, \$18,562.50 was paid
7 out of that closing. There was a homeowner that hadn't
8 paid their dues. They sold some lots and then they back
9 paid those dues, so obviously that would come off of that
10 119 surplus.

11 Mr. McMahan: No, Your Honor, it doesn't because
12 as Mr. Neill says, this is a cash basis accounting, that
13 cash was received this year, not last year.

14 Mr. Neill: They can't ---

15 Mr. McMahan: --- and it's not ---

16 The Court: You kind of asking for it both ways,
17 cash basis, cash accrual.

18 Mr. McMahan: Well in Mr. Neill's own, by Mr.
19 Neill's own argument that money counts towards this year's
20 assessments. They're all sorts of past due assessments
21 there, Your Honor, which is ---

22 The Court: I understand, Mr. McMahan, let's
23 keep it as simple as we can. Let me hear you on the beach
24 house renovation.

25 Mr. McMahan: Going back to the Nation's

1 memorandum, if you look at paragraph nine the blue tab,
2 when what happened was this. Litchfield Plantation Company
3 owns the beach house but it is a common amenity of
4 Litchfield Plaintiff Association. There became a large
5 dispute with Georgetown County about the property taxes
6 that were supposed to be paid on that amenity; and the
7 Georgetown County basically said if it's a common amenity
8 they will reduce the property taxes significantly. If it's
9 a privately owned house then they're going to be sky high.
10 So at the time of that ---

11 The Court: Well you folks know that in
12 Georgetown County the beach front funds the rest of the
13 county.

14 Mr. McMahan: Well, Judge, I tell you we didn't
15 mind working this deal out with Georgetown County because
16 they lowered the taxes dramatically but that required
17 Litchfield Plantation Company to then deed the property
18 over to the homeowners association immediately and before
19 the end of 2010. Well the law in South Carolina requires
20 that if a property is deeded over to a homeowners
21 association as a common element that it has to be in a
22 state of good repair. There's a South Carolina Supreme
23 Court case on that; and it was not in a state of good
24 repair. It needed significant repair and what happened was
25 is that the prior owner of Litchfield Plantation Company

1 hired an estimator to go out and figure out how much money
2 was required to actually bring it up to a good state of
3 repair. That's in the Charles Nations [sic] memo, that
4 number is in the accounting. It's \$42,000 and, I'm sorry,
5 \$42,556. The South Carolina Supreme Court says that money
6 has to be paid or reserve given at the time of the
7 transfer. The time of the transfer was December of 2010,
8 so and that money has never been paid.

9 Now the homeowners, we went out there and we
10 looked at it and we don't think they give us a proper
11 estimate. We think there's more to it than what they said,
12 so there is a factual dispute. We think it's more like
13 \$60,000 as opposed to 42 which is what's in the accounting.
14 We got estimates; we've provided all the estimates to Mr.
15 Neill. I don't know what his position is regarding that
16 but there's no doubt that that is currently owed because
17 that beach house was transferred a long time ago and the
18 law requires them to make that payment or bring it to a
19 proper state of repair at the time of transfer.

20 The Court: But isn't that part, I mean that
21 money has been paid, has it not?

22 Mr. McMahan: No, it has not.

23 The Court: Have the repairs been made?

24 Mr. McMahan: No, to some extent. What we did
25 was we hired a painter to go out there and to, we couldn't

1 fix the wood work because we didn't have the money to do
2 that, so we caulked up the holes in the wood work, put a
3 coat of paint on two sides of the house. The repairs still
4 need to be done. We just don't have the money to do it
5 right and so, you know, all of this is ongoing but we don't
6 have that money and that money is due and that money under
7 the accounting should be paid because, of course, you know,
8 the documents say all amounts in arrears. That is clearly
9 in arrears by the South Carolina Supreme Court's --

10 The Court: Who did you buy the property from?

11 Mr. McMahan: The property was not, well the
12 property would have been bought by Litchfield Plantation
13 Company in the late sixties, I have no clue. They held
14 title to it.

15 The Court: Who did you get it from, who did the
16 homeowners association?

17 Mr. McMahan: From the defendant and the
18 defendant is required to have it in a good state of repair
19 at the time of transfer and it wasn't and their own
20 admission here is that it's 40, whatever, their number is
21 42,000 and change. Our number is about 60 and change or
22 close to that, it's in the accounting, but there's no doubt
23 that that money was owed and that money was owed a year and
24 a half ago.

25 The Court: So you get ---

1 Mr. Neill: Judge ---

2 The Court: --- your homeowners association,
3 somebody gives you a beach house you get to look the gift
4 horse in the mouth, so to speak.

5 Mr. McMahan: Well if the wood is rotting and
6 the appliances don't work and the roof is in bad shape and
7 you have to take out, do major repairs on it, it's not me
8 that says that, that's the Supreme Court of the State of
9 South Carolina that says that.

10 The Court: Okay, all right.

11 Mr. Neill: Judge, there's no allegations in his
12 action at all about the beach house, not about the first
13 thing in those pleadings that addresses it. It is in the
14 second lawsuit that was filed last week. It's going to be
15 addressed; it's going to be dealt with. Obviously we
16 contest at this point how the repairs are made. Just
17 because the Supreme Court says one thing in one case
18 doesn't necessarily mean they'll do it again in the second
19 case, you know, but it's a decision that will be made later
20 on. At some point if they get a judgment we'll owe it.

21 The Court: It's a disputed matter that you have
22 chosen to raise in a subsequent lawsuit? How many lawsuits
23 do ya'll have?

24 Mr. McMahan: We have two, Your Honor, and last
25 year you told me to sue for what they're owed ---

1 The Court: If ya'll keep filing lawsuits and
2 paying recording, I mean filing fees we can cut the
3 insurance, I mean the taxes out on that building.

4 Mr. McMahan: Well that might be the case, Your
5 Honor, but there's only two cases, but the Supreme Court
6 said that was due in December of 2010 and there's no doubt
7 that, I mean their own document say it's 42,000. We think
8 it's more like 59.

9 The Court: All right, well, you know, that's a
10 matter that's involved in another lawsuit. Obviously you
11 anticipated it being a separate issue because you filed a
12 separate lawsuit about it, so what I'm going to do is I'm
13 going to require, and someone is going to have to submit
14 another order, require Mr. Neill in order to have, I'll
15 clarify my prior order, in order to exercise his Class B
16 voting rights he's going to have to pay the 17,887.72 and
17 the 12,946.48 as well as the \$119,148 in order ---

18 Mr. Neill: Do we get any type of offset for
19 that eighteen five that was paid?

20 The Court: I'm not going to address that here,
21 I'm just not going to address that. He says you owe him
22 more; you say you owe him less. I'm going to split the
23 baby right here and try to get a figure that I, I determine
24 not to be a real issue and all these other matters can be
25 determined finally at trial. I just want to make sure that

1 the homeowners association can operate smoothly from this
2 point forward, okay?

3 Mr. McMahan: Your Honor, if this money is paid
4 and you have it put in the order that the homeowners
5 association is going to refund to the homeowners any excess
6 assessments that they paid, those were the cap.

7 Mr. Neill: Whoa, Judge, we got parties that
8 aren't here, that's a whole another issue.

9 The Court: That would be a matter actually for
10 your homeowners association I think to vote on or whatever.
11 I think your individual homeowners are certainly entitled
12 to a credit or rebate or something if they paid in excess
13 depending on how the money was assessed, but that's
14 something for you to address. I mean the Court is not
15 going to make that determination.

16 Mr. McMahan: Your Honor ---

17 Mr. Neill: And that's not before the Court
18 anyway.

19 The Court: Homeowners may have just wanted the
20 make a eleemosynary gift to the homeowners association and
21 just for the betterment of the community.

22 Mr. McMahan: Your Honor ---

23 The Court: I doubt it but maybe so.

24 Mr. McMahan: Your Honor, we understand your
25 ruling. We believe that is contrary to the plain language

1 of the documents, and we believe that if you intend to do
2 that then maybe a receiver ought to be appointed to this
3 homeowners association to manage it so that, cause what
4 we're concerned about is they're going to put this money in
5 and take control and take this money right back out and
6 they're going to draw any and all monies ---

7 The Court: You need to come back and see me and
8 then we would talk very seriously about that.

9 Mr. McMahan: Because if they take control of
10 this homeowners association they will simply dismiss this
11 other case that I have filed. I won't be the attorney any
12 more.

13 The Court: I don't even believe Mr. Neill, Mr.
14 Shelton got the nerve to do that.

15 Mr. McMahan: But how am I going to get the
16 expenses paid for it, Your Honor, if they're not willing to
17 pay the cost of the lawsuit? I mean I'm handling it pro
18 bono but it puts me in a very uncomfortable position
19 because ---

20 The Court: What a wonderful thing for you to
21 do.

22 Mr. McMahan: I am handling it pro bono, Your
23 Honor. But it puts me in a position as an attorney
24 representing the homeowners association trying to collect
25 this money answering to the defendant in the action and I

1 don't know how it's possible to proceed forward with that
2 case if in fact the defendant is calling the shots and
3 that's why we think maybe a receiver should be appointed.

4 The Court: I'm really kind of calling the
5 shots.

6 Mr. McMahan: Excuse me?

7 The Court: I'm really kind of calling the shots
8 cause I ---

9 Mr. McMahan: Yes, sir, which is fine.

10 The Court: --- have exclusive jurisdiction in
11 this case and I'm going to maintain and if anything like
12 that happens I'd be extremely upset and I can do all sorts
13 of things. That's a great thing about my job, it takes
14 about two years for somebody to correct me.

