

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2009-CP-10-0553

Emerald Investments, LLC.....Appellant

v.

Ashley River Properties II, LLC; and Kriti Ripley, LLC.....Respondents

RECORD ON APPEAL
(Volume 1 of 2)

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**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM CHARLESTON COUNTY
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Ashley River Properties II, LLC; and Kriti Ripley, LLC.....Respondents

INDEX

Attached hereto is the record on appeal for the above-captioned appeal, including:

I: Orders/Judgments

Page No.

0001	A.	Notice of Entry of Judgment, dated April 26, 2013
0002	B.	Order, dated April 26, 2013
0016	C.	Notice of Entry of Judgment, dated July 24, 2013
0017	D.	Order, dated July 24, 2013
0021	E.	Order, dated December 5, 2013

II: Pleadings

Page No.

0023	A.	Plaintiff's Trial Brief, dated January 17, 2013
0048	B.	Motion to Alter or Amend Judgment, dated May 9, 2013
0064	C.	Notice of Appeal, dated September 9, 2013

III: Transcripts

Page No.

- 0066 A. Transcript of Record (Volume 1), dated January 22, 2013
- 0264 B. Transcript of Record (Volume 2), dated January 23, 2013

IV: Exhibits

Page No.

- 0315 A. Request to Modify Award, dated November 15, 2005 (Δ Exhibit 2)
- 0323 E. Foreign Judgment Enrolled in SC, dated April 29, 2008 (Δ Exhibit 4)
- 0331 I. Arbitration Award, dated October 28, 2010 (Δ Exhibit 5)
- 0339 J. Photo (Δ Exhibit 13)

V: Other

Page No.

- 0341 A. Operating Agreement of ARP-II, dated December 29, 2003
- 0391 B. Appraisal Report of Land, dated October 16, 2009
- 0460 C. Appraisal Report of Marina, dated October 16, 2009

JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

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Clayton B. McCullough
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Charleston, SC 29401

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/crt denies plntff's cause of action for judicial

CASE NO: 2009CP1000553

Emerald Investments Llc VS Ashley River Properties II Llc Etc , defendant, et al

This judgment was entered on the 26th day of April, 2013, and a copy mailed first class on Monday, April 29, 2013, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
EMERALD INVESTMENTS, LLC,)
)
Plaintiff,)
)
v.)
)
ASHLEY RIVER PROPERTIES II, LLC;)
and KRITI RIPLEY, LLC,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 09-CP-10-0553

ORDER

FILED
2013 APR 26 PM 2:48
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Presiding Judge:	Hon. Deadra L. Jefferson
Date of Trial:	January 22-23, 2013
Court Reporter:	Joyce Rueger
Plaintiff's counsel:	Clayton B. McCullough, Esq.
Defendant's counsel:	William C. Cleveland, Esq.

PROCEDURAL BACKGROUND

This matter arises out of a lawsuit filed on January 30, 2009 by Plaintiff Emerald Investments, LLC ("Emerald") against Defendants Ashley River Properties II, LLC ("ARP-II") and Kriti Ripley, LLC ("Kriti"). Plaintiff's Complaint filed January 30, 2009, contains causes of action for (1) judicial dissolution of ARP-II pursuant to Section 33-44-801(4)(b) and (e) of South Carolina's Uniform Limited Liability Company Act ("the LLC Act") and (2) a declaratory judgment that Emerald owns a 70% membership interest in ARP-II.

This matter came before the Court for a non-jury trial on the merits on the above dates. The Plaintiff was present and represented by Clay McCullough, Esq. The Defendant was present and represented by William Cleveland, Esq. At trial, Plaintiff presented three witnesses including Thomas Lussier, Stuart Longman, and Davidson Williams. The Defendant did not call

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any witnesses. Having heard the testimony of the witnesses and having duly considered the admitted evidence, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On January 30, 2009, Plaintiff filed a Complaint containing a cause of action for Judicial Dissolution of ARP-II, specifically seeking an Order, pursuant to S.C. Code Ann. § 33-44-801(b) and (c) of South Carolina's Uniform Limited Liability Company Act, dissolving ARP-II and directing the winding up of its affairs. Additionally, Plaintiff's Complaint alleged a cause of action for a declaratory judgment, seeking an Order, pursuant to S.C. Code Ann. § 15-53-30, declaring Emerald to be a 70% member of ARP-II.
2. On September 23, 2009, Defendants filed an Answer in the form of a general denial, as well as asserting the following defenses: 1) failure to state a claim upon which relief can be had; 2) *res judicata*; 3) collateral estoppel; 4) claims are required to be submitted to binding arbitration in the state of New York; 5) improper venue; 6) statute of limitations; 7) doctrine of estoppel; 8) doctrine of laches; 9) doctrine of unclean hands; 10) Plaintiff's allegations pertaining to steps taken by Kriti and/or ARP-II to recover monies from ARP-I are irrelevant to the Plaintiff's claim to dissolve ARP-II and should be disregarded; and 11) Plaintiff's claims for dissolution are banned by the doctrines of *res judicata* and collateral estoppel because they were litigated in the lawsuit brought by Emerald Investments against the Defendants in the Charleston County Court of Common Pleas and bearing Civil Action Number 2005-CP-10-4571. Defendants sought an Order requiring the Plaintiff submit the dispute to binding arbitration in the state of New York

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[Signature]

or, in the alternative, that the Complaint be dismissed and the Defendants recover their costs, attorneys' fees and incurred expenses.

3. On April 16, 2010, this Court signed a Consent Order, dismissing Plaintiff's declaratory judgment claim without prejudice under Count II pursuant to the provisions of S.C. R. CIV. PRO. 41(a)(2). The parties further agreed that the claims or issues raised in Count II would be arbitrated between the parties in New York in accordance with the provisions of the ARP-II Operating Agreement. Further, the Order stayed the Plaintiff's judicial dissolution claim under Count I pending the arbitration proceedings to be conducted in New York. Finally, "[t]he parties further stipulate[d] and agree[d] that the findings of the above-referenced New York arbitration, upon confirmation of the award, shall be admissible in and binding upon the parties in any action (including, but not limited to, this action) seeking an order of judicial dissolution of ARP II."
4. This case involves the development of a marina and mixed-use residential condominiums in Charleston, South Carolina, known as Ripley Light Yacht Club Marina & Condominiums (the "Project"), located alongside the Ashley River.
5. Emerald Investments, LLC ("Emerald") and its principal Stuart Longman ("Longman") were the original developers of the Project through entities known as Ripley Light Development, LLC ("RLD") and Ripley Light Yacht Club, LLC ("RLYC"), and later as sole managing members of Ashley River Properties II, LLC ("ARP-II") and Ashley River Properties I, LLC ("ARP-I").
6. In the fall of 2003, Emerald sought outside investors for ARP-II, and on December 29, 2003, Emerald and Kriti Ripley, LLC ("Kriti") entered into the Operating Agreement of ARP-II pursuant to the LLC Act.

7. Pursuant to the Operating Agreement, Emerald became a 70% financial and voting member in ARP-II and Kriti became a 30% financial and voting member in ARP-II. Kriti paid \$1,250,000.00 for its interest in ARP-II, and Emerald's initial capital contribution to ARP-II was \$2,500,000.00.
8. In late 2004, Kriti accused Emerald of breaching the Operating Agreement in various respects.
9. Kriti and ARP-II subsequently filed for arbitration, pursuant to the Operating Agreement, against Emerald and Longman in New York, *Re: 13 115 Y 00698 05* ("First New York Arbitration") over these alleged breaches.
10. On October 30, 2005 the arbitrators issued the First New York Arbitration Award ("First Award").
11. Among other things, the First Award stripped Emerald of its voting rights in ARP-II and awarded Kriti certain moneys arising from the diversion of Company funds.
12. The First Award also denied the remedy of forfeiture and held that Kriti "may purchase the Membership Shares of the Emerald Member at a cost equal solely to the Emerald Member's unreturned capital contribution to the Company."
13. During the initial arbitration and, consistently thereafter, Emerald took the position that it continued to own a 70% interest in the Company and Kriti took the position that Emerald's interests had been diluted.
14. Thereafter, Kriti commenced a second arbitration ("Second New York Arbitration") to recover moneys due from Emerald arising from its diversion of funds and for legal fees. That arbitration, dated June 22, 2006, awarded Kriti legal fees and damages.

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15. Kriti then moved to confirm both awards in the Supreme Court of the State of New York, New York County, and on February 15, 2008 both arbitration awards were confirmed by the Honorable Ira Gammernan, Judicial Hearing Officer and reduced to judgment on March 27, 2008 in the amount of \$1,184,581.72 against Emerald and Longman.
16. On April 29, 2008, this New York Judgment was enrolled in Charleston County.
17. In an earlier action, Emerald sought a judicial determination, also in the Supreme Court of the State of New York, that Kriti's right to acquire Emerald's interest in the Company had expired, which motion was granted in 2009.
18. On January 30, 2009 Emerald brought the present action against ARP-II and Kriti. Emerald's Complaint included causes of action for (1) judicial dissolution of ARP-II pursuant to Section 33-44-801(4)(b) and (e) of South Carolina's Uniform Limited Liability Company Act ("the LLC Act") and (2) a declaratory judgment that Emerald still owns a 70% membership interest in ARP-II.
19. On April 16, 2010, this Court executed a Consent Order ("Consent Order") whereby Emerald's declaratory judgment claim was dismissed without prejudice pursuant to the provisions of Rule 41(a)(2), S.C. R. Civ. PRO., so that the remaining claims and issues could be arbitrated in New York.
20. The Consent Order also stayed Emerald's judicial dissolution action pending arbitration, and provided that "[t]he parties further stipulate and agree that the findings of the above-referenced New York arbitration, upon confirmation of the award, shall be admissible in and binding upon the parties in any action (including, but not limited to, this action) seeking an order of judicial dissolution of ARP II."

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21. Emerald subsequently commenced arbitration, pursuant to the Operating Agreement, against ARP-II and Kriti in New York, *Re: 13 115 00216 10* ("Third New York Arbitration"). That arbitration, by an award, dated October 28, 2010, ("Third Award") made a number of findings and conclusions of law.
22. The Third Award found that "the Capital Call, dated February 28, 2005 was defective on its face and, thus, ineffective to trigger a dilution of Emerald's membership interests." Therefore, the Third Award concluded that Emerald continues to own a 70% interest in ARP-II, while Kriti continues to own 30% of the membership interests.
23. Citing the grounds for dissolution contained in the Operating Agreement at Section 9.1¹, the Third Award found "no basis to dissociate Kriti or Emerald from the Company or to dissolve the Company despite the fact that dissolution may be in the best interests of all parties." Furthermore, "[t]he Panel finds that none of these events [in Section 9.1] has occurred and, thus, the parties have not provided sufficient facts for the Arbitrators to render a fact finding authorizing dissolution."
24. Next, citing the grounds for dissociation contained in the Operating Agreement at Section 10.5, the Third Award found "to the extent that the Panel is empowered to opine" that "[t]he parties did not present sufficient evidence to justify a finding of the extreme remedies of dissociation or forfeiture of either member's membership interest in the Company." More specifically, the Third Award states that "the decisions of Kriti did not constitute waste nor 'wrongful conduct that adversely and materially affected the Company's business . . . , [n]or did Kriti's conduct constitute ' . . . a material breach of

¹ These events include the following: "(a) written consent of the members who own the Required Interest of the Voting Rights in the Company; (b) Any event occurs that makes it unlawful for all of substantially all of the business of the Company to be continued, but any cure of illegality with ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this subsection; (c) the filing by the Secretary of State of a certificate of administratively dissolving the Company; (d) The expiration of the period fixed for the duration of the Company."

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[the Operating Agreement] or a duty owed to the Company or the other Members under [Section 33-44-409 of the LLC Act].”

25. On December 16, 2011, the Supreme Court of the State of New York issued its order and judgment confirming the award issued in the New York arbitration proceeding.

26. The relevant findings of the arbitration proceedings include the following:

“All Kriti’s actions in managing ARP-II complained of by Emerald, were [‘]well within reasonable business efforts to manage a complex piece of waterfront property,[’] such that Kriti’s decisions did not constitute (i) corporate waste, (ii) wrongful conduct adverse to ARP-II’s business, (iii) a material breach of the Operating Agreement, or (iv) a material breach of a duty owed to ARP-II or Emerald[.]”

The findings also provide “[n]either Kriti nor ARP-II committed corporate waste or engaged in any misconduct to support dissociation, dissolution, or an award to Emerald of damages; and any request for dissociation, dissolution or damages against Kriti is denied[.]”

CONCLUSIONS OF LAW

I. Plaintiff's Dissolution Action Pursuant to the LLC Act

1. Resolving disputes by way of arbitration is favored by the public policy of this state.

Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 693 S.E.2d 434 (Ct. App. 2010).

2. A main premise upon which this policy rests is the “laudable goal of providing ‘a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings.’” Batten v. Howell, 300 S.C. 545, 547, 389 S.E.2d 170, 171 (1990) (quoting Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 333 S.E.2d 781 (1985)).

3. Whenever factual allegations underlying a claim are submitted for resolution by way

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of arbitration, it serves the policy of this state, which favors arbitration and which favors the efficient and non-piecemeal resolution of disputes, to have all relevant facts determined by way of arbitration.

4. Section 12.18 of the Operating Agreement contains a broad arbitration clause covering "[a]ny dispute or controversy arising under or in connection with this Agreement."
5. The April 16, 2010 Consent Order entered by this Court reflects that all factual findings related to the claims asserted in the Plaintiff's complaint be resolved by way of arbitration and that the findings made in the New York arbitration proceeding "shall be admissible in and binding upon the parties in any action (including, but not limited to, this action) seeking an order of judicial dissolution of ARP II."
6. On October 28, 2010, the arbitration panel issued the Third Award, which found "[n]either Kriti nor the Company committed corporate waste or engaged in any misconduct which would support a finding of fact requiring dissociation, [or] dissolution." The panel continued, "Emerald did not commit sufficient acts to support a finding of dissociation, and, to the extent that the Panel is empowered to opine on the request for dissociation of Emerald, such request for relief is denied."
7. Before issuing their award, the arbitration panel held six hearing days in which they considered all of the allegations of misconduct that Plaintiffs presented at the trial of this case, with the exception that Plaintiff claims that it has not received certain information concerning ARP-II since the date of the arbitration.
8. At trial, Plaintiff took the position that the Third Award did not and could not address § 33-44-801(4)(e) of the LLC Act because those standards are much broader than the

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more limited dissolution grounds found in Section 9.1 of the Operating Agreement, and the arbitrators, per Section 12.18 of the Operating Agreement, could only consider matters "arising under or in connection with this Agreement." However, the Court finds that when Sections 9.1 and 10.5 are read in conjunction with one another, they mirror the language of the LLC Act.

9. The Plaintiff contends that the manner in which ARP-II conducted a previous capital call is evidence supporting judicial dissolution of ARP-II. The 2010 arbitration proceeding specifically addressed Plaintiff's claims with regard to the subject capital call. Although the panel found the capital call defective, it was "ineffective to trigger a dilution of Emerald's membership interests." Further, the panel declined to classify the capital call as a "squeeze down".

10. Additionally, Plaintiff contends the Defendants had a duty to provide information regarding the day-to-day operations of the company. As it pertains to fiduciary duties between Emerald and ARP-II,

[M]embers of a limited liability company are like shareholders in a corporation in that they do not owe a fiduciary duty to each other or to the company, and that as long as members of a limited liability company are not acting in a managerial capacity, they do not have fiduciary duties to one another unless such fiduciary duties are set forth in the operating agreement.

51 AM. JUR. 2D LIMITED LIABILITY COMPANIES § 11 (2013).

11. There is no statutory or common law authority that creates a duty for Kriti to advise Emerald of the everyday managerial functions of the company. Emerald was stripped of its voting power for valid reasons articulated by the arbitrators.

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12. Arbitration awards are conclusive and binding. Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Cl. App. 2005). Plaintiff's argument that the Court should make its own findings of fact with regard to the Plaintiffs' claims that ARP-II should be judicially dissolved, while novel, would entirely circumvent the purpose of having the arbitration proceeding in the first place. As case law illustrates, "[j]udicial review of an arbitration award is limited in scope, and any attempt to convert arbitration into a trial-like judicial proceeding is looked upon with disfavor." Lauro v. Visnapuu, 351 S.C. 507, 570 S.E.2d 551 (S.C. App. 2002). Absent statutory grounds, an arbitration award will be "vacated only on the non-statutory ground of manifest disregard or perverse misconstruction of the law." Jones at 78, 610 S.E.2d at 850. Pursuant S.C. Code Ann. § 15-48-130 (1976), an award may be vacated on five statutory grounds: 1) "corruption, fraud, or other undue means"; 2) "evident partiality by an arbitrator"; 3) "arbitrators [exceed] their powers"; 4) "arbitrators [refuse] to postpone the hearing upon sufficient cause being shown"; and 5) no agreement to arbitrate exists.
13. The findings of the New York arbitration award, after considering all of the evidence Plaintiff presented here, and more, are that Kriti committed no misconduct. Those factual findings are binding in this lawsuit.
14. There is no evidence that Kriti engaged in any such misconduct since the date of the arbitration award.

II. REMEDY

15. The Court acknowledges that it cannot be divested of its ability to dissolve a corporation pursuant to the LLC Act. See Episcopal Housing Corp. v. Federal Ins. Co., 269 S.C. 631, 636, 239 S.E.2d 647, 649 (1977) ("It is well established in South

Carolina that general arbitration agreements which oust the South Carolina circuit court from jurisdiction are unenforceable as against public policy.") Over six hearing days, the arbitration panel considered every issue that could have been presented and was presented to them, and found "the decisions of Kriti did not constitute waste nor 'wrongful conduct that adversely and materially affected the Company's business . . . ,'" [n]or did Kriti's conduct constitute " . . . a material breach of [the Operating Agreement] or a duty owed to the Company or the other Members under [Section 33-44-409 of the LLC Act]." Pursuant to the parties Consent Order of April 19, 2010, the findings of the New York arbitration upon confirmation are binding in any action seeking an Order of judicial dissolution of ARP II. Therefore, this Court is bound by those factual findings. Further, the Court can discern no evidence from that record or the current record before it that pursuant to S.C. Code Ann. § 33-44-801(4)(e), "the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner." Neither party has presented any new evidence regarding the alleged basis of dissolution pursuant to S.C. Code Ann. § 33-44-801(4)(e). While it is clear that these parties have a heightened degree of acrimony toward one another and a lack of trust, the Court has heard no evidence forming a sufficient basis for dissolution or warranting the Court to order such relief. In addition, in light of the decline in real estate values and depressed real estate market the Court cannot justify arbitrarily forcing the parties to place this valuable real estate on the market at what would most certainly result in a substantial loss to the parties.

16. An action for the dissolution of an LLC sounds in equity. Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). Moreover, the LLC Act “grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members,” Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009).

17. The Plaintiff directs the court's attention to Park Regency, LLC v. R&D Dev. of the Carolinas as the basis for the Plaintiff's' argument that this Court has the authority to fashion and grant the equitable relief they are seeking in this case. In Park Regency, members of an LLC brought an action to dissociate a defaulting member from the LLC. Op. No. 5056, *1. The Court ordered the member's dissociation, and the Court of Appeals affirmed, grounding the action in equity. Id. However, the Court finds the facts of Park Regency inapposite to the present case, as this case involves the dissolution of an entire entity and not the dissociation of a single member. Further, unlike the present case, Park Regency does not involve a binding arbitration agreement. While the LLC Act “grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members,” Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009), when an operating agreement exists, it supersedes statutory authority. Clary v. Borrell, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012). Thus, the ARP-II Operating Agreement provisions regarding the basis and means for dissolution would be controlling over the LLC Act.

18. The arbitrators and the court remain bound by the ARP-II Operating Agreement. Section 9.1 of the Operating Agreement articulates the grounds for dissolution:

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(a) written consent of the members who own the Required Interest of the Voting Rights in the Company; (b) Any event occurs that makes it unlawful for all of substantially all of the business of the Company to be continued, but any cure of illegality with ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this subsection; (c) the filing by the Secretary of State of a certificate of administratively dissolving the Company; (d) The expiration of the period fixed for the duration of the Company.

Section 10.5 of the Operating Agreement articulates five grounds for wrongful dissociation, including when a Member:

(i) Engage[s] in wrongful conduct that adversely and materially affect[s] the Company's business; or (ii) Willfully or persistently commit[s] a material breach of this Agreement or of a duty owed to the Company or the other Members under Section 33-44-409 of the Act; or (iii) Engage[s] in conduct relating to the Company's business that makes it not reasonably practicable to carry on the business with the Member.

The Court notes that these grounds basically mirror S.C. Code Ann. § 33-44-801.

19. "Generally, operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply." Clary v. Borrell, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012); See also S.C. Code Ann. § 33-44-103

(1976) (discussing that members of an LLC may enter into an operating agreement "to regulate the affairs of the company and conduct of its business, and to govern relations among the members, managers, and company"). Here, because the operating agreement clearly provides grounds upon which dissolution may occur, and the arbitration panel found no factual support for dissociation or dissolution in the Third Award, statutory authority addressing dissolution need not be taken into account.

20. The Third Award found that "dissolution may be in the best interests of all parties" and "Kriti and Emerald cannot work together in any constructive manner," but the

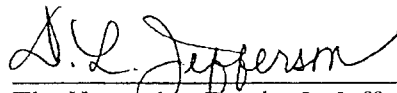
panel concluded that "[n]either Kriti nor the Company committed corporate waste or engaged in any misconduct which would support a finding of fact requiring dissociation, [or] dissolution."

21. Moreover, this Court finds that judicial dissolution is not supported given the factual findings of the Third New York Arbitration, specifically denying relief in the form of dissolution, and while the Plaintiff seeks relief under equitable principles, the court has not been provided nor can it discern any basis to grant such relief. To grant such relief would nullify the binding nature of the factual findings as well the binding nature of arbitration, because "[o]rdinarily, where an arbitration award has been consummated in accordance with the agreement of the parties, both parties are bound by the finding of the arbitrator as to the merits of all matters within the scope of the award." Haworth v. White Stack Towing Co., 256 S.C. 542, 544, 183 S.E.2d 320, 321 (1971). "When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009).

BASED ON THE FOREGOING, the Court denies the Plaintiff's cause of action for judicial dissolution.

IT IS SO ORDERED.

4/26, 2013
Charleston, South Carolina


The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

RETURN SERVICE REQUESTED



www3.charlestoncounty.org

Clayton B. McCullough
68 1/2 Queen Street
Charleston, SC 29401

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/Denying plntff's mot to alter or amend

CASE NO: 2009CP1000553

Emerald Investments Llc VS Ashley River Properties II Llc Etc , defendant, et al

This judgment was entered on the 24th day of July, 2013, and a copy mailed first class on Tuesday, August 06, 2013, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

Ashley River Properties II, LLC, as
assignee of Lunar Systems, LTD and
Ashley River Properties II, LLC, in its
own right,)
)

Plaintiffs,)
)

vs.)
)

Ashley River Properties One, LLC)
successor in the interest to Ripley)
Light Yacht Club, LLC and Ripley Light)
Development, LLC,)
)

Defendants.)
)

Ashley River Properties One, LLC)
)

Third-Party Plaintiff,)
)

vs.)
)

Lunar Systems, LTD and Thomas J.)
Lussier,)
)

Third-Party Defendants.)
)

**ORDER DENYING DEFENDANT
AND THIRD-PARTY PLAINTIFF
ASHLEY RIVER PROPERTIES ONE,
LLC'S MOTION TO ALTER OR
AMEND**

2013 JUL 24 PM 4:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

Presiding Judge:

Date of Trial:

Court Reporter:

Plaintiff's counsel:

Defendant's counsel:

Third-Party Defendant's counsel:

Hon. Deadra L. Jefferson

January 23, 2013

Joyce Rueger

William C. Cleveland, Esq.

Clayton B. McCullough, Esq.

Frank M. Cisa, Esq.

THIS MATTER is before the Court on Defendant and Third-Party Plaintiff Ashley River
Properties One, LLC's Motion to Alter or Amend pursuant to Rule 59(e), SCRPC. The case

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initially came before the Court on January 23, 2013, for a non-jury trial on ARP-II's claim against ARP-I as assignee of Lunar and independently for indemnification and ARP-I's claims against ARP-II, Lunar, and Thomas J. Lussier for abuse of process. At the conclusion of the trial, the Court took the matter under advisement. On April 26, 2013, this Court issued an Order denying ARP-II's indemnity claims against ARP-I, denying ARP-I's abuse of process counterclaim against ARP-II, and denying ARP-I's third-party claim for abuse of process against Lunar and Lussier. The Defendant and Third-Party Plaintiff, Ashley River Properties One, LLC's Motion to Alter or Amend was filed May 9, 2013, and received by the Court on May 13, 2013. Plaintiff Ashley River Properties II, LLC's Memorandum in Opposition to the Motion to Alter or Amend was filed May 23, 2013 and received by the Court on May 23, 2013, and the Defendants Lunar Systems, LTD and Thomas J. Lussier's Memorandum in Opposition to the Motion to Alter or Amend was filed May 28, 2013 received by the Court on May 24, 2013.

STANDARD OF REVIEW

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment, is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (quoting Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). The Supreme Court has clarified the two situations in which a Rule 59(e) motion is appropriate. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Additionally, "[a] party cannot use a motion to reconsider to present an issue he

2 

could have raised prior to judgment but did not." Anderson Mem'l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)).

ANALYSIS

Plaintiff contends the Court's Order erred in two ways: a) by finding that "ARP-I did not satisfy the elements of abuse of process, and b) that ARP-I failed to prove damages with specificity regarding the abuse of process claim." The Court will address each argument in the order raised by ARP-I.

First, ARP-I argues the Order erred by finding ARP-I did not prove the elements of abuse of process. ARP-I contends, as it did at trial, that ARP-II's continuation of the *lis pendens* on ARP-I's property constituted an ulterior purpose and "willful act in the use of the process not proper in the regular course of the proceeding." Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999). As case law illustrates, the filing of a *lis pendens* does not alone constitute an abuse of process, even if done with an ulterior motive to tie up the property. D.R. Horton, Inc. v. Westcott Land Co., Inc., 398 S.C. 528, 550, 730 S.E.2d 340, 351 (Ct. App. 2012). The facts are uncontested that ARP-II has not been paid its judgment, and as the Court's Order states, the continuation of the *lis pendens* was done for the purpose of being indemnified. ARP-II's actions do not constitute an abuse of process.

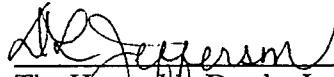
Finally, ARP-I argues the Order erred by finding ARP-I did not prove damages with specificity as to its abuse of process claim. As this Court has already denied ARP-I's abuse of process counterclaim against ARP-II and denied ARP-I's third-party claim for abuse of process against Lunar and Lussier, an extended discussion on damages is not necessary. Even if ARP-I's damages rose beyond mere speculation, because it failed to show that ARP-II, Lunar, and

Lussier engaged in willful acts not authorized in the use of the process, no damages are recoverable.

CONCLUSION

Having considered the Third-Party Plaintiff and Defendant's Motion, the Plaintiff's Memorandum in Opposition thereto, the Third-Party Defendants' Memorandum in Opposition thereto, as well as the various interests balanced by the Court at the time of the ruling, the Motion to Alter or Amend is hereby DENIED.¹

IT IS SO ORDERED.


The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

July 24, 2013
Charleston, South Carolina

TEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P. & G.S.
By 
DEPUTY CLERK

¹ This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

4 

The South Carolina Court of Appeals

Emerald Investments, LLC, Appellant,

v.

Ashley River Properties II, LLC, and Kriti Ripley, LLC,
Respondents.

Appellate Case No. 2013-002109

The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2009CP1000553

ORDER

The time for serving and filing the appellant's initial brief and designation of matter is hereby extended until January 13, 2014 .

FOR THE COURT

BY V. Claire Allon, Deputy
CLERK

Columbia, South Carolina

cc:

Clayton B. McCullough, Esquire

FILED

12/5/13 EAC

William C. Cleveland, III, Esquire
Ross A. Appel, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO.: 2009-CP-10-553
	)	
Emerald Investments, LLC,	)	
	)	
Plaintiff,	)	
vs.	)	PLAINTIFF'S TRIAL BRIEF
	)	
Ashley River Properties II, LLC and	)	
Kriti Ripley, LLC	)	
	)	
Defendants.	)	

Plaintiff, Emerald Investments, LLC ("Emerald"), by and through its undersigned counsel, submits this Trial Brief.

This is a "business divorce" case involving Emerald and Kriti Ripley, LLC ("Kriti") – the sole members of Ashley River Properties II, LLC ("ARP-II"). Emerald seeks judicial dissolution of ARP-II, pursuant to the South Carolina Uniform Limited Liability Company Act (the "LLC Act"), based on nearly a decade's worth of unlawful, oppressive, fraudulent, and unfairly prejudicial conduct Emerald and its principal Stuart Longman ("Longman") have suffered at the hands of Kriti and Kriti's manager Davidson D. Williams ("Williams").

Kriti's and Williams' efforts have led to almost a decade's worth of costly and prolonged litigation spanning multiple states. Williams himself recently conceded that, "I think it's time we sever our interests somehow and end this nightmare." (Arbitration Hr'g Tr. 1278:21-23). Emerald and Longman could not agree more.

This brief first argues that this Court has the power to dissolve ARP-II, and then argues that it should dissolve ARP-II given Kriti's and Williams' egregious misconduct towards Emerald and Longman. It concludes with recommendations this Court may utilize in fashioning a dissolution order.

STATEMENT OF THE FACTS

This case involves the development of a marina and mixed-use residential condominiums in Charleston, South Carolina known as Ripley Light Yacht Club Marina & Condominiums (the "Project"). The Project consists of two separate components, approximately four acres of upland property and a marina on the Ashley River.

Emerald and Longman were the original developers of the Project through entities known as Ripley Light Development, LLC ("RLD") and Ripley Light Yacht Club, LLC ("RLYC"), and later as sole managing members of ARP-II and Ashley River Properties I, LLC ("ARP-I").

In the fall of 2003, Emerald sought outside investors for ARP-II. On December 29, 2003, Emerald and Kriti entered into the Operating Agreement of ARP-II pursuant to the LLC Act ("Operating Agreement"), a separate Project Development Agreement for the Ripley Light Project dated December 30, 2003 ("Project Development Agreement"), and an Indemnity Agreement. Emerald became a 70% financial and voting member in ARP-II and Kriti became a 30% financial and voting member in ARP-II. Kriti paid \$1,250,000.00 for its interest in ARP-II, and Emerald's initial capital contribution to ARP-II was \$2,500,000.00.

Less than a year after Kriti entered the picture, in late 2004, Kriti accused Emerald of breaching the Operating Agreement in various respects. (November 4, 2004 Letter from Kriti to Emerald). Kriti's principal accusations involved Emerald's alleged mishandling of funds and failure to disclose certain information, including the existence of certain preconstruction investors for the Project. Emerald vigorously disputed both charges because the use of a "sweep account" was common industry practice and all money was returned, and the preconstruction investors had no claim against ARP-II.

On or about January 14, 2005, Kriti terminated the Project Development Agreement, removed ARP-I from its role in developing the Project, and assumed sole management of ARP-II from Emerald. Kriti and ARPII subsequently filed for arbitration, pursuant to the Operating Agreement, against Emerald and Longman in New York, *Re: 13 115 Y 00698 05* ("First New York Arbitration") over these alleged breaches. Kriti petitioned the arbitrators for, among other things, (1) full management control over ARP-II and (2) forfeiture of Emerald's entire interest for challenging the validity of a February 2005 Kriti-initiated two-million dollar (\$2,000,000.00) capital call. (February 28, 2005 Capital Call Letter from Kriti to Emerald).

The First New York Arbitration found that Emerald technically violated the Operating Agreement by using the sweep account, and, as a result, lost its voting rights in ARP-II. (1st Arbitration Award, p. 3, ¶ 1). As for the preconstruction investor "claims," ARP-II was required to discharge them at its sole expense, and Emerald and Longman were responsible for indemnifying ARP-II in the amount of four-hundred thousand dollars (\$400,000.00), which represented only a fraction of the total preconstruction investor claims, according to Kriti and Williams. (1st Arbitration Award, p. 3, ¶ F). The

arbitrators reached this result because "[w]e question Kriti's conduct in encouraging some of these third parties to assert claims against ARP II and not accept partial reimbursement of their deposits." (1st Arbitration Award, p. 3, ¶ F). Next, the arbitrators found that Emerald had probable cause to challenge Kriti's capital call, refusing to find that Emerald forfeited its entire interest by doing so – as alleged by Kriti. (1st Arbitration Award, p. 3, ¶ B.4). Finally, the arbitrators provided Kriti the right to buy-out Emerald's interest (1st Arbitration Award, p. 4, ¶ 3), but Kriti failed to timely act on this buy-out option.

Soon thereafter, on November 15, 2005 Kriti and ARP-II petitioned the arbitrators to modify the award, among other things, to increase the indemnification award to \$879,541.74 and to specify which third-party claims made up the \$400,000.00 awarded. The arbitrators rejected Kriti and ARP-II's request on December 9, 2005. The First New York Arbitration Award, and a later Second New York Arbitration, were subsequently confirmed by the New York Courts and made final on February 15, 2008.¹ A March 27, 2008 New York judgment totaling \$1,184,581.72 (and encompassing the \$400,000.00 indemnification award from the First New York Arbitration) was subsequently enrolled in Charleston County on April 29, 2008.

Before, during, and after the First New York Arbitration, the members of ARP-II have been embroiled in a series of lawsuits and arbitrations between themselves and third parties. The following cases provide a sampling as well as important background relevant to the ultimate disposition of the present dissolution action.

¹ "The second arbitration proceeding dealt with accounting issues and monetary claims that had been bifurcated from the original arbitration and reserved for a subsequent arbitration, because of the time constraints contained in the arbitration provision of the parties' agreement." Confirmation Order, p.2.

- Kriti and Williams caused Lunar Systems, LTD, one of the preconstruction investors, to bring a lawsuit against ARP-II and ARP-I in 2005. On December 20, 2007, Kriti-managed ARP-II satisfied this claim (as required by the First New York Arbitration) and Lunar purported to assign its claim against ARP-II to ARP-I. ARP-II then proceeded to surreptitiously put Emerald-managed ARP-I into default to gain additional leverage over Emerald and Longman.²
- Kriti and ARP-II enrolled the \$1,184,581.72 New York judgment against Emerald and Longman in Charleston County, and then subsequently obtained a charging order against Emerald's distributional interest, on which it later sought to foreclose.³
- Liollio Associates, LLC brought a breach of contract action against ARP-I, ARP-II, and Kriti for breach of contract.⁴

While Emerald was locked out of any role in the day-to-day affairs of ARP-II, Kriti's poor management caused ARP-II to become saddled with debt and the Project to be mired in dysfunction. Several lucrative offers for the Project were rejected by Kriti, which would have made both they and Emerald millions. Moreover, during this time, Emerald and Longman were routinely kept in the dark regarding ARP-II's dealing and finances, despite repeated requests for Operating Agreement mandated disclosure. Finally, and perhaps most egregiously, despite the First New York Arbitration's finding that Emerald had probable cause to challenge Kriti's capital call, for years Kriti considered it to have successfully diluted Emerald's interest in ARP-II down from 70% to approximately 21%. (E.g., 2007 K-1s of ARP-II).