15 Mr. McMahan: Yes, sir, I understand.

16 The Court: Now what else do we have in
17 reference to this ---

18 Mr. McMahan: Pretty much everything.

19 The Court: --- and I'm reluctant to appoint a
20 receiver because it seems like every time I appoint a
21 receiver at the end of the day the receiver walks away with
22 the pot and everybody else is left with the empty space. I
23 mean, the receiver ends up with all the money when they
24 start accessing fees and things of that nature so I'm
25 reluctant to do it and in this case I'm going to be

1 monitoring this case anyway.

2 All right, now you have all sorts of motions
3 here. I don't even know which one we just heard.

4 Mr. McMahan: We didn't hear any of them, Your
5 Honor, that really wasn't even a motion.

6 The Court: We hadn't even started yet, okay.
7 We clarified my prior order; is that right?

8 Mr. McMahan: That's correct, Your Honor.

9 The Court: Okay, well which one do you want to
10 do now?

11 Mr. McMahan: I think the proper one would be
12 the oldest which would be the board election which that
13 would resolve three of them, Your Honor, and in fact
14 there's one of them that might make it real quick which is
15 a mootness.

16 The Court: Is that the summary judgment motion?

17 Mr. McMahan: Yes, sir, there's two of those and
18 then, actually three of those.

19 Let me tell you what happened so you'll
20 understand. Our homeowners documents require that there be
21 an annual meeting of the homeowners held in November of
22 every year in which there is an election of a board. The
23 homeowners association was controlled by Mr. Neill's
24 client, the president, being he is president as well,
25 refused to have meetings. There went a period of time,

1 there was one in 2008 and he refused to have one in 2009.
 2 He refused to have one in 2010. He at that point was down
 3 to two board members which was himself and a man named
 4 Jeffrey Van Trese who is also a vice president of Mr.
 5 Neill's company.

6 At the end of 2011 that's when they told, in
 7 2010, they told us they were going broke and they couldn't
 8 pay anything and so the homeowners went to these, the
 9 directors and asked them to, please, have the homeowners
 10 board have an annual meeting with an election for a board.
 11 The board is supposed to have five members; it only had
 12 two. They refused. They would not have a meeting and so
 13 the homeowners availed themselves of a provision in the
 14 bylaws which allowed for the calling of a special meeting
 15 and for a special meeting and there was a notice and the
 16 notice put in there that the purpose of the meeting was to
 17 remove the two directors who we believe were running it
 18 improperly and to allow a vote for a new board of
 19 directors. That was done and that special meeting resulted
 20 in the board that are the plaintiffs in this particular
 21 case which was the real reason we filed this thing to begin
 22 with.

23 Now my motion for summary judgment is to validate
 24 the fact that they were the board from February 26th up
 25 till the end of last year, cause at the end of last year we

1 had an annual meeting like the documents required and
2 there's a whole nother board now that's on the, that runs
3 the place. There is some carry over between them but the
4 question is who is the board between February of 2010 and
5 basically November of last year, December of last year.

6 The Court: And your move for summary judgment
7 of that issue partial summary judgment, okay.

8 Mr. McMahan: Yes, Mr. Neill has also moved for
9 summary judgment on that issue and then after we had the
10 new board election I filed a motion saying really all this
11 is moot now because the new board went back and ratified
12 the actions of the board that was elected back in February.
13 So I'm not really sure it matters right now, but as a
14 practical matter those motions are the ones that are before
15 you now and Mr. Neill has some question about the notice --
16 -

17 The Court: Are they not moot?

18 Mr. Neill: They're not, Judge, because I think,
19 first of all, I haven't seen any affidavits or any
20 documents from the new board saying that they ratified
21 anything, but no affidavits have been produced that says
22 that that happened.

23 The Court: Is that all you need?

24 Mr. Neill: No, I wish it was, Judge. The
25 issues that we've got it's real simple. The bylaws, and we

1 covered this a little bit the last time ---

2 The Court: There you go.

3 Mr. Neill: We covered this, well but this
4 isn't, this wasn't served to me prior to it, this is a
5 summary judgment motion, Judge, I got ten days. The bylaws
6 are simple. They require a specific notice provision on
7 how they can have these special meetings, okay? They
8 called the special meetings; they got enough signatures, I
9 agree with that, but then it also states that they have to
10 mail notice to all the homeowners at least fourteen days
11 but no more than thirty days prior to having this hearing.
12 There's numerous emails that or affidavits submitted with
13 their summary judgment motion that specifically state that
14 they were emailing these notices to people, they were
15 delivering them within the fourteen-day period. By doing
16 those actions they rendered their meeting invalid and the
17 action that they took there invalid. Now I know their
18 argument is going to be that Mr. Trotter, who was there on
19 behalf of LPC, waived that right when he appeared at the
20 meeting, but the problem is Mr., Mr. Trotter left a notice
21 on everybody's chair prior to the meeting that they had a
22 problem with the meeting, they didn't agree with it, and,
23 and then he didn't participate in the meeting. There's a
24 whole, some case laws in South Carolina that's says how you
25 protect your rights is you may appear at the meeting, that

1 you have to object and you can't participate. He did
2 exactly what he was supposed to. If anything there is a
3 question of fact as to whether he properly objected to the
4 meeting, whether he waived it ---

5 The Court: But does it make any difference if
6 it was ratified ---

7 Mr. Neill: It may not, Judge.

8 The Court: --- by the subsequently elected
9 board which everybody seems to agree was properly ---

10 Mr. Neill: Here's the problem, so the first
11 meeting doesn't happen, okay? They're not the right board
12 for the first year, okay? They then call an annual meeting
13 for the second year, okay? The problem is they're not a
14 board, they don't have the authority to call an annual
15 meeting, so what do we do. We turn back to the bylaws
16 again because the bylaws give us all these rules. The
17 bylaws state that the annual meeting must be held on the
18 second November of, on the second Tuesday of November of
19 every single year. In that case it was November 8th and
20 that no notice is required for that meeting. So
21 technically a meeting was held on that date, obviously no
22 one appeared, and no action gotten taken care of. What
23 they called was a special meeting, a group of homeowners,
24 they're not the board, they were never proper, they were a
25 group of homeowners, they needed to meet the five percent

1 requirement and they have to give notice to everybody.

2 The Court: That's the 2010 meeting.

3 Mr. Neill: This is the new, this is the new
4 board.

5 The Court: Okay.

6 Mr. Neill: So they didn't do that meeting
7 properly either under the bylaws so technically we're
8 caught in this crazy situation right now where we've got
9 these five individuals who are seeking declaratory
10 judgment, they haven't had any meetings correctly to get
11 themselves a proper vote ---

12 The Court: Has anybody challenged the board?

13 Mr. Neill: Yes.

14 Mr. McMahan: No.

15 Mr. Neill: We have, Judge, we've ---

16 The Court: That's no.

17 Mr. Neill: This action started as a declaratory
18 judgment asking them to approve ---

19 Mr. McMahan: Not the first board, Your Honor.

20 Mr. Neill: And we've counterclaimed the same,
21 Judge, and Scotty Trotter intervened to do the exact same
22 thing again saying he was, he was the only board member
23 because there hadn't been any proper election since he was
24 elected.

25 Mr. McMahan: It's worse than that, Your Honor.

1 The Court: There couldn't be.

2 Mr. McMahan: Because their documents not only
3 require that there be an annual meeting, there was an
4 annual meeting in late of last year. Mr. Neill sent a
5 subpoena to K. A. Diehl in December of last year seeking to
6 have all the balance and notices delivered to him for that
7 board election. They've had those documents sitting there
8 in their office waiting on him for the last three months
9 and he's never bothered to go pick them up.

10 The Court: So you don't believe his position is
11 correct?

12 Mr. Neill: There's a question of fact ---

13 The Court: You don't believe his position is
14 correct, that creates a substantial issue of fact so I will
15 deny the summary judgment motions both ways.

16 Mr. McMahan: Including the mootness motion,
17 Your Honor?

18 The Court: Yes, he says there's an issue with
19 the new board so --

20 Mr. McMahan: Thank you, Your Honor.

21 The Court: All right, it has just has to be
22 flushed out and beaten up at a trial, okay? So we don't
23 even agree with that we have a board now, well you say yes,
24 you say no.

25 Mr. McMahan: Put it this way, they've taken no

1 actions to contest the current board.

2 Mr. Neill: Judge, this is a declaratory
3 judgment action.

4 The Court: Okay, all right, okay, all right,
5 what else do we have?

6 Mr. Baxter: I'll jump in and ---

7 Mr. Neill: Doug, I think I can given what's
8 happened so far, Judge, I'll go ahead and voluntarily
9 dismiss the counterclaims that I brought that his motion to
10 strike as well and, of course, we do that without prejudice
11 pursuant to the rules so that takes care of that. That
12 also takes care of his discovery motion as well and I'll --
13 -

14 The Court: Mr. Baxter, I'll miss you so today.

15 Mr. Baxter: And I'll also withdraw that motion
16 against Bob to have him disqualified as counsel.

17 Mr. Baxter: Your Honor, one other thing I think
18 and I just want to make the record clear ---

19 The Court: You're ahead of the game now, they
20 just consented to your motion.

21 Mr. Baxter: While I got a chance I'm going to
22 say something, they have also filed a motion to compel
23 requesting certain, they've gotten everything. The only
24 thing we've not produced is they asked for ---

25 The Court: They dismissing as to you.

1 Mr. McMahan: No, but there's a motion, I want
2 to make sure their motion to compel goes away as well
3 because they're asking for financial records from the
4 individuals that they're suing.

5 The Court: You're out of the lawsuit.

6 Mr. Baxter: That, that motion ---

7 The Court: You're out.

8 Mr. Baxter: Okay.

9 Mr. Neill: That's withdrawn.

10 The Court: Okay, what else?

11 Mr. McMahan:: I think Rob Shelton has one.

12 Mr. Shelton: Your Honor, we've got, Mr. Trotter
13 has filed a motion to Rule 67 to deposit to the Clerk of
14 Court those notes and, and the notes and mortgages that
15 are, that are in dispute and what we've been arguing back
16 and forth about. They are, they're the secondary lawsuit
17 that's been discussed this morning that was not in place
18 when we filed this motion, to that secondary lawsuit seeks
19 to foreclose them and alleges that the assignment is void
20 for lack of consideration and is void for lack of authority
21 to execute the assignment. In any event either way Mr.
22 Trotter wants to tender those notes to the Clerk of Court
23 for safekeeping until there's a final determination as to
24 who should receive them and Mr. Trotter has this entire
25 time brought all these motions and under this criminal

1 charge. He has, I've got Billy Monckton here with me this
2 morning, Billy Monckton represents Mr. Trotter in the
3 criminal case. Mr. Trotter is, in order to satisfy the
4 demands of the Solicitor's office, desperately trying to
5 hand those notes over to somebody to safeguard them until
6 Your Honor can determine ---

7 The Court: For safekeeping or for
8 determination, is he divesting himself of the notes or is
9 he ---

10 Mr. Shelton: The problem, he will pursuant to
11 your order, the problem he has is he doesn't know who to
12 divest them to. If he can assign them to the Clerk and the
13 Clerk can when there's a final, an appealable order in this
14 case or the other case or whichever case Your Honor chooses
15 to caption it under, when there's an order in place that
16 the Clerk can determine who the rightful owner of them, is
17 they can be assigned to that person. Mr. Trotter is
18 seeking to safeguard them to satis -- first of all that's
19 been his goal ---

20 The Court: Who claims the notes?

21 Mr. Shelton: --- and, secondly, that's what the
22 Solicitor is demanding of him. That's what he wants to do.

23 Mr. McMahan: Your Honor, once Mr. Neill is
24 going to stand up and state that his client is laying claim
25 to those notes there is no dispute that they were taken

1 from our homeowners association. Mr. Neill?

2 Mr. Neill: Well, Judge, we don't have a claim
3 to them. We owe the money under the notes so ---

4 Mr. McMahan: They should be reassigned over to
5 the homeowners association, Your Honor.

6 Mr. Shelton: Divesting them is in the second
7 lawsuit there are allegations that pertain to those notes.

8 The Court: Does Mr. Trotter take the position
9 that as far as he knows they belong to the, to the
10 homeowners association?

11 Mr. Shelton: There's great dispute as to who
12 owns, because Mr., Mr., the bottom man has alleged that the
13 assignments are improper.

14 The Court: Who are they assigned to?

15 Mr. McMahan: If you look at tab twelve of the
16 notebook in front of you, Your Honor, that is the
17 assignment.

18 The Court: I mean someone assigned them to
19 someone.

20 Mr. McMahan: Here's what happened ---

21 Mr. Shelton: --- and Mr. Trotter will tender
22 them to the Clerk of Court pending further instructions
23 from Your Honor and Mr. Trotter doesn't lay claim to them
24 after that. It's up to Your Honor to decide who they go to
25 at the end of either this lawsuit or the other lawsuit or

1 however Your Honor wishes to safeguard those notes. There
2 is obviously a dispute as to who has control now and, and,
3 and Mr. Trotter's goal simply is to safeguard the
4 documents.

5 Mr. McMahan: Your Honor, there is apparently no
6 dispute between Litchfield Plantation Association and
7 Litchfield Plantation Company according to what Mr. Neill
8 just said. The only dispute is between Litchfield
9 Plantation Association and Mr. Trotter.

10 Mr. Trotter took it upon himself after he left as
11 president of the company to take these notes and give them
12 not to himself, Your Honor, but to give them to one of his
13 corporate entities, Litchfield Plantation Buyout Group,
14 which is not a party to this litigation and is not the
15 moving party. There is no evidence that Litchfield
16 Plantation buy out group has ever assigned them to Mr.
17 Trotter who does not have any personal assignment that
18 we've ever seen that says that he has them and now moreover
19 these notes are not an issue in this particular case. As a
20 matter of fact these notes, one of these notes is not an
21 issue in the other case.

22 The Court: Let me ask Mr. Shelton this, has the
23 buy out company or buy out group ever given any
24 consideration for the notes or was this ---

25 Mr. Shelton: Yes, \$1,000 was paid for the, for

1 the transfer, for the assignment of the notes and Mr.
2 Trotter, the Buyout Group is a party in that second
3 lawsuit, Your Honor. Mr. Trotter can assign them from the
4 Buyout Group to the Clerk of Court in that second action
5 pending further and final order of you, of, of Your Honor.

6 The Court: And you don't object to that, do
7 you?

8 Mr. McMahan: Well, Your Honor, but there's a
9 problem because there are five notes and what Mr. Trotter
10 took for his buy out group was one of the notes that is at
11 issue in the other action and one note that's not even in
12 default yet, that's not at issue in that case. That note
13 doesn't mature until 2014 so if that note is assigned to
14 the Clerk of Court in that action then whether the
15 enforcement rights as the Clerk of Court is supposed to
16 enforce it, how are we supposed to handle it let them hold
17 on to it. We don't even know if Mr. Trotter has the
18 originals.

19 The Court: I think, I think, I think it's to be
20 turned over to the Clerk of Court pending a determination
21 of ownership.

22 Mr. McMahan: But there's no dispute as to
23 ownership unless Mr. Neill says that he thinks he owns it
24 because Mr. Trotter took them from us.

25 The Court: Is it true that there's just one

1 that even is ---

2 Mr. Shelton: How many notes are in the
3 affidavit for the indictment?

4 Mr. Baxter: There are four or five.

5 The Court: I'll hear from you, Mr. Monckton.

6 Mr. Monckton: Your Honor, all we want to do is
7 in the assignment there's something in the assignment that
8 says if Mr. Trotter is not deemed to be the proper owner of
9 the board actions then they should be assigned to the
10 proper authorities. All we're trying to do is safekeep
11 them with you. You decide if somebody, if they need to do
12 something with them can come to you.

13 The Court: I can't keep up with my cell phone.
14 Let's do it with the Clerk perhaps.

15 Mr. McMahan: If they get reassigned they ought
16 to go back to the homeowners association they got taken
17 from. That's not in this assignment with Mr. Monckton
18 said, I think it's in the separate document.

19 The Court: What I'd like for someone to tell
20 me, is there anyone else who really says I own them? The
21 obligation is ---

22 Mr. Shelton: Well they're assigned to
23 Litchfield Plantation Buyout Group and Mr. McMahan claims
24 that that assignment is ineffective; that is not
25 determined. There is dispute as to that because no one has

1 even answered the lawsuit where he said that. It's not
2 even, no one has even signed an acceptance of service.
3 That has, that has its day in court later. Mr. Trotter
4 seeks to divest himself of these notes so that they can be
5 kept safe until the Clerk is instructed by a judge as to
6 who should receive them.

7 Mr. McMahan: Mr. Trotter doesn't have the
8 notes, according to the assignment they belonged to the
9 Buyout Group. Mr. Trotter ---

10 The Court: He has physical possession of the
11 notes.

12 Mr. McMahan: I don't even know that.

13 The Court: Okay, well they're saying they do.

14 Mr. McMahan: Do they have physical possession?

15 Mr. Shelton: Charles Nation I'm told does have
16 physical possession of the notes.

17 Mr. McMahan: Mr. Trotter doesn't apparently.
18 so, you know, this has been a difficult situation but
19 really what they're trying to do is get an advantage over
20 the Solicitor's office. But the notes here, if you assign
21 the notes to any case they should be assigned in the other
22 case not in this case because this case does really not
23 have anything to do with collection on those notes and if
24 you decide in this case there's going to be a title problem
25 because what we have is a filed assignment saying that

1 those notes went from the homeowners association to a
2 buyout group and then we'll have an order saying they went
3 from Mr. Trotter individually to the Court. The gap
4 between what happened between the buy out group and Mr.
5 Trotter will be unfilled ---

6 The Court: No, we can address it in an order.
7 We can say that he has physical possession. We don't have
8 to say he has ownership; that he has physical possession;
9 that there is a dispute pending in the Court of Common
10 Pleas as to the ownership and that the notes for
11 safekeeping are to be turned over to the Clerk of Court for
12 safekeeping. That's all we got to say.

13 Mr. Shelton: That's all we're asking, Your
14 Honor.

15 Mr. McMahan: It would be very appropriate in a
16 interpleader but not appropriate in this particular case,
17 or it would be appropriate in the case in collection.

18 The Court: Counsel, what would be your
19 objection to that?

20 Mr. McMahan: Because it's going to make it
21 difficult, we're going to have two different actions, a
22 pending, and you've got this gap in the chain of title,
23 unless it is assignment from the Buyout Group to Mr.
24 Trotter individually ---

25 The Court: There again, what I'm doing is

1 saying if he only has physical possession, not legal
2 possession or ownership; that he simply has physical
3 possession or if I found the note on the sidewalk, I means
4 it's the same thing, you know. I just want to give it to
5 someone else.