² Ashley Rivers Properties II, LLC, as assignee of Lunar Systems, LTD and Ashley Rivers Properties II, LLC in its own right vs. Ashley Rivers Properties One, LLC, successor in the interest to Ripley Light Yacht Club, LLC and Ripley Light Development, LLC (C/A No.: 2005-CP-10-2434).

³ Kriti Ripley, LLC and Ashley River Properties II, LLC, v. Emerald Investments, LLC and Stuart Longman (C/A No.: 2008-CP-10-2344). The Circuit Court's decision is pending appeal before the South Carolina Court of Appeals.

⁴ Liollio Associates, LLC v. Ashley Rivers Properties I, LLC, Ashley Rivers Properties II, LLC and Kriti Management, Inc. (C/A No.: 2005-CP-10-2537).

Having had enough, on January 30, 2009, Emerald filed the present action seeking (1) a judicial dissolution of ARP-II pursuant to the LLC Act, and (2) a declaratory judgment that Emerald is a 70% member of ARP-II. On April 16, 2010, the Honorable Deadra L. Jefferson signed a Consent Order whereby the parties agreed to stay the dissolution action and submit the latter claim to another round of arbitration in New York.

Emerald subsequently commenced arbitration in New York against Kriti *Re: 13 115 00216 10* (the "Third New York Arbitration"). On October 28, 2010 the arbitrators issued their decision (the "Third New York Arbitration Award"), which, among other things, confirmed Emerald's 70% stake in ARP-II and declared Kriti's capital call to be "defective on its face and, thus, ineffective to trigger a dilution of Emerald's membership interest". (3rd Arbitration Award, p. 2). The arbitrators also refused to find that either dissociation or dissolution was warranted pursuant to the narrow terms of the Operating Agreement. (3rd Arbitration Award, p. 3-5). Nevertheless, the arbitrators observed that "dissolution may be in the best interests of all parties" and "Kriti and Emerald cannot work together in any constructive manner." (3rd Arbitration Award, p. 3-4).

The Third New York Arbitration was confirmed on January 30, 2012. The issue before this Court now is whether Emerald's request for dissolution should be granted.

The Consent Order provided that "the findings of the above-referenced New York arbitration, upon confirmation of the award, shall be admissible in and binding upon the parties in any action (including, but not limited to, this action) seeking an order of judicial dissolution of ARP-II." Therefore, Emerald takes the position that all exhibits referenced

in the arbitration award itself are admissible. Below, we cite to a number of emails and documents that were exhibits in the NY arbitrations. The materials will be presented at the trial of this case, however, in an effort at full disclosure, opposing parties have not consented to the admission of the materials into evidence in advance of the trial. They are only offered here in an effort to explain the history of this case to date.

POINTS AND ANALYSIS OF LAW

I. THIS COURT HAS THE AUTHORITY TO DISSOLVE ARP-II.

As indicated by the Consent Order, this Court possesses the ultimate power to dissolve ARP-II, a South Carolina limited liability company. The LLC Act provides that dissolution may occur either upon "an even specified in the operating agreement," S.C. Code Ann. § 33-44-801(1), or "on application by a member . . . upon entry of a judicial decree" if any of five (5) criteria are met. S.C. Code Ann. § 33-44-801(4) (emphasis added). Therefore, notwithstanding the Operating Agreement and decisions made thereunder, this Court – not a New York arbitration panel – ultimately retains jurisdiction over and authority to dissolve ARP-II.⁵

Granted, the Third New York Arbitration Award did not dissolve ARP-II. However, this decision was necessarily limited to the specific grounds for dissolution set forth in the Operating Agreement. See Section 12.8 of the Operating Agreement ("[a]ny dispute or controversy arising under or in connection with this Agreement shall be submitted to

⁵ In an earlier attempt by Emerald to dissolve APR II and in response to Emerald's argument that only a South Carolina Court could entertain a lawsuit to judicially dissolve ARP-II, the Court of Appeals noted that Emerald lacked standing because the First New York Arbitration gave Kriti the right to acquire all of Emerald's interest in ARP-II. Ashley River Properties, I, LLC v. Ashley River Properties II, LLC, 374 S.C. 271, 648, S.E.2d 295, n. 1. However, the First New York Arbitration's buyout provision provided that "[t]he closing shall take place pursuant to the terms of Section 13.02(c) [of the Operating Agreement] within 10 days and no later than 120 days after the date of this Award." This time period having long expired, Kriti lacks the right at present to purchase Emerald's interest. Therefore, Emerald has standing with respect to this instant judicial dissolution action.

binding arbitration . . . "). This is significant because the Operating Agreement's grounds for dissolution are much narrower than those found in the LLC Act. Compare Section 9.1 of the Operating Agreement; S.C. Code Ann. § 33-44-801(4). Moreover, such narrow grounds for dissolution cannot be made exclusive by contract because, under the LLC Act, an operating agreement may not "vary the requirement to wind up the limited liability company's business in a case specified in Section 33-44-801(3) or (4)." S.C. Code Ann. § 33-44-103(b)(6). Therefore, the Third New York Arbitration did not and indeed *could not* have made a complete and final decision on whether ARP-II should be dissolved.

S.C. Code Ann. § 33-44-801(4)(e) of the LLC Act authorizes the dissolution and winding up of an LLC upon the application of a member and a judicial decree that: "the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner." The Third New York Arbitration's findings do not limit this Court's authority to make findings in present action because the Operating Agreement's dissociation and dissolution provisions concern conduct and consequences of a completely different nature than that of S.C. Code Ann. § 33-44-801(4)(e).

Unlike the standards for *dissociation* found in the Operating Agreement and the LLC Act, S.C. Code Ann. § 33-44-801(4)(e) focuses on negative conduct directed at the petitioner, *i.e.* a member of the LLC, as opposed to conduct detrimental to the LLC itself or the members collectively. (Operating Agreement Section 10.5 (mirroring S.C. Code Ann. § 33-44-601(6), which allows dissociation where a member commits "wrongful conduct . . . materially affect[ing] the *Company's business*," breaches "a duty owed to

the *Company*," or engages in "conduct relating to the *Company's business*" making it impracticable to carry on business together)) (Emphasis added). Therefore, the issue before this Court is not whether Kriti and Williams' conduct harmed *ARP-II*, but whether Kriti and Williams harmed *Emerald*.

Given the above, this Court has the power to consider provisions of the LLC Act including, but not limited to, S.C. Code Ann. § 33-44-801(4)(e) and decide whether to dissolve *ARP-II*.

II. KRITI'S CONDUCT WARRANTS DISSOLUTION UNDER THE LLC ACT.

The baseline fiduciary duties members owe one another under the LLC Act, namely a duty of loyalty and a duty of care, guide the application of S.C. Code Ann. § 33-44-801(4)(e). S.C. Code Ann. § 33-44-409 (setting forth duties); S.C. Code Ann. § 33-44-103(b)(2)-(4) (prohibiting unreasonable limitations on the duty of loyalty, duty of care, and obligation of good faith and fair dealing). According to Chief Justice Toal, fiduciary duties in the LLC context are similar if not identical to those existing in the partnership context.⁶ These duties are as follows:

Partners are held to a standard stricter than the morals of the marketplace, and their fiduciary duties should be broadly construed, connoting not mere honesty but the punctilio of honor most sensitive. In all matters connected with the partnership every partner is bound to act in a manner not to obtain any advantage over his copartner in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

⁶ As Chief Justice Toal has written, although there may be a difference between partnerships and LLC's under the LLC Act with respect to the good faith and fair dealing obligation "[i]n practice, the effect of this difference may be minimal." Jean H. Toal & W. Bratton Riley, *Fiduciary Duties of Partners and Limited Liability Company Members under South Carolina Law: A Perspective from the Bench*, 56 S.C. L. Rev. 275, 286 (Winter 2004). Justice Toal went on to point out that "courts will likely broaden the implications of the obligation [of good faith and fair dealing] such that morally offensive behavior . . . will be deemed 'bad faith' behavior resulting in a breach of the obligation of good faith and fair dealing." *Id.* at 289.

Kuznik v Bees Ferry Associates, 342 S.C. 579, 597-98, 538 S.E.2d 15, 24 (Ct. App. 2000) (emphasis added).

In addition, the South Carolina Supreme Court has offered guidance on what constitutes "oppressive," "fraudulent," and "unfairly prejudicial" in the business context. Last summer, in Ballard v. Roberson, a case also involving a marina development, the Court summarized the law as follows:

In establishing the proper considerations for finding oppression, we observed that "the terms 'oppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case." We also noted this was a fact-sensitive review and should therefore be determined through a "case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior." Although we declined to set out specific factors in Kiriakides, we observed several commonly considered ones including: "eliminating minority shareholders from directorate and excluding them from employment[,] . . . failure to enforce contracts for the benefit of the corporation[, and] withholding information from minority shareholders."

(S.C. Sup. Ct. Op. No. 27161, filed August 29, 2012) (citing Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587, 541 S.E.2d 257 (2001) (internal citations omitted) (emphasis added). But perhaps most telling, "[t]he concern and focus in shareholder oppression cases is that the minority 'faces a trapped investment and an indefinite exclusion [from] participation in business returns.'" Id. (citing Kiriakides, 343 S.C. at 604, 541 S.E.2d at 267). This is commonly known as a "freeze out" in closely held business entities like ARP-II.

For the better part of a decade, Kriti and Williams have acted in a manner unlawful, oppressive, fraudulent, and unfairly prejudicial towards Emerald in violation of the duties set forth in the LLC Act, S.C. Code Ann. § 33-44-801(4)(e), and South

Carolina case law. For years, Emerald has been locked out of the business by Kriti and truly faces the prospect of losing its entire investment in ARP-II as a result of Kriti's oppression. The Third New York Arbitration agreed with this assessment, observing that "[d]issolution may be in the best interests of all parties," and that "Kriti and Emerald cannot work together in any constructive manner." (3rd New York Arbitration, p. 3-4).

The most noteworthy and flagrant examples of Kriti's conduct giving rise to dissolution under S.C. Code Ann. § 33-44-801(4)(e) are presented below.

a. Kriti tried to squeeze down Emerald's interest in ARP-II by issuing a bad-faith, facially defective capital call.

Since day one, Kriti has tried to diminish Emerald's ownership interest in ARP-II for its own benefit. After obtaining full managerial control of ARP-II, Williams acknowledged during the Third New York Arbitration hearing that he wrote to a Kriti investor the following: "[w]e also have effective control over major financial decisions and have the ability to squeeze down the developer [Emerald/Longman] if he so much as hiccups." (January 12, 2004 e-mail from Williams to Yargos Vardinoyannis). The alleged missing funds from the sweep account and the potential preconstruction investor claims had set the stage for Kriti in Williams' mind. Later, in an e-mail to his superiors, Williams spoke of an "opportunity" to "get a bigger piece of the project." (December 6, 2004 e-mail from Williams to Yannis Vardinoyannis). Kriti's analysis of a proposed offer on the property from Centex, which Longman had brought to the table, was based not on its 30% share, per the Operating Agreement, but rather based on a purported squeeze down of Emerald's interest. Notably, in Ballard v. Roberson,

discussed above, the Court found e-mail communications indicating the member with voting rights' desire to oust the other partner very compelling in its oppression analysis.

Kriti's squeeze down was to be accomplished via the above-mentioned capital call. While there are no South Carolina cases directly on point, courts from around the country have invalidated capital calls where the primary motivation was to squeeze-down and oppress fellow business partners rather than fund the business. E.g. Della Ratta v. Larkin, 856 A.2d 643 (Md. Ct. App. 2004) (affirming the invalidation of a capital call where the motivation was to squeeze out the other partners, and there had been little or no effort to explore less oppressive means of funding); Schafer v. RMS Realty, 741 N.E.2d 155, 179 (Ohio Ct. App. 2000) (holding that the power to issue a capital call must be balanced with a partner's fiduciary duties to its co-partners). In the present case, the facts similarly show that Kriti's capital call was driven by ulterior motives.

First, as determined by the Third New York Arbitration, the capital call violated the Operating Agreement by placing various disputed claims as preconditions to the capital call's satisfaction. Williams stated in the capital call letter that even if Emerald paid the full amount of the capital call (\$1.4 million, which is 70% of the \$2 million call), the money would be first applied to cover funds allegedly missing from the sweep account (\$155,000) and to set up a reserve fund for potential third-party claims (\$1,000,000) – not to satisfying the capital call. (February 28, 2005 Capital Call Letter from Kriti to Emerald). This was a blatant violation of Sections 3.7(b), (c) of the Operating Agreement, which do not authorize such preconditions.

All told, Emerald would have had to come up with \$2.7 million to avoid having its interest diluted under Section 3.7(d) of the Operating Agreement. Kriti knew that Emerald lacked sufficient funds to meet these obligations, and, in any event, would dispute the above-mentioned preconditions. This provided Kriti precisely what it wanted and what it promised its investors – a pretext to dilute Emerald and wrest control of ARP-II away from Emerald.

Second, Marshall Investments Corporation ("Marshall") was ready willing and able to lend the company funds at the time the capital call was issued, but Kriti scuttled this by doing everything in his power to reject this source of funding, lest it obviate the need for the capital call. Marshall had approved \$2.125 million in additional financing weeks prior to Kriti's issuing the capital call. (See January 12, 2005 e-mail from Richard Pitts to Longman). However, per the capital call letter, Kriti refused to accept these funds citing "various problems" with ARP-II (February 28, 2005 Capital Call Letter from Kriti to Emerald).

Moreover, Marshall never indicated that any "issues" with ARP-II would stand in the way of funding ARP-II. Marshall continued to honor draw requests even after Lunar Systems, one of the preconstruction investors, filed its *lis pendens* against ARP-II. Presumably, Marshall had no problem honoring draw requests because it knew that under the preconstruction investor contracts, investor deposits were subordinate to bank debt.

Ultimately, the loan was tabled by Marshall at Williams' insistence once Kriti filed formal litigation against Emerald. (March 28, 2005 Letter from Meghan Harris to

Williams and Longman). Just a few weeks prior, Kriti had met with Marshall in New York and presented eighteen (18) documents laying out his various disputes with Longman. (March 11, 2005 e-mail from Williams to Ron Sweet). What possible explanation could there be for Kriti's actions other than to make sure his capital call plan would come to fruition?

Kriti's conduct with respect to the capital call shows that it was orchestrated to squeeze down Emerald, potentially costing the latter millions in the event the Project was sold. Indeed, failure to enforce contracts for the benefit of the company, like the Marshall loan, is one of the tell-tale signs of oppression under South Carolina law. E.g., Kiriakides, n. 28. It did not matter to Kriti that the preconditions to the capital call were invalid under the Operating Agreement. It did not matter to Kriti that Emerald disputed the validity of the sweep account claims and the preconstruction investor claims. It did not matter that Marshall was ready and able to keep ARP-II going through its challenges. By Kriti's own admissions, all that mattered was the "opportunity" to "get a bigger piece of the project." (December 6, 2004 e-mail from Williams to Yannis Vardinoyannis).

This sort of blatant misconduct against Emerald constitutes grounds for dissolution under S.C. Code Ann. § 33-44-801(4)(e).

b. Kriti encouraged the preconstruction investors to bring suit against ARP-II to set the stage for the capital call engineered to squeeze down Emerald's interest.

In early 2001 preconstruction investors, including Lunar, entered into separate Real Estate Purchase Agreements and Early Purchase Addendums with RLYC and

RLD. (Lunar Contract and Early Purchase Addendum). These investors put down payments on specific condominium units planned for the Project. Admittedly the Project encountered delays in building the condominiums, but it was not until Kriti and Williams entered the picture that the preconstruction investors began asserting claims against ARP-II and other Emerald affiliated entities, including ARP-I.

Williams regarded these potential claims as the perfect "opportunity" for him to get a "bigger piece of the project." (December 6, 2004 e-mail from Williams to Yannis Vardinoyannis). Williams organized what was referred to as the "waterside gang," convincing the preconstruction investors to file claims against both ARP-II and ARP-I. (March 4, 2005 e-mail from Jamie George to Davidson Williams). Eventually the Lunar and the other pre-construction investors filed *lis pendens* on both ARP-II's and ARP-I's property.

As the manager of ARP-II, Kriti's conduct makes no sense. Not surprisingly, the First New York Arbitration "questioned Kriti's conduct in encouraging some of these third parties to assert claims against ARP II and not accept partial reimbursement of their deposits." (1st Arbitration Award, p. 3, ¶ F). But aside from the obvious harm Kriti did to ARP-II by ginning up these claims, when viewed in connection with the squeeze down plan against Emerald it all makes sense from Kriti's perspective.

Kriti's demand that Emerald set up a reserve account of \$1 million for payment of these claims was the most significant and disputed pre-condition Kriti placed on the capital call. Kriti knew this would prevent Emerald from meeting the capital call, because obviously these funds were outrageous and unavailable, plus Emerald disputed the

validity of these claims against ARP-II. This would allow Kriti at the First New York Arbitration to argue both that (1) Emerald's challenging its validity stripped Emerald of all interest in ARP-II, or at a minimum, (2) Emerald's failure to meet the capital call diluted Emerald's interest from 70% to approximately 21.3%.

Fortunately, the arbitrators stymied Kriti's takeover plan. Nevertheless, Kriti's and Williams' oppressive conduct has been beyond the pale and merits dissolution under S.C. Code Ann. § 33-44-801(4)(e).

c. Kriti-managed ARP-II wrongfully obtained default judgment against ARP-I after settling Lunar's claim.

After Kriti's capital call was questioned at the First New York Arbitration, Kriti concocted a plan to gain additional leverage against Emerald by obtaining a judgment against ARP-I in connection with the Lunar litigation.

As previously mentioned, Lunar filed suit against ARP-II and ARP-I in 2005. That case was pending while Emerald argued at the First New York Arbitration that ARP-II was not responsible for the preconstruction investor claims. Nevertheless, the First New York Arbitration Award required ARP-II to discharge third-party vendor claims, *at ARP-II's own expense*, including the debt at issue in the Lunar Litigation. (3rd New York Arbitration, p. 3, ¶F). The arbitrators also required Emerald and Longman to indemnify ARP-II for \$400,000 worth of all third-party claims, including Lunar's. The arbitrators rejected Kriti's post-decision motions seeking to enlarge the indemnification award and to specify which claims ARP-II's indemnification award was to go towards. Ultimately, ARP-II's indemnification award against Emerald was confirmed and included in ARP-II's

New York judgment against, which has subsequently been enrolled in Charleston County.

After the First New York Arbitration was confirmed, Lunar and Kriti-managed ARP-II began negotiating a settlement. Initially, Lunar released the *lis pendens* on ARP-II's property on May 15, 2006, but not ARP-I's property, while a settlement was being worked out. Lunar and ARP-II ultimately agreed to settle and release the claim. Lunar executed this settlement, and it was transmitted to ARP-II on September 25, 2007. This document would have "resolve[d] and release[d] any and all claims set forth in the Complaint" and dismissed the present action "with prejudice."

However, on or about December 20, 2007, Williams had a change of heart, and by e-mail dated that same day asked Lunar to scrap the original settlement agreement and execute a new one so that ARP-II could obtain a purported assignment of Lunar's claim to pursue ARP-I. (December 20, 2007 e-mail from Williams to Lussier, Lunar's principal). In clear violation of the First New York Arbitration, which had been decided years earlier, Williams informed Lunar that Longman is responsible for Lunar's claim and that he needs additional leverage against Emerald. Specifically, in that same December 20, 2007 e-mail Williams wrote the following:

As you know, **we do not believe we are responsible for the payment of your claim. We believe Longman is.** By paying off this claim, I am taking the risk that I can recover this payment from Longman, or otherwise resolve the matter in the course of my continuing disputes with him over his conduct in this sorry affair. The arbitration awards still have not been confirmed by the NY Court. If they are overturned, this whole thing becomes a mess again, and you are stuck in the middle of it if we have not settled. **I can't take this risk without [] gaining some backstop protection and additional leverage with Longman in the form of an assignment.** This is why I am asking for the assignment of claim.

Lunar finally acquiesced to Williams' demand, and on December 20, 2007, it agreed to a modified settlement agreement containing the purported assignment language. (December 20, 2007 Settlement and Purported Assignment). Kriti never informed Emerald about this settlement much less the purported assignment of rights. ARP-I and Emerald only came to know about these efforts during the deposition of Williams, on July 21, 2008 in a separate proceeding in New York between Emerald and Kriti.

Since the First New York Arbitration ruled that ARP-II alone was to settle Lunar's claim, Emerald and Longman believed the pending Lunar Litigation in South Carolina had or would soon be resolved entirely. Unfortunately, they were mistaken.

Upon learning of the settlement and assignment of rights, Longman discovered that ARP-II, as purported assignee of Lunar, had obtained both an entry of default and a May 23, 2008 default judgment in the amount of \$526,945.17 against ARP-I. This came despite the First New York Arbitration's having been confirmed, and a judgment against ARP-I, encompassing Emerald's obligation with respect to Lunar's claim, having been enrolled. Through Kriti's machinations, it now had two separate judgments against ARP-I arising out of the same claim.

Besides Kriti's misconduct in seeking double recovery against Emerald in contravention of the First New York Arbitration, the circumstance under which the second judgment was obtained constitutes fraud. ARP-II's request for entry of default was served on Frank Guarino ("Guarino"), ARP-II's listing agent for the Project, on April 2, 2008. (See August 12, 2008 Affidavit of Stuart Longman). Guarino was technically

ARP-I's registered agent; however, Williams knew Guarino and Emerald had not worked together for years. Not surprisingly, Guarino never forwarded the default papers to Longman. (Id.)

After Longman challenged the default judgment, Kriti urged Guarino to execute a highly suspect affidavit. Williams e-mailed Guarino, who was well aware of the enmity between Kriti and Emerald, an affidavit attesting that he forwarded the default papers to Longman. (August 14, 2008 e-mail from Williams to Guarino). In that same e-mail, Williams said he was shopping national brokers, strongly insinuating that Guarino's maintaining the coveted ARP-II listing was contingent on Guarino's executing the affidavit.

The purported Lunar assignment and the circumstances leading up to the ARP-I judgment are clear violations of the fiduciary duties Kriti owed Emerald. Amazingly, in the above-referenced e-mail, Williams boasted to Guarino that "[t]his judgment and the lien effectively puts the holder in control of ARP-I's property." (August 14, 2008 e-mail from Williams to Guarino). This was Kriti's plan all along – do whatever necessary to obtain additional leverage and power over Emerald.

Fortunately, on December 18, 2008, Judge Hughston put a temporary end to Kriti's machinations by entering an order setting aside the default judgment against ARP-I, finding that Emerald had shown "good cause." This case is also before this Court.

The actions regarding the assignment and the circumstances leading up to the default judgment are shocking, but they are not surprising given the track record. When

taken together with the previously discussed capital call and the preconstruction investor claims, there can be no doubt that only an order of dissolution by this Court, pursuant to S.C. Code Ann. § 33-44-801(4)(e), can save Emerald from future oppression and misconduct.

d. Kriti has repeatedly concealed and misrepresented information to Emerald.

After wresting control of ARP-II away from Emerald, on a number of occasions, Kriti withheld and misrepresented information to conceal its various misdoings. The first involves Kriti's efforts to block access to ARP-II financial records during the period where Kriti claimed to have squeezed-down Emerald's interest via the aforementioned capital call. The second involves a continued failure to provide routine financial information without constant demands. The third involves recent conduct regarding withholding the two most recent appraisals for ARP-II's property.

Despite the Operating Agreement providing all members, regardless of voting rights, the right to receive certain financial information, Kriti repeatedly rebuffed and challenged Emerald's attempts to exercise these rights. In the summer of 2006, Emerald made repeated requests in writing to Kriti and ARP-II to be allowed to inspect and review ARP-II's books and records. (June 12, 2006 and July 5 Letters from Emerald to Kriti) Emerald made these requests in response to Kriti's and ARP-II's allegations that Emerald's 70% membership interest had been squeezed down. These requests were never honored.

Emerald sent another request on in 2009, which included detailed requests for company financial records. (October 1, 2009 Letter from Emerald to Kriti). Kriti

responded to this latest request by claiming all materials had been produced, and that additional materials were unavailable because Emerald was a judgment creditor of ARP-II and that Emerald lacked voting rights. (October 17, 2009 Letter from Kriti to Emerald): Neither of these are grounds for withholding information under the Operating Agreement.

When viewed in context with Kriti's efforts to squeeze down Emerald's interest in ARP-II, the motivation for Kriti's concealment becomes apparent. In the wake of the First New York Arbitration, where the arbitrators found that Emerald had probable cause to challenge the capital call, Kriti decided to proceed as if the capital call successfully diluted Emerald. However, for obvious reasons, Kriti hoped to conceal these efforts to prevent a subsequent challenge by Emerald. Kriti's hope was to sell the ARP-II property and make distributions according to the purported squeeze down while keeping Emerald in the dark. This manipulation and withholding of company information not only violates the Operating Agreement, but also constitutes oppressive and bad-faith conduct towards Emerald.

Additionally, Emerald has continued to make requests to obtain ARP-II's financial records and tax returns. Despite its best efforts, Emerald has largely been kept in the dark as the finances of ARP II. The records are only rarely supplied and that is only after repeated demands and/or threats of further legal action. This is clear oppression because Kriti has a duty to share information with Emerald.

Most recently, counsel for Emerald was informed that additional appraisals on ARP II had been performed. These materials had never been provided to Emerald.

Counsel for Emerald had requested all most recent appraisals long prior to the disclosure, but these were never received. Moreover, Kriti failed to produce the most recent appraisals which Emerald is clearly entitled to receive.

As a result, Emerald was forced to subpoena Fred Beck & Associates, the company who performed the appraisals. Immediately after the subpoenaed materials were received by Emerald, which was less than two weeks before trial, Kriti belatedly produced the appraisals as well. In any event, Emerald learned that appraisals had been performed in both 2011 and 2012 at Bank of America's request. The most recent appraisal established value of approximately \$14.3 million for ARP-II's property, including both the marina and upland components.

This pattern of concealing information in order to maximize Kriti's advantage to Emerald's detriment has been ongoing for the better part of a decade. When viewed in context with Kriti's other acts of misconduct and oppression towards Emerald, they support Emerald's claim for dissolution under S.C. Code Ann. § 33-44-801(4)(e). Indeed, in Jordan v. Holt, the Supreme Court upheld the dissolution of an LLC where the managing partner, among other things, had "ignor[ed] requests for financial information." 362 S.C. 201, 206, 608 S.E.2d 129, 131 (2005).

III. THIS COURT'S DISSOLUTION ORDER SHOULD TAKE INTO ACCOUNT THIS CASE'S UNIQUE CIRCUMSTANCES.

An action for the dissolution of an LLC sounds in equity. Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). The operating agreement plays a significant role in structuring a resolution in dissolution cases. See Clary v. Borrell, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012). However, since the LLC "grants broad judicial

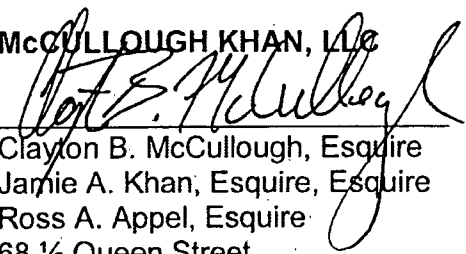
discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members," Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 454 (2009), a court need not look *exclusively* to the operating agreement. Rather, "in fashioning its solution to a complex problem," a court may "consider[] all circumstances" affecting the LLC, especially one "whose sole asset suffered from a depressed value due to a poor economy." Park Regency, LLC v. R&D Development of the Carolinas, LLC, Op. No. 5056, *9-10 (Ct. App. Filed November 28, 2012).

Having presented various grounds for dissolution, Emerald respectfully requests that this court use its equitable powers to fashion an appropriate remedy in this case. Specifically, Emerald requests an order requiring Kriti to buy out its 70% interest. Valuation ought to be established by ascertaining the proper valuation of the ARP-II Property (both marina and upland), which considers all relevant circumstances, and subtracting all company debt on the books. 70% of the remaining equity constitutes the value of Emerald's ownership interest.

CONCLUSION

For the above reasons, Emerald respectfully requests that this Court dissolve ARP-II and order a buy-out of Emerald's interest. After nearly a decade of near constant combat, this outcome is in both parties' best interests and would also serve the interests of creditors and other third parties as well as judicial economy by providing an impetus to resolving the other actions currently pending between Emerald, Kriti, and their affiliated entities.

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Counsel for Plaintiff

1.17, 2013
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Ashley Rivers Properties II, LLC, as)
assignee of Lunar Systems, LTD and)
Ashley River Properties II, LLC, in its)
own right,)

Plaintiffs,)

vs.)

Ashley River Properties One, LLC)
successor in the interest to Ripley)
Light Yacht Club, LLC and Ripley Light)
Development, LLC,)

Defendants.)

Ashley River Properties One, LLC)

Third-Party Plaintiff,)

vs.)

Lunar Systems, LTD and Thomas J.)
Lussier,)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

FILED
JULIE J. ARMSTRONG
CLERK OF COURT
MAY -9 PM 2:27

**NOTICE & MOTION TO ALTER OR
AMEND JUDGMENT UNDER
RULE 59(e), SCRCP**

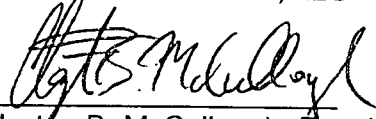
PLEASE TAKE NOTICE that Defendant and Third-Party Plaintiff, Ashley River Properties One, LLC ("ARP-I"), pursuant to Rule 59(e), SCRCP, will move before the Honorable Deadra L. Jefferson in the Court of Common Pleas at the Charleston County Courthouse, Charleston, South Carolina on the 10th day after or at such time as counsel may be heard, for an order amending and altering the Court's Order entered April 26, 2013 in this matter by Judge Jefferson. ARP-I received written notice of the aforementioned Order on April 29, 2013.

The grounds for this motion are that (a) the Order erred by finding that ARP-I did not satisfy the elements of abuse of process, and (b) that ARP-I failed to prove damages with specificity regarding the abuse of process claim.

This motion is being supported by a memorandum being filed contemporaneously with this notice & motion.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

Ashley Rivers Properties II, LLC, as
assignee of Lunar Systems, LTD and
Ashley River Properties II, LLC, in its
own right,

Plaintiffs,

vs.

Ashley River Properties One, LLC
successor in the interest to Ripley
Light Yacht Club, LLC and Ripley Light
Development, LLC,

Defendants.

Ashley River Properties One, LLC

Third-Party Plaintiff,

vs.

Lunar Systems, LTD and Thomas J.
Lussier,

Third-Party Defendants.

CERTIFICATE OF SERVICE

2013 MAY -9 PM 2:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

I hereby certify that a true and correct copy of the **Notice & Motion to Alter or Amend Judgment Under Rule 59(e), SCRCP** has been served upon the following by mailing a copy properly addressed and with sufficient postage affixed thereto on this 9TH day of May, 2013.

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and Thomas J. Lussier

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Elizabeth Plasters, Paralegal

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Ashley Rivers Properties II, LLC, as)
assignee of Lunar Systems, LTD and)
Ashley River Properties II, LLC, in its)
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Plaintiffs,)

vs.)

Ashley River Properties One, LLC)
successor in the interest to Ripley)
Light Yacht Club, LLC and Ripley Light)
Development, LLC,)

Defendants.)

Ashley River Properties One, LLC)

Third-Party Plaintiff,)

vs.)

Lunar Systems, LTD and Thomas J.)
Lussier,)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

**MEMORANDUM IN SUPPORT OF
DEFENDANT AND THIRD PARTY
PLAINTIFF'S MOTION TO ALTER OR
AMEND JUDGMENT UNDER
RULE 59(e), SCRPC**

2013 MAY -9 PM 2:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

Defendant and Third-Party Plaintiff Ashley River Properties One, LLC ("ARP-I") files this Memorandum in Support of its Motion to Alter or Amend Judgment Under Rule 59(e) (the "Memorandum") concerning the Order in the above-captioned case, which was entered on April 26, 2013 by the Honorable Deadra L. Jefferson. Emerald received written notice of the aforementioned Order on April 29, 2013. The Order denied both of Plaintiff Ashley River Properties Two, LLC's ("ARP-II") claims against ARP-I, namely (a) the claim ARP-II purportedly purchased from Lunar Systems, Ltd.'s ("Lunar") against ARP-I and (b) ARP-II's claim against ARP-I under the Indemnity Agreement. The Order

also denied ARP-I's claim against ARP-II and Lunar and its principal, Thomas J. Lussier ("Lussier"), for abuse of process.

The Order properly dismissed both of ARP-II's claims; however, ARP-I respectfully maintains that the denial of ARP-I's abuse of process claim constitutes an error of law. For the reasons set forth and discussed below, ARP-I respectfully requests that this Honorable Court alter or amend its Order and find that ARP-I is entitled to recover against ARP-II, Lunar, and Lussier for abuse of process.

ARGUMENT

I. The Order erred by finding that ARP-I did not satisfy the elements of abuse of process.

The Order properly states that law on abuse of process, (Order, p. 10-11, ¶12), but the Order did not appropriately apply that law to the facts of this case.

Abuse of process requires a showing of (a) "an ulterior purpose" and (b) "a willful act in the use of the process not proper in the regular course of the proceeding." Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999). Moreover, a "[d]efendant who has done nothing more than carry out process to its authorized conclusion, even though with bad intentions, cannot be liable for abuse of process." Hainer v. Am. Med. Int'l, 328 S.C. 128, 492 S.E.2d 103 (1997) (emphasis added).

Lunar filed the *lis pendens* against ARP-I's property on June 7, 2005. (Order, p. 10, ¶10). On October 30, 2005, the First New York Arbitration Award found that ARP-II, not ARP-I, was required to resolve Lunar's claim "at the expense of ARP-II," and that Stuart Longman (ARP-I's principal) was required to indemnify ARP-II for some, but not

all, of the third-party claims, including Lunar's. (Order, p. 4-5, ¶¶11-12). This award was subsequently confirmed on February 15, 2008 and the corresponding judgment enrolled in Charleston County. (Order, p. 6, ¶¶20-21). On December 20, 2007 ARP-II paid Lunar \$325,000 and gave it a note in the amount of \$175,000. (Order, p. 6, ¶18). The Order, among other things, held that this Assignment and Release constituted an accord and satisfaction of Lunar's claim, which the arbitration found ARP-II was obligated to discharge, and that "the Assignment and Release fully settled Lunar's claim." (Order, p. 8, ¶¶1-5). Therefore, the Order concluded that "ARP-II possesses no claim against ARP-I by virtue of the Assignment and Release." (Order, p. 8, ¶6).

Even assuming that Lunar "was within its rights to file the *lis pendens* initially," (Order, p. 11, ¶15), in connection with its claim against ARP-I, given the foregoing, by the terms of the Order itself, as of December 20, 2007 at the latest, neither ARP-II nor Lunar and Lussier had any claim against ARP-I since Lunar's claim had been fully satisfied and settled. Nevertheless, ARP-II, Lunar and Lussier actively and willfully maintained the *lis pendens* on ARP-I's property for approximately two and a half years. The *lis pendens* was ultimately released pursuant to a court order on June 11, 2010. (Order, p. 6, ¶22). During this two and half-year time period, ARP-I was essentially prohibited from further developing or marketing its property.

ARP-II, Lunar, and Lussier could have (and should have) released the *lis pendens* on ARP-I's property right after Lunar's claim was fully settled on December 20, 2007. See S.C. Code Ann. § 15-11-10, et. seq. However, it did not occur until a court order required them to do so on June 11, 2010, and the evidence in the record

demonstrates that ARP-II, Lunar, and Lussier each had an ulterior purpose for willfully leaving the *lis pendens* on ARP-I's property.

E-mail communications between ARP-II and Lunier/Lussier reveals this ulterior purpose. For example, on August 17, 2007, Lussier sent Davidson Williams (ARP-II's manager) an e-mail referencing the former's "cooperation with the *lis pendens*." (Third Party Plaintiff's Exhibit #3). Prior e-mail communication between these entities and individuals demonstrates Lussier was well aware of the First New York Arbitration's findings. Specifically, on May 25, 2007, Lussier e-mailed Williams an acknowledgement that "your arbitration agreement seems to name ARP-2 as responsible." (*Id.*) Taking these communications together, it is clear that Lussier's "cooperation" with the *lis pendens* meant keeping it in place against ARP-I for ARP-II's benefit. This constitutes an ulterior purpose because Lunar and Lussier knew they no longer had a claim against ARP-I, and the *lis pendens* was, therefore, not to apprise third-parties of Lunar's pending claim, but to serve ARP-II's interests in its struggles against ARP-I and its principal, Stuart Longman.

ARP-II's ulterior purpose is also evidenced by emails with Lunar and Lussier. Most notably, Williams writes to Lussier by e-mail on December 20, 2007 the following:

As you know, **we do not believe we are responsible for the payment of your claim. We believe Longman is.** By paying off this claim, I am taking the risk that I can recover this payment from Longman, or otherwise resolve the matter in the course of my continuing disputes with him over his conduct in this sorry affair. The arbitration awards still have not been confirmed by the NY Court. If they are overturned, this whole thing becomes a mess again, and you are stuck in the middle of it if we have not settled. **I can't take this risk without [] gaining some backstop protection and additional leverage with Longman in the form of an assignment. This is why I am asking for the assignment of claim.**

(Third Party Plaintiff's Exhibit #4) (emphasis added). Earlier, Lussier had written to Williams acknowledging that that the *lis pendens* "could complement the ARP-II property." (*Id.*) Taken together with Lussier's discussion regarding "cooperation with the *lis pendens*," it is clear that the *lis pendens* was being kept in place in order to obtain "backstop protection and additional leverage with Longman." This was the case even though the First New York Arbitration, which had found ARP-I was not liable to Lunar, was decided back in October 30, 2005 and subsequently confirmed.

The lawful purpose of a *lis pendens* is not to gain leverage against a non-party (Longman) for matters collateral to and separate from the grounds for the *lis pendens* (Lunar's claim), but this is exactly the ulterior purpose pursued by ARP-II. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002) ("[t]he *lis pendens* mechanism is not designed to aid either side in a dispute between private parties. Rather, *lis pendens* is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, *i.e.*, the fact of a suit involving property."); *Hewitt v. Rice*, 154 P.3d 408, 412-13 (Colo. 2007) ("A *lis pendens* has serious consequences because '[o]nce a *lis pendens* is filed, it renders title unmarketable and therefore effectively prevents the property's transfer until the litigation is resolved or the *lis pendens* is expunged.").

ARP-II, Lunar and Lussier's coordination and willful failure to release the *lis pendens* constitutes a willful act in the use of the process not proper in the regular course of the proceeding. The *lis pendens* mechanism may not be used in the absence of a valid claim and may not be used to gain additional backstop and leverage against a non-party in separate disputes between the parties.

Moreover, although counsel for ARP-I did not have the opportunity to introduce this evidence at trial (although it was pre-marked and included as Plaintiff's Exhibit #10 and Exhibit #11), on March 20, 2009, counsel for ARP-I wrote to counsel for Lunar and Lussier demanding the *lis pendens* be released. During this time, ARP-I had taken the position that ARP-II did not obtain any rights with respect to the December 20, 2007 Assignment and Release. The Order found that ARP-II did not obtain any rights either. Counsel for Lunar and Lussier replied that they would not release the *lis pendens* because ARP-II had not completely fulfilled its obligations under the December 20, 2007 Assignment and Release. This too was a *willful* and improper use of the *lis pendens* statute because ARP-II's failure to pay Lunar pursuant to their settlement agreement did not concern ARP-I whatsoever. There was a continued, and willful, decision to keep the *lis pendens* in place, and this damaged ARP-I.

II. ARP-I's damages claims are not speculative and are capable of ascertainment with a reasonable degree of certainty.

At trial, ARP-I claimed various damages caused by ARP-II, Lunar and Lussier's abuse of process regarding keeping the *lis pendens* on its property. These damages included, site design and engineering fees, legal fees, and certain carrying costs on the property (taxes and interest payments). ARP-I also testified as to lost profits.

Our supreme court recognized the principle that when the defendant's tortious conduct has caused the plaintiff to become involved in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages. Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971). The site design and

engineering fees are recoverable damages' because ARP-I had made these investments into the property, but the *lis pendens* prohibited further improvement and sale of the property, so these investments were ultimately lost once the bank took the property back. The legal fees were expended by ARP-I in order to have the *lis pendens* released, which, as argued above, was illegally maintained on the ARP-I property for years and which ARP-II, Lunar and Lussier vigorously defended and refused to release – despite repeated demands by ARP-I to do so. The taxes and interest payments are included as damages because these costs were born by ARP-I during the period in time where the *lis pendens* rendered the property undevelopable and essentially useless. Finally, the lost profits are in connection with ARP-I's inability to sell the property due to the *lis pendens*.

All of the above damages are recoverable and capable of ascertainment to a reasonable degree of certainty. Although Emerald was prevented from introducing this evidence, ARP-I can provide invoices and financial records regarding the above mentioned engineering costs, legal fees,¹ and carrying expenses. Moreover, lost profit damages can be ascertained based on similar sales of real property in the market during the period in question when the *lis pendens* was on the property. Finally, the fact that the Defendants committed abuse of process is sufficient to establish, at the very least, nominal damages. See Cook v. Atl. Coast Line R. Co., 183 S.C. 279, 190 S.E. 923, 924 (1937).

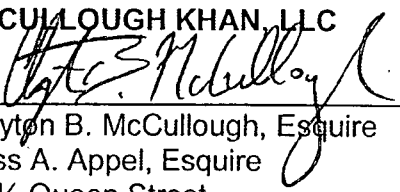
¹ Attorney fees are sufficient damages to establish the final element of abuse of process. Dawley v. La Puerta Architectural Antiques, Inc., 133 N.M. 389, 62 P.3d 1271 (N.M. 2003).

All of the above damages are casually connected to ARP-I's abuse of process claim. Should this Honorable Court reverse its decision regarding the abuse of process claim, damages can certainly be established.

CONCLUSION

For the foregoing reasons, Emerald respectfully requests that this Court reconsider its Order and alter and amend its decision based on the points raised in this Memorandum.

McCULLOUGH KHAN, LLC


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5.9, 2013
Charleston, SC

Counsel for Ashley River Properties One, LLC

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Ashley Rivers Properties II, LLC, as)
assignee of Lunar Systems, LTD and)
Ashley River Properties II, LLC, in its)
own right,)

Plaintiffs,)

vs.)

Ashley River Properties One, LLC)
successor in the interest to Ripley)
Light Yacht Club, LLC and Ripley Light)
Development, LLC,)

Defendants.)

Ashley River Properties One, LLC)

Third-Party Plaintiff,)

vs.)

Lunar Systems, LTD and Thomas J.)
Lussier,)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

CERTIFICATE OF SERVICE

2013 MAY -9 PM 2:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

I hereby certify that a true and correct copy of the **Memorandum in Support of Defendant and Third-Party Plaintiff's Motion to Alter or Amend Judgment Under Rule 59(e), SCRPC** has been served upon the following by mailing a copy properly addressed and with sufficient postage affixed thereto on this 9TH day of May, 2013.

William C. Cleveland, Esquire
Womble Carlyle Sandridge & Rice, PLLC
5 Exchange Street
Charleston, SC 29401

Counsel for Ashley River Properties II

Frank M. Cisa, Esquire
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858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464

Counsel for Lunar Systems, LLC
and Thomas J. Lussier


Elizabeth Plasters, Paralegal

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Ashley Rivers Properties II, LLC, as assignee
of Lunar Systems, LTD and Ashley River
Properties II, LLC, in its own right,

Plaintiff,)

vs.)

Ashley River Properties One, LLC, successor
in the interest to Ripley Light Yacht Club,
LLC and Ripley Light Development, LLC

Ashley River Properties One, LLC
Third-Party Plaintiff,

vs.

Lunar Systems, LTD and Thomas J. Lussier,
Third-Party Defendants

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2005-CP-10-2434

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney:

William C. Cleveland, Esquire, Bar No. _____

Address:

5 Exchange Street, Charleston, SC 29401

Phone: _____ Fax: _____

E-mail: _____ Other: _____

Defendant's Attorney:

Clayton McCullough, Bar No. _____

Address:

68 1/2 Queen Street, Charleston, SC 29401

Phone: _____ 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)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Notice & Motion to Alter or Amend Judgement Under Rule 59 (e), SCRPC

Estimated Time Needed: 20

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

5.9.13
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: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED – AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2009-CP-10-0553

Emerald Investments, LLC,

Appellant,

v.

Ashley River Properties II,
LLC; and Kriti Ripley, LLC,

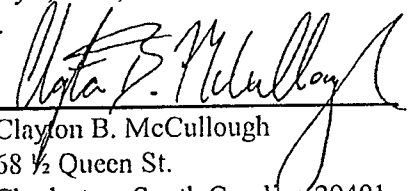
Respondents.

FILED
2013 SEP -9 PM 4:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

NOTICE OF APPEAL

Emerald Investments, LLC appeals the order of the Honorable Deadra L. Jefferson dated April 26, 2013. Appellant timely filed and served on all counsel of record a motion to Alter or Amend Judgment pursuant to Rule 59(e) on May 9, 2013, and received written notice of entry of the order denying said motion on August 9, 2013.

September 3, 2013


Clayton B. McCullough
68 1/2 Queen St.
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(843) 937-0400
Attorney for Appellant

Other Counsel of Record:
William C. Cleveland
P.O. Box 999
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2009-CP-10-0553

Emerald Investments, LLC,

Appellant,

v.

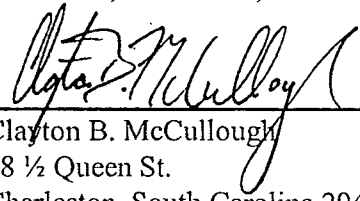
Ashley River Properties II,
LLC; and Kriti Ripley, LLC,

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the filing of the Notice of Appeal with Charleston County Court of Common Pleas on Ashley River Properties II, LLC and Kriti Ripley, LLC by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2013, addressed to their attorney of record, William C. Cleveland, Post Office Box 999, Charleston, South Carolina 29402.

September 9, 2013


Clayton B. McCullough
68 1/2 Queen St.
Charleston, South Carolina 29401
(843) 937-0400
Attorney for Appellant

2013 SEP -9 PM 4:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

EMERALD INVESTMENTS, LLC

Plaintiff

vs.

ASHLEY RIVER PROPERTIES II,
LLC

Defendant

THE COURT OF COMMON PLEAS

DOCKET NO. 2009-CP-10-553

TRANSCRIPT OF RECORD

January 22, 2013

Charleston, South Carolina

VOLUME 1 (OF 2)

B E F O R E:

THE HONORABLE DEADRA JEFFERSON, JUDGE

A P P E A R A N C E S:

CLAYTON B. MCCULLOUGH, ESQ.
Attorney for the Plaintiff

WILLIAM C. CLEVELAND, ESQ.
Attorney for the Defendant

FRANK M. CISA, ESQ.
Attorney for 3rd party Plaintiff Lunar Systems

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

INDEX TO PROCEEDINGS	PAGE
PROCEEDINGS	4
THOMAS LUSSIER	
Direct Examination by Mr. McCullough	7
Cross-Examination by Mr. Cleveland	40
STUART LONGMAN	
Direct Examination by Mr. McCullough	44
Cross-Examination by Mr. Cleveland	140
Redirect Examination by Mr. McCullough	144
DAVIDSON WILLIAMS	
Direct Examination by Mr. McCullough	147
Cross-Examination by Mr. Cleveland	181
CERTIFICATE OF THE COURT REPORTER	198

INDEX TO EXHIBITS

[All exhibits pre-marked prior to start of trial unless otherwise indicated in transcript]

PLAINTIFF

<u>No.</u>	<u>Description</u>	<u>Marked / Admitted</u>
1	Contract	11
5	Emails	(I.D. only)
13	Photos	47
14	Operating Agreement	56
26	Arbitration award	(I.D. only)
41	Appraisal of marina	118
42	Appraisal of land	118

1 PROCEEDINGS

2 THE COURT: So in 2005 -- because I have Emerald
3 for Abuse of Process but that's not accurate. It's
4 Ashley River Properties, I, is it not because Emerald is
5 not a party to 2005-CP-10-2434.

6 I have an action for a first cause of action, which
7 is Abuse of Process on page 20 of the third party Summons
8 and Complaint. The third party plaintiff in that case is
9 Ashley River Properties I versus Lunar Systems Limited
10 and Thomas Lussier.

11 So I assume then Ashley River Properties -- so
12 according to these pleadings Ashley River Properties I is
13 proceeding in the third -- in the Abuse of Process
14 against Mr. Lussier and Lunar Systems, is that correct?

15 MR. MCCULLOUGH: Yes, ma'am. There was also I
16 believe a counterclaim served on the defendant. The
17 lawsuit brought by Ashley River Properties II against
18 Ashley River Properties I made a counterclaim back for
19 Abuse of Process as well.

20 THE COURT: It's not reflected in these pleadings
21 unless I've missed something.

22 [Whereupon, the court reviews documents]

23 THE COURT: And there is no longer a declaratory --
24 a request for a declaratory judgment, correct?

25 MR. MCCULLOUGH: Your Honor, I've got it, an answer

1 -- may I approach?

2 THE COURT: Uh huh.

3 MR. MCCULLOUGH: I've got an extra copy of it.

4 THE COURT: You can just tell me what the date is
5 on the pleading and what it's entitled.

6 MR. MCCULLOUGH: On June 14, 2010 there is an
7 answer to the amended complaint, a counterclaim, and
8 third party complaint that was filed by Mr. Lussier.

9 THE COURT: Okay. Give us one second to find it.
10 You said June 14th?

11 MR. MCCULLOUGH: Correct.

12 [Whereupon, the court reviews documents]

13 THE COURT: There is remaining in 2005-2434 then an
14 Abuse of Process claim with ARP I against Lunar Systems
15 and Mr. Lussier. And then an indemnity action and Abuse
16 of Process claim with ARP I counterclaiming against the
17 Abuse of Process with ARP II and the indemnity against
18 ARP II, correct -- well yes, ARP I against ARP II is that
19 correct?

20 MR. MCCULLOUGH: Correct.

21 THE COURT: Okay. We're going to try them
22 separately for the benefit and the sanity of my court
23 reporter and for me. So we're going to go forward on
24 2009-553 and then we'll proceed on 2005-2434. And Mr.
25 Cleveland is not going to call any witnesses in 2009-553

1 so Mr. McCullough you need to proceed with calling your
2 witnesses.

3 MR. MCCULLOUGH: Thank you, Your Honor. May I
4 briefly open on one point?

5 THE COURT: If it's a matter of law you need to
6 save it until the end. If it's a matter of fact I...

7 MR. MCCULLOUGH: It's only to point out the -- if
8 we're trying the dissolution case what was actually
9 decided in 2010 ---

10 THE COURT: --- I can't hear you. I need you to
11 repeat what you just said.

12 MR. MCCULLOUGH: Purely to show and point out what
13 was decided in the 2010 dissolution case. I wanted to
14 just ---

15 THE COURT: --- which 2010 dissolution -- you're
16 talking about the arbitrator's ---

17 MR. MCCULLOUGH: --- arbitration ---

18 THE COURT: --- I'm going to read the arbitrator's
19 award. I don't need you to interpret that for the court.

20 MR. MCCULLOUGH: Okay. Your Honor, we would call
21 Thomas Lussier to the stand.

22 THE COURT: Sir, if you'd come to the stand and be
23 sworn.

24 [Whereupon, Mr. Lussier comes forward]

25 [Whereupon, the witness is duly sworn by the Clerk]

1 of Court]

2 CLERK OF COURT: Please be seated. Sir for the
3 record if you would please state your name spelling your
4 last name.

5 THE WITNESS: Thomas Lussier, L-U-S-S-I-E-R.

6 THE COURT: You may proceed, Mr. McCullough.

7 MR. MCCULLOUGH: Thank you, Your Honor.

8 THE COURT: You're welcome.

9 - - - - -

10 THOMAS LUSSIER,

11 Having been first duly sworn,

12 Was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. MCCULLOUGH:

15 Q. Good morning.

16 A. Good morning.

17 Q. You are a partner of Lunar Systems, Limited?

18 A. Correct.

19 THE COURT: Mr. McCullough, we're going to need you
20 to speak up.

21 MR. MCCULLOUGH: I'm sorry.

22 THE COURT: I know the court reporter can't hear
23 you because I can barely hear you.

24 Q. [Mr. McCullough] You're a partner of Lunar Systems,
25 Limited, correct?

1 A. Correct.

2 Q. All right. I'm going to hand you --

3 MR. MCCULLOUGH: Your Honor, I've got several
4 packets of notebooks with our proposed exhibits and with
5 the court's permission they have been marked for
6 identification. I'll hand these to Mr. Lussier.

7 [Whereupon, documents are provided to the witness]

8 Q. [Mr. McCullough] If you would turn to tab 1 for me?

9 A. Tab what?

10 Q. Tab number 1.

11 A. Okay.

12 [Whereupon, the witness complies]

13 MR. CLEVELAND: Objection, Your Honor.

14 THE COURT: Basis?

15 MR. CLEVELAND: Your Honor, I object to the
16 testimony of Mr. Lussier because this goes to the -- what
17 the plaintiff is claiming is that the conduct of Mr.
18 Lussier and Mr. Williams with regard to the payment of
19 the Lussier claim and taking an assignment and not
20 resolving it was unfair and oppressive conduct that
21 warrants judicial dissolution.

22 That's the purported relevance of this. The way in
23 which ARP II handled the claims of Mr. Lussier were part
24 of the arbitration demand and the findings of the
25 arbitrator that there was no misconduct encompasses the

1 claims of this conduct that they are trying to establish
2 through Mr. Lussier here.

3 THE COURT: I haven't heard the testimony so I
4 don't know what he's trying to prove at this moment Mr.
5 Cleveland.

6 MR. MCCULLOUGH: And Your Honor ---

7 THE COURT: --- so I'll take your objection under
8 advisement ---

9 MR. CLEVELAND: --- thank you, Your Honor ---

10 THE COURT: --- and we'll proceed. But I'm
11 cautioning you Mr. McCullough, I'm not retrying the
12 arbitration case.

13 MR. MCCULLOUGH: Yes, Your Honor.

14 Q. [Mr. McCullough] This is a contract that you
15 entered into for purchase of real estate from Ripley
16 Light Yacht Club, correct?

17 A. Correct.

18 Q. And just for clarification is this a blow-up of
19 Ripley Light Marina?

20 [Whereupon, the witness is shown photo]

21 A. I believe so.

22 Q. And the property that you were contracting with was
23 for the construction of condominiums in this area
24 [indicates] is that correct?

25 A. I believe at that time it was actually in this area

1 right here [indicates].

2 Q. Okay. And you entered into a contract and provided
3 earnest money on that contract, correct?

4 A. Correct.

5 Q. And it was in the amount of 325,000 dollars?

6 A. I believe that's correct.

7 Q. And those condominiums were never built?

8 A. They weren't.

9 Q. And so as a result if you would turn to tab 2 for me
10 --

11 MR. MCCULLOUGH: Well, Your Honor, at this point we
12 would move exhibit 1 into evidence?

13 THE COURT: Any objection? Have you shown it to
14 Mr. Cleveland?

15 MR. CLEVELAND: Your Honor, I have my blanket
16 objection that you've taken the testimony subject to.
17 Other than that ---

18 THE COURT: --- I don't know if the testimony is
19 relevant or not and I don't know if the findings of the
20 arbitrators are conclusive yet and I think it would be
21 premature for me to make that finding without hearing the
22 scope of the testimony.

23 So I need each exhibit to be taken in turn. So I
24 need to know if you have any exception to the -- have you
25 seen it first of all? And do you have any exception to

1 it?

2 MR. CLEVELAND: I agree it's authentic. And so my
3 objection would be based on our earlier one.

4 THE COURT: Remind me again what the exhibit is Mr.
5 McCullough? Let me see it. What is the exhibit Mr.
6 McCullough?

7 MR. MCCULLOUGH: It's the contract that they ---

8 THE COURT: --- between the parties?

9 MR. MCCULLOUGH: Yes, Your Honor.

10 THE COURT: The contract is relevant at this point.
11 It will be marked and admitted.

12 [Whereupon, plaintiff's exhibit number 1 is entered
13 into evidence by the court]

14 Q. [Mr. McCullough] If you would, turn to tab 2 for me.

15 [Whereupon, the witness complies]

16 Q. As a result of failure to build a condo did you
17 subsequently file a lawsuit here in Charleston County?
18 By you I mean Lunar Systems, Limited?

19 A. I believe so, yes.

20 Q. And as part of that did you file a lis pendens on
21 not only ARP I's property but ARP II's -- and ARP stands
22 for Ashley River Properties number 1 and Ashley River
23 Properties number 2.

24 A. I remember so I think we did.

25 Q. And at tab 2 is this copy of not only the lis

1 pendens filed on those two properties but also a copy of
2 the complaint filed in this case?

3 A. Correct.

4 MR. MCCULLOUGH: Your Honor, we would move this
5 into evidence just for ease of use so we can have it ---

6 THE COURT: --- you can't enter pleadings into the
7 record pursuant to the rules.

8 MR. MCCULLOUGH: All right.

9 Q. [Mr. McCullough] If you would then turn to tab 3 for
10 me.

11 [Whereupon, the witness complies]

12 Q. Do you see that?

13 [Whereupon, the witness reviews documents]

14 A. Yes.

15 Q. Now is this an email that you sent to Mr. Cisa with
16 a copy to Davidson Williams?

17 A. It is.

18 Q. And this was an agreement for a partial release of
19 the lis pendens that we just looked at a moment ago, is
20 that correct?

21 A. Correct.

22 Q. And the agreement as detailed in this email was that
23 Mr. Williams on behalf of Kriti Management would pay
24 Lunar 325,000 dollars and you would in turn release the
25 lis pendens but only on ARP II's property, is that

1 correct?

2 A. Yes, that what I believe the email states that I had
3 agreed. Yes.

4 Q. All right. And you were not releasing the lis
5 pendens on ARP I's property but only on ARP II's
6 property, correct?

7 A. I believe that's what happened.

8 Q. And that's what this email purports to show?

9 A. Correct.

10 Q. And materials attached to that email also include
11 unsigned draft documents of that partial release,
12 correct?

13 A. Correct.

14 MR. MCCULLOUGH: Your Honor, we would move this
15 into evidence as -- our next exhibit.

16 THE COURT: Any objection? Tell me again what the
17 exhibit is?

18 MR. MCCULLOUGH: [No response]

19 THE COURT: Mr. McCullough, what's the exhibit?

20 MCCULLOUGH: This is an email dated April 10, 2006
21 among the parties about the release of the lis pendens
22 and a draft but not filed copy of the lis pendens that
23 was attached.

24 THE COURT: Is this a colloquy between the parties?
25 How is it not hearsay?

1 MR. MCCULLOUGH: It was an email communication
2 discussing the settlement and the release of -- a partial
3 release of the lis pendens.

4 THE COURT: Well, settlement negotiations are
5 hearsay. So is there an exception?

6 MR. MCCULLOUGH: Pardon me?

7 THE COURT: I said its settlement negotiations and
8 its hearsay. Is there an exception? I assume that's why
9 Mr. Cleveland stood up.

10 MR. MCCULLOUGH: I'm not offering this for the
11 purpose of settlement discussion as much as offering it
12 to show that there was a release and a negotiation of one
13 without the other. That goes to the ---

14 THE COURT: --- you're offering it for its truth
15 and its hearsay.

16 MR. MCCULLOUGH: It's against the party opponent.
17 Davidson Williams is ---

18 THE COURT: --- you have other people in that
19 discussion do you not?

20 MR. MCCULLOUGH: Just Mr. Lussier, Mr. Williams,
21 and Frank Cisa are the only people on this list.

22 THE COURT: Let me see the email please? But the
23 more critical question is was this submitted to the
24 arbitrator as proof of misconduct?

25 MR. MCCULLOUGH: I don't -- I have no idea.

1 THE COURT: You didn't go to the arbitration?

2 MR. MCCULLOUGH: I just got this case about six
3 months ago, Your Honor.

4 THE COURT: Oh, okay.

5 MR. MCCULLOUGH: I don't think any of us were in
6 the arbitration. This was handled by New York lawyers.

7 THE COURT: Okay. Can I see the email please?

8 MR. MCCULLOUGH: It's at tab number 3 in that
9 notebook right there [indicates], Your Honor.

10 [Whereupon, the court reviews documents]

11 THE COURT: How is this an admission against
12 interest?

13 MR. MCCULLOUGH: Pardon me?

14 THE COURT: What did you say? You said this was a
15 statement of a party opponent?

16 MR. MCCULLOUGH: Yes, Your Honor. We've sued ---

17 THE COURT: --- I got that part. But how is it not
18 self-serving and bolstering? I guess I'm trying to
19 figure out what purpose this is serving in admitting it.

20 MR. MCCULLOUGH: I'm trying to show factually how
21 this entire event occurred from a partial release of one
22 property, however the ---

23 THE COURT: --- but it was never concluded was it?
24 This is your client saying I've agreed to do something
25 but to have an agreement you have to have both parties

1 agree to it don't you?

2 MR. MCCULLOUGH: Your Honor, it was executed and
3 that's our entire case. There was a lis pendens filed on
4 my client and Will's client's property.

5 THE COURT: That's it.

6 MR. MCCULLOUGH: Frank's client agreed to dismiss
7 the lis pendens on Will's client's property ---

8 THE COURT: --- okay ---

9 MR. MCCULLOUGH: --- but it remained on our
10 property for five additional years until 2010. And so
11 our case in its entirety -- on I guess Mr. Lussier as
12 part of the dissolution case is that all of this was
13 orchestrated and was not decided in the arbitration but
14 orchestrated to put additional leverage to try to run Mr.
15 Longman out of ARP II.

16 And that's why it is critical to the dissolution
17 case. And I would point out in the 2005 arbitration the
18 only item that was discussed and the only thing that was
19 ruled I'll read ---

20 THE COURT: --- I don't know what was discussed
21 because we don't have a transcript. And none of y'all
22 were parties to it correct?

23 MR. MCCULLOUGH: Correct.

24 THE COURT: So you really don't know what was
25 presented.

1 MR. MCCULLOUGH: I was just going to read the award
2 that says we question Kriti's conduct in encouraging some
3 of these third parties to assert claims against ARP II
4 and not accept partial reimbursement of their deposits.

5 Mr. Longman will testify as to the tenor of the
6 discussion with these three vendors and then the
7 negotiation -- and then all of a sudden that changed and
8 everybody filed a lawsuit and filed a lis pendens on his
9 property and ARP II property.

10 [Whereupon, the court reviews documents]

11 THE COURT: This is the agreement that we've
12 already talked about haven't we in the first case which
13 is 2009-4667 and 325,000 dollars with a 175,000 note?

14 MR. MCCULLOUGH: Correct.

15 THE COURT: So why is that relevant to this case?

16 MR. MCCULLOUGH: Because I'm just trying to
17 establish what you'll see in subsequent emails is the
18 discussion not to release the lis pendens on ARP I's
19 property, which is the basis ---

20 THE COURT: --- I think y'all can stipulate that
21 they didn't release the lis pendens can't you?

22 MR. MCCULLOUGH: Your Honor, I think -- if we're
23 going to show a dissolution we've got to show oppression,
24 unfairly prejudicial with fraudulent activity. And that
25 was never before the arbitrators because that was not a

1 part of the operating agreement. And so our entire
2 reason we are here today is to show that there has been a
3 pattern of conduct of oppression and unfairly prejudicial
4 conduct ---

5 THE COURT: --- actually the operating agreement
6 does encompass that language. So it's a little
7 misleading to say that.

8 MR. MCCULLOUGH: The operating agreement ---

9 THE COURT: --- and then the -- yes, it is. That
10 is exactly what the arbitrators say on page 3 of 6. They
11 say the -- and I'm referring to subsection 9.1 (b) any
12 event occurs that makes it unlawful for all or
13 substantial all of the business -- unlawful for all or
14 substantially all of the business of the company be
15 continued but any cure of illegality.

16 MR. MCCULLOUGH: And we're not -- we're not taking
17 the position that ARP III can't run a marina. But we're
18 taking the position is the LLC statute...

19 THE COURT: Nevertheless we're getting far afield
20 of what we're discussing, which is the admissibility --
21 what is the defense's objection to the admissibility of
22 the email, Mr. Cleveland?

23 MR. CLEVELAND: Your Honor, a couple of things.
24 The primary one is you asked a few minutes ago whether
25 this was the subject of the arbitrator's award. And

1 although I wasn't there when they tried the case exhibit
2 number 2, which is behind tab (b) of my bound -- is the
3 second amended demand in the arbitration. And paragraph
4 30 speaks in broad language about the very event that Mr.
5 McCullough is trying to describe.

6 MR. MCCULLOUGH: Your Honor, if we're going to get
7 into all the pleadings of the arbitration we actually do
8 have the transcript and we can actually bring this over
9 and I will show you all the materials where Kriti argued
10 that the New York arbitrators couldn't decide to dissolve
11 the company and that that had to be tried in South
12 Carolina.

13 And I will tell you that on page 3 of 6 in the 2010
14 arbitration it says, we find no basis to dissociate or
15 dissolve the company although dissolution may be in the
16 best interest of the parties. The operating agreement
17 explicitly states the basis for dissolution.

18 And it's extremely limited -- whether it's unlawful,
19 which is what you just described, whether there is
20 written consent, whether it is administratively
21 dissolved, whether the period for the LLC is expired.
22 And it goes on to say, the panel finds that none of these
23 events have occurred and thus the parties have not
24 provided sufficient facts for the arbitrators to render a
25 fact finding authorized dissolution. So basically the

1 arbitration on dissolution was on whether it was
2 administratively dissolved, whether it expired, whether
3 the entire operation was legal, or whether it was by
4 consent. And I will stipulate that none of those four
5 are what we are here about today.

6 We have never tried -- only this Honorable court can
7 try the issue of whether this company ought to be
8 dissolved based on oppression or unfairly prejudicial
9 conduct to Stu Longman. And to do that we've got to get
10 into this conduct that occurred with Lunar.

11 Hopefully, you will hear about an orchestrated
12 default, about a capital call that was rejected by the
13 arbitrators and a number of other things.

14 [Whereupon, the court reviews documents]

15 THE COURT: Actually 10.5 -- and I knew I had read
16 something else regarding this, 10.5 of the operating
17 agreement does touch on the statute, which is the parties
18 did not present sufficient evidence to justify a finding
19 of extreme remedies of disassociation of forfeiture of
20 either member's membership interest in the company.

21 And actually it goes back up to -- there is a
22 portion in the agreement that makes a reference to 10.5.
23 And 10.5 (b) -- subsection (b)(3) which is, provides that
24 dissociation may be found where a member engages in
25 conduct relating to the company's business that makes it

1 not reasonably practical to carry on the business with a
2 member. Which while broad language I think what you're
3 talking about would fall into that category would it not?

4 MR. MCCULLOUGH: Your Honor, respectfully not even
5 remotely. And I need you to understand the position that
6 we are taking ---.

7 THE COURT: --- I'm clear on your position.

8 MR. MCCULLOUGH: No ma'am. The arbitration was to
9 decide whether or not the entity could continue or a
10 party needed to be disassociated. What you just read was
11 whether or not the entity could continue. That's not
12 what the LLC statute provides.

13 The LLC would have you look at the petitioner,
14 Emerald; Stu Longman, to decide whether he has been
15 unfairly oppressed or prejudiced. And that's not what
16 the arbitration panel was considering and that's not what
17 the operating agreement talks about. It talks about the
18 company; it does not talk about the petitioner, and the
19 LLC act talks about the petitioner being lawfully
20 prejudiced.

21 THE COURT: I still don't see how this email bears
22 on any relevance of any of those issues.

23 MR. MCCULLOUGH: I'm sorry. You're behind the
24 computer; I couldn't hear you.

25 THE COURT: I said I still don't understand how

1 this email is relevant to any of those issues.

2 MR. MCCULLOUGH: Your Honor, we intend to show that
3 this entire assignment and the subsequent default was
4 orchestrated by ARP II as an effort to freeze Stu Longman
5 and Emerald out of ARP I. And we feel that it is
6 relevant to show that he has been oppressed and he's been
7 prejudiced.

8 THE COURT: How does this show that? How does this
9 make that issue more or less probable?

10 MR. MCCULLOUGH: It shows that there was a release
11 of -- he settled his case. What this shows is that, and
12 you just mentioned it, he settled his case yet he left in
13 a lis pendens on Stu Longman's property for an additional
14 four years.

15 Also, Davidson Williams got an assignment of this
16 claim even though it's been settled. Even though the
17 arbitration in 2005 determined that this was an ARP II
18 responsibility Mr. Lussier assigns his claims back to
19 Davidson Williams ---

20 THE COURT: --- Mr. Lussier is not a party to this
21 case is he?

22 MR. MCCULLOUGH: Your Honor we're trying -- he's
23 not.

24 THE COURT: We're trying 2009-553. He is not a
25 party to this case correct?

1 MR. MCCULLOUGH: Correct. We're trying to
2 establish unfairly prejudicial conduct towards Stu ---

3 THE COURT: --- I understand what you're trying to
4 establish. I'm talking about the rules of evidence right
5 now, which is...

6 MR. MCCULLOUGH: Correct.

7 THE COURT: And he's not a party to this case ---

8 MR. MCCULLOUGH: --- correct ---

9 THE COURT: --- so this cannot be a statement of
10 the party.

11 MR. MCCULLOUGH: It's against Davidson Williams is
12 the statement against party; a party who is the managing
13 member with 100 percent voting rights of ARP II ---

14 THE COURT: --- how is this somehow against him?
15 They don't deny that this was settled. I think y'all can
16 cut to the chase and stipulate to all this. It was
17 settled; the lis pendens was removed.

18 MR. MCCULLOUGH: I think they've stipulated to that
19 it was released. I think the purposes behind that ---

20 THE COURT: --- I don't think you can know what was
21 in their mind and nor can he speculate about what their
22 purposes were. It's a matter of presenting
23 circumstantial evidence which you would like the court to
24 infer. They had bad motives but this email does not
25 establish that.

1 MR. MCCULLOUGH: And all I'm doing to establish the
2 email is just to show that there were communications
3 about the settlement, and communications about the
4 partial release of the lis pendens.

5 THE COURT: But it does not purport to show what
6 you are representing to the court, which is somehow there
7 was some nefarious motive in that. So the objection is
8 sustained. The document is inadmissible. You may ask
9 your next question.

10 MR. MCCULLOUGH: Thank you.

11 Q. [Mr. McCullough] If you would turn to tab 5 for me.

12 [Whereupon, the witness complies]

13 Q. Now, is this a series of emails between you and Mr.
14 Williams dated June of 2000 -- or May and June of 2007?

15 A. Yes. I don't see -- yes, that's correct; May 25th
16 of 2007 is where it starts.

17 Q. If you would turn and look at the second email on
18 the first page. And this is an email that you wrote to
19 Mr. Williams on May 25, 2007, correct?