6 Mr. McMahan: But he's ---

7 The Court: We're not making determination
8 whatsoever that he has a right to have them; that he's in
9 possession of them legally; that he has any ownership of
10 these notes. We're not making any determination
11 whatsoever. The alternative is just let him keep them,
12 that's not what you want, is it?

13 Mr. McMahan: No, sir, but nor do we want him to
14 have legal title to them. If there is ---

15 The Court: We're going to make sure that it
16 doesn't speak legal title.

17 Mr. McMahan: So he's still going to claim legal
18 title to these notes after this assignment?

19 Mr. Shelton: We're going to have to wait and
20 see what the Court determines as to who receives the legal
21 title to these notes and mortgages. Mr. Trotter doesn't
22 have any interest in that. He'll assign them to the Clerk
23 if you want him to and there will be a recorded assignment
24 to the Clerk. He wants to divest himself of the possession
25 of these notes to safeguard them. At the end of the ---

1 The Court: And again I don't want to assign
2 them to anyone. I just want to have the possession turned
3 over to the Clerk for safekeeping. That's what I want to
4 see, so that we are not affecting anyone's rights at all.

5 Mr. McMahan: And so to make sure I'm clear,
6 Your Honor, under that order Mr. Trotter is still claiming
7 a legal right to the notes, is that basically what you
8 saying?

9 The Court: Why do we even have to address that?

10 Mr. Shelton: It doesn't have to be addressed,
11 Your Honor. I have not been retained to answer this second
12 lawsuit for him. I don't know how his attorney will answer
13 that.

14 The Court: It says that there is a dispute as
15 to ownership and without finding whether he has any
16 ownership rights at all the Court determines that he is in
17 physical possession of the notes.

18 Mr. McMahan: And so will he relinquish the
19 physical possession to the Clerk?

20 The Court: And he is simply relinquishing
21 physical possession of the notes for safekeeping ---

22 Mr. Shelton: That's right.

23 The Court: --- that's what I'm hearing to the
24 Clerk of Court ---

25 Mr. Shelton: That's right.

1 The Court: --- until, until such time as
2 there's a determination of ownership.

3 Mr. McMahan: Well from what Rob just said he
4 doesn't have physical possession, they're in the possession
5 of Charles Nation.

6 Mr. Shelton: Well for me to record that order
7 I would have to get physical possession of them and record
8 them with that order, that's my goal.

9 The Court: Okay, I mean, you know, you can have
10 your attorney, you can have possession of something and
11 your attorney actually hold it for you. I mean I don't, I
12 don't, that's just semantics. I don't see where there's
13 any problem with that. If you'll prepare an order ---

14 Mr. Shelton: I'll prepare it today.

15 The Court: --- to that regard, share it with
16 counsel before we get it, let's make sure that we're not
17 saying that anybody owns it legally. It's just a matter
18 being in someone's possession, okay. What else?

19 Mr. McMahan: That may be it, Your Honor.

20 Mr. Neill: That's all, Judge.

21 The Court: Okay, I am sure that the Clerk is
22 over there scratching her head as to exactly what she needs
23 to do. Let's sort of go down the list of these, cause I'm
24 going to do some Form 4's orders.

25 The motion to compel filed by Litchfield, which

1 is number two, was that abandoned?

2 Mr. Neill: That was withdrawn, Your Honor, yes.

3 The Court: Withdrawn, okay. The motion to
4 dismiss and partial summary judgment due to mootness that
5 was yours, Mr. McMahan, is that right?

6 Mr. McMahan: That's correct, Your Honor.

7 The Court: Okay, I dismissed both of them, did
8 I not?

9 Mr. McMahan: You denied that motion.

10 The Court: Okay, denied both of them, okay.

11 Mr. McMahan: All three of them.

12 The Court: The motion, notice of motion and
13 motion to compel discovery by Mr. Baxter was withdrawn,
14 right?

15 Mr. Baxter: Based upon the dismissal of the
16 counterclaim.

17 The Court: Dismissal, okay. The Litchfield
18 Company's motion for summary judgment again was likewise
19 denied.

20 Trotter's motion to deposit monies, I think we're
21 talking about depositing the note was granted, Mr. Shelton
22 to prepare an order.

23 The motion for temporary injunction I don't think
24 we even ---

25 Mr. Neill: We just withdraw that, Judge.

1 The Court: Was withdrawn. Motion to join
2 parties or dismiss the action --

3 Mr. Neill: That one we'll withdraw as well,
4 Judge.

5 The Court: Withdrawn. Motion to disqualify
6 counsel was withdrawn; is that right?

7 Mr. Neill: Yes, Your Honor.

8 The Court: And finally the motion for summary
9 judgment, that's your second motion for summary judgment?

10 Mr. McMahan: Actually that was my first one,
11 Your Honor, mootness was the second one.

12 The Court: And that was denied, but I'm going
13 to, we use that to sort of clarify my order, put in there
14 that there would be an order forwarded by, who is going to
15 prepare that order?

16 Mr. Neill: I'll prepare it, Judge, we prepared
17 the first order so --

18 The Court: And you're going to get it to Mr.
19 McMahan, okay.

20 Mr. Neill: Of course.

21 The Court: Okay, all right, gentlemen, I hope
22 that what we accomplished here today was ---

23 Mr. Neill: The only other thing, Judge, is I
24 don't think we talked about cause Doug had a motion to
25 strike my amendment but I was just ---

1 Mr. Baxter: Well what I was going to request if
2 you need a form order reflecting that the counterclaims had
3 been withdrawn then that would make that motion moot, too.

4 The Court: Why don't you prepare an order to
5 that as well.

6 Mr. Neill: I was, can I do a separate order for
7 that, that will make it a whole lot clearer.

8 The Court: Certainly.

9 Mr. Baxter: And we just ask that it be done
10 without prejudice pursuant to the rules.

11 The Court: All right, okay, you just get that
12 to me, Mr. Baxter, and we'll take care of it. All right,
13 gentlemen, thank you for your cooperation. I hope that we
14 can move along with this matter, okay.

15 Mr. Baxter: Thank you, Your Honor.

16 The Court: Have a good day.

17 End of Requested Transcript....
18
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20
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22
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24
25

CERTIFICATE OF REPORTER

I, the undersigned Brenda R. Babb, Official Court Reporter for the South Carolina Court Administration, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal in the Court of Common Pleas for Georgetown County, South Carolina.

I do further certify that I am neither kin, counsel nor interest to any party hereto.

July 13, 2012

Brenda R. Babb

Brenda R. Babb, CVR

OFFICIAL REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

IN COURT OF COMMON PLEAS
2011-CP-22-00319

Litchfield Plantation)
Associates, Inc., et al.,)

PLAINTIFFS,)

vs.)

Litchfield Planation)
Company, Inc, et al.,)

DEFENDANT.)

TRANSCRIPT OF RECORD

September 20, 2012
Georgetown, South Carolina

BEFORE:

The Honorable Larry B. Hyman, Jr., Judge

APPEARANCES:

BY: Robert F. McMahan, Jr, Esquire
Timothy W. Bouch, Esquire
Attorneys for Plaintiffs

BY: Mark D. Neill, Esquire
Attorney for Defendants

BY: Robert S. Shelton, Esquire
Attorney for E. Scott Trotter

BRENDA R. BABB
Circuit Court Reporter

Brenda Babb
Circuit Court Reporter
South Carolina Court Administration
Post Office Box 4800
Calabash, North Carolina 28467

February 9, 2013

Yancey A. McLeod, III, Esquire
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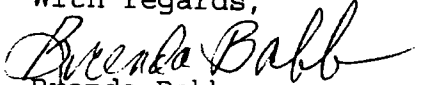
Re: Litchfield Plantation Associates, Inc., et al. vs.
Litchfield Plantation Company, et al.
2011-CP-22-00319
Appellate Case No: 2012-212842

Dear Mr. McLeod:

Enclosed please find a corrected transcript cover page in the
above referenced matter reflecting the date of September 20,
2012. I apologize for this oversight.

Thank you for your attention to this matter.

With regards,


Brenda Babb
Circuit Court Reporter

enclosure

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

IN COURT OF COMMON PLEAS
2011-CP-22-00319

Litchfield Plantation)
Associates, Inc., et al.,)

PLAINTIFFS,)

vs.)

TRANSCRIPT OF RECORD

Litchfield Planation)
Company, Inc, et al.,)

DEFENDANT.)

April 19, 2012
Georgetown, South Carolina

BEFORE:

The Honorable Larry B. Hyman, Jr., Judge

APPEARANCES:

BY: Robert F. McMahan, Jr, Esquire
Timothy W. Bouch, Esquire
Attorneys for Plaintiffs

BY: Mark D. Neill, Esquire
Attorney for Defendants

BY: Robert S. Shelton, Esquire
Attorney for E. Scott Trotter

BRENDA R. BABB
Circuit Court Reporter

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1 The Court: Litchfield Plantation v. Litchfield
2 Plantation Company. All right, whose motion do we have
3 here this morning, looks like we got a protective order and
4 a temporary injunction?

5 Mr. Shelton: This one is mine, Your Honor, I'm
6 Bob Shelton here for Scott Trotter.

7 The Court: Okay.

8 Mr. Shelton: We have, you're familiar with this
9 case, I believe, this case was brought on two basic causes
10 of action, the first one being the question of whether the
11 special meeting in February of 2011 was effective, was it
12 properly noticed, were the votes taken properly, and what
13 are the effects of the action.

14 The second question is the Class B shares. Your
15 Honor has already issued partial summary judgment order
16 dealing with the Class B shares. On July 23rd we continued
17 to take my client's deposition in the courthouse and Mr.
18 McMahan, in taking his deposition, was aware that I would
19 object to his going into anything that would have to do
20 with acts that may become part of the basis for a criminal
21 charge against my client. In July, excuse me, in June we
22 filed a motion in limine because we had been on the trial
23 roster several times already and to try to limit any
24 testimony that might be available from my client because
25 there were pending criminal charges against him. When we

1 convened for the deposition Mr. McMahan went into those
2 questions regardless of my motion in limine and continued
3 to ask my client whether he was a fit board member and
4 asked him about transactions that had taken place that may
5 have been the basis for the criminal charges against him.
6 Mr. MaMahan's reasoning for doing this during the
7 deposition was that when we filed the motion to intervene
8 in this case, which if Your Honor recalls was that we could
9 to tender to the Court for safe keeping the documents which
10 were the basis for the criminal charge ---

11 The Court: Right.

12 Mr. Shelton: --- which we have long since done.
13 Mr. McMahan filed the answer alleging among other things my
14 client had unclean hands so he feels as though he was
15 entitled to go into that in his deposition. The question
16 asked before the Court does not involve the Class B shares
17 anymore. The question before the Court when this comes to
18 trial is solely the issue of whether that February 2011
19 meeting was properly called, whether there was proper
20 notice given, the votes were taken properly, and what the
21 effects of that 2011 meeting are. Neither, no party has
22 questioned whether Mr. McMahan's client had the rights to
23 try and call a special meeting so the question of the acts
24 that may or may not have taken place prior to that to lead
25 up to calling a special meeting is not before the Court.

1 The only thing we're, the only question remaining is
2 whether they did it right and if they did what are the
3 effects of the action, the acts taken at that special
4 meeting. So I have asked the Court to issue a protective
5 order for Mr. Trotter so that if that if his deposition is
6 re-convened certain matters not be inquired into and that
7 would be anything outside the question of whether that
8 meeting was properly called and what are the net effects of
9 that meeting and certainly anything that would call into
10 question any of the actions ---

11 The Court: Is Mr. Trotter incarcerated now?

12 Mr. Shelton: He is not.

13 The Court: Okay.

14 Mr. Shelton: He is not but he has been
15 arrested; he has been charged. The charge against him has
16 very recently been dismissed but would leave to re-indict
17 so he is, he's still under a very real threat of
18 prosecution. All of these charges were brought against him
19 at the behest of the people in the plaintiff class. They
20 have had ongoing meetings with the Solicitor in order to
21 press those charges so those are very real threat.

22 The Court: All right, let me hear you, Mr.
23 McMahan. How do you, how do you circumvent Mr. Trotter's
24 exercise of his Fifth Amendment right?

25 Mr. McMahan: Well, Your Honor, if he wishes to

1 assert his Fifth Amendment right he is certainly within his
2 rights but understand that the question that caused them to
3 terminate the deposition concerned events that occurred two
4 years prior to the factual basis for the criminal charge.
5 The defense that we pled would be unclean hands and is not
6 fit to be a board member due to his repeated violations of
7 the covenants of the plantation association. I was going
8 into that, actually I have a copy of the transcript if
9 you'd like to see it, Your Honor. The events that I was
10 talking about that took place in 2009, the events that gave
11 rise to the criminal charge took place in April of 2010 and
12 11.

13 The Court: Well are you alleging criminal
14 violations or, or are you asking him about conduct that
15 might lead to criminal prosecution back in 2009? He said
16 he thinks it is.

17 Mr. McMahan: Well, Your Honor, I have no
18 control over what the Solicitor or the Attorney General
19 would decide to do ---

20 The Court: I understand that but if there's a
21 possibility that he may be subjecting himself to, to
22 further criminal prosecution he has the right to invoke the
23 Fifth Amendment, doesn't he?

24 Mr. McMahan: Well but he didn't do that, Your
25 Honor, he didn't invoke the Fifth Amendment. What they did

1 was terminate the deposition and during the, obviously if
2 he decides to invoke his Fifth Amendment right then there
3 are certain inferences that can be drawn from that by ---

4 The Court: Well are you saying that there was,
5 that you wanted to ask him other questions, they just
6 terminated the deposition?

7 Mr. McMahan: Exactly right, Your Honor.

8 The Court: All right, well I'm going to let you
9 re-convene the deposition but I'm not going to infringe on
10 his right to invoke the Fifth Amendment at any time during
11 that deposition.

12 Mr. Shelton: Your Honor, we would ask for a
13 protective order limiting the matters that can be inquired
14 into to the matters that are before the Court at that
15 meeting, not whether they had the right to call a meeting.
16 We haven't said they don't have a right to call a meeting.
17 The whole question before the Court ---

18 The Court: I'm going to give them some latitude
19 in that regard, Mr. Shelton. I'm going to let them ask
20 questions that they may think is relevant or think are
21 relevant. If they're not relevant then you don't have to
22 worry about them in trial anyway, but I'm certainly going
23 to limit them when it comes to any matters that might lead
24 to a criminal prosecution and, of course, that's a call
25 that Mr. Trotter is going to have to make. Mr. Trotter is

1 going to have to make that decision. He knows what he's
2 done or what he's been involved in. It may be of a
3 criminal nature, it may not, but he's certainly going to
4 have to be able to have some latitude in deciding whether
5 or not there is a possibility that, and with the advice of
6 his counsel, that it could lead to a criminal prosecution.

7 Mr. Shelton: And I ask, Your Honor, if you
8 would be willing to issue a protective order limiting
9 extensive burden of additional expense on Mr. Trotter
10 because the potential is there for this to take several
11 days of question, plead the Fifth Amendment question, plead
12 Fifth Amendment all at Mr. Trotter's personal expense which
13 I believe is being done in design to harass him and to
14 assist the Solicitor.

15 The Court: Well, I mean how long are you, you
16 thinking you're going to ---

17 Mr. McMahan: Your Honor, we were forty-five
18 minutes into the deposition when they terminated, that is
19 my understanding.

20 The Court: You want me to limit him as to time?

21 Mr. Shelton: I would appreciate it, Your Honor.

22 Mr. McMahan: I think that one day would be
23 adequate.

24 The Court: One day? Then, okay, it would have
25 to be done on the same day.

1 Mr. McMahan: Your Honor, this case is likely to
2 pop up on the roster on the August, October 8th term court.

3 The Court: Don't I have this case?

4 Mr. McMahan: You're not the judge that term,
5 Judge, that's Judge Baxley.

6 The Court: Okay, all right, so this hasn't been
7 designated as ---

8 Mr. McMahan: It has not, Your Honor, so unless
9 they're willing to make him available for deposition to re-
10 convene within the next two weeks could you at least
11 continue it at least a month so that we're allowed to take
12 the deposition?

13 The Court: I think they can make him available
14 in the next two weeks.

15 Mr. Shelton: We'll make him available, Your
16 Honor.

17 The Court: He will be available in the next two
18 weeks.

19 Mr. McMahan: Thank you, Your Honor.

20 The Court: All right, what else do we have,
21 gentlemen?

22 Mr. Neill: Your Honor, I have a motion that
23 kind of deals with three parts. It's listed on the roster
24 as a motion for temporary injunction, there's actually
25 three parts to it. It's a temporary injunction, it's a

1 motion to determine whether an automatic stay comes into
2 place and then in the alternative a Writ of Supersedes if
3 Your Honor determines that the automatic stay does attach.

4 Basically what I've got is, and you remember this
5 well, we've been going through this case for a while where
6 basically five individuals decided they were going to take
7 control of Litchfield Plantation Association. They did so
8 without a court order, court order and they took control of
9 it and basically did two things, but more importantly they
10 decided that the Litchfield Plantation Company's Class B
11 voting rights were going to be terminated.

12 We came before this Court, Your Honor read the
13 covenants and restrictions and found just simply through a
14 clear reading of the covenants and restrictions they were
15 not terminated, that is simply not the case. When that
16 took place they kind of had to fall back on plan B. Plan B
17 was we've got to delay this thing. So, of course, then
18 they invoked a provision that says, okay, due to the
19 arrears to the association your voting rights are
20 suspended. Our response was ---

21 The Court: I thought we cleared all that up.

22 Mr. Neill: Yeah, our response was tell us how
23 much that is, they refused to do that. Your Honor made to
24 do it; we got a number; we paid that number. Now the
25 reason the delay part of it is important is something that

1 Your Honor doesn't know because this hasn't come up before,
2 is that there's another provision in that covenants and
3 restrictions that basically those Class B voting rights are
4 renewed in five-year periods. The current period runs from
5 2010 to 2015 and basically Litchfield Plantation Company
6 during each five-year period has to sell a hundred lots and
7 if they don't they lose their Class B voting rights.

8 The Court: All right.

9 Mr. Neill: So what we're looking at now is the
10 situation where if we can string this thing out we can
11 effectively remove their ability to reinstate those rights,
12 in effect terminate them, which is what they wanted to do
13 in the beginning, okay? So, what we had happen here,
14 Judge, after you issued your ruling which says, Litchfield
15 Plantation Company, you pay \$150,000 and some change and
16 you get your voting rights back, okay? And when we had our
17 motion to reconsider they didn't argue over the fact
18 whether you were correct in determining whether the rights
19 were terminated or not, they just said you gave us the
20 wrong amount, okay?