20 A. Correct.

21 Q. And it says on the second sentence, in addition your
22 arbitration agreement seems to name ARP II as
23 responsible. Do you see that?

24 A. I do.

25 Q. Now were you provided -- you say arbitration

1 agreement. Do you mean the arbitration award from New
2 York in 2005?

3 A. I think that's what I meant.

4 Q. All right. Did you see that arbitration award?

5 A. I believe I did.

6 Q. And your read of that arbitration award was that
7 your claim was an ARP II responsibility?

8 A. I think what I said is it seems to name --

9 Q. Now if you will turn to page at the top is this an
10 email from Mr. Williams to you?

11 A. At the very top of the first page?

12 Q. At the top of the second page?

13 [Whereupon, the witness reviews document]

14 Q. Does Mr. Williams say there is still some
15 uncertainty whether ARP II is responsible for it or ARP I
16 or even Stu Longman?

17 A. Yes, yes I do see that.

18 Q. So you were having discussions with Mr. Williams
19 during this time period about who was ultimately
20 responsible for the Lunar claim is that fair?

21 A. Right. I mean to my extent I discussed that it
22 seemed like he was. I didn't discuss that it seemed like
23 ARP I was.

24 Q. And then based on the continued negotiations, if you
25 turn to exhibit 6, you executed a final settlement

1 agreement and final release with Ashley River Properties
2 II, is that correct?

3 A. Correct.

4 Q. If you will turn to the second page of tab 6.

5 [Whereupon, the witness complies]

6 Q. I'm going to read this to you and you can tell me if
7 I read this right.

8 In exchange for the payment and note Lunar agrees to,
9 dismiss with prejudice the lawsuit pending before the
10 Charleston County Court of Common Pleas entitled Lunar
11 Systems versus Ashley River Properties I, Ashley River
12 Properties II, and successors of interest Ripley Light
13 Yacht Club, Ripley Light Development, and Robert
14 Cunningham. Do you see that?

15 A. Yes.

16 Q. And down at tab 7 the parties agree that this
17 agreement may be asserted and introduced as evidence for
18 the parties hereby released as an absolute and final
19 defense and barred to any claim released herein in any
20 present or future suit or proceeding of any nature. Do
21 you see that?

22 A. Yes.

23 Q. And you signed this document and sent it back,
24 correct?

25 A. Yes.

1 Q. So it was your understanding that you had entered
2 into a settlement agreement and release that fully and
3 completely released Ashley River Properties I and Ashley
4 River Properties II from these claims?

5 A. I don't know about that.

6 Q. All right. Well, you released it -- it says an
7 absolute final release in any present and future suit.
8 Do you see that -- tab 7?

9 A. On number 7?

10 Q. Yes?

11 A. The parties agree that in this agreement may be
12 asserted and introduced as evidence for the parties.

13 I believe we were talking about ourselves; ARP II
14 and Lunar Systems. I'm not a lawyer so I don't know --
15 you're saying that I agreed that...

16 Q. I'm just asking you what the document says. Let me
17 ask this. You signed and returned that document but Mr.
18 Williams never signed that settlement agreement. Is that
19 correct?

20 A. I'm sorry?

21 Q. That settlement agreement was never signed by Mr.
22 Williams or anybody on behalf of Ashley River Properties
23 II. Is that correct?

24 A. He did sign it. It was signed on 12/24.

25 Q. So that settlement agreement was executed?

1 A. It was; 12/24/07.

2 Q. I want you to turn to tab 7 for me.

3 [Whereupon, the witness complies]

4 MR. CLEVELAND: Your Honor?

5 THE COURT: Yes, sir?

6 MR. CLEVELAND: Mr. McCullough hasn't offered it.

7 but let me -- in case there is some ---

8 THE COURT: --- unless he offers it there is no

9 ruling to be made.

10 MR. CLEVELAND: All right. Thank you, Your Honor.

11 THE COURT: You may proceed.

12 Q. [Mr. McCullough] This is another series of emails

13 between you and Mr. Williams around November and December

14 of 2007, is that correct?

15 A. Yes. I believe I had sent that to Mr. Cleveland and

16 copied Mr. Williams and Mr. Cisa and my partner in Lunar

17 Systems. And the next one I did send to Mr. Williams.

18 Q. If you would turn to the email with the top dated

19 Thursday, November 20, 2007.

20 [Whereupon, the witness complies]

21 Q. Do you see that email?

22 A. Which page is it?

23 MR. MCCULLOUGH: Your Honor, may I approach just to

24 show him ---

25 THE COURT: --- yes sir, you may.

1 [Whereupon, Mr. McCullough shows documents to the
2 witness]

3 A. That's December 20th.

4 Q. Oh, I'm sorry if I misspoke. December 20, 2007. I
5 want to read you an email -- first of all this is the
6 email that you wrote to Mr. Williams, correct?

7 A. Correct.

8 Q. I'm just going to read the second paragraph and you
9 make sure I got it right.

10 [Reading] I had planned either to let the lis
11 pendens on ARP I lapse when the next required court
12 action occurred or to try to extract some settlement from
13 Longman separately upon his sale or an optioning of the
14 property between the hotels.

15 As the arbitration award is not finalized I will
16 agree with you on the assignment. I don't want to rack
17 up any additional legal entanglements.

18 Q. Do you see that?

19 A. Yes.

20 Q. So at this point you were aware that the New York
21 arbitration had not yet been confirmed is that correct?

22 A. Yes. I was aware he was fighting the arbitration.

23 Q. And was that the basis for you to continue to keep
24 the lis pendens on ARP I's property the fact that the
25 arbitration had not been approved?

1 A. I'm not sure what I was thinking. I know that I
2 just wanted to get out of the case and be paid.

3 Q. Now you mentioned an assignment. Did Mr. Williams
4 approach you about an assignment of your claims against
5 ARP I?

6 A. I think that in the settlement agreement initially
7 that I signed on the 24th of September that was included.

8 Q. All right. Now I had asked you previously whether
9 the settlement agreement had been signed; the one that we
10 looked at a minute ago. Had that settlement agreement
11 ever been signed or had the assignment been signed in
12 December of 2007?

13 A. I signed the settlement agreement in September of
14 2007 and then it was returned to me with the check in
15 December of 2007 signed.

16 Q. Okay. And you end with an assignment assigning the
17 claims that you had to ARP II is that right?

18 A. Yes. It says final settlement agreement and full,
19 final, and complete release.

20 Q. Now you're referencing a document. Do you mind if I
21 see what you've got?

22 A. That's the September document.

23 Q. Okay. And do you have a copy of this [indicates]?
24 This is the final settlement agreement dated September
25 2007? This is the one that you signed. Do you have a

1 copy of this where Mr. Williams signed?

2 A. I do not.

3 Q. Okay. But what we do have is a document executed
4 in December of 2007 showing an assignment and a covenant
5 not to sue is that correct? And you can turn to tab 8 if
6 that would help.

7 [Whereupon, the witness complies]

8 A. That's what tab 8 is.

9 Q. Now I want to read to you an email ---

10 THE COURT: --- Mr. McCullough, let me interrupt
11 you just one second. I apologize. We'll be at ease for
12 a few moments. Sir, if you'd like to go use the restroom
13 or otherwise you're welcome to; just don't discuss your
14 testimony with anyone.

15 [Whereupon, the court takes a brief recess]

16 THE COURT: We'll resume testimony. I was just
17 laughing with my Bailiff saying I thought I wasn't Chief
18 Judge anymore. But I guess I've got to wrap up all my
19 business so I appreciate y'all indulging me. You may
20 continue.

21 MR. MCCULLOUGH: Thank you, Your Honor.

22 THE COURT: You're welcome.

23 DIRECT EXAMINATION OF MR. LUSSIER RESUMES

24 BY MR. MCCULLOUGH:

25 Q. Now we were on tab 7. If you turn the page from the

1 email we just discussed to the next document this is
2 another email dated December 20, 2007 from Mr. Williams
3 to you is that correct?

4 A. On tab 7?

5 Q. Yes, where we just were.

6 [Whereupon, the witness reviews documents]

7 A. Yes.

8 Q. I want to read what Mr. Williams wrote to you and
9 ask you some questions about it okay?

10 A. Okay.

11 Q. [Reading] As you know we do not believe we are
12 responsible for the payment of your claim. We believe
13 Longman is.

14 By paying off this claim I'm taking the risk that I
15 can recover this payment from Longman or otherwise

16 resolve the matter in the course of my continuing
17 disputes with him over his conduct in this sorry affair.

18 The arbitration awards still have not been confirmed
19 by the New York court. If they are overturned this whole
20 thing becomes a mess again and you are stuck in the
21 middle of it if we have not settled.

22 I can't take this risk without gaining some back
23 stop protection and additional leverage with Longman in
24 the form of an assignment. That is why I am asking for
25 the assignment of the claim.

1 Q. Do you see that?

2 A. Yes.

3 Q. Did I read that accurately?

4 A. Correct.

5 Q. And does that summarize Mr. Williams' position to
6 you as to why he needed the assignment?

7 A. In this email, yes.

8 Q. All right. And based on that and based on his
9 criteria you subsequently executed that assignment
10 assigning your rights to ARP II at Mr. Williams request
11 is that correct?

12 A. Correct.

13 MR. MCCULLOUGH: Your Honor, we would move exhibit
14 or tab 7 into evidence as establishing why all this
15 transpired.

16 THE COURT: Mr. Cleveland?

17 MR. CLEVELAND: I object, Your Honor. I want to
18 renew my objection that this was the subject of the
19 arbitration proceeding. Particularly if you look at tab
20 B, which is exhibit -- plaintiff's -- excuse me,
21 defendant's exhibit 2 on page ---

22 THE COURT: --- you said tab B. There -- oh,
23 you're talking about your exhibits?

24 MR. CLEVELAND: Yes, Your Honor.

25 THE COURT: I'm at tab B.

1 MR. CLEVELAND: And look at page 13. What this is
2 the second amended arbitration demand that Mr.
3 McCullough's client filed and was the basis of the
4 arbitration award in 2010.

5 Paragraph 30 describes Mr. Longman's dissatisfaction
6 with the handling of the Lussier claim and the assignment
7 and all the things that Mr. Lussier is talking about now.

8 [Whereupon, the court reviews documents]

9 THE COURT: Who are the members of Emerald
10 Investments?

11 MR. MCCULLOUGH: Emerald Investments was an entity
12 that Stu Longman was the sole member of that was the
13 member of ARP II.

14 THE COURT: Who are the members of ARP II?

15 MR. MCCULLOUGH: Davidson Williams.

16 MR. CLEVELAND: The members are Emerald and Kriti,
17 Your Honor.

18 THE COURT: I'm sorry, say that one more time.

19 MR. CLEVELAND: The members of ARP II are Emerald
20 Investments controlled by Mr. Longman and Kriti Ripley,
21 LLC, which Mr. Williams is the manager of.

22 THE COURT: Thank you.

23 [Whereupon, the court reviews documents]

24 MR. MCCULLOUGH: Your Honor, I would just point out
25 that to my reading there is nothing in the 2010

1 arbitration award with any factual findings associated
2 with any of this.

3 THE COURT: I'm sorry?

4 MR. MCCULLOUGH: I don't believe there is anything
5 of factual findings in the 2010 arbitration award related
6 to any of the Lunar assignment claims or how that
7 impacted Mr. Longman.

8 THE COURT: I don't think it has to be that
9 specific. They found that there -- and I'm going to look
10 back at their specific findings but they talk about how
11 the business is operated and whether these parties have
12 done anything to preclude the business from being able to
13 operate, and whether they have engaged in any unlawful
14 conduct or any wrongful conduct to prevent the operation
15 of the entitles I believe; if my memory serves me
16 correctly.

17 MR. MCCULLOUGH: We would agree with that, Your
18 Honor.

19 [Whereupon, the court reviews documents]

20 THE COURT: This is all the same 325,000 dollars is
21 it not?

22 MR. MCCULLOUGH: It's all the same money, yes, Your
23 Honor.

24 THE COURT: I'm still trying to figure out how this
25 is germane to any issue in the case.

1 MR. MCCULLOUGH: Your Honor, it's our entire
2 position that this is the same money. There was a
3 complete and total settlement where he was paid in full
4 by ARP II and yet continued to have a lis pendens on ARP
5 I's property even though he thought the arbitration said
6 it was an ARP II responsibility; even though he had been
7 paid in full.

8 And the reason he executed that assignment is -- was
9 a result of the communication from Mr. Williams when Mr.
10 Williams said I needed it for some back stop protection
11 and additional leverage with Longman.

12 THE COURT: We'll mark it for I.D. I just -- I'm
13 still not persuaded that it is germane to the issue,
14 which is -- and I understand your posture on the case.
15 But it's not unreasonable at least based on the posture
16 of this case for him to have taken that position. I
17 don't see that as nefarious in its nature. You may
18 proceed.

19 Q. [Mr. McCullough] Based on emails we reviewed you
20 thought that the arbitration award decided that ARP II
21 had to pay you right; that's what you thought?

22 A. I remember reading the arbitration and thinking it
23 referred to that. I wasn't sure categorically but yes,
24 that's what I thought.

25 Q. That's what you put in an email ---

1 A. --- right. ---

2 Q. --- you said --

3 THE COURT: Mr. McCullough, I need you to speak a
4 little more clearly for me. I'm having some difficulty
5 hearing you.

6 MR. MCCULLOUGH: Sure.

7 Q. [Mr. McCullough] You thought it was an ARP II
8 responsibility?

9 A. That's what I thought when I was...

10 Q. And you entered into a settlement and received a
11 settlement for the amount you were owed from ARP II
12 right?

13 A. I never received 175,000. That's...

14 Q. You entered into a promissory note for that amount
15 correct?

16 A. Correct.

17 Q. And you received settlement funds in excess of
18 300,000 dollars from ARP II correct?

19 A. Correct.

20 Q. And you had -- the assignment was not your idea; it
21 was Mr. Williams idea correct?

22 A. I think the crux of that matter was when the 175 was
23 going to be due initially I wanted it to be paid by
24 December 31, 2007. Apparently according to this
25 correspondence there was a sale that didn't happen so he

1 requested that the note be extended to December 31st,
2 2008. That's why we rewrote the agreement.

3 Q. And you ---

4 A. --- I was not a fan of that because I wanted to be
5 paid on December 31st, 2007.

6 Q. Well isn't it true that you wanted to resolve the
7 case and then after the deal was done you would consider
8 an assignment? Isn't that what these emails state?

9 A. I wanted to keep the present settlement in place,
10 which was for us to be paid on December 31st, 2007.

11 Q. And it was Mr. Williams pushing the idea of an
12 assignment of those claims to ARP II right?

13 A. I thought that the final settlement agreement
14 assigned the claim anyway.

15 Q. Well, and he told you he wanted to do that because

16 the New York arbitration award had not been approved and
17 that he needed to gain some back stop protection and
18 additional leverage with Longman. That's what he told
19 you right?

20 A. I think it says here yes, he says that...

21 Q. It says ---

22 A. --- [Reading] We observed the second anniversary of
23 the arbitration award in our favor. We still have no
24 decision confirming the award.

25 Q. And then in the email we just went over I'll reread

1 it for you. This is Mr. Williams talking to you,
2 [Reading] I can't take this risk without gaining some
3 back stop protection and additional leverage with Longman
4 in the form of an assignment.

5 Q. That's what he told you correct?

6 A. Correct.

7 Q. And so that's what happened. You signed an
8 assignment in December of 2007 assigning your claims to
9 ARP II to pursue any claims you might have against ARP I
10 is that correct?

11 A. That's correct.

12 Q. And so you certainly never released that lis pendens
13 that you had filed on ARP I's property during this time
14 period did you?

15 A. I didn't release it. I thought the agreement
16 assigned it.

17 Q. You just gave it to Davidson Williams to handle?

18 A. I believe that's what my settlement agreement
19 indicated.

20 Q. Even though you thought at the time you signed that
21 assignment that this was an ARP II responsibility based
22 on the arbitration award?

23 A. I was unsure. I thought it could be. It seems I
24 think I said.

25 Q. And Mr. Williams said well, that might not be

1 accurate because the New York arbitration award has not
2 been confirmed. That's what he said right?

3 A. I think that's what it says here.

4 Q. Right. And did you know that the New York
5 arbitration award was confirmed in 2008?

6 A. I did not.

7 Q. And did you know that the ARP I lis pendens that you
8 had filed was not removed until 2010?

9 A. I came to know that subsequently. I thought I was
10 out of the case and just waiting to be paid for my
11 promissory note.

12 Q. So you received a full settlement for your claims.
13 You received 325,000 dollars and a promissory note from
14 ARP II correct?

15 A. Correct.

16 Q. Despite that you allowed ARP II access ownership of
17 the lis pendens that you had filed against ARP I right?

18 A. Correct.

19 MR. MCCULLOUGH: That's all I've got, Your Honor.
20 Thank you.

21 THE COURT: Any questions of the witness, Mr.
22 Cleveland?

23 MR. CLEVELAND: Just a couple, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. CLEVELAND:

1 Q. Mr. Lussier, would you turn to exhibit 1, which is
2 your contract?

3 [Whereupon, the witness complies]

4 Q. Do you have that in front of you?

5 A. Yes, I do.

6 Q. And about 7 or 8 pages in in exhibit 1 is the early
7 purchase addendum. Could you turn to that?

8 A. I have it.

9 Q. And would you read the first two sentences in
10 paragraph 2 (b) please?

11 A. [Reading] Purchaser agrees to allow the company to
12 apply said funds to the actual purchase and closing of
13 the underlying real estate of the condominium project as
14 set forth in schedule A attached hereto the condominium
15 property.

16 In such event as collateral for repayment of the
17 funds the purchaser will receive a pari passu dollar for
18 dollar interest in the purchase of the condominium
19 property. This ---

20 Q. --- thank you, that's fine. Did you understand that
21 by putting down a deposit for the condominium that were
22 supposed to be built that you receive collateral in terms
23 of an interest in the property itself to secure repayment
24 of your investment?

25 A. Yes, that's correct. It mentions that in the

1 following sentences.

2 Q. And is that why you filed the lis pendens?

3 A. Correct.

4 Q. I have no further questions.

5 THE COURT: Any redirect?

6 MR. MCCULLOUGH: No, Your Honor.

7 THE COURT: Sir, you may step down.

8 [Whereupon, the witness is excused and exits the
9 witness stand]

10 MR. MCCULLOUGH: Your Honor, we would call Stuart
11 Longman.

12 THE COURT: Let me interrupt you one second. I'm
13 going to break for lunch at 12:30. Do y'all want to --
14 which would interrupt your examination of the witness.
15 Would you prefer to break now and resume a little
16 earlier?

17 MR. MCCULLOUGH: It probably makes a little more
18 sense, Your Honor.

19 THE COURT: And we can make up for our bumpy start
20 this morning. I apologize. I never have that many calls
21 from Court Administration but it is what it is. It
22 needed to be taken care of. Yes, sir?

23 MR. CLEVELAND: Your Honor, I know that you need to
24 hear the testimony before you can rule on it and I
25 appreciate it. I just wanted to draw your attention that

1 based on Mr. McCullough's pretrial brief and based on the
2 exhibits that he has been kind enough to show us the
3 large part of Mr. Longman's testimony is going to be
4 about things in 2005 and 2006 that he claims were unfair
5 conduct.

6 Most of these are exhibits that were in the
7 arbitration proceeding itself. And so I would renew my
8 objection to going into matters that were the subject of
9 the findings of the New York arbitration.

10 THE COURT: I think I've already ruled on that and
11 made it clear that I am not going to retry the
12 arbitration proceeding and that Mr. McCullough is to be
13 guided by that. Other than that you'll have to make a
14 contemporaneous objection as we proceed in the testimony.

15 MR. CLEVELAND: Thank you, Your Honor.

16 THE COURT: You're welcome. Y'all have a good
17 lunch. Let's resume -- let's give ourselves -- is an
18 hour and 15 minutes enough?

19 MR. MCCULLOUGH: Yes, Your Honor.

20 MR. CISA: I think so, Judge.

21 THE COURT: So what does that take us to -- I'm not
22 good at math so I have to have like numbers on my watch
23 because I have to like count. I can't do the digital
24 thing.

25 MR. CISA: It's like 1:30, Judge.

1 THE COURT: Yes, that's an hour and 15 minutes why
2 don't we do that? I'll see y'all at 1:30. Have a good
3 lunch.

4 [Whereupon, court is in recess from 12:15 p.m. until
5 1:35 p.m.]

6 THE COURT: Is the plaintiff ready to proceed?

7 MR. MCCULLOUGH: Yes, Your Honor.

8 THE COURT: Is the defense ready to proceed?

9 MR. CLEVELAND: Yes, Your Honor.

10 THE COURT: If the witness would -- you can call
11 your next witness.

12 MR. MCCULLOUGH: I'd call Stuart Longman.

13 [Whereupon, Mr. Longman comes forward]

14 [Whereupon, the witness is duly sworn by the Clerk
15 of Court]

16 CLERK OF COURT: Please be seated. Sir for the
17 record if you'll please state your name spelling your
18 last name.

19 THE WITNESS: Stuart Longman, L-O-N-G-M-A-N.

20 THE COURT: You may proceed, Mr. McCullough.

21 MR. MCCULLOUGH: Thank you, Your Honor.

22 THE COURT: You're welcome.

23 - - - - -

24 STUART LONGMAN,

25 Having been first duly sworn,

1 Was examined and testified as follows:

2 DIRECT EXAMINATION

3 BY MR. MCCULLOUGH:

4 Q. Stu, briefly walk us through a little bit about
5 yourself. Give us your educational background please?

6 A. I quit school when I was 19, quit college when I was
7 19 and before that I had gone to --

8 Q. Married?

9 A. Yes.

10 Q. Kids?

11 A. Four.

12 Q. And what do you do for a living today?

13 A. I have a solar, commercial solar construction and
14 development business and what they call a demand response
15 business.

16 Q. And what -- explain generally the type of work that
17 entails?

18 A. We do large commercial solar projects on large
19 industrial buildings, ground mounds; typically these are
20 connected to the grid in a number of different places,
21 New England essentially, Hawaii, New Jersey, and we're
22 just opening up a branch in Japan.

23 Q. And what's the name of your business?

24 A. Seaboard Solar.

25 Q. And where is it located?

1 A. Danbury, Connecticut.

2 Q. All right. Let's turn back the clock in general
3 fashion without getting too detailed walk the Judge
4 through your prior development experience leading up to
5 your involvement in the Ripley Marina.

6 A. I had started doing remodeling, moved to new
7 construction, then spec construction through the usual
8 land development, did quite a number of condos, did the
9 first pass of solar condominiums in New England and we
10 did industrial office buildings and so forth.

11 Q. When did you first learn about the Ripley Light
12 Marina area and the project?

13 A. In 2000.

14 Q. Okay. How did you learn about that?

15 A. I was contacted by a Broker in Miami who was
16 pitching the project.

17 Q. Stu, I'm going to get you to look at tab 13 to the
18 notebook in front of you. Is this an accurate
19 representation of what the area looks like today?

20 [Whereupon, the witness reviews photo]

21 A. Yes, it is.

22 MR. MCCULLOUGH: Your Honor, I would move this into
23 evidence. It's a -- just for ease of use for us to go
24 walk through the physical area we're talking about?

25 THE COURT: Any objection?

1 MR. CLEVELAND: No, Your Honor.

2 THE COURT: Marked and admitted without objection,
3 plaintiff's next in line.

4 [Whereupon, plaintiff's exhibit number 13 is entered
5 into evidence by the court]

6 THE COURT: Have you given the court reporter a
7 copy?

8 MR. MCCULLOUGH: Yes, Your Honor.

9 THE COURT: Okay. You may proceed. What number
10 is that Madame Court Reporter?

11 THE COURT REPORTER: It is 13.

12 THE COURT: Thank you.

13 MR. MCCULLOUGH: Your Honor, with the court's
14 permission I've got a blowup and I was going to get Mr.
15 Longman down to orient you the different parcels. But I
16 don't want to -- I know this is non jury. We're trying
17 to show you the difference with the ARP II land and the
18 ARP I land. So with your permission I'll have him come
19 down.

20 THE COURT: Or you can just put it up on the ELMO
21 and just let him look behind him; it would be up on the
22 screen.

23 MR. MCCULLOUGH: Either way.

24 THE COURT: I think that's easier ---

25 MR. MCCULLOUGH: We've got this blown up if that's

1 okay.

2 THE COURT: I think the ELMO is just as easy. He
3 doesn't have to get out of his seat.

4 Q. [Mr. McCullough] Stu, while we're getting that lined
5 up walk us through us your purchase of various parcels
6 and what you did to get this project up and running.

7 A. The first parcel is the one on the north side of the
8 inlet ---

9 Q. --- let's not refer to the photograph. Just
10 generally walk us through what you did as far as what you
11 were purchasing and a permit and anything of that nature.

12 A. Okay. I purchased approximately eight acres from
13 Arthur Applegate in 2000 and contracted the purchase.
14 The existing -- the then existing marina and about
15 another eight acres from Arthur Collins; got both of them
16 about the same time.

17 From that went on -- we consummated the purchase of
18 the Applegate property. The -- we did not consummate the
19 purchase of the Collins property.

20 I ended up getting all of the permits for the marina
21 that now exists on the north side; dredging permits, as
22 well as permits for the construction of I think 226 or
23 228 condominium units.

24 Q. All right. Now Stu if you will turn around.

25 [Whereupon, the witness complies]

1 Q. Is that [indicates] the round Holiday Inn just to
2 orient us up on the top?

3 A. Yes, on the top left.

4 Q. Okay. And what portion -- what do you own -- what
5 does ARP II own; what property?

6 A. Basically the property on this side [indicates] of
7 the little subdivision street there [indicates] that runs
8 up to the highway. And the property that ARP I owns is
9 the little piece in between the two hotels.

10 Q. All right. That's ARP I's property right there
11 [indicates]?

12 A. Yes.

13 Q. And this is ARP II's property here [indicates]?

14 A. Exactly.

15 Q. All right. And so the lis pendens we heard about
16 right now it was placed on the ARP I parcel until 2010?

17 A. Yes.

18 Q. And it was placed on the ARP II parcel until the
19 settlement agreement that we've heard about?

20 A. Exactly.

21 Q. Now did the property look like this when you
22 purchased it in 2001?

23 A. No. It was a series of small lots which we merged
24 to create essentially the ARP II property. And we kept
25 the ARP I property as a separate lot.

1 Q. And what permits did you obtain on behalf of ARP II?

2 A. All the necessary permits for the marina for the
3 dredging which involved O-C-R-M, DEHEC, Army Corp, Fish
4 and Wildlife.

5 And those permits were basically to dredge the
6 marina which was completely silted up and remove all of
7 the debris that was in this area [indicates] here from
8 the years when it was a concrete plant.

9 To remove the what was the receiving dock for the
10 concrete dredge, the barge that fed the concrete plant
11 and rebuild it. And then the permit for the slips
12 themselves, which I think was for 125 or thereabouts; 115
13 slips.

14 And then we got permission from the B-A-R, and the
15 T-R-C and so forth for the first design of the
16 condominiums which included the Collins property; that
17 was 226 condominiums.

18 That was later amended and we got permits from all
19 of the same agencies for the 128 on what is now ARP II
20 and ARP I properties.

21 Q. All right. So your original permits included this
22 property over here [indicates] which is the Collins
23 track.

24 A. Yes.

25 Q. And subsequently you did not ultimately close on the

1 Collins track so you reapplied for permits solely on the
2 ARP II and the ARP I parcels?

3 A. Exactly.

4 Q. Now we see the marina. Walk us through what the
5 permits were for related to the condominiums.

6 A. Well, essentially you go through three steps; the
7 preliminary -- I'm sorry some concept, preliminary, and
8 final. We got through both concept and preliminary. The
9 final permit is simply the construction -- so we
10 essentially got through the entire process.

11 Q. And where were the condos going to go?

12 A. They were going to go essentially from the highway
13 up at the top of the screen [indicates] down that long
14 narrow piece [indicates] and then coming in right along
15 the water from the what is now the party deck over to the
16 property line.

17 And then there was another building approximately
18 the same size as the hotels in between the hotels.

19 Q. Okay. Now have those condos been constructed?

20 A. No.

21 Q. And if I asked this already I apologize. Is this
22 [indicates] what the property looks like today;
23 generally?

24 A. Generally.

25 Q. Okay. How many slips have been constructed, wet

1 slips?

2 A. 83.

3 Q. What else has been constructed since you purchased
4 this property that we can see on this [indicates]
5 photograph?

6 A. The party deck has been rebuilt, which is that
7 square thing right there [indicates] and the men's and
8 woman's room with a small office next to it.

9 Q. Okay. You can have a seat.

10 [Whereupon, the witness complies]

11 Q. Now, there are a number of different entities. I
12 want you to describe for Judge Jefferson these various
13 entitles. First, what is Emerald LLC?

14 A. Emerald LLC was the holding company that I created
15 originally when I was going to purchase all the property.
16 It was created when we came down to start to develop.

17 Q. And Emerald is the -- your -- it is one of two
18 members of Ashley River Properties II?

19 A. Yes.

20 Q. And who is the other member?

21 A. Kriti Ripley, LLC.

22 Q. And are you -- you control and own Emerald?

23 A. Yes.

24 Q. Who controls and owns Kriti Ripley LLC?

25 A. The Vardinoyannis [phonetic] family from Greece.

1 Q. Now explain to -- well, before we get into that
2 explain to us what Ashley River Properties Roman Numeral
3 I; that's an LLC?

4 A. Yes.

5 Q. And what does that property -- what did it own?

6 A. It owned and owns the piece in between the hotels
7 only.

8 Q. And who is the sole member of ARP I?

9 A. Emerald Investments.

10 Q. And that flowed 100 percent to you?

11 A. Well within my family, but yes.

12 Q. When did you first become involved with a person by
13 the name of Davidson Williams?

14 A. In late 2003; the third quarter of 2003 I believe.

15 Q. And how did you become involved with Mr. Williams?

16 A. He was introduced to me by a Broker in Greenwich,
17 Connecticut.

18 Q. And for what purpose?

19 A. He had expressed interest in investing in this
20 property that had been described to him by the Broker.

21 Q. And did -- you touched on this before, was this
22 Davidson Williams' money that was being invested?

23 A. No.

24 Q. Whose money was he actually investing?

25 A. He is the manager in the New York office of the

1 Vardinoyannis family. And so it is their money from a
2 variety of entities that he is investing.

3 Q. All right. Two things; first speak up a little
4 bit. And second, explain to us who this -- tell us a
5 little bit about this family.

6 A. They are a family that as I understand it at the end
7 of World War II the two original brothers or cousins
8 leased a decrepit tanker ---

9 MR. CLEVELAND: --- Your Honor, I going to object.
10 This sounds like hearsay ---

11 THE COURT: --- basis of the objection? I'm sorry,
12 I can't hear you. What's the basis of the objection?

13 MR. CLEVELAND: Hearsay. He's said as he
14 understands it. It doesn't sound like he has personal
15 knowledge.

16 THE COURT: You need to lay the appropriate
17 foundation for his personal knowledge of the --

18 Q. [Mr. McCullough] Do you know where the money came
19 from?

20 A. I was told by Mr. Williams where it came from.

21 THE COURT: Sustained, hearsay. He has to know of
22 his own personal knowledge.

23 MR. MCCULLOUGH: Okay.

24 Q. [Mr. McCullough] Based on the financial information
25 you've seen somebody invested funds into Kriti Ripley

1 LLC?

2 A. Yes.

3 Q. And was your primary contact for Kriti Ripley LLC
4 Mr. Williams?

5 A. Yes.

6 Q. Now, an entity was formed called Ashley River
7 Properties Roman Numeral II correct?

8 A. Yes.

9 Q. And they owned that entity -- they owned the
10 property we just described correct?

11 A. Yes.

12 Q. And the permits that you had obtained for that
13 property?

14 A. Yes.

15 Q. Now how much did Kriti invest into ARP II?

16 A. A million 250.

17 Q. And what did they -- what did that entity get in
18 return for that investment?

19 A. Thirty percent of the entity.

20 Q. And who remained a 70 percent owner?

21 A. Emerald Investments.

22 Q. I'd like you to turn to tab 14 for me.

23 [Whereupon, the witness complies]

24 Q. What is this document?

25 A. This is the operating agreement of Ashley River

1 Properties II.

2 Q. And does this spell out the contractual rights
3 between Kriti and Emerald as it relates to ARP II?

4 A. Yes.

5 Q. It also spells out the ownership rights and the
6 ownership percentages?

7 A. Yes.

8 MR. MCCULLOUGH: Your Honor, we would move the
9 operating agreement into evidence.

10 THE COURT: Any objection?

11 MR. CLEVELAND: No, Your Honor.

12 THE COURT: Marked and admitted. What number is
13 that Madame Court Reporter?

14 THE COURT REPORTER: It's 14.

15 THE COURT: Number 14 without objection.

16 [Whereupon, plaintiff's exhibit number 14 is entered
17 into evidence by the court]

18 Q. [Mr. McCullough] Mr. Longman turn to page 25 of that
19 document please?

20 [Whereupon, the witness complies]

21 Q. Does it spell out certain ways to seek dissolution?

22 A. It does.

23 Q. And what four events allow for dissolution per the
24 operating agreements?

25 A. Written consent of the members who own the required

1 interest of the voting rights in the company, any event
2 that occurs that makes it unlawful for all or
3 substantially all of the business to be continued, the
4 filing by the secretary of State of a bankruptcy
5 petition, and the expiration of the term of the LLC
6 itself.

7 Q. And have any of those four events occurred to your
8 knowledge?

9 A. No.

10 Q. Now this operating agreement is dated in December of
11 2003, does that sound right?

12 A. Yes.

13 Q. Now is it fair to say, and I think this might be one
14 thing we can all agree on, have there been continued
15 fights between yourself and Mr. Williams over the control
16 and operation of Ashley River Properties II?

17 A. Yes.

18 Q. When did those fights first occur? When did the
19 disagreements first start?

20 A. In September of 2004.

21 Q. What occurred in September of 2004?

22 A. I ---

23 MR. CLEVELAND: --- objection, Your Honor.

24 THE COURT: Basis?

25 MR. CLEVELAND: Going back to 2004 many of these

1 matters that he is talking about particularly things
2 emanating from 2004 had been submitted to arbitration,
3 ruled upon and confirmed by the court's order.

4 And I don't believe it's relevant to the issue of
5 whether the company should be dissolved today, that there
6 was a matter that was adjudicated, ruled upon back in
7 2004; unless it pertains to some ongoing misconduct that
8 hasn't already been adjudicated by the 2010 arbitration.
9 So I object to the relevance of this.

10 THE COURT: Anything -- and I've already ruled on
11 this Mr. McCullough, anything that relates to Kriti's
12 mismanagement or complained mismanagement, anything that
13 deals with their business decisions, anything that
14 relates to any allegations of corporate waste, anything
15 that relates to wrongful conduct adverse to ARP II's
16 business, anything that relates to a material breach of
17 the operating agreement or anything that relates to a
18 material breach of the duty owed to ARP II or Emerald
19 has already been decided by the arbitrator and is res
20 judicata by your agreement.

21 So it becomes the law of this case as a binding
22 fact; any of their fact findings. So with that in mind
23 you may proceed.