21 And what has happened now is we've paid that
22 money in good faith; they accepted that money; my guess is
23 they're spending that money, Okay? When we paid the money
24 we served them with a notice that we wanted a special
25 meeting called so that we can exercise our voting rights.

1 They accept that, they called a special meeting, then the
2 meeting is scheduled for a Saturday. On Friday I get a
3 letter from Mr. MaMahan, who's also a plaintiff in this
4 action as well, stating that they have, today they will be
5 filing a notice of intent to appeal your order and that by
6 filing that they have essentially stayed our ability to use
7 our voting rights at that meeting.

8 We go to attend the meeting and they start off
9 with a portion of the meeting where we're going to recall
10 the current board. All the votes are cast, they come back
11 and say, oh, the votes were counted and they were not
12 recalled. I stand up to question the Board, said did you
13 count Litchfield Plantation Company votes? They said, no,
14 we did not count them. I asked them had you counted them
15 would they have been recalled? They said, yes, they would
16 have been recalled. I asked them on whose opinion was it
17 that you aren't counting their votes. They said Mr.
18 MaMahan's based on the fact that they had filed this notice
19 of appeal.

20 They then move to adjourn the meeting. I
21 objected. I told them and we're going to continue this
22 meeting. We're going to nominate people; we're going to
23 cast our votes; and we're going to elect our board members
24 which is exactly what we did. We elected five new board
25 members were John Miller, Billy Deggan, Carson Benton,

1 Jason Morris, and Paul Suter. We re-convened the meeting.

2 We then tried to exercise our rights as a Board.
3 We're here and say we're here to exercise our rights, they
4 will not acknowledge us. They told us that they would not
5 acknowledge us because they had been specifically told by
6 Mr. MaMahan that they do not have to, okay? So this is the
7 kind of situation I'm in right now, and luckily we've got a
8 couple of different ways we can deal with it under the law.

9 The first one is the case is ongoing, okay, this
10 case is not over. Like Mr. Shelton was saying, we still
11 have another, the second part of this issue to determine,
12 whether these people are even the proper board for the
13 H.O.A. So these people who have never been declared to be
14 anything have taken away my clients voting rights, have
15 accepted \$150,000 from them and still refused to honor
16 those rights. When you look at that in conjunction with
17 the fact that in 2015 if we can't meet our requirements to
18 sell those hundred lots we're going to be terminated of our
19 rights. That's what I think they're trying to do now.
20 They know in the end they're not going to prevail on this
21 so the key is to delay right now so that we can keep this
22 tied up in the court of appeals until this all takes place.
23 Now clearly there ---

24 The Court: What keeps you from selling lots in
25 the meantime?

1 Mr. Neill: Well it's very difficult to sell
2 lots when you can't approve plans, those type of things to
3 build houses on those lots ---

4 The Court: Okay.

5 Mr. Neill: --- so it makes it tough, Judge, but
6 what we've got at, so we've got the issue with the T.K.O.,
7 but more importantly I think what they have failed to
8 recognize is though we've got Rule 241 that kind of tells
9 us when matters are stayed and when they're not and there's
10 a general rule and I can pass the rule up to you, Judge, if
11 you need it, that says there is a general rule you file the
12 notice of appeal things are stayed, there's like eight or
13 nine exceptions. Two of those exceptions deal with
14 personal property and real estate, okay? It would be my
15 contention that clearly our voting rights are a personal
16 property right that my client has, okay? They have to be
17 something. They could possibly be real estate since they
18 are tied to the real estate that we own as well, but the
19 result is the same either way. There's a statute that says
20 if we have an appeal that involves personal property the
21 plaintiffs, in order to stay that appeal, have to do one of
22 two things. They got, one, they've got to pay, they've got
23 to pay that property into the court which obviously is not
24 something we can do here today. We don't have a physical
25 piece of property we can do that, or the other option is

1 they have to go back to the Court, they have to say, Court,
 2 we want to stay this appeal and the Court makes a decision
 3 as, okay, you need to post a bond. This is the amount of
 4 your bond and this is what you have to do if you want to
 5 stay this, okay? They have done, they have not done that
 6 in this case. They never approached the Court, they never
 7 asked for a bond posted by two sureties. They're never
 8 done any of that as the statute requires. As a result, and
 9 there's actually a case directly on point that says that if
 10 you do not go and do these steps, your action does not stay
 11 the previous order, okay? I think it's clear that we fall
 12 under that personal property exemption. They've failed to
 13 comply with it. They did not stay your Judge's order and
 14 as a result of it when we exercised our rights at that
 15 meeting we properly elected the Board and are entitled to a
 16 temporary injunction restraining them and their agents from
 17 recognizing us as the Board.

18 Now in the alternative, Judge, if you find that
 19 we don't fit under one of those exceptions, then we've got
 20 the opposite with the writ of supersedeas which is
 21 basically a petition, that begins with a petition to the
 22 trial court and basically says that, hey, there are certain
 23 special circumstances in this particular case where we are
 24 going to allow the order to remain in effect during the
 25 pendency of the appeal. I think those are clearly

1 prevalent here today.

2 You've got my client who has been denied his
3 voting rights by five individuals who have never been
4 authorized by a court to do anything. They filed an appeal
5 on behalf of an entity that they have never been given the
6 authority to manage. They've taken the \$150,000 that we
7 paid them, accepted them, are probably using that money
8 right now, but still refuse to give us access to our voting
9 rights; and faced with the situation where we can meet the
10 hundred lot requirement by 2015 they're going to get what
11 they want anyhow and our rights are automatically going to
12 be terminated regardless. So I think under those
13 particular circumstances we've got clearly something that's
14 entitled to a Writ of Supersedeas until the appeals court
15 can make a decision one way or the other.

16 I think there's another thing that's important to
17 understand, Judge, is I think clearly and, of course, the
18 Court of Appeals -- this is another thing, Judge.
19 Yesterday they filed their appeal, I filed, yesterday I get
20 a request asking for a thirty-day extension to respond to
21 my notice for appeal saying, stating scheduling conflict.
22 It's just more along the lines of we're going to drag this
23 out so that even if they win there won't be enough time for
24 them to meet the requirements under the covenants and
25 restrictions and we lose all the rights; and I think it's

1 clearly interlocutory given the fact that the Court's
2 determination of the amount that was due was not a final
3 judgment because if Your Honor remembers there's the second
4 lawsuit going on where they claim that other monies are
5 owed, those issues are still going to be litigated. They
6 were never finally decided by this Court. The Judge, you
7 just said, Judge, that if you want the voting rights this
8 is what you've got to do and we did that and we still don't
9 have the voting rights.

10 The Court: All right, Mr. MaMahan, tell me why
11 their voting rights would not be considered a property
12 right?

13 Mr. Bouch: Your Honor, may I ---

14 The Court: Or what kind of right, how would you
15 characterize it?

16 Mr. Bouch: Well, Your Honor, my name is Tim
17 Bouch and I'm relatively new to this action.

18 The Court: All right.

19 Mr. Bouch: I'm sorry Mr. Neill ---

20 The Court: Welcome to the fray.

21 Mr. Neill: I'm sorry to interrupt, Judge, but
22 Mr. Bouch has never filed a notice of appearance in the
23 trial court. He is handling the appellate court in this
24 but he's never filed a notice of appearance.

25 The Court: Well he's appearing here for me.

1 Mr. Neill: I just want to make sure that it's
2 clear because if I need to serve him in the future I think
3 that ---

4 Mr. Bouch: We'll be happy ---

5 The Court: Okay, well he's here today and I'm
6 going to hear from him.

7 Mr. Bouch: Thank you, Your Honor. Your Honor,
8 I think one of the interesting things that Mr. Neill
9 admitted to the Court was he has no piece of personal
10 property that he has either identified or can go into ---

11 The Court: Well how would you characterize his
12 right, these voting rights? Would you characterize them as
13 real property, personal property, or something in between.

14 Mr. Bouch: Well, Your Honor, that's the whole
15 issue and I think the whole idea is rather inovative that
16 he wants to turn the exception to swallow the whole rule.

17 Our position is this, Your Honor, with respect to
18 the order that was issued in May, Your Honor, actually in
19 August, August 24th, this, this, this whole squabble as I
20 understand it arose because a developer who was ---

21 The Court: Counsel, I want you to tell me
22 whether or not you believe that this voting right is a
23 property right or a personal right, or realty right or
24 whatever it is.

25 Mr. Bouch: No, sir.

1 The Court: Is it personal property, realty,
2 what is it?

3 Mr. Bouch: No, sir, it's a ---

4 The Court: What is it then?

5 Mr. McMahan: --- a right based on the operation
6 of the documents, Your Honor. It is not a pice of personal
7 property that can be identified under the interpretation of
8 the statute nor is it a piece of real property.

9 The Court: So it's nothing?

10 Mr. McMahan: No, sir, I did not saying that.

11 The Court: Well what, well then tell me what it
12 is?

13 Mr. Bouch: The right arising out of the
14 documents in the case. It is not a personal, it is not a
15 piece of identified personal piece of property. It's like,
16 it's like a constitutional right. It's a statutory right
17 given under the horizional property regime statute and the
18 corporate statute in South Carolina.