24 MR. MCCULLOUGH: Thank you, Your Honor.

25 Q. [Mr. McCullough] Proceed please?

1 THE COURT: You need to ask your client a question.
2 It's not going to be an open door question for everything
3 he thinks went wrong with the company. That would be
4 averse to the court's ruling.

5 MR. MCCULLOUGH: I'm sorry. Maybe -- I'm not
6 offering this. I'm purely trying to -- at this point I
7 think it's unfair to ask you to make a decision in fact.
8 And I have no intention of going through what the
9 arbitrators decided. I'm basically just trying to in
10 summary fashion describe how all of this created.

11 THE COURT: It is your contention that there has
12 been a violation of 33-44-801 to the extent that you are
13 not allowed or did not present evidence in the
14 arbitration that -- let me see exactly.

15 [Whereupon, the court reviews documents]

16 THE COURT: All of these other provisions mirror
17 the operating agreement; that being 33-44-801 subsection
18 (4) which is, the economic purpose of the company is
19 likely to be unreasonably frustrated. While not in those
20 exact terms the arbitrator addressed that.

21 Another member has engaged in conduct relating to
22 the company's business that makes it reasonably
23 practicable -- that makes it not reasonably practicable
24 to carry on the company's business with that member.
25 That's boiler plate from the parties operating agreement.

1 Or it is not otherwise reasonably practicable to carry on
2 the company's business in conformity with the articles of
3 organization and the operating agreement. That mirrors
4 the operating agreement and was addressed likewise by the
5 arbitrators.

6 The company failed to purchase the petitioners
7 distributional interest after giving effect to the
8 provisions of the operating agreement. That's just not
9 -- it's not applicable.

10 The manager's or members in control of the company
11 have acted, are acting, or will act in a manner that is
12 unlawful, oppressive. And all of that language is in the
13 operating agreement with the exception of fraudulent.

14 So to the extent that -- it's my understanding that
15 your argument is that you were not allowed to present --
16 that you didn't present evidence in the arbitration
17 regarding any fraudulent activity?

18 MR. MCCULLOUGH: Your Honor, it's our position that
19 the operating agreement -- I agree with you up until that
20 last statement -- does not provide for a dissolution
21 based on the unlawful, oppressive, fraudulent, or
22 unfairly prejudicial conduct ---

23 THE COURT: --- it uses that exact language in that
24 it makes it unlawful. They use that language in the
25 operating agreement at 9.1(b). So that has been

1 addressed.

2 MR. MCCULLOUGH: Unlawful to continue the
3 operation, correct ---

4 THE COURT: --- same thing, unlawful because the
5 language that prefaces that is a judicial decree that the
6 managers or members in control of the company have acted,
7 are acting, or will act in a manner that is unlawful.
8 That is encompassed by the parties' agreement. And that
9 has been dealt with by the arbitrator.

10 The other language is oppressive -- I really can see
11 no substantial difference between the language oppressive
12 and somebody acting contrary to the parties' ability to
13 conduct business.

14 To me it's all the same with the exception of the
15 way it is articulated, which is when you start talking
16 about corporate waste or the more operative language is
17 the wrongful conduct averse to ARP II's business. To me
18 that's the same thing as oppressive conduct.

19 There really is no material difference to me.
20 Wrongful conduct, oppressive conduct it all falls into
21 the same category. We then get into fraudulent, which
22 that language is not used in the operating agreement; at
23 least not that I have been able to discern, or unfairly
24 prejudicial to the petitioner. So those would be the
25 only two looking at it in the light most favorable to you

1 in terms of what you say you were not able to present
2 testimony on and was not ruled on by the arbitrator.

3 Those are the only two things that have not been
4 addressed; which is whether the behavior was fraudulent
5 or unfairly prejudicial to the petitioner.

6 MR. MCCULLOUGH: Yes. And it's our position and
7 what we're trying to do -- the 2010 arbitration award and
8 the 2005 arbitration award struck down this capital call.

9 THE COURT: I'm sorry; I didn't hear you.

10 MR. MCCULLOUGH: Stuck down the capital call and
11 determined that the capital call was invalid on its face.
12 And then they went through that litany. And so it's our
13 position that what we're here today to do is to determine
14 whether the capital call amongst other things was
15 unfairly prejudicial to the petitioner. And as part of
16 the ---

17 THE COURT: --- the capital call; that is a ruling
18 and finding by the arbitration.

19 MR. MCCULLOUGH: They said it was invalid on its
20 face. That is the fact that they have determined that we
21 all agree is before this court. So they have determined
22 that the capital call was invalid on its face.

23 THE COURT: Are you talking about where they said
24 the loans?

25 MR. MCCULLOUGH: No, exhibit 40 ---

1 THE COURT: --- what page are you referring to?

2 MR. MCCULLOUGH: The 2010 arbitration award.

3 THE COURT: What page?

4 MR. MCCULLOUGH: At page -- tab 40, page 2.

5 [Whereupon, the court reviews documents]

6 THE COURT: Oh, we find that the capital call dated
7 February 28th was defective on its face and thus
8 ineffective to trigger a dissolution. And I'm sure
9 that's a typo because it says dilution but I'm sure they
10 meant dissolution.

11 Or maybe they did mean dilution of Emerald's
12 membership interest. [Reading] The capital call imposed
13 conditions and the application to Emerald's capital
14 contribution, which was contrary to the terms of
15 operating agreement.

16 Accordingly, we find Emerald continues to own a 70
17 percent interest and 30 percent sold but does not impact
18 however the finding that Kriti continues to be the sole
19 member with voting rights as determined by the initial
20 arbitration and confirmed.

21 [Whereupon, the court reviews documents]

22 THE COURT: You still need to tie -- I still don't
23 understand how that affects the court's ruling.

24 MR. MCCULLOUGH: Your Honor, they found it was
25 invalid on its face. They didn't find whether that was

1 unfair -- that fact that we take now is determined --
2 whether that is unfairly prejudicial to the petitioner.
3 And it's our goal here today to show you that the basis
4 behind the capital call was to squeeze down Stu Longman's
5 ownership interest, which has been determined by the
6 arbitration to be in effect.

7 But to show that it has been unfairly prejudicial to
8 Mr. Longman we've got to show that -- what transpired
9 during this timeframe that there was a 20 million dollar
10 offer on the table that was rejected in large part
11 because they were deciding on the different splits
12 between the two owners on purported defaults that they
13 got on the Lunar case that we just talked about in an
14 effort to create additional leverage as he said or a back
15 stop was the terminology in his email.

16 And then the K-1's that we just found about in 2010
17 ARP II actually reports to the federal government that
18 they are a 70 or 80 -- 79 percent owner when in fact the
19 2005 arbitration said the exact opposite that ARP -- that
20 Stu Longman was still the owner of that 70 percent.

21 Your Honor, it's our intent and the only way I know
22 how to do this is to show that from 2005 until last week
23 this continued effort to squeeze Mr. Longman's ownership
24 interest down. And we can rely on the arbitrator's
25 decisions but I don't know how else to do it other than

1 to try to paint the picture of what has happened to date.

2 THE COURT: Mr. Cleveland?

3 MR. CLEVELAND: Your Honor, the parties spent over
4 six full hearing days litigating this very issue. Mr.
5 Longman claimed a number of things. He claimed that the
6 capital call was invalid. He claimed that Mr. Williams
7 did not -- sold the property when he had the opportunity
8 to; the very things Mr. McCullough is talking about.

9 And he claimed that he was entitled to damages in an
10 amount not less than 10 million dollars. That's what he
11 claimed in the arbitration. The arbitrators found no
12 misconduct. They did not award one dollar in damages and
13 repeatedly found that the actions taken by Mr. Williams
14 were all within reasonable efforts to run a complex
15 project.

16 Very specifically they dealt with the issue of the
17 capital call because they found that the capital call did
18 not operate to reduce Mr. Longman's percentage.
19 Obviously, they considered the claims that the capital
20 call was invalid because they determined it was invalid.

21 And in the very same order said there was no
22 misconduct on the part of Mr. Williams. Now you can be
23 wrong without being guilty of misconduct. And they were
24 wrong in the way that the capital call was structured but
25 the arbitrators found no misconduct at all. It's...

1 MR. MCCULLOUGH: Your Honor, I'm sorry. I have to
2 dispute that they found no misconduct. They said that
3 the -- that Mr. Longman had a probable cause to question
4 it. And in the ---

5 THE COURT: --- I've read the arbitration order.
6 It very clearly states that there is no misconduct in
7 terms of -- this really comes down to the business
8 judgment rulings on aspects. They found clearly there
9 was no -- the only misconduct that could be contemplated
10 in this is somehow operating the business because that's
11 the only basis for which these parties have a
12 relationship; they were conducting a business together.

13 MR. MCCULLOUGH: Your Honor, in the 2005 order they
14 state that there is probable cause to object and they go
15 on for half a page on the reasons there is probable
16 cause; all of the conduct. They also find and I will
17 quote it; this is on page 6.

18 [Reading] We question Kriti's conduct in
19 encouraging some of these third parties to assert claims
20 against ARP II and not accept partial reimbursements of
21 their deposits.

22 That's the whole Lunar business that we touched on.
23 And then in 2010 they say that the capital call is
24 invalid on its face ---

25 THE COURT: --- they do. But they ultimately find,

1 as I've already articulated for the record which is
2 binding on you and your client, that what they did was
3 well within reasonable business efforts to manage a
4 complex piece of waterfront property, that their
5 decisions did not constitute corporate waste, wrongful
6 conduct averse to ARP II's business, a material breach of
7 the operating agreement, or a material breach of a duty
8 owed to ARP II or Emerald.

9 MR. MCCULLOUGH: But I still think then I get to
10 come tell you why it's been unfairly prejudicial to my
11 client. And based on that unfairly ---

12 THE COURT: --- I'm going to give you a very little
13 bit of room on that but I think that the operating
14 agreement mirrors the statute. And while the words used
15 are not the same it is clearly the intention of that
16 operating agreement to mirror the statute, which most
17 operating agreements in this State -- that are entered
18 into in this State because all lawyers pretty much use
19 the same operating agreement or some version of it mirror
20 the statute.

21 And while it may have been inartfully drafted and
22 did not use these exact terms that was clearly the
23 intention of the agreement when they entered into it
24 because otherwise you would obfuscate the purpose of --
25 you would then have an agreement that is contrary to our

1 dissolution rules under the statute. And the language
2 that is used is pretty typical of the language used in
3 operating agreements.

4 But I need to be very clear; I am not relitigating
5 the arbitration. That is contrary to public policy. It
6 really then allows parties to go into arbitration and
7 then to basically ignore the findings of an arbitrator,
8 which you paid substantial money for and you've spent
9 substantial time litigating, and then be able to say
10 well, I don't like that agreement. I don't like what the
11 arbitrators did and therefore I want to come to court and
12 litigate it.

13 And it's a very bright line test and it's very clear
14 and I'm not going to relitigate the arbitration. Not
15 because I have a particular feeling about it one way or
16 the other; I don't.

17 But it then -- it's a slippery slope because then
18 folk -- which we're already dealing with because we have
19 people more and more now coming into court saying I
20 really don't like what the arbitrator did so I think I
21 should be able to just sort of skirt this language and
22 read it in a real vague way and I should be able to come
23 back to court and have a jury trial on it or I should be
24 able to come here non jury because I really just don't
25 like what the arbitrators did. And that's the -- not the

1 problem but as business people when you enter into an
2 agreement that calls for binding arbitration, and you
3 really don't have to be a business person because when
4 you go to get your car repaired you entered into binding
5 arbitration.

6 Everything is binding arbitration now and most
7 people don't read the small print but whatever you buy
8 now, even your cell phone is binding arbitration. So it
9 then it becomes what's the point of having binding
10 arbitration agreements if you can just say well I really
11 don't like what the arbitrator did and I want another
12 bite of the apple and I want to come into court and try
13 it.

14 So for me it's a black letter principle; it's
15 precedent and has nothing to do with whether I agree or
16 disagree with what the arbitrator did. I wasn't there;
17 it was three of them. They paid them 111,000 dollars;
18 good, bad, or indifferent it's what they agreed to and
19 it's what they have found.

20 I don't need you to go back through everything and
21 again if you all were not parties to it I don't know --
22 you say you have a transcript so you should have been
23 able to read it. You already know what was presented.
24 So I think it's a pretty bright line test. I'm not going
25 to relitigate that arbitration.

1 MR. MCCULLOUGH: I have no intention of doing it.

2 THE COURT: So to the extent that Mr. Cleveland has
3 raised that validly and I have already ruled for the
4 record what -- so really you are now stuck with proving
5 basically that they committed some fraud that would
6 support dissolution of this corporation because to the
7 extent, and again it's a slippery slope when you start
8 talking about unfairly prejudicial to the petitioner
9 that's a typical catch all in the statute that just
10 basically appeals to equity.

11 But I'm still not going to go back into this
12 arbitration and then find that something they did that
13 may deal with their business judgment, whether they
14 should have sold property or shouldn't have sold it and
15 goes with the operation of business find that that was
16 unfairly prejudicial because that would be contrary to
17 what was found in the arbitration agreement.

18 MR. MCCULLOUGH: And I promise you I will not do
19 that. I do think that's different than because the
20 arbitrators twice to the extent we have the ability or
21 the authority to opine I do think they recognize there
22 were limitations especially when ---

23 THE COURT: --- they were limited by the operating
24 agreement but the operating agreement mirrors the statute
25 almost exactly. The only thing it left out was

1 fraudulent, it didn't use the exact word oppressive, and
2 it did not say unfairly prejudicial to the petition which
3 I wouldn't have included that either probably because
4 it's just a catch all in the statute.

5 But it has all the other language that you typically
6 would deal with in business dealings. It just does not
7 use the word fraudulent or oppressive. But oppressive in
8 a business context means that you've oppressed me to the
9 point where I cannot legitimately do business. So it all
10 comes under the same heading when it all comes back
11 around to it.

12 So really what you're left with, if in fact there
13 was no testimony regarding fraudulent behavior that's
14 basically what it comes back around to, which is you will
15 be allowed at least on that prong of the statute where
16 you say to the extent you are precluded or did not
17 present testimony to the arbitrators and that they did
18 not make a specific finding regarding that.

19 MR. MCCULLOUGH: Your Honor, I guess the only other
20 question I would have does that also mean we can discuss
21 because the 2010 award specifically said that the capital
22 call was invalid on its face it's our position that that
23 is a critical part of the reason we need to resolve this
24 case is the capital call ---

25 THE COURT: --- does that tie into some fraudulent

1 behavior of the defendants?

2 MR. MCCULLOUGH: I would think it's both fraudulent.
3 and unfairly prejudicial.

4 THE COURT: I think we know what the elements of
5 fraud are don't we? So you don't have to ---

6 MR. MCCULLOUGH: --- but actually I'm trying to get
7 more to unfairly prejudicial because I do think it's a
8 catch all but I think it's there for a reason and it was
9 not in the operating agreement and...

10 THE COURT: I'm going to give you some latitude but
11 it's not going to be much because I'm not going to
12 relitigate this arbitration. Yes, sir?

13 MR. CLEVELAND: Your Honor, I just wanted to add to
14 my objection there is no allegation of fraud. No
15 allegation.

16 THE COURT: Is there not?

17 MR. MCCULLOUGH: We're actually trying to dissolve
18 the company and as part of that we have to show fraud
19 through the statute. We're not suing ---

20 THE COURT: --- but did you allege that? What do
21 the pleading say or does it just cite the statute?

22 MR. MCCULLOUGH: We're suing for dissolution. And
23 the statute requires a showing of fraud or unfairly
24 prejudicial to the petitioner. We're not seeking a ---

25 THE COURT: --- did you cite the statute when you

1 proceeded under that cause of action or did you simply
2 say you were seeking a dissolution?

3 MR. MCCULLOUGH: Seeking a dissolution.

4 THE COURT: You didn't cite the statute?

5 MR. MCCULLOUGH: Oh, I think the statute -- I think
6 the statute is here...

7 [Whereupon, Mr. McCullough reviews documents]

8 MR. MCCULLOUGH: I think your consent order even
9 said we're shelving that issue until the determination of
10 the ---

11 THE COURT: I'm sorry, I can't hear you. I didn't
12 hear what you last said.

13 MR. MCCULLOUGH: I think it similarly references
14 the statute.

15 THE COURT: I didn't -- say that one more time.

16 MR. MCCULLOUGH: Yes, we referenced and the consent
17 order references 33-44-101 hereinafter the judicial
18 dissolution claim.

19 [Whereupon, the court reviews documents]

20 MR. MCCULLOUGH: Your Honor, I've got the page if
21 it would help citing the statute in the complaint.

22 THE COURT: Yes. What paragraph is it?

23 MR. MCCULLOUGH: Page 10 the second paragraph where
24 it actually spells out the first cause of action,
25 judicial dissolution -- cites to that statute on page 9.

1 THE COURT: And he does allege at paragraph 46 Mr.
2 Cleveland he says Kriti and ARP II have engaged in
3 conduct that has been oppressive, fraudulent, and
4 unfairly prejudicial and it is impracticable to carry on
5 ARP II's business.

6 MR. CLEVELAND: Your Honor, and the next paragraph
7 spells out the conduct. And I don't believe there are
8 any allegations of fraud in there. I do agree with you
9 that 46 ---

10 THE COURT: --- I don't think he has to. I think
11 he can just say -- I don't know that he has to --
12 pleadings are notice documents. So I don't think he has
13 to tell you every single thing he is relying on.

14 MR. CLEVELAND: No, but I think he has to put the
15 elements of fraud in if he intends to rely on fraud.

16 THE COURT: That's an interesting question.

17 MR. CLEVELAND: And if you look at 47 all of these
18 were claims -- all of these were claims that were
19 submitted to the arbitrators as being the basis of the
20 allegations of wrongful misconduct.

21 THE COURT: Fraudulent was one of them?

22 MR. CLEVELAND: In paragraph 47 -- 46 is a catch
23 all but 47 describes the conduct.

24 THE COURT: No, I'm talking about what was
25 submitted to the arbitrator. Do you have proof that was

1 actually submitted to him, fraudulent, because they don't
2 make any findings about anything fraudulent? They simply
3 make finding regarding -- they focus in on the operating
4 agreement and the language of the operating agreement.
5 But I didn't see anything in there about fraudulent
6 conduct.

7 MR. CLEVELAND: I agree with that. I don't -- I
8 agree with that; just as they have not alleged any
9 fraudulent conduct in this lawsuit. I don't believe
10 there was any evidence of fraud. And I don't believe
11 there is any evidence in the case of fraud.

12 THE COURT: But the issue doesn't become whether
13 there is any evidence of it. The issue becomes whether
14 that issue was submitted to the arbitrator and whether
15 they made a finding on it.

16 MR. CLEVELAND: But the other side of that issue I
17 respectfully submit is whether there is any evidence
18 today. In other words I would ---

19 THE COURT: --- I don't know if there is any
20 evidence today. I haven't heard the testimony. But the
21 issue becomes the only thing I've -- the only thing you
22 all presented to me at this point that has a preclusive
23 effect is what the arbitrators made a decision on. And
24 if they didn't make a decision regarding fraud then that
25 is a portion of the statute where they -- I've not been

1 able to discern any finding regarding fraud in -- or
2 fraudulent really is the term that the statute uses. It
3 doesn't use the term fraud it says fraudulent and acting
4 or will act in a manner that was fraudulent. I don't
5 believe the arbitrators unless I missed something made
6 any findings regarding that.

7 MR. CLEVELAND: Let me just state very quickly and
8 then I'll sit down. My position is that the complaint
9 sets out in paragraph 47 what he considers the wrongful
10 conduct to be that satisfies the statute. All of these
11 items that are here were submitted to the arbitrators and
12 there is no other item of fraudulent conduct that is
13 alleged anywhere in the complaint.

14 And I would submit that paragraph 47 doesn't allege
15 the existence of any fraudulent conduct. So whereas I
16 agree with you that paragraph 46 cites -- paragraph 47
17 goes on to identify the conduct; none of which has any
18 indicia fraud to it.

19 MR. MCCULLOUGH: But were unlawfully prejudicial to
20 the petitioner, Stu Longman which is what we're trying to
21 show here today. And this is a notice of pleading. It
22 was not -- otherwise in every lawsuit you can find ---

23 THE COURT: --- the question becomes was anything
24 other than these allegations in paragraph -- were these
25 allegations in paragraph 47 presented to the arbitrator?

1 MR. CLEVELAND: I don't think there is any doubt or
2 any contest in that issue they were.

3 MR. MCCULLOUGH: And what we're asking ---

4 THE COURT: --- that's not my question. My
5 question is were these factual allegations submitted to
6 the arbitrator; those articulated in paragraph 47 A
7 through D?

8 MR. MCCULLOUGH: I think they were. And I think
9 they determined ---

10 THE COURT: --- and they made findings regarding
11 that conduct correct?

12 MR. MCCULLOUGH: They did. And my point is that
13 what we are here today to do is to take those factual
14 findings for instance that the capital call was invalid
15 on its face ---

16 THE COURT: --- and actually you use that language
17 in paragraph 48 which is that you more particularly
18 allege that the allegations 47 A through D violated the
19 operating agreement and that they constituted bad faith,
20 oppressive and unfairly prejudicial conduct.

21 MR. MCCULLOUGH: Because Kriti then told the
22 arbitrators that you can't do that; that's South Carolina
23 law. You've actually got to do -- you have to focus
24 entirely on the operating agreement.

25 THE COURT: Where do you have that actually ---

1 MR. MCCULLOUGH: --- Your Honor, I didn't bring all
2 the underlying pleadings that's why I was going to show
3 Judge Young's order from before where he made that
4 determination on the motion to dismiss. And it was based
5 on ---

6 THE COURT: --- I respect Judge Young immensely; he
7 and I are colleagues. But I don't ---

8 MR. MCCULLOUGH: --- I was just trying to ---

9 THE COURT: --- know what you presented to him. I
10 don't know what he read, and I'm not going to rely --
11 that is not binding in this case.

12 MR. MCCULLOUGH: I agree ---

13 THE COURT: --- I would want to see where you all
14 either stipulated to that or whether it was argued to the
15 arbitrator that that was the posture of the case.

16 MR. MCCULLOUGH: They consented to it. That's why
17 the dissolution claim was the key ---

18 THE COURT: --- is that correct Mr. Cleveland?
19 Y'all consented that they were bound only to the
20 operating agreement as it bore on dissolution?

21 MR. CLEVELAND: No, Your Honor. What we agreed to
22 was that only you as a South Carolina court had authority
23 to judicially dissolve the company.

24 THE COURT: I have a question. Where is it stated
25 in the transcript what you all agreed to?

1 MR. CLEVELAND: I think what we agreed to is in the
2 consent order that you signed.

3 THE COURT: So then how do I know what was argued
4 to the arbitrators because you all have represented to
5 this court that somehow the arbitrators it was argued to
6 them that they were limited in their fact finding.

7 MR. CLEVELAND: No. I disagree with that 100
8 percent. ---

9 THE COURT: --- but that's not Mr. McCullough's
10 position. And if in fact that is his position I need to
11 know where it is reflected in that arbitration record.

12 MR. MCCULLOUGH: The arbitration in New York had no
13 authority to dissolve this company ---

14 THE COURT: --- that's not the question. I'm
15 talking about fact finding; not dissolution.

16 MR. MCCULLOUGH: I don't think they were asked to
17 opine as to the South Carolina statute or those
18 particular ---

19 THE COURT: --- that's not my question. You've
20 represented to the court that the scope of the fact
21 finding was limited and it was limited because the
22 defendants in this case represented to the New York
23 arbitrators that they were limited in some way as to what
24 they could consider in terms of their fact finding in
25 this case. I am clear they could not dissolve the

1 corporation. That does not mean however that they could
2 not make findings of fact as to whether it was supported
3 or unsupported to dissolve it. And it does not mean they
4 could not rely on the South Carolina statute in looking
5 at that criteria.

6 So my question becomes because the whole purpose of
7 the arbitration was for their findings of fact to be
8 limited or y'all wouldn't have spent 111,000 dollars in
9 six days they hearing it. So then the question becomes
10 was there in some way their fact finding ability limited?
11 I know they couldn't dissolve the corporation; that's a
12 foregone conclusion.

13 That does not mean however that once I consider
14 their findings of fact I can decide whether dissolution
15 is appropriate or whether it's not appropriate because
16 theoretically the whole reason you have that arbitration
17 and go through all that fact finding is so that this
18 court doesn't have to do it. And so then it becomes
19 almost a ministerial duty as to whether this court then
20 dissolves the corporation or doesn't dissolve the
21 corporation.

22 MR. MCCULLOUGH: It would be our position that
23 because it was intended at the time to stay the
24 dissolution lawsuit with the intent to bring it back
25 before you in the consent order and the fact that the

1 arbitration award itself in two separate places says to
2 the extent that the panel is empowered to opine. But
3 beyond that, Your Honor, I wasn't there. I'm not about
4 to represent to you what was testified to up there
5 because I was not a party to it.

6 THE COURT: Okay. If there was some limitation in
7 how the testimony was to be presented or are you
8 representing to this court that what you're about to
9 illicit from this witness was not testified to in New
10 York?

11 MR. MCCULLOUGH: I'm not telling you that. What
12 I'm saying is that the impact of the invalid capital call
13 if you want us to take the matter of law the arbitrators
14 found that the capital call was invalid on its face what
15 I'm trying to do here today is show the basis behind that
16 and why that is unfairly prejudicial to my client.

17 I don't know how to do that without getting into
18 some of the background for why it was done and when it
19 was done, and how it was done.

20 THE COURT: Does the capital call bear in any way
21 on how this corporation was run and the reasonable
22 business efforts in running the company?

23 MR. MCCULLOUGH: I think that's a different fight
24 altogether.

25 THE COURT: Are you contending that it was a

1 material breach of the operating agreement or a material
2 breach of a duty ARP II owed to Emerald?

3 MR. MCCULLOUGH: The arbitration found ---

4 THE COURT: --- I mean ARP I owed -- well -- I'm
5 sorry, I'm reading backwards -- or there was a material
6 breach of duty that the defendants owed to your clients.

7 MR. MCCULLOUGH: I think the arbitrators found that
8 it was ---

9 THE COURT: --- that's not my question. My
10 question is ---

11 MR. MCCULLOUGH: --- I'm trying to answer, Your
12 Honor ---

13 THE COURT: --- what is your contention?

14 MR. MCCULLOUGH: Was the attempts at squeezing down
15 his shares a breach of fiduciary duty to Stu Longman? I
16 think it was. And I would suggest that you are the first
17 person to look as to the impact on Stu Longman and
18 Emerald.

19 The arbitrators were focused on the operations and
20 the continued operations of ARP II. Stu Longman owns 70
21 percent of an entity that he is handcuffed to, has no
22 voting rights, has no say so, gets no financial
23 information ---

24 THE COURT: --- that's how he structured it in this
25 agreement didn't he?

1 MR. MCCULLOUGH: That's why that statute says you
2 can't change that; it's actually per the operating
3 agreement. That's why there are sections in the statute
4 that the legislature said you can't change this in any
5 operating agreement; it's too important.

6 THE COURT: I'm going to give you a little latitude
7 but I'm not retrying it. I'm not retrying the
8 arbitration.

9 MR. MCCULLOUGH: Okay.

10 THE COURT: So you need to cut to the chase and get
11 to the heart of it if you say their behavior was
12 fraudulent.

13 MR. MCCULLOUGH: Okay.

14 Q. [Mr. McCullough] Stu, we've got the marching orders.
15 In summary fashion explain to the Judge the capital call
16 and how that went down factually.

17 THE COURT: You need to ask your client specific
18 questions. I'm not...

19 MR. MCCULLOUGH: I trying.

20 Q. [Mr. McCullough] All right. Was there a capital
21 call?

22 A. Yes.

23 Q. What was the capital call based on?

24 A. It was based on Davidson Williams' desire to raise
25 an additional 2 million dollars beyond the amount that

1 they entity had in the bank at the time.
2 Q. And I want you to turn to tab 22.
3 [Whereupon, the witness complies]
4 Q. Is this the capital call?
5 A. Yes.
6 Q. Now, what was the amount he was asking you to
7 contribute?
8 A. A million 4.
9 Q. And how is that million 4 -- actually did he stack
10 things on top of -- Mr. Williams stack things on top of
11 the actual monies to be used for the operation of the
12 marina?
13 A. He did.
14 Q. All right. Explain that.
15 A. The first monies he said in an ancillary letter
16 would be used for other items not credited toward the
17 capital call.
18 Q. And did you -- and how much total did he ask for?
19 A. What he was asking for from me I believe would be
20 about two and a half million dollars.
21 Q. And was one of the bases for that capital call the
22 fact that there was no other financing available?
23 A. That was what he wrote in a letter to me, yes.
24 Q. And in fact was there other financing that not only
25 was available but the monies were still being offered?

1 A. Exactly. We had a commitment. The documents had
2 been transferred or transmitted from a bank and I signed
3 them. The only remaining requirement was his signature.

4 Q. And what was that lending institution?

5 A. Marshall Investments.

6 Q. I want you to turn to exhibit 16.

7 [Whereupon, the witness complies]

8 Q. Is this an email from Marshall Investment Group
9 confirming that the 2 million dollar loan was still --
10 2.125 million dollar loan was still available?

11 A. Yes.

12 Q. And this was January of 2005?

13 A. Yes.

14 Q. And despite that in February of 2005 that was one of
15 the reasons Mr. Williams used to elicit the capital call?

16 A. Correct.

17 MR. MCCULLOUGH: Your Honor, we would submit
18 exhibit 22 as an exhibit. And I understand Mr.
19 Cleveland's objection. It's basically to show you the
20 capital call and the basis for the capital call. This is
21 the capital call from Mr. Williams on behalf of Kriti
22 Ripley, LLC to Stu Longman?

23 THE COURT: Any objection?

24 MR. CLEVELAND: Yes, Your Honor.

25 THE COURT: What's the basis of the objection?

1 MR. CLEVELAND: You will see that this exhibit 22
2 has an exhibit sticker on it, which is Williams 4 and a
3 date on there of June 23, 2010. This was an exhibit that
4 was used in the arbitration proceeding. And we
5 respectfully submit that we are relitigating the merits
6 of the capital call.

7 The arbitration award and the confirmation judgment
8 that goes with it is very, very clear that the capital
9 call was very much the center of that arbitration
10 proceeding along with all kinds of other claims. But
11 that one is extremely clear that they litigated the
12 propriety of the capital call. And within the context of
13 that the -- and Mr. Longman contended then as he contends
14 now that that was a breach of fiduciary duty to him to
15 embark upon that.

16 The arbitrators clearly understood his point because
17 they agreed with him that the capital call was not
18 validly executed and then went on to find that there was
19 no misconduct and no evidence of any breach of any
20 fiduciary duties to Mr. Longman in the very same order.

21 THE COURT: So, and Mr. McCullough you can chime in
22 if you agree or disagree. The reason the capital call
23 was invalidated was because it wasn't properly signed?

24 MR. MCCULLOUGH: No, that's not it at all. And if
25 you will look at exhibit ---

1 THE COURT: --- well, they are bound by their
2 findings about the capital call with the agreement. I'm
3 not going to opine about what the arbitrators meant and
4 I'm not going to relitigate what they meant about the
5 capital call.

6 MR. MCCULLOUGH: Right.

7 THE COURT: Or the -- they clearly found that it
8 was invalid in writing in their findings. What was the
9 basis of their finding it invalid?

10 MR. MCCULLOUGH: I'll read it. It's fairly
11 lengthy. I'll read it in the 2005 arbitration ---

12 THE COURT: --- I don't need you to read it to me.

13 MR. MCCULLOUGH: I'm sorry. It's on the second
14 page ---

15 THE COURT: --- I'm looking at it at on page 2 of 6.

16 MR. MCCULLOUGH: I thought you asked me what ---

17 THE COURT: --- I was asking for the very specific
18 language where you say that they invalidated it for some
19 other reason other than it being invalidly executed.

20 MR. MCCULLOUGH: Page 2, Roman Numeral B (4).

21 THE COURT: Page 2, Roman Numeral B (4).

22 MR. MCCULLOUGH: Of exhibit 26.

23 [Whereupon, the court reviews documents]

24 THE COURT: You're looking at the arbitrator's
25 award? I'm looking at page 2. I don't see what you are

1 referring to.

2 [Whereupon, the court reviews documents]

3 MR. MCCULLOUGH: Exhibit 26 to ---

4 THE COURT: --- oh, I was looking at the wrong one.

5 B -- what's the number again?

6 MR. MCCULLOUGH: Page 2 B (4).

7 MR. CLEVELAND: Was that not the 2005 order?

8 [Whereupon, Mr. Cleveland and Mr. McCullough confer]

9 MR. CLEVELAND: Your Honor ---

10 THE COURT: --- let me read it first please.

11 [Whereupon, the court reviews documents]

12 MR. CLEVELAND: Your Honor, that's not the 2010

13 order. That's the 2005 ---

14 THE COURT: --- I know.

15 MR. CLEVELAND: Thank you.

16 MR. MCCULLOUGH: I'm sorry -- the 2005 order

17 THE COURT: That's okay.

18 [Whereupon, the court reviews documents]

19 THE COURT: I find -- it appears that this

20 arbitration was on a very limited issue was it not; the

21 one in 2005 that you are referring to which deals with

22 this capital call?

23 MR. MCCULLOUGH: I missed the first part of what

24 you said. I apologize.

25 THE COURT: I said this was on a very limited issue

1 was it not? Was this provided -- was this presented in
2 some bifurcated fashion to the arbitrators?

3 MR. MCCULLOUGH: Correct. And then the second
4 portion was more of damages out of it.

5 MR. CLEVELAND: I think that's correct, Your Honor.
6 The 2005 arbitration was actually quite broad and
7 pertains primarily to the fact that it was alleged that
8 Mr. Longman had misappropriated monies from the
9 partnership -- I mean from the limited liability company.

10 The arbitrators found that he had done that and
11 that's why they stripped him with his voting rights. As
12 part of this episode a full engaged arbitration happened
13 in 2005 but there was no invalidity of the capital call
14 ordered at that time.

15 And it wasn't until 2010, which is the arbitration
16 that is binding in this case considered whether the
17 capital call was valid or not. And I can direct the
18 court to where the award addresses the capital call. But
19 that would be the 2010 award.

20 THE COURT: But they make findings about the
21 capital call in the 2005 award.

22 MR. CLEVELAND: What they say is that Mr. Longman
23 had a basis to question the capital call. On that basis
24 they didn't forfeit his interest. But I don't believe
25 they went further in declaring it invalid.

1 THE COURT: You're correct.

2 MR. MCCULLOUGH: They did that in 2010.

3 MR. CLEVELAND: That's right. That is when they
4 did it. And that's when the whole validity of the
5 capital call was presented to them and they found as Mr.
6 Longman intended that it hadn't been done properly and it
7 was defective on its face is what they held.

8 MR. MCCULLOUGH: And Your Honor, my only point is
9 that is the facts that we know and agree that would be
10 owned to him. And I'm trying to use that to show that
11 it's unfairly prejudicial to Stu Longman. And so that's
12 the purpose behind -- if it's all based on the capital
13 call I'm introducing the capital call letter itself.

14 MR. CLEVELAND: And our position is simply in the
15 context of having been presented with the facts that the
16 capital call was defective the arbitrators also found
17 that there was no evidence of misconduct.

18 And I would respectfully submit that this conduct
19 includes fraudulent behavior and misconduct includes
20 oppression, and misconduct includes being unfairly
21 prejudicial, and that they have a very broad sweeping
22 finding of no misconduct.