19 The Court: Okay, go on.

20 Mr. Bouch: Well, Your Honor, essentially we
21 take the position is this -- with respect to the order that
22 is on appeal and whether it's properly appealed or not it's
23 before the Court of Appeals and we don't have to discuss
24 that basis here -- what we are seeking to do is maintain
25 the status quo.

1 Now, a couple of things that Mr. Neill mentioned
2 that quite frankly are not true. The money he paid us is
3 in trust and it has not been expended and will not be
4 expended. If he wants an accounting on that he's welcome
5 to it.

6 The Court: But it sure hasn't been returned.

7 Mr. Neill: No, Your Honor.

8 Mr. Bouch: I'll be happy to send it back to
9 him, Your Honor.

10 The Court: All right.

11 Mr. Neill: We don't want it back, Judge, we
12 want ---

13 The Court: Let him finish.

14 Mr. Bouch: We just wanted to clarify the rule.
15 And number two, Your Honor, and your question to Mr. Neill,
16 I think was telling, what prevents them from selling any
17 property and the answer is nothing. There is a
18 hypothetical view that well maybe a potential purchaser
19 would want plans approved, you know. Your Honor, we have
20 no intention of upsetting the status quo entity. There is
21 a great deal of mistrust apparently between each side.
22 From our side the first thing they wanted was the
23 management company's checkbook and, of course, the case
24 arose out of some concern that the monies belonging to the
25 homeowners were being improperly utilized. We have no

1 objection to any sort of accounting. We have no, we have
 2 no intention of delaying anything. The request to respond
 3 was from my firm dealing with my firm's scheduling issues,
 4 Your Honor, had nothing whatsoever to do with any type of
 5 delay. If Mr. Neill's client feels that we are in fact, as
 6 opposed to speculating, in fact, preventing any marketing
 7 or selling of the property, we'll be happy to address that,
 8 Your Honor, but that is not, and the affidavits submitted
 9 is telling, Your Honor, the last, the last case talks about
 10 we believe they're going to do this. Well Number one, we
 11 deny it, have no interest in doing that and, number two,
 12 they have alleged no facts and they have not, you know,
 13 pled any evidence at all that would lead one to believe we
 14 are doing this, and that is the problem.

15 Rule 241, the supersedeas rule essentially, as we
 16 read it, Your Honor, the intent of it in sub-paragraph (c)
 17 is to preserve the status quo entity and that's all we want
 18 to do. That's all we want to do and we'll entertain an
 19 order, you know, compelling us to do that.

20 What is also telling that in December when, when
 21 counsel were negotiating, I guess, or drafting the order
 22 that ultimately the Court entered, we offered that, please
 23 put in the clause that homeowners association money will
 24 only be extended for homeowners association purposes, and
 25 they turned that down. They said, no, we're not going to

1 put that in there.

2 Mr. Neill: Your Honor, that's simply not true.

3 Mr. Bouch: Well I have the letter, Your Honor,
4 it's December 21st, 2001, it was addressed to Mr. Neill.

5 The Court: But do you have the response? All
6 right, you seemed to have asked that but what did, what was
7 the response?

8 Mr. Bouch: It was not included, Your Honor, and
9 it was declined.

10 Mr. Neill: Your Honor, we have no problem, we
11 have no intentions of using money for anything other than
12 LPA purposes. That is not what we want but we do want our
13 rights back.

14 The Court: I understand.

15 Mr. Neill: But we don't have any intentions of
16 doing it. If we do wrong ---

17 The Court: All right.

18 Mr. Bouch: Your Honor, our position is, number
19 one, we have appealed it, whether it's proper or not will
20 be decided by another court. Number two, with respect,
21 Your Honor, we'll either be sustained or not and we accept
22 that.

23 The Court: Well the question before me is
24 whether or not that appeal works as a stay; that's the
25 issue I have this morning, whether it works as a stay

1 without any supersedeas, without any bond, with no more
2 action than filing a notice of intent to appeal.

3 Mr. Bouch: And here, Your Honor, if I may
4 address, the first thing we did to offer, under Rule 65, a
5 motion for a temporary injunction. That requires the
6 showing of a bond and they haven't put one up. The second
7 argument they have is we don't need a temporary injunction,
8 okay? We need you to decide whether this is an automatic
9 stay and that goes directly to your question. Are these
10 personal, are these items of personal property, which the
11 statute says, that can either be paid or deposited in the
12 court, like a watch or a piece of sculpture or a car, or is
13 it a piece of real property and they haven't identified any
14 of these. These rights, Your Honor, but to go back to the
15 point is, if they could point to anything that we have done
16 or threatened to do that permits, that precludes them from
17 doing anything under this sale provision that they have
18 another year and a half, two years to do, to 2015, not only
19 then we're properly for the Court if we deny them that
20 right and we haven't denied them that right. They haven't
21 asked for any and that's, that's the whole point and, and
22 as the supersedeas or lifting the automatic stay in Rule
23 241 of the appellate rules, sub paragraph (c), the
24 effective of granting is to stay the matters decided in the
25 order. That's the intent of the rule is to make sure that

1 if whatever happens in the future we don't have to undo
 2 this stuff all over again. So to the extent we are
 3 preventing a sale of any right, to the extent we are
 4 preventing, and they've conceded they are not going to use
 5 any money, and neither are we, for anything other than,
 6 than proper H.O.A. account, or H.O.A. business, and we, of
 7 course, will be happy to submit to any accounting that they
 8 feel is an improper expenditure. Nobody is out there,
 9 this, this case began because we thought they were looting.
 10 We're the residents; they're the developer. We have no, no
 11 incentive to loot the homeowners association. It's our
 12 grass that needs cut, it's our road, it's our roads that
 13 need to be maintained. That is the concern and if indeed
 14 the developer says I've got a sale, you need to let me
 15 change the zoning, we'll be happy to look at it, Your
 16 Honor, and if we can't come to an agreement, lord knows,
 17 they know the way to the courthouse just like we do.

18 The Court: That's what was done.

19 Mr. McMahan: That's right, and, and, and but,
 20 but now we're just talking about the abstract, oh, we might
 21 have something, some time in the next two years that might
 22 require a board action and we want our board instead of
 23 your board. I didn't know, it's an advisory opinion in
 24 honor of something that may not even come to pass.

25 The Court: What brings us to court is the fact

1 that your board divested them, the developer, of any voting
2 rights, that's what brings us to court.

3 Mr. Bouch: That's right, Your Honor, that's
4 right.

5 The Court: It's not who will control. it's
6 whether or not your board has the authority just to
7 completely divest them of any rights, any voting rights at
8 all.

9 Mr. Bouch: That is the gravamen of the
10 underlying lawsuit that they're right ---

11 The Court: So to say that it makes no
12 difference who controls the board, it's really a little
13 insincere isn't it, counsel?

14 Mr. Bouch: No, no, Your Honor, because I think,
15 appealing to both sides, sincere in good faith, okay? It
16 really doesn't matter as long as the homeowners association
17 operates under professional management and that the monies
18 the homeowners pay into that are used for the homeowners
19 benefit, not the profitable benefit of the developer, but
20 for the homeowners association. The developer set up this
21 board ---

22 The Court: Well why is it that your board first
23 thing divested the developer of all of his voting rights?

24 Mr. Bouch: Under the, under the documents, Your
25 Honor, those were divested legally and properly because of

1 improper loans and improper expenditures to the developer's
2 enrichment, that was the concern; and the deterioration of
3 the homeowner's common areas due to the lack of funding
4 because of improper loans, we contend, were made from the
5 developer controlled board to the developer.

6 The Court: And that's being pursued under a
7 separate cause of action, isn't it? I mean that's being
8 pursued?

9 Mr. Bouch: I believe it's more a matter of
10 procedure that substance which is why we're boliched up in
11 this appeal.

12 The Court: Okay, all right. All right, now
13 what else do we have before us this morning?

14 Mr. Neill: Then we have a motion, I have
15 amotion to compel in the other case asking Mr. McMahan to
16 provide me with this evidence that they have of these
17 improper things. He gave it to me this morning. There's
18 three documents in it and I really haven't had a chance to
19 go through it so I'll withdraw it for now with leave to ---

20 The Court: All right, so it's withdrawn, okay?
21 Well what I want you fellows to do is I want you to have a
22 proposed order on my desk by this time next Friday.

23 Mr. McMahan: Thank you, Your Honor.

24 The Court: Thank you.

25 End of Requested Transcript....

CERTIFICATE OF REPORTER

I, the undersigned Brenda R. Babb, Official Court Reporter for the South Carolina Court Administration, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal in the Court of Common Pleas for Georgetown County, South Carolina.

I do further certify that I am neither kin, counsel nor interest to any party hereto.

December 29, 2012

Brenda R. Babb

Brenda R. Babb, CVR-Master

OFFICIAL REPORTER

ORIGINAL

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2011-CP-22-00319

LITCHFIELD PLANTATION)
ASSOCIATION, INC, ET AL.,)

Plaintiffs,)

Transcript of Record

vs.)

August 16, 2012

LITCHFIELD PLANTATION)
COMPANY, INC, ET AL.,)

Defendants.)

B E F O R E:

Honorable Larry B. Hyman
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S:

Michael S. Seekings, Esquire
Attorney for Plaintiff

Howell V. Bellamy, Jr., Esquire
Mark David Neill, Esquire
Attorney for Defendant

Kay H. Richardson, CVR
Circuit Court Reporter

I N D E X

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E X H I B I T S

<u>No.</u>	<u>ID</u>	<u>EV</u>

(There were no exhibits marked during the hearing.)