23 MR. MCCULLOUGH: I'm sorry. I think they were
24 limited to what the operating agreement allowed them ---

25 THE COURT: --- I really don't. The longer I hear

1 this case and the more I get into it I'm inclined to
2 think differently about it. I think that the
3 arbitrator's purpose was to make all factual findings
4 upon which the court could base its decision on
5 dissolution. Otherwise it obviates the entire purpose of
6 having arbitration.

7 But I'm going to give you a little bit of latitude
8 but I'm really not convinced that this capital call has
9 any bearing on them nor is it any evidence of wrongdoing
10 on the part of -- there are some finding about what the
11 motivation may have been in the capital call and whether
12 Kriti -- what their motivation may have been behind it in
13 the 2005 agreement.

14 But the bottom line is when it came down to the
15 other portion of this case being heard they very -- the
16 arbitrator's panel found that there was no wrongdoing.
17 Wrongdoing encompasses a lot of things. It's hard for me
18 to believe it wouldn't include fraud because if there was
19 some evidence of fraud arbitrators have broad powers
20 based on the facts of the case and made findings.

21 And based on the specificity of the fact finding
22 they made in this order it's hard for me to believe that
23 they would just leap over that. They would have at least
24 made some mention of it. They would have specifically
25 said we feel we are bound by this operating agreement and

1 we see there is evidence of fraud as evidenced by these
2 things. But we feel constrained from making any finding
3 about it.

4 Based on how I've read these documents up until to
5 this point they have been very specific. There was three
6 of them; lawyers, well versed in this type of litigation.
7 I just don't find that persuasive. Again, I'm not going
8 to relitigate the arbitration. I'm going to give you
9 some latitude but you need to get to the heart of the
10 matter.

11 MR. MCCULLOUGH: And this exhibit is -- the only
12 objection -- does that come in?

13 THE COURT: Marked subject to the objection. I
14 have it under advisement. I'm not at all convinced
15 however that it is relevant that it makes any issue of
16 consequence more or less probable.

17 MR. MCCULLOUGH: All right.

18 Q. [Mr. McCullough] In addition to the capital call
19 issue was there also an issue with regards to the three
20 folks that had contracts on the condominiums?

21 A. There was.

22 Q. And that included Mr. Lussier?

23 A. Yes.

24 Q. All right. Very briefly explain the outcome of
25 those three contracts.

1 A. The outcome? I'm not sure I understand.

2 Q. All right. The condos didn't get built correct?

3 A. Correct.

4 Q. Did you have communications with those three owners
5 prior to them filing lawsuits?

6 A. Yes.

7 Q. What was the motivation behind them ultimately
8 filing a lawsuit?

9 A. David Williams met with them and convinced them that
10 they would not get paid if he won the arbitration and
11 convinced them to file lawsuits against ARP II.

12 MR. CLEVELAND: Objection, Your Honor.

13 THE COURT: Basis?

14 MR. CLEVELAND: Hearsay.

15 THE COURT: Sustained. He has no personal
16 knowledge.

17 Q. [Mr. McCullough] Turn to tab 26 for me.

18 [Whereupon, the witness complies]

19 A. I'm there.

20 Q. And is this the 2005 arbitration award?

21 A. Yes.

22 Q. And on page 3 -- did you participate in that
23 arbitration?

24 A. Yes.

25 Q. And on page 3 (f) it says, we find that Kriti and

1 ARP II are entitled to indemnification from Emerald and
2 Longman in the amount of 400,000 dollars for all claims
3 to date of third party contract vendees against ARP II.

4 Now, are those third party contract vendees the
5 three condos we're talking about here?

6 A. Yes.

7 Q. And it says, we question Kriti's conduct in
8 encouraging some of these third parties to assert claims
9 against ARP II and not accept partial reimbursement of
10 their deposits. Do you see that?

11 A. Yes, I do.

12 Q. And did Kriti in fact encourage those three to file
13 claims?

14 A. Yes they did.

15 Q. What's your understanding of those claims who is
16 responsible for paying the 400,000 dollars indemnity
17 obligation?

18 A. ARP II.

19 Q. Now you were here for the testimony a moment ago or
20 this morning about the lis pendens filed against ARP I's
21 property and ARP II's property. Did you remember that?

22 A. Yes.

23 Q. Now when was the lis pendens removed on ARP II's
24 property?

25 A. In 2010.

1 Q. No, on ARP II's property?

2 A. Oh, I'm sorry. In 2008 I believe.

3 Q. And when was the lis pendens removed on the ARP I

4 property?

5 A. I believe that was 2010.

6 Q. And was that -- did that occur after a Circuit Court

7 judge here in Charleston ordered it?

8 A. Yes.

9 MR. CLEVELAND: Objection.

10 THE COURT: Basis?

11 MR. CLEVELAND: Well, he's mischaracterizing the

12 order. And so if he is trying to put in evidence what

13 the order says I would submit that the best evidence is

14 the order itself. In fact, it was a consent order. And

15 so the question that he's asking I believe leaves the

16 court with the wrong impression; that it was a part of

17 that order.

18 MR. MCCULLOUGH: I'll withdraw it.

19 Q. [Mr. McCullough] Per consent order was it finally

20 removed in 2010?

21 A. Yes, it was.

22 Q. All right. Now you're here and you reviewed the

23 emails that were discussed earlier?

24 A. Yes, I did.

25 Q. Now it was -- when was the 2005 New York arbitration

1 confirmed?

2 A. In 2008.

3 Q. And if the justification behind leaving the lis
4 pendens on ARP I's property was the possibility that the
5 New York courts would not approve the New York
6 arbitration when had that issue been resolved?

7 A. In 2008.

8 Q. And was the ARP I lis pendens removed in 2008 after
9 the award was approved?

10 A. No.

11 Q. It wasn't removed until two years later?

12 A. Correct.

13 MR. MCCULLOUGH: Your Honor, all of the evidence on
14 the second -- or I guess the third lawsuit is the same
15 with the exception of about five questions on damages.
16 And this is the assignment ---

17 THE COURT: --- we're keeping it separate for the
18 record. I'm keeping it separate for a clean appellate
19 record. We're going to try them separately. It's easier
20 for me to keep track, easier for the court reporter to
21 keep track; it's easier that way.

22 MR. MCCULLOUGH: Okay.

23 Q. [Mr. McCullough] All right. What's your
24 understanding of why based on the documents why Lunar
25 didn't -- why the assignment took place?

1 MR. CLEVELAND: Objection, Your Honor.

2 THE COURT: I couldn't hear the question
3 completely. Could you repeat the question please?

4 MR. MCCULLOUGH: Yes. I was questioning his
5 understanding of why ---

6 THE COURT: --- I need you to repeat the question
7 exactly as you stated it. I couldn't hear you; you were
8 droned out by background noise.

9 Q. [Mr. McCullough] Why was the -- what's your
10 understanding of why the assignment took place.

11 THE COURT: You need to ask a question that is
12 based on his personal knowledge. That opens the door to
13 him saying what someone told him. You need to lay the
14 appropriate foundation for his rational perception to be
15 able to answer the question of his own personal
16 knowledge. You may proceed. The objection is sustained.

17 Q. [Mr. McCullough] Were you aware that the lawsuit
18 had been assigned to ARP II?

19 A. No.

20 Q. Who owns 70 percent of ARP II?

21 A. Emerald Investments.

22 Q. Who is controlled by whom?

23 A. Me.

24 Q. Is that something as a 70 percent owner of ARP II
25 that you would have liked to have known?

1 A. Yes.

2 Q. What transpired -- and only to your own knowledge,
3 what transpired with regards to the prosecution of that
4 assigned claim?

5 A. The assigned claim went to court. We didn't know
6 about it. We did not defend it. It went to a judgment
7 and we found out about the judgment only later through
8 the testimony of Williams at the 2010 arbitration.

9 Q. All right. So there was actually a lawsuit filed
10 against ARP I correct?

11 A. Yes.

12 Q. Did you receive a -- did you know that lawsuit had
13 been filed?

14 A. No.

15 Q. Who was it purportedly served on?

16 A. ARP I's agent for service, which was Frank Guarino
17 at the time who was a Broker working for ARP II.

18 Q. So ARP II's employee purported to accept service of
19 a lawsuit against ARP I?

20 A. Correct ---

21 MR. CLEVELAND: --- objection.

22 THE COURT: Basis of the objection?

23 MR. CLEVELAND: There has been no testimony that
24 Mr. Guarino was an employee of ARP II.

25 THE COURT: You're going to have to have him answer

1 questions of his own personal knowledge. Somebody would
2 have had to have told him that; either he would have to
3 have seen the green card or the Sheriff's affidavit.
4 Either way it would be hearsay in reporting what he saw
5 or what someone told him.

6 Q. [Mr. McCullough] Who did you observe Frank Guarino
7 working for?

8 A. Mr. Williams at the Ripley Marina offices. I had
9 hired Mr. Guarino many years before to work as a Broker
10 in those office and he continued to.

11 Q. All right. And did you continue to go to this area
12 from time to time during this 2007, '08 and '09
13 timeframe?

14 A. Yes.

15 Q. And did you observe Frank Guarino working for ARP II
16 and David Williams?

17 A. I did.

18 Q. Now so ARP II David Williams filed a lawsuit against
19 Stu Longman and ARP I but serves his employee Frank
20 Guarino?

21 A. Yes.

22 MR. CLEVELAND: Objection.

23 THE COURT: Sustained. You haven't based his -- he
24 has to -- did he see the person get served? He did not
25 therefore he cannot answer based on his own knowledge and

1 his rational perception.

2 He cannot testify as to what someone told him
3 including you; whether it is part of the court record or
4 not. He doesn't have any personal knowledge of who was
5 served and when they were served. You may proceed.

6 Q. [Mr. McCullough] Did you know the lawsuit had been
7 filed?

8 A. No.

9 Q. Did David Williams ever tell you that a lawsuit had
10 been filed?

11 A. No.

12 Q. Were you represented by counsel in Charleston, South
13 Carolina at that time?

14 A. Yes I was; by Richard Rosen's firm.

15 Q. And did Richard ever tell you that you had been
16 sued?

17 A. No.

18 Q. Now you learned that a default had been entered?

19 A. At a point in time a couple of years later.

20 Q. All right. And how did you learn that?

21 A. Through the testimony of David Williams at the third
22 arbitration.

23 Q. And was that a surprise to you?

24 A. It was a complete shock.

25 Q. So you never received notification that there was a

1 default hearing?

2 A. Never.

3 Q. You never received notification through your lawyer
4 that a hearing was conducted?

5 A. No.

6 Q. To your knowledge did anybody ever bother to tell
7 your lawyer in Charleston that there was a default
8 hearing?

9 A. No.

10 Q. Was that order set aside?

11 A. It was.

12 Q. Have you had a difficult time maintaining any sort
13 of oversight of your 70 percent ownership in ARP II?

14 A. It has been impossible.

15 Q. Why?

16 A. We get no information whatsoever unless we subpoena
17 it or in some other way go to court for it.

18 Q. Have you had a difficult time -- have you been able
19 to obtain the internal financial information from ARP II?

20 MR. CLEVELAND: Objection.

21 THE COURT: Basis?

22 MR. CLEVELAND: This is -- was very much one of the
23 things that was arbitrated. It is item 47 (d) on the
24 particulars that the complaint submitted.

25 MR. MCCULLOUGH: I'll limit it from the time of the

1 arbitration, Your Honor.

2 THE COURT: Let me ask a question. He doesn't have
3 any voting rights correct?

4 MR. MCCULLOUGH: Correct.

5 THE COURT: He was stripped of that correct?

6 MR. MCCULLOUGH: He's just a 70 percent owner; no
7 voting rights.

8 THE COURT: But that's in the arbitration ---

9 MR. MCCULLOUGH: --- correct ---

10 THE COURT: --- findings as to why he doesn't have
11 any voting rights correct ---

12 MR. MCCULLOUGH: --- correct.

13 THE COURT: It becomes a legal issue. Did they
14 have any duty to advise him if he's a non-voting member
15 of the corporation?

16 MR. MCCULLOUGH: I think that Justice Toal has said
17 that the members of an LLC have a similar duty in a
18 partnership. It's a fiduciary obligation. I think you
19 absolutely have a duty to continue to keep your -- he's a
20 co-owner whether they like it or not. They have to
21 continue to make -- if he asks for financial information,
22 if he asks for what happening with his 70 percent
23 investment I think they absolutely have to ---

24 THE COURT: --- that's not the question. The
25 question is about a lawsuit. If he is a non-voting

1 member and he's not the registered agent do they have any
2 legal obligation to notify him?

3 MR. MCCULLOUGH: Of?

4 THE COURT: Of anything really other than how his
5 stock has appreciated or depreciated.

6 MR. MCCULLOUGH: Oh, I absolutely think they do. I
7 mean every minority shareholder ---

8 THE COURT: --- are you telling me that if I own
9 stock in Bellsouth and they get sued they have to notify
10 me and I don't have a voting interest? I would have a
11 voting interest wouldn't I at an annual stockholders
12 meeting if I owned some shares in Bellsouth? I'm just
13 saying theoretically; I don't own any.

14 But I'm just saying I don't think you have to notify
15 every non-voting member of a corporation everything that
16 is going on with the corporation unless one) you're a
17 registered agent and you have some managerial authority,
18 or you get to vote. I think the only thing you're
19 entitled to as a non-voting member is whether I'm
20 entitled to a dividend and whether my stock is
21 appreciated or depreciated.

22 MR. MCCULLOUGH: But this is ---

23 THE COURT: --- you don't get to manage it on a day
24 to day basis if you can't vote can you?

25 MR. MCCULLOUGH: I think you -- voting rights are

1 separate and apart from ownership rights and I think ---

2 THE COURT: --- that's not my question. If you
3 don't have voting rights you don't -- the way you manage
4 a corporation on a day to day basis is by voting about
5 what action you're going to take to do whatever. And if
6 you can't vote how are you involved in the management of
7 the business?

8 MR. MCCULLOUGH: I don't think you are. I think
9 we've lost that fight. The arbitrators said ---

10 THE COURT: --- and that's my question. So then
11 the question then rolls back around to what duty did they
12 have to notify him of anything if he had no authority to
13 manage it, to vote, or give his -- let's just say
14 theoretically they had notified him of it. He would have
15 no standing to come in and do anything. He could come
16 watch it if he wanted to ---

17 MR. MCCULLOUGH: --- are we talking about the
18 lawsuit?

19 THE COURT: Uh huh.

20 MR. MCCULLOUGH: The lawsuit was against a totally
21 different entity.

22 THE COURT: I understand that but you're saying
23 they had a duty to notify him about it.

24 MR. MCCULLOUGH: Your Honor, they moved him into
25 default. A totally different company, a totally

1 different entity by -- this is -- it's our allegation
2 that this is fraud. They had -- they served an ARP II
3 lawsuit on a ARP II employee and purported that to be
4 service on ARP I, an entity that he is still owns 100
5 percent ---

6 THE COURT: --- you're still getting far afield of
7 my question. Morally -- there may be legally -- a person
8 who doesn't help manage a corporation, a person who
9 doesn't have voting rights what duty does somebody have
10 to notify them of anything?

11 MR. MCCULLOUGH: They have a fiduciary duty.

12 THE COURT: You'll have to show me some case law
13 that says that but you need to go ahead and ask your
14 questions.

15 MR. MCCULLOUGH: Can I read this case law --

16 THE COURT: Go ahead and ask your questions. I'm
17 going to research it over the evening.

18 MR. MCCULLOUGH: Okay.

19 Q. [Mr. McCullough] Stu were you ---

20 THE COURT: --- I'm just trying to figure out how
21 any of it is -- I'm trying to rule on the objection. And
22 I know that I have -- even though I've read all this I
23 still have -- y'all have a much broader knowledge of this
24 case than I do and I appreciate y'all being patient as
25 I've learned it. But when I ask those questions it's

1 because I'm trying to get a point of reference to rule on
2 the objection.

3 MR. MCCULLOUGH: It's like trying to drink water
4 out of a fire hydrant; it's too much information. I
5 understand.

6 THE COURT: But it will all settle. I will
7 eventually find a compartment. Okay, you may proceed.
8 You may ask your next question.

9 MR. MCCULLOUGH: I want to make sure that -- the
10 lawsuit was not on ARP II. That was against ARP I.

11 THE COURT: I was clear.

12 Q. [Mr. McCullough] And Stu, have you asked for
13 financial information on ARP II ---

14 A. I have.

15 Q. Have you received it ---

16 MR. CLEVELAND: --- objection.

17 THE COURT: I'm sorry. What's the -- and again, I
18 can barely hear y'all. I need y'all to speak up for me.
19 You said you had an objection Mr. Cleveland?

20 MR. CLEVELAND: Yes, Your Honor.

21 THE COURT: And what's the basis of that objection?

22 MR. CLEVELAND: One because this has been ruled on
23 by the arbitrators. I don't believe it's relevant ---

24 THE COURT: --- how has it been ruled on by the
25 arbitrators?

1 MR. CLEVELAND: Ma'am?

2 THE COURT: How has it been ruled on by the
3 arbitrators?

4 MR. CLEVELAND: Paragraph -- by their finding that
5 there was no misconduct whatsoever. Paragraph 47 (d)---

6 THE COURT: --- was all of this presented to the
7 arbitrators about the lawsuit?

8 MR. CLEVELAND: Well, what we're talking about now
9 this is the first question in a new area about the
10 failure -- alleged failure to give financial records to
11 Mr. Longman. And so he was asked did you have a problem
12 getting financial records or something to that effect.
13 And so I ---

14 THE COURT: --- I assume this question is from the
15 arbitration forward.

16 MR. MCCULLOUGH: Correct.

17 THE COURT: Do you have an objection to that
18 question from the arbitration forward is when he says
19 this question -- the time period that he is ---

20 MR. CLEVELAND: --- no, Your Honor.

21 THE COURT: As long as it is confined to the time
22 period since the arbitrators findings Mr. McCullough you
23 may proceed.

24 Q. [Mr. McCullough] Just to be -- since the 2010
25 arbitration you still own 70 percent of ARP II correct?

1 A. Yes.

2 Q. You don't have any voting rights?

3 A. Right.

4 Q. And you still put a boatload of money, time, energy,
5 and effort into ARP II right?

6 A. Yes.

7 Q. And you still own the majority of it?

8 A. I do.

9 Q. And have you asked for ---

10 MR. CLEVELAND: --- Your Honor, I have to object.
11 I have not done this before but he's now leading him into
12 a new area and I object to the leading at this point.
13 The witness ought to testify.

14 THE COURT: The objection is sustained; leading.
15 You may rephrase your question, Mr. McCullough.

16 Q. [Mr. McCullough] Have you asked for financial
17 information?

18 A. Yes.

19 Q. Have you received any?

20 A. No.

21 Q. Do you feel like you're entitled to it?

22 A. I do.

23 Q. Why?

24 A. Because I own 70 percent of the entity and as you
25 know I have spent quite a bit of money getting to this

1 point.

2 Q. Turn to exhibit 32 for me.

3 [Whereupon, the witness complies]

4 Q. That's a K-1?

5 A. Yes.

6 Q. And what does it show?

7 A. It shows that Emerald is being afforded a 21 percent

8 interest in the Ashley River II entity.

9 Q. And who owns the majority?

10 A. It's been reported to the I-R-S that Kriti owns the

11 majority.

12 Q. And is that contrary to what the -- your

13 understanding of the 2005 arbitration award?

14 MR. CLEVELAND: Objection, Your Honor.

15 THE COURT: Basis?

16 MR. CLEVELAND: Well, I thought we were now in the

17 area since the 2010 arbitration. This is not. This is

18 going back now to the 2005 arbitration and the -- what

19 this area has to do with is the attempts or alleged

20 attempts by ARP to dilute the percentage from 70 percent

21 down to 20 percent. That was done because they thought

22 the capital call was valid. The capital call was not

23 valid. And all this was the subject of the arbitration

24 proceedings and which led to a declaration that the

25 capital call was not defective -- well it was defective,

1 that he owns 70 percent and the claims of dilution were
2 very much the heart of that arbitration proceeding as
3 well and that led to a finding of no misconduct
4 whatsoever.

5 THE COURT: How is this relevant Mr. McCullough?

6 MR. MCCULLOUGH: I think it's fraudulent. I think
7 it's unfairly prejudicial. As the 2005 arbitration award
8 stated ---

9 THE COURT: --- how is it fraudulent what they are
10 reporting to the I-R-S?

11 MR. MCCULLOUGH: Because it's to the detriment of --
12 this is incorrect. It was after the 2005 arbitration.

13 THE COURT: How is it detrimental to your client?

14 MR. MCCULLOUGH: Because he doesn't get the tax
15 breaks as a result of the ownership.

16 THE COURT: Was this conduct that you are alleging
17 did it happen during the time that the arbitrators dealt
18 with the operation of the company and whether there was
19 any breach of duty in the operation of the company?

20 MR. MCCULLOUGH: It continued past the arbitration
21 award. It's our understanding that this continued in
22 2010 and ---

23 THE COURT: --- I need some concrete proof of your
24 allegations that it went beyond the award; that the
25 behavior continued and went beyond the award because the

1 award clearly deals with the operation of the company.
2 And what -- the timeframe that you're indicating deals
3 with is the same timeframe of the arbitration award.

4 MR. MCCULLOUGH: But Your Honor -- let me make sure
5 I understand. In 2005 we both read that section that
6 said that they felt that the capital call was invalid and
7 that Stu Longman still owned 70 percent of the entity.
8 Here you have a K-1 where Davidson Williams on behalf of
9 ARP II said the exact opposite that Stu Longman doesn't
10 own 70 percent ---

11 THE COURT: --- if it's within the scope of when
12 these arbitrators heard this and awarded it ---

13 MR. MCCULLOUGH: --- but now I'm trying to show you
14 that this which they have -- the arbitration ---

15 THE COURT: --- the arbitrators ruled that whatever
16 they did during that timeframe was valid and legitimate
17 business decision.

18 MR. MCCULLOUGH: But they did not rule as to
19 whether or not it was fraudulent or unfairly prejudicial
20 to ---

21 THE COURT: --- they said it was not in any way
22 wrongful; same thing. Fraud and wrongful; they all in
23 the same category. So if you're going to deal with
24 anything that dealt with business judgment, business
25 decisions, corporate waste, the operating agreement,

1 whether there was any material breach of a duty, which
2 includes fiduciary duty because they don't specify what
3 duty it is.

4 So the only duty that they could be referencing is
5 those from the allegations of your summons and complaint,
6 which come under the breadth of fiduciary duty, it needs
7 to be beyond what the arbitrators have already ruled
8 upon.

9 MR. MCCULLOUGH: Can I ask him the impact of the K-
10 1 on him personally since we're ---

11 THE COURT: --- to the extent that the arbitrators
12 have already dealt with damages it's not relevant because
13 they would have already considered that would they not?

14 MR. MCCULLOUGH: I don't believe they would have
15 considered whether it was unfairly prejudicial to him.

16 THE COURT: They would have considered damages and
17 they ruled on that.

18 Q. [Mr. McCullough] Stu, did you recently ask the value
19 of the ARP II property?

20 A. I did.

21 Q. And what were you told?

22 MR. CLEVELAND: Objection.

23 THE COURT: I'm sorry, I can't hear the question.
24 You said what were you told. You need to establish
25 foundationally that someone that is a party to this case

1 told him that and that it would be in the nature of
2 admission against interest to some extent.

3 What someone else told him would be hearsay because
4 they are entitled to cross-examine that person on their
5 underlying foundation for their knowledge of the value of
6 the property or what they allege to be the value of the
7 property. You have to establish that your client of his
8 own knowledge knows what the value of this property is.

9 Q. [Mr. McCullough] Did you know that the ARP II
10 property had been appraised in 2011.

11 A. I learned that.

12 Q. Where -- when did you learn that?

13 A. I learned that at a meeting in Charleston a few
14 weeks ago.

15 Q. Did you know that ARP II had been appraised -- the
16 value of ARP II's property had been appraised in 2012?

17 A. I did.

18 MR. CLEVELAND: Objection.

19 THE COURT: Basis?

20 MR. CLEVELAND: Your Honor, the meeting that Mr.
21 Longman was referring to I believe is when we mediated
22 the case and all the parties signed a confidentiality
23 agreement. And I believe where he is going with this is
24 to try and make allegations as to what was said at the
25 mediation as a basis for his claims in his lawsuit and I

1 think that's inappropriate.

2 THE COURT: Mr. McCullough?

3 MR. MCCULLOUGH: I have not asked him anything that
4 was said in the mediation. I'm asking him if he knew it
5 had been appraised ---

6 THE COURT: --- he is going to have to know of his
7 own personal knowledge. In other words not what somebody
8 told him. Let's just say for example a realtor told him
9 it is worth 2 million dollars it's still inadmissible.

10 Its hearsay because they are entitled to cross-
11 examine that person as their foundation for their opinion
12 that it is worth -- because realty -- of course a person
13 who owns it can say what they think something is worth
14 because you know we have sentimental value and everything
15 else attached to our property.

16 But a realtor has to employ a method to determine
17 the value of property and they are entitled to cross-
18 examine the person on that.

19 MR. MCCULLOUGH: I'll tell you exactly what
20 occurred and you can tell me if I can ask any of this or
21 not.

22 THE COURT: Okay.

23 MR. MCCULLOUGH: We mediated this case about six --
24 about a month ago; six weeks ago. At the mediation for
25 the first time it was disclosed that the property has

1 been appraised two times; one in 2011 and one in 2012.
2 The value was presented at the mediation.

3 I requested copies of the appraisals. The
4 appraisals were not forthcoming. We subsequently had to
5 subpoena the appraisals and the values of the appraisals
6 were far different than what was provided to us at the
7 mediation ---

8 THE COURT: --- you're going to have to call the
9 person who provided the appraisal so that they can
10 testify ---

11 MR. MCCULLOUGH: --- we stipulated to the
12 authenticity of the appraisals and I believe Mr.
13 Cleveland has already admitted that in his record without
14 our objection. That's one of the few we actually agreed
15 on ---

16 THE COURT: --- have you all stipulated to the
17 appraisals Mr. Cleveland?

18 MR. CLEVELAND: Yes, Your Honor. This -- I have no
19 objection ---

20 THE COURT: --- so then you all have stipulated to
21 the value of the property?

22 MR. MCCULLOUGH: No, ma'am.

23 MR. CLEVELAND: Your Honor, we've stipulated that
24 the appraisals were authentic and I've agreed with Mr.
25 McCullough that ---

1 THE COURT: --- are they -- and I didn't mean to
2 interrupt you but are they appraisals that your people
3 have done and your people have done? Are they
4 conflicting in value? Are they...

5 MR. MCCULLOUGH: We just found out about it last
6 week. We finally got a copy of it. We have not had the
7 time to get our own appraisal ---

8 THE COURT: --- okay ---

9 MR. MCCULLOUGH: --- so I'm offering this appraisal
10 that was provided I think a week and two days ago but we
11 just then found out about it.

12 THE COURT: Who performed this appraisal?

13 MR. MCCULLOUGH: And outfit called Fred Beck and
14 Associates. They are based out of -- at least the local
15 appraisers are based out of Horry County.

16 THE COURT: And you all stipulated to those coming
17 into the record?

18 MR. MCCULLOUGH: We -- yes, ma'am.

19 MR. CLEVELAND: Yes, Your Honor.

20 THE COURT: And what number is that?

21 MR. MCCULLOUGH: It's our 41 and 42.

22 THE COURT: So I guess my question becomes still
23 what basis is the foundation of your client that -- you
24 all stipulated to them coming in so they've come in. But
25 you -- I guess I'm trying to figure out if you stipulated

1 to it Mr. Cleveland then he should be able to testify as
2 to what the value of it is because you've agreed which a
3 stipulation is an agreement doesn't require any further
4 proof.

5 MR. CLEVELAND: I agree, Your Honor. My objection
6 goes to trying to suggest that something different was
7 said in the mediation.

8 THE COURT: Well, he can say as a result of the
9 mediation what is his understanding of the value of the
10 property. He can't go into anything else unless he has
11 personal knowledge of it.

12 Q. [Mr. McCullough] Based on the mediation what was
13 your understanding of the value of the property?

14 A. 8.7 million dollars.

15 Q. 8.7 million. And after mediation did we subpoena
16 those documents?

17 A. We did.

18 Q. All right. Turn to number 41.

19 [Whereupon, the witness complies]

20 MR. MCCULLOUGH: Your Honor, could we go ahead and
21 admit these two into evidence I believe by stipulation?

22 THE COURT: 41 and 42 are the appraisals that you
23 all stipulated to is that correct.

24 MR. MCCULLOUGH: Yes, Your Honor.

25 MR. CLEVELAND: Yes, Your Honor.

1 THE COURT: It will be marked and admitted without
2 objection.

3 [Whereupon, plaintiff's exhibit numbers 41 and 42
4 are entered into evidence by the court]

5 Q. [Mr. McCullough] Now Mr. Longman turn to the second
6 page -- well, first of all is the appraisal split between
7 the Ripley Light Yacht Club Marina and then the -- that's
8 one appraisal and the other appraisal is for .4108 net
9 acreage of vacant land?

10 A. That's correct.

11 Q. Okay. Will you show us what exhibit 41 of the
12 Ripley Light Marina appraisal encompasses on that diagram
13 behind you?

14 [Whereupon, the witness views documents]

15 A. Essentially the wet slips, the party deck, and the
16 men's and women's rooms.

17 Q. All right. And the 4.08 [sic] acreage of vacant
18 land marked as exhibit 42 show me that property?

19 [Whereupon, the witness complies]

20 A. That's essentially all the rest of the land from the
21 parking lot area all the way to the highway.

22 Q. So this [indicates] is marina property and then this
23 [indicates] is the other parcel 4.08 [sic] acres?

24 A. All the way down, yes.

25 Q. Okay, all the way down. What was the as is value of

1 Ripley Light Club Marina as of July 2, 2012?

2 A. According to the appraisal it's 7 million 205,000.

3 Q. We'll come back to this appraisal but turn to the
4 second page of exhibit 42.

5 [Whereupon, the witness complies]

6 Q. What is the as is value dated July 2, 2012 on the
7 4.08 [sic] acreage of vacant land?

8 A. 7 million 100,000.

9 Q. So based on the appraisals that we have finally been
10 provided the values are 14 million 305,000 dollars?

11 A. That's correct.

12 Q. Now turn -- flip forward for me to page 4 of the
13 appraisal itself, not the summary.

14 [Whereupon, the witness complies]

15 Q. I'm going to read something and I want you to make
16 sure I reading this right and I'm going to ask you about
17 it. Before I do that have you had an opportunity as a
18 real estate developer to review appraisals before?

19 A. Yes.

20 Q. And you are aware there are different types of
21 appraisals?

22 A. Yes.

23 Q. All right. And one of those appraisals is an as is
24 appraisal?

25 A. That's correct.

1 Q. I'm going to read this and you tell me if this is a
2 fair representation of your understanding of what an as
3 is appraisal would be.

4 Page 4, market value as is on the appraisal date is
5 an estimate of the market value of a property in the
6 condition observed upon inspection as it physically and
7 legally exists without hypothetical conditions,
8 assumptions, or qualifications as of the date the
9 appraisal was prepared.

10 Do you see that?

11 A. I do.

12 Q. So it's your understanding that on the date that the
13 appraisal was out there or at least as of July 2012 the
14 as is value of the way it existed at that date was 14
15 million 300,000 dollars?

16 A. That's correct.

17 Q. Were you surprised when you received these
18 appraisals?

19 A. Yes.

20 Q. Why?

21 A. Well, because we've been told and I don't know if I
22 can say it or not but we had been told that the value was
23 half that.

24 MR. CLEVELAND: Objection; hearsay.

25 THE COURT: Sustained; hearsay.

1 Q. [Mr. McCullough] I want you to turn to page 7.

2 [Whereupon, the witness complies]

3 Q. Were you also surprised to learn that ARP II had
4 received permit approval to triple the size of the
5 marina?

6 A. Yes.

7 Q. All right. On page 7 I'm going to read this and I'm
8 going to ask you some questions about it.

9 On March 30, 2012 the owners received the approval
10 from the Army Corp of Engineers for a permit to expand
11 the subject marina by adding an additional 11,510 linear
12 feet of floating dock structure to accommodate 186
13 pleasure crafts for recreational boating in the
14 Charleston harbor..

15 These additional 186 wet slips will be situated
16 along the southern bank of the Ashley River itself. A
17 full copy of this permit with drawings has been included
18 in the addendum to this report.

19 According to the permit the time limit for
20 completing this work is March of 2017. If additional
21 time is needed to complete the work expansion the owners
22 would need to file a request for the additional time.
23 Reading on, it is our understanding that if the subject
24 marina were to sold this permit may also be transferred
25 to the new owners of the properties with the proper

1 signature by the purchaser on the permit as required by
2 the Army Corp of Engineers.

3 Stu, as a 70 percent owner of ARP II what do you
4 think these permits do to the value of your property?

5 A. Well, if you use the same wet slip number that is in
6 the most recent appraisal it increases the value by about
7 12 and a half million dollars.

8 Q. All right. Now, how many wet slips are out there
9 now?

10 A. 83.

11 Q. And this is an additional 186?

12 A. Yes.

13 Q. So it's more than tripling the size of what we're
14 talking about?

15 A. Exactly.

16 [Whereupon, Mr. McCullough and Mr. Cleveland confer]

17 MR. MCCULLOUGH: Your Honor, I believe without
18 objection this is a blow up of ---

19 THE COURT: --- if you have a smaller one I prefer
20 to use that one. And then tell me what tab it's under.

21 Q. [Mr. McCullough] First of all looking at this
22 exhibit that is already up here ---

23 THE COURT: --- what tab is it? And I need you to
24 take that down so I can see Mr. Cleveland.

25 [Whereupon, Mr. McCullough complies]

1 THE COURT: What tab is it under?
2 MR. MCCULLOUGH: This is part of the appraisal that
3 is tab ---
4 THE COURT: --- what page is it?
5 MR. MCCULLOUGH: They are not numbered. Its page
6 41 back in the back the whole permit is included. And I
7 apologize for not numbering these ---
8 THE COURT: --- that's okay. We'll find it.
9 MR. MCCULLOUGH: Thank you.
10 Q. [Mr. McCullough] All right. Looking at this diagram
11 Stu, is this [indicates] the area where the permit for
12 the new docks would be located?
13 A. Yes.
14 Q. Out into the Ashley across from this property here
15 [indicates]?
16 A. Yes, exactly.
17 Q. And this [indicates] is Ashley River Marina?
18 A. Yes.
19 Q. And this would be City Marina down here [indicates]?
20 A. Yep.
21 Q. Using that these are -- this [indicates] is the
22 marina that we just observed is that correct?
23 A. Yes.
24 Q. And all of this [indicates] would be new?
25 A. Yes.

- 1 Q. And is it based on your examination essentially the
2 same size as Ashley River Marina right there [indicates]?
3 A. It is.
4 Q. So basically the permit is to build this [indicates]
5 right there [indicates]?
6 A. Exactly.
7 Q. Stu, were you aware that ARP II had received permit
8 approval to triple the size of the docks ---
9 A. --- no, absolutely not.
10 Q. Now based on the arbitration you did finally receive
11 ARP II financial records for past years correct?
12 A. Yes.
13 Q. How much did it cost ARP II to construct the wet
14 slips and docks for the existing marina?
15 A. About a million 550.
16 Q. And that was how many wet slips?
17 A. 83.
18 Q. So what was the cost or what was the net profit
19 basically based on this most recent appraisal per wet
20 slip?
21 A. About 70,000 dollars per wet slip.
22 Q. All right. So you multiply that times 186 new wet
23 slips?
24 A. Correct.
25 Q. So what's the potential -- or what's the --

1 extrapolating those two numbers what is the value of this
2 permit?

3 A. The value of the permit is about 12 and a half
4 million dollars.

5 Q. Now in addition to doing it per wet slip could you
6 also value it per linear foot ---

7 THE COURT: --- are you standing for a reason, Mr.
8 Cleveland?

9 MR. CLEVELAND: Objection, Your Honor.

10 THE COURT: Basis of the objection?

11 MR. CLEVELAND: This is irrelevant.

12 THE COURT: Would you like to respond to the
13 objection.

14 MR. MCCULLOUGH: The first words out of his mouth
15 this morning were even if there is a dissolution it
16 doesn't matter because there is no equity in the
17 property. We intend to show there is a tremendous amount
18 of equity in the property.

19 More importantly the fact that the 70 percent owner
20 was kept in the dark about this entire permitting process
21 we think is fraudulent and unfairly prejudicial and is
22 the basis for this entire course of conduct. They didn't
23 give us the appraisals. They misrepresented the value of
24 the appraisals. They sure as heck ---

25 THE COURT: --- all this happened since the

1 arbitrator's award?

2 MR. MCCULLOUGH: Pardon me?

3 THE COURT: All this happened since the
4 arbitrator's award ---

5 MR. MCCULLOUGH: --- this all happened well after
6 the arbitration award.

7 THE COURT: I didn't hear you.

8 MR. MCCULLOUGH: Well after the arbitration award.
9 These permits were not approved until last year. We
10 didn't find out about them until last week.

11 THE COURT: All of -- what do slips arguably and
12 permitting deal with the day to day operation of this
13 business?

14 MR. MCCULLOUGH: That is the business; running a
15 marina.

16 THE COURT: But what authority does he have to
17 participate in the day to day running of this ongoing
18 concern?

19 MR. MCCULLOUGH: I don't think any.

20 THE COURT: Okay. So what duty did they have to
21 advise him of the day to day operations of this concern?

22 MR. MCCULLOUGH: I don't -- I think they've got a
23 fiduciary obligation not to try to take advantage of
24 their minority partner. And I think ---

25 THE COURT: --- theoretically since he has no

1 voting rights his only right is to benefit or to gain
2 monetary advantage. In other words a return of his
3 initial investment if there is some sale or there is some
4 gain above in the term of dividends correct?

5 MR. MCCULLOUGH: Correct.

6 THE COURT: Is there any indication that this
7 company received dividends and didn't pay him some since
8 the arbitration?

9 MR. MCCULLOUGH: It's our understanding that based
10 on the case law that we've got to present that Your Honor
11 has the authority to either order a judicial sale or
12 place a value on Mr. Longman's interest and award that
13 amount. And that's what we're here asking you to do.

14 And Mr. Cleveland stood up this morning and said
15 there is no value to this business. He based that on --
16 and of course we don't know. We were told that the value
17 of this business was 8.7 million dollars when in fact its
18 14.3.

19 But we would submit it is far more than that because
20 they just tripled the size of the marina and they didn't
21 disclose any of that information. We believe that's
22 highly prejudicial to Mr. Longman and fraudulent. They
23 have an obligation -- they can't take advantage of the
24 situation and Mr. Longman ---

25 THE COURT: --- how are they taking advantage of it

1 when they have no duty to him at this moment ---

2 MR. MCCULLOUGH: --- they have an absolute duty as
3 partners. They have a fiduciary obligation not to ---

4 THE COURT: --- don't -- they have no fiduciary
5 obligation to tell him about the day to day operations of
6 this business if he has no authority to vote on what they
7 are doing correct?

8 MR. MCCULLOUGH: Tripling the size of this marina
9 is ---

10 THE COURT: --- that's not my question. You
11 continue -- that's the funny thing about lawyers; they
12 always answer what they want to answer. They never
13 answer the question that is asked. And I did it too so
14 it's not ---

15 MR. MCCULLOUGH: --- Your Honor ---

16 THE COURT: --- I need you to answer the question
17 that I am asking. I understand that you are an advocate
18 and you have an advocacy posture. You're supposed to;
19 that's your job. The court doesn't have a posture. I
20 don't have a side. So when I ask questions they are
21 completely neutral and I need you to answer for me.

22 MR. MCCULLOUGH: Yes, ma'am.

23 THE COURT: If a person is not a voting member of
24 an operation of an ongoing concern of a business what
25 duty do they have to notify him of the day to day

1 operations of the business when he theoretically has no
2 say as to what they do or do not do. And that's my
3 question.

4 MR. MCCULLOUGH: I don't think -- first of all I'm
5 not sure I have a clear answer for you. I think -- do
6 they need to send him updates on a daily or weekly basis?
7 No.

8 THE COURT: I think certainly if they are going to
9 sell something they need to notify him because he's
10 entitled to get paid.

11 MR. MCCULLOUGH: And I think if they represent the
12 value of the company I think that ought to be truthful.
13 They can't lie.

14 THE COURT: It depends on who they are lying to.
15 If they -- and whether it affects him or not because then
16 it's a whole different ball game. If they are lying to
17 someone else that they are entering into a transaction
18 with and then it has a financial effect on him that's
19 different.

20 But I haven't heard anything up to this point -- I
21 guess we're getting a little far afield of my original
22 question which is -- because you're getting into some
23 things about whether the slips were increased and the
24 value of those. I really don't have any testimony other
25 than your client's belief that it increased the value.

1 We know in any real estate transaction that getting a
2 permit of course affects the value of property especially
3 in a coastal town where we have lots of coastal building.

4 But until those things are actually erected unless
5 -- in other words it's not increased until they put it on
6 the market to sell it basically because the value of it
7 is what the market will bring. They haven't built them
8 yet.

9 So I still am trying to figure out in the grand
10 scheme of what we're talking about today where there is
11 already a binding finding that they have not done
12 anything wrong in operating this business ---

13 MR. MCCULLOUGH: --- they didn't know about any of
14 this ---

15 THE COURT: --- how is any of this relevant? And
16 it gets back to the original question him not knowing is
17 not germane. What is germane is him not knowing if they
18 had a duty to inform him and in some way that
19 detrimentally affected him or his interest.

20 And so if we come back to the original question
21 which is what duty did they have to advise him of any of
22 this when this is arguably the ongoing nature of this
23 business, he had no authority to vote, he had no say so.
24 So what duty do they have to notify him of the everyday
25 mechanics of this business is my question?

1 MR. MCCULLOUGH: I don't think they have an
2 obligation to notify him of the everyday mechanics of the
3 business. They didn't need to notify them that they had
4 spent a tremendous amount of money and energy procuring
5 these permits.

6 But the cases and I'll pull them for you when we're
7 finished here -- and especially in a scenario where he
8 doesn't have any voting rights. And to some extent his
9 rights have been handcuffed. David Williams's
10 responsibility has increased, not decreased.

11 He has a fiduciary obligation to Mr. Longman and Mr.
12 Emerald; whether he likes them or not. And for them not
13 to produce the appraisals when asked, for them to
14 misrepresent both here today and at the mediation the
15 true value of the property and to say that this doesn't
16 increase ---

17 THE COURT: --- what happened at the mediation has
18 no bearing on this cause of action. A mediation is in
19 the nature of settlement negotiations. None of it is
20 admissible or otherwise you'd eliminate the whole need
21 for having mediations; people wouldn't engage in them
22 because what they go and say can then be used against
23 them in a courtroom.

24 MR. MCCULLOUGH: I understand that. But the idea
25 that you can obtain, which is an extremely valuable asset

1 which is this permit and not disclose that when you're in
2 the middle of a legal tussle not to mention that they've
3 got again a fiduciary obligation to Mr. Longman to keep
4 him abreast. Maybe not on the day to day operations but
5 certainly of big ultimate decisions I think they do have
6 an obligation to let him know these things ---

7 THE COURT: --- actually the case law is contrary
8 to your position because it indicates that members of a
9 limited liability company aren't like shareholders in a
10 corporation in that they do not owe a fiduciary duty to
11 each other or to the company and that as long as members
12 of a limited liability company are not acting in a
13 managerial capacity they do not have fiduciary duties to
14 one another unless such fiduciary duties are set forth in
15 the operating agreement.

16 So that makes me -- but we're getting -- we're
17 really getting into the legal argument part of this and
18 you seem to keep digressing into that instead of asking
19 questions of the witness and I need us to move along
20 because our time is limited.

21 So I need you to go ahead and ask your questions of
22 the witness and then Mr. Cleveland can make a
23 contemporaneous objection if he'd like and the court will
24 rule on it. But I don't want to digress into legal
25 argument any more regarding the questions unless it

1 becomes -- unless it's germane to ruling on the
2 objection.

3 Q. [Mr. McCullough] Stu, you obtained permits for the
4 marina; the original permits right?

5 A. Yes.

6 Q. And y'all placed -- y'all talked to different folks
7 about possibly selling or developing?

8 A. Yes, I did.

9 Q. And is there a value as a developer to obtain
10 permits?

11 MR. CLEVELAND: Objection, Your Honor.

12 THE COURT: Basis?

13 MR. CLEVELAND: Relevance. I believe this is all
14 irrelevant and it doesn't speak to any misconduct or
15 serve as a basis for dissolution ---

16 THE COURT: --- yes. I think we can all stipulate
17 that getting permits adds to value but adds value to
18 coastal property. But to the extent of him opining you
19 really haven't established that he is an expert although
20 an owner can opine as to what they believe to be the
21 value of their own property. I'm going to give you a
22 little latitude but I need you to move it along because I
23 really...

24 MR. MCCULLOUGH: I was trying to move this along.
25 I can establish that in his 35 years of development

1 experience ---

2 THE COURT: --- he doesn't have to have any -- I
3 can say what I think my property is worth. The law
4 allows me to do that. He can say what he thinks his
5 property is worth.

6 Q. [Mr. McCullough] Is the permit itself before you
7 construct the docks is that worth a significant amount to
8 other third parties?

9 A. It's worth everything. When we did the original
10 property purchase and paid 3 million dollars for it when
11 we finally got the permits for the condominiums and for
12 the marina the 83 slips or 95 slips originally we were
13 offered more than 20 million dollars for exactly the same
14 property without any construction; either the marina or
15 the condominiums.

16 MR. CLEVELAND: Objection, Your Honor; hearsay.

17 THE COURT: Unless you can establish of his own
18 personal knowledge that he knew of the offer and was
19 involved in that it would be hearsay.

20 MR. MCCULLOUGH: He's objected to everything else
21 but I'll go through every one of them. I've got like ten
22 emails where Centex made offers or negotiations back and
23 forth and we could spend an hour on it if you would like.

24 MR. CLEVELAND: I don't think any of it is
25 relevant.

1 THE COURT: Bear with me just one second.

2 [Whereupon, the court reviews documents]

3 Q. [Mr. McCullough] Why don't you think ---

4 THE COURT: --- I said wait for me just one moment.

5 MR. MCCULLOUGH: Oh, I'm sorry, Your Honor.

6 THE COURT: That's okay.

7 [Whereupon, the court reviews documents]

8 THE COURT: I guess what I'm trying to figure out
9 is why any of this is relevant because if I order it
10 dissolved I'm going to order somebody to value it. And
11 that's how it's going to be split.

12 I'm not going to take his word for what it's worth
13 or anybody else. I'm going to have business -- somebody
14 that is in the business of evaluating entities would do
15 it and that's how it would be split unless they came
16 to an agreement about it.

17 MR. MCCULLOUGH: And that's what we want, Your
18 Honor. We just found out about these appraisals.

19 THE COURT: But I'm trying to figure out how it's
20 relevant to dissolution at this point.

21 MR. MCCULLOUGH: It all goes to whether it's
22 prejudicial to Mr. Longman for this just to be
23 maintained. And that ---

24 THE COURT: --- increasing in value doesn't make it
25 prejudicial for him to remain in business because

1 theoretically if they built these things and they did it
2 then it's at a considerable profit to all of them would
3 it not be?

4 MR. MCCULLOUGH: We have no idea. They won't tell
5 us anything. We found out about this because we
6 subpoenaed records from a third party and we sent Mr.
7 Longman ---

8 THE COURT: --- I think if you are going to build
9 condos on the water you're going to make money. I think
10 we can all agree to that. In Charleston? Yes, I think
11 to say you would lose money I think that sort of
12 stretches the imagination especially with the economy
13 bouncing back.

14 If you have the ability to build condos on where he
15 is talking about which is next to those other condos
16 where that marina is and build slips it's going to make
17 money. So what I need for you to focus in on how is this
18 relevant to dissolution.

19 If the court were to order dissolution I'm not going
20 to take anybody's word on how much it's worth. It's
21 going to be valued and then it's going to be split that
22 way because that's the only fair way to do it. I
23 wouldn't go between who thinks it's worth what and divide
24 it that way. That wouldn't be fair to anybody. That
25 would not be the objective way to do it. So to the

1 extent that -- I'm struggling to figure out what fact of
2 consequence any of this makes what you're arguing for
3 more or less probable in this case.

4 MR. MCCULLOUGH: Let me -- I just want to very
5 quickly cite -- to a case we cited in our pretrial brief,
6 the Bees Ferry Associates case as it stands to what
7 partners and Chief Justice Toal was opining LLC and
8 partnerships essentially should be created similarly.

9 It says, all matters connected with the partnership
10 every partner is bound to act in a manner not to obtain
11 any advantage over co-partner in the partnership affairs
12 by the slightest misrepresentation, concealment, threat,
13 or adverse pressure of any kind.

14 And Your Honor, the fact that these -- this is all
15 we -- we don't know what's out there because they don't
16 give us anything. We know that this is ---

17 THE COURT: --- but what is relevant to this
18 court's inquiry are the findings made by the arbitration
19 panel and whether based on those findings basically
20 whether this court should dissolve this corporation ---

21 MR. MCCULLOUGH: --- and so what ---

22 THE COURT: --- because that the posture that y'all
23 really have presented the case to the court.

24 MR. MCCULLOUGH: Right. And the concealment of
25 this information and the reason behind it ---

1 THE COURT: --- but that's happened subsequent to
2 these findings has it not?

3 MR. MCCULLOUGH: Exactly, which is why it's even
4 more relevant because what you've asked us to determine
5 as to whether or not there is something in the record or
6 since then that shows unfairly prejudicial conduct to Mr.
7 Longman.

8 And we would submit to you that misrepresentations
9 or just blanket ignoring the fact that he still owns 70
10 percent of this business -- we have no idea what else is
11 out there. Mr. Longman had to go to the O-C-R-M and Army
12 Corp of Engineers office to pull the permits. We had to
13 subpoena the records so I mean we just don't know.

14 The fact that there have been five lawsuits and
15 arbitration and everything else and the fact that they
16 both testified at the arbitration that this nightmare
17 needs to end I mean of course it's -- I'm getting off the
18 subject.

19 But you asked me whether they had a duty to provide
20 this information and I feel like it is imperative you
21 understand our position that they have an absolute duty
22 to provide this information. Not the day to day running
23 but you can't conceal the fact that they have a marina
24 permit tripling the size of the marina and not disclose
25 it. And that's no small administrative matter.

1 THE COURT: That's the day to day running of the
2 corporation.

3 MR. MCCULLOUGH: That's the primary asset of the
4 corporation.

5 THE COURT: It's still the day to day running of
6 the corporation. You need to proceed with asking -- you
7 keep digressing into legal argument.

8 Q. [Mr. McCullough] All right. Would you have liked to
9 have known this information?

10 A. Yes.

11 Q. Why?

12 A. Because we were engaged in a situation where he was
13 making offers to basically get me out of the company for
14 a sum of money that was minuscule.

15 Q. What's the single biggest asset ---

16 MR. CLEVELAND: --- objection, Your Honor.

17 THE COURT: Basis of the objection?

18 MR. CLEVELAND: That he's talking about matters
19 that went on at the mediation; incorrectly stating them I
20 might add. But he shouldn't be talking about mediation
21 at all. And I object ---

22 THE COURT: --- whatever happened in the mediation
23 is off limits. It's in the nature of settlement
24 negotiations. It's not admissible.

25 Q. [Mr. McCullough] Stu, what's the single biggest

1 asset of ARP II?

2 A. The marina.

3 Q. And is this tripling of the marina how does that
4 impact the value?

5 A. It obviously increases it dramatically.

6 Q. That's all I've got at this time. Thank you.

7 THE COURT: Any questions for the witness?

8 MR. CLEVELAND: Yes, Your Honor.

9 THE COURT: You may proceed.

10 MR. CLEVELAND: Thank you.

11 CROSS-EXAMINATION

12 BY MR. CLEVELAND:

13 Q. Mr. Longman, good afternoon. My name is Will
14 Cleveland. We've met before.

15 A. Yes.

16 Q. Do you need a break, are you okay?

17 A. I'm good.

18 Q. Would you turn to page 47 of exhibit 41, which is
19 the appraisal?

20 [Whereupon, the witness complies]

21 A. Yes.

22 Q. Looking at the last couple of sentences before the
23 heading that says maximize -- excuse me, maximally
24 productive. Does the appraisal say and I'll quote,

25 However given the current economic conditions a

1 tight credit market and the suppressed residential
2 housing market and the current lack of demand for
3 additional floating slips in the market the development
4 of a marina would not be financially feasible at this
5 time.

6 A. Is this -- I'm sorry, is that 47 or 48?

7 Q. 47 of the marina Ripley Light ---

8 A. --- yes, okay ---

9 Q. --- Yacht Club, does it say that?

10 A. Yes.

11 Q. Mr. Longman, have you been provided with a general
12 ledger of the company?

13 A. Up through 2010 I believe.

14 Q. Don't you have the financial statements as of
15 December 2011; the last time they were prepared?

16 A. We have a balance sheet I believe; that's it.

17 Q. And didn't you receive the general ledger for 2011?

18 A. I don't remember if we did but I don't think so.

19 Q. But you don't know?

20 A. -- I can't remember.

21 Q. Mr. Longman, the arbitrators in 2005 ordered that
22 you pay ARP II 400,000 in consideration of the fact that
23 you had taken deposits from people like Mr. Lussier
24 right?

25 A. Yes.

1 Q. Did you ever pay the 400,000 dollars?
2 A. That was part of the amount that was the total award
3 is that what you're referring to?
4 Q. Yes, sir. Did you ever pay the 400,000 dollars?
5 A. No.
6 Q. Did you ever pay any of the judgment?
7 A. No.
8 Q. And that's been outstanding since the confirmation
9 of the awards in 2008?
10 A. Yes.
11 Q. Now Mr. Longman, looking at the appraisal, exhibit
12 plaintiff's exhibit 41 and looking at page 2 -- are you
13 there?
14 [Whereupon, the witness reviews documents]
15 Q. Page 2 is only the second page Mr. Longman.
16 A. The cover page of the letter?
17 Q. The letter, yes sir. Are you there?
18 A. Yes.
19 Q. And it has a date of July 24, 2012 on the top left
20 hand?
21 A. Yes.
22 Q. And it's directed to Mr. Passel [phonetic]?
23 A. Yes.
24 Q. And this letter summarizes the appraisal does it
25 not?

1 A. It does.

2 Q. And it provides for two different values for the
3 marina does it not?

4 A. Yes, it does.

5 Q. One is the 7 million 205,000 as if it were valued as
6 dockominiums where the slips would be sold to third
7 persons is it not?

8 A. Yes.

9 Q. And the other way that it values it is at the value
10 of 1 million 585,000 dollars if it were valued based on
11 the rental of the wet slips?

12 A. Yes.

13 Q. And currently the wet slips are being rented are
14 they not?

15 A. They are.

16 Q. And did you read the market analysis of the market
17 for the sale of wet slips that is contained in this
18 appraisal?

19 A. I did.

20 Q. And would you agree with the assessment that the
21 market is very, very weak at the present time?

22 A. It is weak.

23 Q. Thank you.

24 MR. CLEVELAND: No further questions, Your Honor.

25 THE COURT: Any redirect?

1 REDIRECT EXAMINATION

2 BY MR. MCCULLOUGH:

3 Q. Stu, the 2005 arbitration had a 400,000 dollar

4 credit for the Lunar claim right?

5 A. Yes.

6 Q. It wasn't that you were to write a check for 400,000

7 dollars. You offset the purchase of your shares by

8 400,000 dollars correct?

9 A. Correct.

10 Q. Who is supposed to write a check?

11 A. Kriti.

12 Q. To Lunar?

13 A. Yes.

14 Q. That's pretty clear from the '05 award right?

15 A. Yes.

16 Q. And they tried to modify that award right?

17 A. They did.

18 Q. And the New York -- and the arbitrators rejected

19 that modification?

20 A. They rejected it.

21 Q. Thank you.

22 MR. CLEVELAND: Nothing in reply, Your Honor.

23 THE COURT: Sir, you may step down.

24 [Whereupon, the witness is excused and exits the

25 witness stand]

1 THE COURT: Let's take a quick restroom break and
2 then we'll resume in about 10 minutes, which will be
3 about quarter of 4. It's actually 3:34 but we'll just do
4 it at quarter of. Who's your next witness, Mr.
5 McCullough?
6 MR. MCCULLOUGH: Pardon?
7 THE COURT: Who is your next witness?
8 MR. MCCULLOUGH: Mr. Williams.
9 THE COURT: Okay.
10 THE COURT: We'll be at ease for a few moments.
11 [Whereupon, court is in recess from 4:35 p.m. until
12 4:45 p.m.]
13 THE COURT: Is the plaintiff ready to proceed?
14 MR. MCCULLOUGH: Yes, Your Honor.
15 THE COURT: You may call your next witness.
16 MR. CISA: Your Honor, may I ask one question
17 before we get started?
18 THE COURT: Sure.
19 MR. CISA: My client has got a flight out at 6
20 o'clock that he would like to try to ---
21 THE COURT: --- he's going to need to leave about
22 4:30 isn't he?
23 MR. CISA: He's got to leave here about 4:30.
24 THE COURT: Conservatively.
25 MR. CISA: I need him in the third case that we're

1 going to deal with after we finish this.

2 THE COURT: Okay.

3 MR. CISA: But his testimony in the third case is
4 going to be exactly the same as his testimony was in this
5 particular case ---

6 THE COURT: --- you might want to ask Mr.
7 McCullough if he will let you call your client out of
8 order.

9 [Whereupon, Mr. Cisa and Mr. McCullough confer]

10 MR. MCCULLOUGH: It's fine with me. I will
11 accommodate him.

12 THE COURT: You want to do that?

13 MR. CISA: I'll be glad to do that.

14 THE COURT: Okay.

15 [OUT OF ORDER WITNESS FROM CASE 2005-CP-10-2434]

16 THE COURT: Are we ready? Call your next witness.

17 MR. MCCULLOUGH: David Williams back on Emerald
18 case.

19 THE COURT: Sir, if you would come stand to be
20 sworn.

21 [Whereupon, Mr. Williams comes forward]

22 [Whereupon, the witness is duly sworn by the Clerk
23 of Court]

24 CLERK OF COURT: Thank you. Please be seated. Sir
25 for the record if you will please state your name

1 spelling your last name.

2 THE WITNESS: My name is Davidson Williams,
3 W-I-L-L-I-A-M-S.

4 THE COURT: Your may proceed.

5 MR. MCCULLOUGH: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 - - - - -

8 DAVIDSON WILLIAMS,

9 Having been first duly sworn,

10 Was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. MCCULLOUGH:

13 Q. Good afternoon Mr. Williams.

14 A. Good afternoon.

15 Q. You are a lawyer correct?

16 A. Yes, I am a lawyer by training.

17 Q. And you are involved in ARP II through the entity
18 known as Kriti Ripley, LLC?

19 A. Yes, that's correct.

20 Q. And the operating agreement for ARP II was executed
21 in December of 2003?

22 A. I believe that's the correct date, yes.

23 Q. And you have participated in all three of the New
24 York arbitrations personally on behalf of Kriti and ARP
25 II.

1 A. That is correct.

2 Q. Since 2005 Emerald and Stu Longman have had no
3 voting rights in ARP II correct?

4 A. That was the outcome of the first arbitration, yes.

5 Q. And so since that time you have been the 100 percent
6 -- when I say you, you on behalf of Kriti Ripley, LLC
7 have managed and run the marina?

8 A. We built the marina and managed it, yes.

9 Q. And you have as we sit here today have 100 percent
10 voting rights to run and manage ARP II as you see fit?

11 A. Yes. We have 100 percent voting rights of -- and
12 management.

13 Q. And you manage and run ARP II as you see fit?

14 A. Well, whatever I think is in the best interest of
15 the project, yes.

16 Q. All right. Of the project?

17 A. Uh huh.

18 Q. Of which Stu Longman owns 70 percent of?

19 A. He has 70 percent of the profit; there is a
20 difference.

21 Q. He has 70 percent of the what? I'm sorry.

22 A. Of the profits after capital is returned through the
23 10 percent preferred return, which was also a different
24 percentage.

25 Q. Stu Longman or Emerald is the 70 percent owner of

1 the entity known as Ashley River Properties II correct?

2 A. I disagree with that statement.

3 Q. So the arbitration did not confirm that Stu Longman
4 was a 70 percent owner of Ashley River Properties II?

5 A. It determined his profit participation after the
6 capital was returned to the partners with a 10 percent
7 return, which is a different ratio.

8 Q. What percentage of Ashley River Properties II does
9 Kriti own?

10 A. We have a 30 percent profit participation.

11 Q. All right. I'm not asking for profit
12 participation. I'm asking ownership. Why don't you do
13 this? Turn to -- would you agree with me that ownership
14 of ARP II was litigated in the third New York
15 arbitration?

16 A. The percentage interests were litigated, yes.

17 Q. All right. And who owns 70 percent of the
18 percentage interest, if you prefer that word, of ARP II?

19 A. As defined in the operating agreement it is after
20 the 2010 arbitration it is Emerald.

21 Q. And up until that point you had routinely issued
22 K-1's that showed different ownership interests?

23 MR. CLEVELAND: Objection, Your Honor.

24 THE COURT: I didn't understand the question and I
25 only heard half of it. Can you please repeat it?

1 MR. MCCULLOUGH: Yes. I asked ---
2 THE COURT: --- I need you to complete the question
3 exactly as you just stated it and if you don't remember
4 I'll ask the court reporter to read it back.
5 MR. MCCULLOUGH: Why don't you read it back because
6 I might not...
7 THE COURT: Can you read it back to him?
8 THE COURT REPORTER: I apologize, Your Honor --
9 technical difficulties.
10 THE COURT: That's okay. Why don't you see if you
11 can remember the question?
12 MR. MCCULLOUGH: I can ---
13 MR. CISA: --- I remember it.
14 THE COURT: Okay.
15 MR. CISA: He said you routinely send out K-1's
16 reflecting a different percentage ownership interest.
17 And there was an objection.
18 THE COURT: And what is the basis of the objection?
19 MR. CLEVELAND: That he is now trying to relitigate
20 issues that were submitted to the arbitration panel in
21 2010.
22 MR. MCCULLOUGH: I'm actually getting -- I'm asking
23 him to agree and he said -- he has refused to agree that
24 Stu Longman owns 70 percent.
25 THE COURT: I think we can stipulate as to what

1 their percentage -- ownership and percentage of interest
2 it is uncontroverted he has no right to manage this
3 corporation. He was stripped of that.

4 MR. MCCULLOUGH: I'm not asking him about that ---

5 THE COURT: --- so the only thing is I don't there
6 is any question that your client owns 70 percent and
7 everybody else owns 30 percent and we can move on from
8 there. I think that's uncontested. I don't think
9 anybody can contest what the -- in the language that was
10 used in the arbitration panel's findings were a 70
11 percent interest.

12 MR. MCCULLOUGH: In the company ---

13 THE COURT: --- and a 30 percent interest.

14 MR. MCCULLOUGH: And I'm asking that and he refused
15 to admit ---

16 THE COURT: --- he did. He answered your question.
17 You used the term ownership. He used the term interest.
18 They are different terms with different meanings.

19 Q. [Mr. McCullough] Does Emerald own 70 percent of ARP
20 II -- of the interest in ARP II?

21 A. Yes, not the voting interest but economic interest,
22 yes.

23 Q. And you disputed that up until the 2010 arbitration
24 award?

25 MR. CLEVELAND: Objection.

1 THE COURT: Basis?

2 MR. CLEVELAND: That he is now trying to relitigate
3 the issues that were ---

4 THE COURT: --- I'm trying to figure out Mr.
5 McCullough how is that relevant whether he disputed it up
6 to the arbitration or not?

7 MR. MCCULLOUGH: I'm trying to show that in all
8 candor that from within months from his involvement in
9 this company he has efforted to squeeze Stu Longman out
10 of the business in addition to ignoring a 2005
11 arbitration award that says that Stu Longman still is a
12 70 percent owner of the company. They issued K-1's that
13 stated that he had majority of the company. And that's
14 just one of the litany of things we ---

15 THE COURT: --- you have to show me that he did
16 that after this arbitration award in 2010 for it to be
17 germane. And you would have to show somehow that this --
18 they have already found that what they did in running the
19 company was reasonable and well within reasonable
20 business efforts.

21 MR. MCCULLOUGH: And that's different from how he
22 treated Stu Longman in my opinion. I'm not asking
23 whether he...

24 THE COURT: Frankly the way he treated Mr. Longman
25 is not germane to this litigation. That's emotions;

1 that's feelings. That doesn't have anything to do with
2 whether this business was run in a commercially
3 reasonable manner or whether somebody was damaged as a
4 result of that.

5 MR. MCCULLOUGH: That's not what we're asking for.
6 We're asking for judicial dissolution based on the fact
7 that he has unfairly prejudiced Stu Longman.

8 THE COURT: I'll give you a little latitude but
9 you're stretching it. You just haven't connected the
10 dots for me up to this point and I'm trying to give you
11 latitude to do it. And I need you to do that for me
12 because I'm at a bit of a loss. All of this goes back to
13 how they've been running the company.

14 And when we go back to the earlier testimony -- if
15 they issued these documents during a time when this other
16 stuff had been issued, and I'm referring to the capital
17 call and all these other things and that had not yet been
18 resolved by the arbitration that's -- it isn't germane;
19 it's not relevant.

20 And so you would have to show me after the
21 arbitrator's findings whether any of this behavior took
22 place and whether it is relevant to dissolution because
23 the arbitrators have already found that they ran the
24 company in a reasonable manner and that they did not
25 breach any duty owed to your client.

1 MR. MCCULLOUGH: I've got emails and communications
2 well before the 2010 arbitration showing about Mr.
3 Williams' communications with his investors in Kriti
4 talking about putting Mr. Longman in a position as to a
5 potential squeeze down ---

6 THE COURT: --- it says that?

7 MR. MCCULLOUGH: It says ---

8 THE COURT: --- did you ---

9 MR. MCCULLOUGH: --- we have the ability to squeeze
10 down the developer if he so much as hiccups.

11 THE COURT: But did you present that in the
12 arbitration?

13 MR. MCCULLOUGH: I have no idea.

14 THE COURT: Then you need to read that record and
15 see if -- I would be hard pressed to believe you didn't.

16 MR. MCCULLOUGH: I'm sure that this was all
17 presented ---

18 THE COURT: --- because that all goes to breach of
19 duty.

20 MR. MCCULLOUGH: And that goes to whether the --
21 per the operating agreement but I don't think it goes to
22 whether from the beginning presented an effort to
23 unfairly prejudice Stu Longman by building in and I plan
24 on, with the court's permission, not only talking about
25 within months of signing the operating agreement writing

1 to his investors about this; about his efforts to get the
2 gang -- Mr. Guarino -- the waterside gang to file
3 lawsuits against Mr. Longman ordering Mr. Longman into
4 default ---

5 THE COURT: --- I'm sure all of that was presented
6 to the arbitrator wasn't it?

7 MR. MCCULLOUGH: I think it was ---

8 THE COURT: --- because that all is oppressive
9 behavior.

10 MR. MCCULLOUGH: Exactly. But I don't think anybody
11 looked to determine whether or not they were unfairly
12 prejudicial to Stu Longman.

13 THE COURT: I really -- I'm going to give you some
14 latitude but I really -- again, the more I hear this I
15 really think this is in a posture with the court making
16 ministerial decision as to whether this corporation
17 should be dissolved or not.

18 And it's all encompassed in whether they ran this
19 corporation appropriately. If you start talking about
20 business decisions -- because -- how do I want to phrase
21 this -- they would not have made the finding that it's
22 not -- that probably in the best world would not be good
23 for all them to all stay in business together if they had
24 not heard all this. They would have no other basis to
25 say that.

1 Them just not liking each other is not a reason for
2 them not to be in business. In six days I kind of feel
3 like they probably heard all this. But I'm going to give
4 you some latitude but you need to...

5 Q. [Mr. McCullough] If you would turn to tab 44 for me.

6 A. I don't have a book.

7 [Whereupon, the witness is provided documents]

8 A. 44 did you say?

9 Q. 44.

10 [Whereupon, the witness reviews documents]

11 Q. Now I believe you just agreed that the operating
12 agreement that you entered into on behalf of Kriti was
13 executed in December of 2003 correct?

14 A. Yes.

15 Q. And in January of 2004 the next month you wrote an
16 email to -- is that Yorgos [phonetic] is that how you
17 pronounce that?

18 A. Yorgos [phonetic].

19 Q. And is he part of the Greek family that Mr. Longman
20 testified or does he work for that group of people?

21 A. Yes. His last name is Vardinoyannis [phonetic].

22 Q. And you were reporting -- part of your job is to
23 report to these folks on their investments, correct?

24 A. Yes.

25 Q. And you were spending their money, not your money

1 when you invested into ARP II on behalf of Kriti Ripley,
2 LLC?

3 A. No, I was spending my money too. Mine and theirs; I
4 invested in this company.

5 Q. So you had an ownership interest in this and your
6 Greek -- the Greek family also had an ownership interest
7 in this?

8 A. In Kriti Ripley, LLC which had an ownership interest
9 in ARP II.

10 Q. And so you were providing information to one of your
11 co-members of that LLC?

12 A. Yes, in this email.

13 Q. And down here [indicates] towards the bottom you
14 write, the developer was desperate to get the marina
15 started this winter. Instead of 25 percent we now have
16 30 percent of the deal for the same investment money.

17 We also have effective control over all major
18 financial decisions and have the ability to squeeze down
19 the developer if he so much as hiccups. We are in a
20 strong position.

21 Do you see that?

22 MR. CLEVELAND: Objection.

23 THE COURT: Basis?

24 MR. CLEVELAND: Your Honor, Mr. -- the basis is
25 relevance. And Mr. McCullough keeps arguing to the court

1 that the arbitrators didn't consider whether there was a
2 breach of a duty to Emerald; to the member. His argument
3 is that the arbitrators limited their findings to whether
4 there was a breach of duty to the company; whether they
5 were dealing with the company.

6 And that's just not what the findings are. On page
7 3 of the confirmed award the arbitrators found that all
8 of Kriti's actions in managing ARP II complained of by
9 Emerald were well within reasonable business efforts to
10 manage a complex piece of waterfront property such that
11 Kriti's decisions did not constitute -- and then going
12 down to number 4 -- did not constitute a material breach
13 of a duty owed to ARP II or Emerald. And I just -- for
14 Mr. McCullough to continue to argue to the court that the
15 findings didn't extend to the alleged breach of duty to
16 Emerald it just flies in the face of the findings of the
17 arbitration panel. And so I object on the basis of
18 relevance.