1 (August 16, 2012.)

2 THE COURT: All right. Litchfield versus Litchfield.
3 Whose motion is it?

4 MR. SEEKINGS: Please the Court, Your Honor, I'm Mike
5 Seekings here on behalf of the Plaintiffs; it's our motion.

6 THE COURT: All right. Let's hear you.

7 MR. SEEKINGS: Please the Court, Your Honor, Mike
8 Seekings, on behalf of the Plaintiffs. I know you've heard
9 this case many times and have issued several orders. This is
10 a motion for reconsideration of the order that Your Honor
11 signed and issued on May 17th of 2012, if the Court has a copy
12 of the order. Specifically, as you recall, this is a case
13 that involves among other things a second cause of action of
14 which you granted Summary Judgment on behalf of the
15 Defendants. The question about whether or not the voting
16 rights of the Class B stockholders could be terminated. And
17 Your Honor ruled as a matter of law that South Carolina did
18 not allow for this Court sitting on a non-jury setting to
19 terminate someone's voting rights as a matter of law and you
20 denied summary judgment on behalf of these Plaintiffs and
21 granted summary judgment on behalf of the Defendants. In
22 addition to that, you took up the question of suspension of
23 the voting rights of the developer Class B stockholder
24 property owners. And in your order went beyond, we believe,
25 ruling on the Motion for Summary Judgment on the second cause

1 of action which was termination of the voting rights and spoke
2 to restoring the voting rights that have been suspended not as
3 a matter of law but as a matter of contract and matter of
4 fact. And you ordered in your order that if the Defendant
5 paid 149,000 plus interest to the Association, their voting
6 rights would be restored and that was following oral argument
7 on the Motion for Summary Judgment on the termination of the
8 voting rights. And what we would ask this Court to do is look
9 at your order and consider the fact that the question of
10 suspension of the voting rights wasn't before Your Honor and
11 in fact, that's a question of contract and fact that at a very
12 minimum should be the subject of an evidentiary hearing and
13 testimony which was not taken. And what Your Honor did is
14 took argument of counsel, made a ruling and has allowed now
15 \$150,000 to be paid in lifting the suspension that comes as a
16 matter of contract of the voting rights. In effect, what that
17 does is it completely shifts the balance of power at
18 Litchfield again back to the Class B voting members when we
19 allege by complaint and as a matter of fact that there is more
20 than the \$150,000 that Your Honor ordered owing; in fact, it's
21 upwards of \$900,000 based on some obligations and a promissory
22 note secured by a mortgage. And I would direct Your Honor's
23 attention specifically in his order to page six. And the
24 first full paragraph in there following where the Court talks
25 about these voting rights and matter of whether or not they

1 should continue to be suspended not terminated. We understand
2 your ruling on the termination but on the suspension, if you
3 look at the middle of the second paragraph you say that it
4 appears that the notes which we as the Plaintiffs allege are
5 due and owing were assigned and that they're not currently in
6 default. Well, Your Honor, we take a different view of that
7 and I would just point out to the Court there's been no
8 testimonial evidence or other evidence other than an
9 accounting provided by the Plaintiffs that they are in fact in
10 default. So, what we're asking today as you reconsider this
11 order is that the portions where you rule on the accounting
12 and the suspension of the voting rights be removed from this
13 order and allow the question of whether or not this Defendant
14 is in fact in arrears on notes and therefore their voting
15 rights suspended be subject to a full evidentiary hearing
16 which we believe we're entitled to. There's a practical
17 effect to everything. As you know, the Class B voting rights
18 are everything plus one and so restoring Class B voting rights
19 will completely shift the balance of power and the current
20 board will be relieved of its duties and there is a
21 substantial amount of money at stake here as well as the
22 livelihood of the Plantation and so while this order speaks
23 just to voting rights, it really effects the entire governance
24 of this property and we believe should be subject to a
25 complete and full evidentiary hearing as opposed to argument

1 of counsel without the benefit of some testimony and further
2 documentary evidence.

3 THE COURT: All right.

4 MR. SEEKINGS: While I understand you've had a long and
5 tortuous history, Your Honor, we would ask that you strike and
6 rewrite that part of the order that doesn't talk to the
7 termination but to the suspension and allow us a full
8 evidentiary hearing continuing the suspension of those voting
9 rights until the amount due and owing under the notes and the
10 mortgage is determined as a matter of law by the court after
11 findings of fact by the fact finder. Thank you, Your Honor.

12 THE COURT: Mr. Neill.

13 MR. NEILL: Thank you, Your Honor. I'm sure, as Your
14 Honor remembers, we had a very long hearing on this. I think
15 it lasted about an hour and a half the last time we got
16 together. And the history of this has been simple. Basically,
17 they claim that our Class B voting rights have been
18 terminated, Your Honor, by -- not by as a matter of law but
19 simply by looking at the covenants and restrictions were clear
20 that that could not take place. You know, that they were
21 suspended until such time as we make the shortfall payment.
22 We had asked repeatedly from the Plaintiffs to give us that
23 number. What is that number? What is it that we owe you and
24 they refused to do so. So, Your Honor, ordered them to give
25 us an accounting, which they did and the numbers that were

1 used came straight off of that accounting. They were their
2 numbers with the exception of a couple of items which were
3 basically two promissory notes that did not come due until
4 June of 2014. Of course, the issue being is, number one, the
5 lawsuit deals with whether these people were even the proper
6 ones to start with; and number two, they don't own those notes
7 right now so they don't even have the right to make a claim of
8 it when you look at the record title. There's a second
9 lawsuit that deals with those notes and we're working through
10 all that. And there was also an issue of some claims, they
11 said we owed them money for a beach house but these were all
12 claims, they were not monies that were actually due and owing
13 right now to the HOA. So, Your Honor, took a look at that and
14 said these were the numbers, there were two notes that were
15 due back in June. Of course, we did not pay those because we
16 didn't know who to pay. You know, my client wasn't gonna pay
17 money to someone that they didn't know they would be
18 protected. And, of course, Your Honor, came up with this
19 number following the numbers that their accountant gave us.
20 We didn't modify those numbers at all. And, of course, my
21 clients in reliance on Your Honor's order have paid those
22 funds and today -- with the goal of restoring their voting
23 rights. And, of course, they need to do that so they can
24 develop the land and they can work towards paying those other
25 notes that come due in 2014. The goal of the Plaintiffs in

1 this whole thing has been delay, delay, delay, don't give them
2 the numbers, don't tell them what they need, that way if we
3 don't give them their numbers, they can never make the
4 payments in the future. And of course, I'm a little baffled
5 by all this. We've paid the HOA 150-some thousand dollars and
6 change and clearly that benefits the homeowners and if we're
7 allowed to go in there and start developing lots and selling
8 lots, we can pay back the monies that will be owed in a couple
9 of years. And that's why it was so important that we had that
10 number right away, Your Honor. Thank you.

11 RULING OF THE COURT:

12 THE COURT: Well, my ruling was made upon the necessities
13 of the situation. I believe that the number that you were
14 ordered to pay was from the -- Litchfield's own accountant.
15 I'm therefore going to deny the Motion for Reconsideration.
16 Okay?

17 MR. NEILL: Thank you, Your Honor.

18 THE COURT: Prepare me an order, Mr. Neill.

19 MR. NEILL: I will, Your Honor. Thank you.

20

21 (Adjourned.)

22

23

24

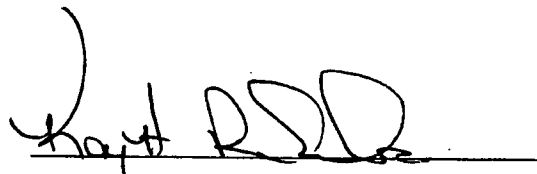
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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the Motion from Reconsideration held in the case of Litchfield Plantation Association, Inc. et al. versus Litchfield Plantation Company, Inc., held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Conway, South Carolina, on August 16, 2012.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson, CVR

Official Reporter

October 10, 2012.

**AMENDMENT TO THE
DECLARATION OF PROTECTIVE COVENANTS,
CONDITIONS AND RESTRICTIONS
FOR LITCHFIELD PLANTATION
and
WAIVER OF RIGHT OF FIRST REFUSAL**

This Amendment to the Declaration of Protective Covenants, Conditions and Restrictions is made this 3rd day of May, 2005, by Litchfield Plantation Company, Inc., ("Company"), and joined in by Litchfield Plantation Association, Inc., a corporation not for profit ("Association"), and Resources Planning Corporation ("RPC").

WITNESSETH:

WHEREAS, the Company as Owner of real property as described in Article I of this Declaration filed a Declaration of Restrictive Covenants dated January 26, 1971, and recorded in Georgetown County Deeds Book 98, Page 36 (the "1971 Declaration"); and

WHEREAS, the 1971 Declaration was amended by the Amendment to Declaration of Restrictive Covenants dated December 30, 1988, and recorded in Georgetown County in Deed Book 317, Page 222 ("the 1988 Modification"); and

WHEREAS, the 1971 Declaration provides that the Declaration, as amended by the 1988 Modification, may be changed, modified or extinguished in whole or in part as to all or part of the property through a written agreement duly executed and acknowledged by the Company, its successors or assigns, and by the then Owners of record of more than one-half (1/2) in area of the premises which are subject to the 1971 Declaration and subject to the payment of charges created by the 1971 Declaration; and

COLUMBIA 879345-1

GEORGETOWN COUNTY PARCEL # _____

SPE