19 THE COURT: Would you like to respond?

20 MR. MCCULLOUGH: Pardon?

21 THE COURT: Would you like to respond to that
22 argument?

23 MR. MCCULLOUGH: I think I have repeatedly I can
24 say -- and I'm not being ---

25 THE COURT: --- it's up to you if you want to make

1 a record that's your choice.

2 MR. MCCULLOUGH: I think -- I was under the
3 impression you were granting me some limited latitude and
4 I was trying to hurry through ---

5 THE COURT: --- I am but you really haven't gotten
6 to the heart of the matter because he is correct in that
7 the arbitration panel and it is binding by the agreement
8 you all reached on April 16th they already found that
9 there was no material breach of a duty owed to ARP II or
10 Emerald. So to the extent that you continue to advance
11 that argument he is correct; it's already been litigated.
12 And I can find no case law in South Carolina why you have
13 cited the case. It deals with partnerships. It does not
14 deal with limited liability corporations.

15 MR. MCCULLOUGH: And I think the -- we can argue
16 the law at the end but I think the ways to treat partners
17 would essentially as Justice Toal wrote her book
18 basically there's no discernible difference between the
19 way you treat members in an LLC.

20 And you have an obligation to treat your members and
21 your partners as obligated by law, which is not to hide
22 the ball and provide them relevant information.

23 THE COURT: We're talking about apples and oranges.
24 You want -- what you are arguing is that your client
25 should have been provided with the day to day managerial

1 decisions regarding the operation of this company.

2 MR. MCCULLOUGH: And that that ---

3 THE COURT: --- irregardless of that the
4 arbitration panel has already found that they ran the
5 business appropriately that they didn't breach any
6 duties. So to the extent that you are advancing their
7 argument I'm sustaining the objection. You may ask your
8 next question.

9 Q. [Mr. McCullough] You were providing this
10 information to the other member of Kriti Ripley, LLC
11 right?

12 MR. CLEVELAND: Objection.

13 THE COURT: I'm sorry, repeat the question.

14 Q. [Mr. McCullough] You were providing this
15 information to the other member of Kriti Ripley, LLC.

16 THE COURT: What's the basis of the objection?

17 MR. CLEVELAND: Again, Your Honor, he is again --
18 you sustained my objection and he just continues to ask
19 the same questions that I've objected to about matters
20 that -- this was back in 2004 that was before even the
21 first arbitration award. And all of which I think he's
22 candidly conceded all these exhibits were provided to the
23 arbitrators and he's asking him questions about it.

24 So I apologize for standing up so many times but I
25 don't know what to do when he keeps coming back even

1 after you rule to go over this and try and present
2 evidence of what occurred that has already been submitted
3 to the arbitrators and ruled on.

4 MR. MCCULLOUGH: I was actually trying to get to a
5 different point.

6 THE COURT: I'll let you ask your next question so
7 I can see if you can provide some connection that you are
8 getting to the next point.

9 MR. MCCULLOUGH: Thank you.

10 Q. [Mr. McCullough] You were providing that information
11 to other members of Kriti Ripley, LLC your co-members
12 correct?

13 A. Yes.

14 Q. And you felt like you needed to keep them advised of
15 what you were doing on their behalf because they were
16 members -- you were their partner; you were their member
17 of the LLC right?

18 A. I was advising them of how we concluded the deal.
19 This is 12 days after we signed the operating agreement.

20 Q. And you were discussing with them the efforts you
21 had made in the furtherance of your LLC, your partnership
22 with them correct?

23 THE COURT: To the extent that we're talking about
24 12 days after the operating agreement was signed Mr.
25 Cleveland's objection is sustained. The arbitration

1 panel has already ruled that the efforts to run the
2 business were reasonable and there has not been a
3 material breach of duty. So you need to go to your next
4 set of questions.

5 Q. [Mr. McCullough] If you would turn to tab 46 for me.
6 [Whereupon, the witness complies]

7 A. Okay.

8 Q. Who is -- I'm going to butcher this name too --
9 Yannis [phonetic]?

10 A. Yannis [phonetic].

11 Q. Is he another member of the Greek family?

12 A. Yes. He is Yorgos [phonetic] brother.

13 Q. And so is he another co-member of Kriti Ripley, LLC?

14 A. Well my partner in Kriti Ripley LLC was another
15 entity and I believe they were the owners of that entity,
16 yes.

17 Q. And so this is another email where you're providing
18 detailed information about Ripley Marina to your co-
19 members correct?

20 A. Yes.

21 Q. And this is an email dated February 22, 2005
22 correct?

23 A. Yes.

24 Q. And attached to this document is a two-page
25 worksheet for lack of a better word describing various

1 scenarios about percentage ownership interest between
2 Kriti and Ripley.

3 A. There were three attachments to this email according
4 to the first paragraph; not one.

5 Q. All right. Well ---

6 A. --- three just are attachments ---

7 Q. --- all right. Let's stop and see if we got them.
8 If you think there is something missing we can try to
9 find the third.

10 [Whereupon, the witness reviews documents]

11 A. Well, what seems to be missing here is the marina
12 completion budget and I can see because these things are
13 Bates stamped that we go from Kriti 225 to Kriti 227.
14 These were exhibits in the 2005 arbitration so I can't
15 explain to you why you're missing a Bates stamp page
16 here.

17 Q. Me either. But my question is does the second and
18 third page that we do have before us show worksheets
19 setting out various percentage interests between Kriti
20 and Emerald?

21 MR. CLEVELAND: Objection.

22 THE COURT: Basis?

23 MR. CLEVELAND: I don't believe this is relevant to
24 anything that is before the court today. This pertains
25 to a timeframe of February 2005 that is -- and I -- so I

1 object to the relevance of this.

2 THE COURT: How does it -- what fact or
3 consequences that make it more or less probable Mr.
4 McCullough?

5 MR. MCCULLOUGH: Your Honor, we're trying to show
6 that not only did this -- he chose members in the Kriti
7 ownership over members of the ARP II. He had a
8 responsibility to his partner member Stu Longman ---

9 THE COURT: --- that's not my question. My
10 question is how is any of this not governed by the
11 findings of fact made in the 2005 arbitration and the
12 2010 arbitration?

13 MR. MCCULLOUGH: Because I don't think the
14 arbitrators had the ability that you've got to determine
15 the matter of law per the South Carolina LLC act ---

16 THE COURT: --- they've already decided this ---

17 MR. MCCULLOUGH: --- that he was unfairly
18 prejudiced. But I understand.

19 THE COURT: I think it's all encompassed by the
20 language that was in the operating agreement. I've tried
21 to give you some latitude regarding it but it appears to
22 me that we are relitigating or attempting to relitigate
23 this arbitration case.

24 And to the extent that the findings of the
25 arbitrators were that the business was managed

1 appropriately and there was no material breach of duty
2 and no material breach of the operating agreement the
3 objection is sustained on relevance.

4 MR. MCCULLOUGH: Okay. I'll move on.

5 Q. [Mr. McCullough] You were in charge of ARP I from
6 2008 until today right? ARP II; excuse me.

7 A. Thank you. Yes, ARP II.

8 Q. One hundred percent voting rights.

9 A. And management control, yes.

10 Q. And you thought it in your -- in ARP II's best
11 interest to procure permits for the significant expansion
12 of the marina correct?

13 A. Yes. We applied for permits in I think it was 2007.

14 Q. And you continued and efforted the permit approval
15 from 2007 all the way until I believe March of 2012 or
16 whenever it was in 2012 when the permits were approved?

17 A. We pursued the permits for darn near five years,
18 yes. I don't recall when they were issued but it was
19 last year sometime.

20 Q. This was something that you deemed important enough
21 to remain an effort of your company for several years?

22 A. Yes, we pursued permits.

23 Q. And you placed a high value on those permits?

24 A. I thought they might ultimately add value at some
25 point to the marina project.

1 Q. A significant amount of money.
2 A. If they could be built at a reasonable cost and
3 rented or sold, yes.
4 Q. Or you could sell just the paper, you could sell the
5 permits to somebody else you wanted to come in and buy up
6 ARP II's property, which would include those permits
7 correct?
8 A. That's one scenario that could happen, yes.
9 Q. And you're not expanding the marina, you're
10 essentially tripling the number of slips; actually more
11 than three times the number of slips right?
12 A. No, that's not exactly right because boat slips are
13 defined length. You have to look at the linear feet;
14 there are two different ways of valuing a marina.
15 Q. Well, let's look at linear feet. You're adding
16 11,510 linear feet right?
17 A. That was the proposal. I think that was the
18 proposal; I'm not sure that's how it came as permitted.
19 I'd have to look at the permit.
20 Q. All right ---
21 A. --- but it's around there. It's around 11,000 feet.
22 Q. And the appraisal on page 29, feel free to look at
23 it, actually values the marina property at 3,000 dollars
24 per linear foot doesn't it?
25 A. I don't think that's correct, no.

1 Q. Why don't you pull out the appraisal for me; exhibit
2 tab 41 page 29.

3 MR. CLEVELAND: Objection, Your Honor.

4 THE COURT: Basis? It should already be in
5 evidence isn't it?

6 MR. MCCULLOUGH: Yes, ma'am.

7 MR. CLEVELAND: The appraisal is in evidence. But
8 I don't -- I object to the relevance of this line of
9 questioning. When he examined Mr. Longman the most Mr.
10 Longman could say was I would have liked to have known
11 about it. But there has been no allegation that there
12 has been ---

13 THE COURT: --- I am trying to figure out why that
14 -- if it increased the value how does that go to -- the
15 only -- conceivable the only thing it would go to would
16 be damages. And again I've already told you pretty much
17 how it would go.

18 MR. MCCULLOUGH: Your Honor, we're trying to show
19 the motivation behind this entire course of conduct to
20 show why they have been prejudicial to Mr. Longman.

21 THE COURT: And actually if there is any exhibit
22 that is still in that notebook it needs to be taken out
23 and given to the court reporter so she can mark it. So
24 why don't you do that while we're doing this now so that
25 -- 41 and 42 should be in.

1 THE COURT REPORTER: Yes ma'am, they are.

2 THE COURT: Is there any other one that we've

3 marked that has not come out of the notebook?

4 THE COURT REPORTER: Number 1 and number 5.

5 THE WITNESS: Do you want me to take them out?

6 THE COURT: Yes sir, if you could for us.

7 [Off the record momentarily]

8 THE COURT: You may proceed.

9 MR. MCCULLOUGH: I'm sorry. Did you rule on

10 whether I could ask him ---

11 THE COURT: --- yes. I don't see how it is

12 relevant. I'm going to give you some latitude but really

13 that would go to damages the valuation of this marina.

14 And if the court orders it dissolved then I'm going to a

15 valuation and that's how I will deal with it. And if

16 it's not then they are just stuck together until they

17 build these condos and build these slips.

18 MR. MCCULLOUGH: Okay.

19 THE COURT: You may proceed.

20 MR. MCCULLOUGH: Thank you.

21 Q. [Mr. McCullough] You didn't tell -- you didn't

22 forward those two appraisals to Mr. Longman or Emerald

23 correct?

24 A. Which two appraisals are we talking about? The ones

25 we were just looking at 41 and 42?

1 Q. Yes, sir?

2 A. No. He has them now.

3 Q. We got them last week because we subpoenaed the
4 appraisals.

5 A. I recollect that he got the summary pages of those
6 appraisals at the mediation and the full appraisals like
7 a week ago or two weeks ago; something like that.

8 MR. MCCULLOUGH: Well, Your Honor, can we talk
9 about the mediation? He brought it up.

10 THE COURT: No, you asked a question that elicited
11 that response. That does not open the door. And you
12 still -- for there to be a breach of a duty you have to
13 establish that there was a duty. And I've given you some
14 latitude but you haven't established to the court that he
15 had a duty to give those to him.

16 Q. [Mr. McCullough] Do you feel like you needed to
17 provide Stu Longman and Emerald the information that the
18 permits had been approved?

19 A. Do I feel I have a duty to give them to him? No, I
20 don't -- I don't think I have to in the ordinary course
21 of business. He became aware of them during the 2010
22 arbitration that we had permit applications pending.

23 Q. The permits weren't approved until 2012?

24 A. Correct.

25 Q. And you never told him in 2012 or 2013 that the

1 permits had been approved?

2 A. No.

3 Q. And you didn't feel like you needed to?

4 A. No, not at the time.

5 Q. Now you had ARP I put in default under the
6 assignment of the Lunar case right?

7 A. We filed a motion for default if that's what you're
8 asking, yes.

9 Q. And a default was entered?

10 MR. CLEVELAND: Objection?

11 THE COURT: Basis?

12 MR. CLEVELAND: Again, relevance Your Honor. ARP I
13 is not a member or a party to the ARP II limited
14 liability company. All of this occurred back in 2007 and
15 '08 long before the arbitration. It's a specific -- the
16 whole taking of an assignment and carrying on with the
17 claim against Lunar or Lunar's claim against ARP I was
18 the subject of paragraph 30 of the arbitration second
19 amended demand.

20 So again I believe that this is irrelevant and has
21 nothing to do with dissolution given the findings of the
22 arbitration panel that are binding here.

23 THE COURT: How is what happened with ARP I
24 relevant to this case especially since they are not a
25 party?

1 MR. MCCULLOUGH: I'm just again trying to show the
2 efforts to do anything humanly possible to apply pressure
3 as his email stated to apply pressure on Stu Longman.
4 And that was the email that was just admitted --

5 THE COURT: I'm going to allow the question subject
6 however to you all being able to represent to me that all
7 this stuff was not presented to the arbitrators. Sir,
8 you may answer the question. Do you need it repeated?

9 THE WITNESS: Yes, I don't recall the question.

10 THE COURT: Please repeat the question.

11 MR. CLEVELAND: Your Honor, may I just make one
12 quick statement for the record?

13 THE COURT: Sure.

14 MR. CLEVELAND: When Mr. McCullough says the email
15 was just admitted ---

16 MR. MCCULLOUGH: --- in the other case.

17 MR. CLEVELAND: It's in the other case ---

18 THE COURT: --- it's in 2005. I knew that, yes.

19 MR. CLEVELAND: Thank you.

20 THE COURT: Not in this case.

21 MR. MCCULLOUGH: I'm trying to keep them straight.

22 THE COURT: I know. That's why I did it separately
23 because on appeal it just makes it cleaner because they
24 would be doing the same thing looking back and forth and
25 that would ruin your train of thought. You may proceed.

1 Q. [Mr. McCullough] You had ARP I -- you moved to have
2 ARP I held in default?

3 A. We did.

4 Q. And never -- you never notified, you personally
5 never notified Stu Longman about that lawsuit?

6 A. Me personally?

7 Q. Yes?

8 A. No, I didn't personally notify him.

9 Q. To your knowledge Frank Guarino is the only one that
10 purportedly knew that that lawsuit had been served right?

11 A. My recollection is that a -- the motion papers were
12 given to Frank Guarino because he was the registered
13 agent for service of process for ARP I; not by me but by
14 the attorney involved.

15 Q. You took the assignment -- you negotiated for the
16 assignment of Lunar's claim?

17 A. I did.

18 Q. And the motivation as stated in the email that we've
19 got is that you wanted additional leverage against Mr.
20 Longman?

21 A. No. My motivation was to settle his claims on terms
22 that were acceptable to me.

23 Q. And you were gaining some backstop protection and
24 additional leverage with Longman in the form of an
25 assignment right?

1 A. I was gaining a claim against Ashley River
2 Properties I.

3 Q. Which you could gain -- you could use for backstop
4 protection and additional leverage; those were your words
5 right?

6 A. That's what I wrote in the email, yes.

7 Q. You also had meetings with Cunningham, Von Grotthuss
8 [phonetic] and Lussier about or at least a meeting about
9 filing suit against ARP I right?

10 A. No, I had meetings with them to understand the
11 nature of their claims because I was -- they were not
12 disclosed to me when I became a member of Ashley River
13 Properties II.

14 Q. And to suggest that they needed to sue Stu Longman,
15 ARP I?

16 A. No.

17 Q. And in fact that's what occurred right?

18 A. I'm trying to remember. I think Von Grotthuss sued
19 first. I don't think Lunar sued him until like a year
20 later.

21 Q. You ended up with the Lunar claim right; you own it?

22 A. We took assignment of the Lunar claim against ARP I,
23 yes.

24 Q. And you negotiated and got a release of the lis
25 pendens on ARP II's property?

1 A. In exchange for money, yes; and a promissory note.

2 Q. The New York arbitration dealing with the 400,000
3 dollar indemnification was approved by the New York
4 courts in 2008, correct?

5 A. Yes, March of 2008 ---

6 MR. CLEVELAND: --- objection, Your Honor.

7 THE COURT: Basis?

8 MR. CLEVELAND: Again, I sat to see whether there
9 was going to be any development of relevance here and I
10 don't think there has. And the whole issue of the
11 language, Ashley River Properties II took the assignment
12 and proceeded as we are here today to seek to obtain
13 indemnification on having paid Mr. Lussier's money.
14 That's one of the cases for your to decide, and took Mr.
15 Lussier's testimony out of order.

16 THE COURT: Well, that's in a different case.

17 THE COURT: Yes, Your Honor. But all that occurred
18 well before the arbitration, was the subject of the
19 arbitration demand and I fail to see how that is relevant
20 to whether there was a breach of any duty ---

21 THE COURT: --- the question becomes and what has
22 lingered in my mind is what difference does it make
23 whether the lis pendens was on the property? He couldn't
24 sell it or do anything with it; it was part of one of
25 these entities wasn't it?

1 MR. MCCULLOUGH: He could -- ARP I could have if
2 there was not a lis pendens on ARP I's property of course
3 it could be sold ---

4 THE COURT: --- because you've been saying ARP II;
5 that's why I'm asking.

6 MR. MCCULLOUGH: He had it on ARP II; that was
7 removed. And he was making these decisions on ---

8 THE COURT: --- I know. But you've been saying ARP
9 II though I think interchangeably with ARP I and that's
10 what got me confused.

11 MR. MCCULLOUGH: There was a lis pendens on ARP
12 II's property.

13 THE COURT: And that was removed?

14 MR. MCCULLOUGH: That was removed. And my point is
15 the New York arbitration in 2005 says we find Kriti's
16 motivation questionable or whatever that terminology is
17 in getting these three folks to sue.

18 And my -- so I think we are allowed based on my
19 understanding of the rulings here today to see -- take
20 that fact that they made that decision, question Kriti's
21 involvement in that, and then question him as to the
22 motivation behind that as to how it impacts Stu Longman.

23 THE COURT: But you can't ask him about Kriti's --
24 well, let me make sure I'm accurate.

25 [Whereupon, the court reviews documents]

1 MR. MCCULLOUGH: He is their ---

2 THE COURT: --- he is their -- yes, I understand.
3 I'm going to give you some latitude but stay within the
4 court's ruling.

5 MR. CLEVELAND: And Your Honor just so the record
6 is clear we don't -- we may object but I believe that
7 there is good grounds to talk about all this in the Abuse
8 of Process case but not in the dissolution case that has
9 to do with ARP II. This has to do with claims against
10 ARP I and by ARP I in response.

11 MR. MCCULLOUGH: It goes to establish either
12 fraudulent or unfairly prejudicial conduct to his
13 partner, co-member Emerald Stu Longman.

14 THE COURT: I've given you some latitude but the
15 more I think about this if I allow you to try that in
16 this way it defeats the whole purpose of having an
17 arbitration. I think the entire matter was encompassed
18 by the operating agreement. And I think all of it was
19 encompassed in the arbitration.

20 And I suspect if I go back and read that arbitration
21 transcript all this stuff was presented. I cannot
22 imagine that the lawyers in New York didn't present all
23 of this because if this has been your client's -- if this
24 is your client's posture now this was the posture then.
25 I don't think anything has changed; at least it shouldn't

1 have.

2 If he feels they treated him unfairly in the
3 operation of this business and it goes back to 2005 and
4 he feels that they were squeezing him out so to speak
5 using your vernacular then he would have presented that
6 to the arbitrators because that's oppressive conduct.
7 That's unfair conduct. That is in the language of the
8 operating agreement conduct that bore negatively on the
9 operation of this business and his ability to conduct his
10 business. Now I'm almost tempted as much as I would hate
11 to put my law clerk and secretary to that job of us
12 dividing up that arbitration transcript and looking at it
13 and combing through it because I suspect that all that
14 stuff was presented. So I don't -- because the language
15 in the operating agreement incorporates the language from
16 the statute.

17 Again, it does not use those specific terms but I
18 believe that was the intent of the agreement. I'll give
19 you some latitude to pursue this line of questioning but
20 I need you to tie the loose ends together to make it
21 relevant to a matter of consequence --

22 Q. [Mr. McCullough] After the 2010 -- 2008 -- the 2005
23 award was confirmed in 2008 you on behalf of Kriti ARP II
24 owned the lis pendens filed by the owners on ARP I's
25 property right?

1 A. Yes, we held the lis pendens and the claim
2 associated with it.

3 Q. And so even after the arbitration was approved in
4 2008 you chose not to remove that lis pendens for an
5 additional two years correct?

6 A. Yes.

7 MR. MCCULLOUGH: Nothing else, Your Honor. Thank
8 you.

9 THE COURT: Any questions for the witness?

10 MR. CLEVELAND: Yes, Your Honor.

11 THE COURT: You may proceed when you are ready.

12 MR. CLEVELAND: Thank you.

13 [Whereupon, Mr. Cleveland reviews documents and
14 confers with Mr. McCullough]

15 MR. MCCULLOUGH: Your Honor, we are going to object
16 to anything dealing with anything submitted at the
17 arbitration. That's one thing Mr. Cleveland has made
18 clear; none of that is relevant here today ---

19 THE COURT: --- I don't know what document you're
20 referring to. What is it that you are trying to
21 introduce Mr. Cleveland?

22 MR. CLEVELAND: I thought I had an agreement with
23 Mr. McCullough that all our exhibits would be admissible
24 but I ---

25 MR. MCCULLOUGH: -- they are authentic -- and I

1 think our agreement is if it comes in it all comes in.

2 If you decide it's not relevant it's not coming in.

3 THE COURT: Bear with me one second.

4 [Whereupon, the court reviews documents]

5 THE COURT: Yes sir, what is it you are seeking to
6 introduce?

7 MR. CLEVELAND: Well, I have 14 exhibits that I
8 marked that I thought we had an agreement that ---

9 THE COURT: --- what are they?

10 MR. CLEVELAND: There are a number of documents.
11 But I'll do is just go through them one at a time, Your
12 Honor, with the witness if that's all right. Some of
13 them I probably won't pull out. I was just trying to
14 streamline things based on what I thought we had agreed
15 to but I now know ---

16 MR. MCCULLOUGH: --- just so we are clear. The
17 understanding was -- my understanding was if Your Honor
18 allowed us to get into what transpired in the arbitration
19 everything comes in. If you were of the opinion that it
20 was not relevant, which Mr. Cleveland has vigorously put
21 forth here today ---

22 THE COURT: --- he didn't say what went on at the
23 arbitration wasn't relevant did he? I thought he said it
24 was binding. I am confused.

25 MR. MCCULLOUGH: A lot of these materials deal with

1 filings in the arbitration.

2 THE COURT: Okay, which he says is binding --

3 MR. MCCULLOUGH: And we're suggesting that none of
4 that is relevant as my understanding is that again and
5 again what we were told today is what the arbitration
6 award decides --

7 THE COURT: I'm confused. Why wouldn't that -- why
8 wouldn't what was submitted at the arbitration be
9 relevant?

10 MR. MCCULLOUGH: Because the arbitrators have
11 decided it.

12 THE COURT: Yes, they've decided. But I guess -- I
13 don't know what -- I'm at a loss because I don't know
14 what documents you are referring to so we probably need
15 to take them one at a time because I don't feel that I
16 have enough grasp of what y'all are referring to to be
17 able to say that -- you may proceed.

18 MR. CLEVELAND: Thank you, Your Honor. And Your
19 Honor, I will be referring to these ARP II exhibits that
20 have all been pre-marked and that are in a bound folder
21 that...

22 THE COURT: Yes, you're going to have to lay the
23 appropriate foundation for each document that you're
24 referring to and then Mr. McCullough is going to have to
25 make a contemporaneous objection.

1 MR. CLEVELAND: Yes, Your Honor. Thank you.

2 THE COURT: You're welcome.

3 CROSS-EXAMINATION

4 BY MR. CLEVELAND:

5 Q. Mr. Williams, would you turn to tab E which is ARP
6 II defendant's exhibit 5?

7 [Whereupon, the witness complies]

8 A. I'm with you.

9 Q. And is that a true and correct copy of the financial
10 statement of ARP II as of December 31, 2011?

11 A. Yes it is, as compiled by the company's outside
12 accountants.

13 Q. And does it reflect how much debt Ashley River
14 Properties II currently has?

15 A. Yes, it does.

16 Q. And what is the amount of debt in rough numbers?

17 A. The total liabilities are just under 14 and a half
18 million dollars as of 12/31/2011.

19 Q. And have you provided this financial statement to
20 Mr. Longman?

21 A. I have.

22 Q. And have you provided financial statements that have
23 been generated since December 31, 2011 to Mr. Longman?

24 A. We have. We gave him an annual compilation as
25 compiled by the company's accounts.

1 Q. And have you given him any quarterly reports since
2 this time?

3 A. Since 2011? We have -- I'm trying to remember. I
4 know that he asked for and we gave him the general ledger
5 for the first three quarters of 2012. He asked for the
6 -- but I'm trying to remember if we gave him financial
7 statements for quarterly I don't know.

8 THE COURT: Mr. Cleveland, I don't mean to
9 interrupt you but if you are going to get into what you
10 all say you provided to him then I'm going to let him get
11 into what he says you didn't give him. So the sword; it
12 cuts both ways.

13 MR. CLEVELAND: Yes, Your Honor.

14 THE COURT: You said it wasn't relevant when Mr.
15 McCullough brought it up so now I'm trying to figure out
16 how it's relevant to what we are talking about because I
17 sustained your objection.

18 MR. CLEVELAND: And the reason this is post the
19 arbitration you had allowed Mr. McCullough to ask about
20 post 2012 arbitration so this is a response to that.

21 THE COURT: He didn't -- I don't think he ever
22 really -- well I'll give you some latitude then to the
23 extent that it addresses anything Mr. McCullough raised
24 post arbitration.

25 MR. CLEVELAND: Thank you, Your Honor.

1 THE COURT: You're welcome.

2 MR. CLEVELAND: Your Honor, I would offer into
3 evidence defendant's ARP II exhibit 5.

4 THE COURT: Any objections Mr. McCullough?

5 MR. MCCULLOUGH: Yes, Your Honor, relevance. My
6 understanding the decision here would be whether or not
7 the company needs to be dissolved not the value of the
8 company. At that point I believe you indicated you would
9 probably get a third party arbitrator to come in -- an
10 appraiser to come in. We don't think...

11 THE COURT: How is the valuation of the business
12 relevant, Mr. Cleveland?

13 MR. CLEVELAND: Your Honor, this is not a
14 valuation. It is the financial statement of the company
15 and shows the debt. And the debt will have to be taken
16 into account at any disposition of the company upon
17 dissolution.

18 THE COURT: It still goes to -- I'm not going to
19 make that determination. If I decide to dissolve it I'm
20 going to get a professional to value the corporation.

21 MR. CLEVELAND: But -- yes, Your Honor, but the
22 evidence of the debt would be relevant to what you then
23 decide to do that's why I'm offering it. And also I'm
24 offering for the -- to show that Mr. ---

25 THE COURT: --- again, that sword cuts both ways.

1 If we're going to get into all that then I'm going to let
2 him call his witness and testify to what he thinks its
3 worth; although I gave him some latitude to do all that.
4 Because if he is going to say what he thinks the
5 liabilities are of the corporation I'm going to let him
6 say what he thinks the value is of the corporation.

7 A professional person who values businesses is going
8 to look at income, outcome, and what if they put it on
9 the market what it would be worth plus all the other
10 variables that they take into account in valuating
11 businesses. So, I'm not -- I don't feel I'm equipped to
12 do that frankly nor would I even try to do it. I
13 wouldn't try to value a business. I don't think I have
14 that level of expertise to do it.

15 I think the arbitrators already decided what the
16 relevant values are and then I'd have a professional --
17 of course they would have to split the cost of that
18 person valuing the business. But I do not -- I think it
19 would be foolhardy of me to say that I would know what
20 the value of a marina or a marina business or a marina
21 development business would be.

22 MR. CLEVELAND: And I don't mean to suggest that
23 this would inform the court as to value; it's simply what
24 the debt is. And again Mr. Longman testified that he
25 hadn't gotten any information since 2010 and this is

1 relevant to rebut that testimony.

2 THE COURT: I'm going to give you some latitude but
3 I may well give Mr. McCullough the opportunity to rebut
4 his testimony. Although his client has testified as to
5 what he believed the value of the business was and the
6 added value of the slips. But to the extent that this
7 raises a new issue that I precluded him being able to
8 testify about I'm going to allow him to supplement the
9 record.

10 MR. CLEVELAND: Of course, Your Honor.

11 THE COURT: You may proceed.

12 MR. CLEVELAND: Thank you.

13 Q. [Mr. Cleveland] Mr. Williams, would you turn to
14 defendant's ARP II exhibit 6?

15 A. Is that tab F in the book?

16 Q. Yes, tab F.

17 [Whereupon, the witness complies]

18 Q. And what is this?

19 A. This is an indemnity agreement dated December 30,
20 2003.

21 Q. And pursuant to this ---

22 MR. MCCULLOUGH: --- Your Honor, I object to ---

23 THE COURT: --- I haven't heard the whole question.

24 MR. MCCULLOUGH: I was actually objecting to the
25 use of this document. It's an indemnity agreement signed

1 together with the operating agreement as part of the 2005
2 arbitration. This was one of the bases for the award --

3 THE COURT: I'm sorry Mr. McCullough, I can barely
4 hear you. And I still haven't heard his question and I
5 don't know what document it is he is seeking to use. You
6 may proceed and I'll reserve ruling on your objection
7 until I hear the question.

8 Q. [Mr. Cleveland] Mr. Williams, in this indemnity
9 agreement did ARP I agree to reimburse ARP II for any
10 expenses in connection with deposits like Mr. Lussier
11 made to Mr. Longman before ---

12 THE COURT: --- now tell me how this is relevant to
13 dissolution? There is another case that deals with
14 indemnification which that would be relevant. But in
15 this case the only issue is whether there should be a
16 judicial dissolution correct?

17 MR. CLEVELAND: That's correct.

18 THE COURT: So I need to know how this line of
19 questioning would be relevant to that issue.

20 MR. CLEVELAND: It's only relevant if the court
21 were to consider the testimony that ARP II took an
22 assignment of a claim against ARP I. It's only relevant
23 if the court considers that relevant to the issue of
24 dissolution. If it's not, if the court doesn't, then
25 this wouldn't be relevant either. If it is relevant of

1 some sort ---

2 THE COURT: --- it's Mr. McCullough's position that
3 they used the assignment to leverage against his client
4 and that that was fraudulent in some way.

5 MR. CLEVELAND: Well, what he ---

6 THE COURT: --- correct -- isn't that his position?

7 MR. MCCULLOUGH: Yes ---

8 MR. CLEVELAND: --- I believe it...

9 THE COURT: So how is what you're asking him
10 relevant to that?

11 MR. CLEVELAND: I believe his position is that the
12 arbitrators made an award that put the burden of paying
13 Mr. Lussier back on ARP II. And our position in response
14 to that is its two fold. One, ARP I was not a party to
15 those proceedings. And two, ARP I had its own
16 contractual indemnity agreement in place, which was why
17 it was appropriate for ARP II to take an assignment of
18 that claim and look to the party who had agreed to pay
19 ARP II back.

20 THE COURT: I'm going to give you a little
21 latitude. You may proceed.

22 MR. CLEVELAND: Well, Your Honor ---

23 THE COURT: --- don't get too far into the
24 indemnity claim because we're going to try that in the
25 2005 case.

1 MR. CLEVELAND: I'm not. I simply wanted to lay
2 the foundation for this document and I'm now offering it
3 into evidence. I don't plan to ask any more about it.

4 MR. MCCULLOUGH: We object on relevance to the
5 dissolution case ---

6 THE COURT: --- sustained. You may proceed.

7 MR. CLEVELAND: Thank you, Your Honor.

8 Q. [Mr. Cleveland] Mr. Williams, was ARP I a party to
9 the 2005 arbitration?

10 A. No, it was not.

11 Q. And when you took an assignment of Lunar's claims
12 against ARP I did you feel like your rights with respect
13 to ARP I had been adjudicated in any way by the 2005
14 arbitration?

15 A. No.

16 THE COURT: All of this deals with the indemnity
17 doesn't it?

18 MR. CLEVELAND: It does, Your Honor.

19 THE COURT: We're not -- we're trying them
20 separately. I want a complete record on the dissolution
21 claim and then we're going to move into the Abuse of
22 Process claim and the indemnity claims.

23 MR. CLEVELAND: Thank you, Your Honor.

24 THE COURT: You're welcome.

25 MR. CLEVELAND: That's all the questions I have. I

1 appreciate it.

2 THE COURT: Mr. Cisa, I assume you have no
3 questions?

4 MR. CISA: I'm not a party to this one, Judge.

5 THE COURT: I just wanted to make sure I'm wasn't
6 excluding you.

7 MR. CISA: I appreciate it. I may have questions
8 but I'm not really a party to this.

9 THE COURT: Any redirect, Mr. McCullough?

10 MR. MCCULLOUGH: No, Your Honor.

11 THE COURT: Sir, you may step down. Does that
12 conclude your witnesses Mr. McCullough?

13 MR. MCCULLOUGH: It does.

14 THE COURT: Okay. And so then that leaves us
15 tomorrow with Mr. Cleveland's witnesses or does he have
16 any?

17 MR. CLEVELAND: We're -- on the dissolution case
18 could I just check my exhibits?

19 THE COURT: Sure. Sir, you may step down.

20 THE WITNESS: Okay.

21 [Whereupon, the witness is excused and exits the
22 witness stand]

23 MR. CLEVELAND: May I ask for clarification from
24 Mr. McCullough?

25 THE COURT: Sure.

1 [Whereupon, Mr. Cleveland and Mr. McCullough confer]

2 MR. CLEVELAND: Your Honor, I would offer into
3 evidence exhibits 8 and 9 that have been pre-marked as
4 defendant's exhibits ARP II. These are the claimants ---

5 THE COURT: --- why don't you ask Mr. McCullough if
6 he has any objection before you...

7 [Whereupon, Mr. McCullough reviews documents]

8 MR. MCCULLOUGH: These are post briefs. They are
9 memorandums and briefings and I mean if we're going to
10 get into ---

11 THE COURT: --- that went before the arbitrator?

12 MR. CLEVELAND: For the arbitration?

13 THE COURT: Whose briefs are they?

14 MR. MCCULLOUGH: These are Emeralds -- this is our
15 reply briefs and post --

16 THE COURT: Doesn't that frame though the issues
17 that you contend were before the arbitrator?

18 MR. MCCULLOUGH: It's my understanding that his
19 position is none of that is relevant. That the ---

20 THE COURT: --- no, that's not his position. His
21 position is that the issues that were litigated by the
22 arbitrator did not come back before this court because
23 you all agreed for them to have to have a conclusive
24 effect.

25 I assume he's offering those documents to show

1 exactly what issues you all presented in the arbitration
2 and in some way for those to act as some admission
3 against interest in terms of what your posture has been
4 in the case.

5 MR. MCCULLOUGH: My concern is if we want to retry
6 that case or examine all of the evidence and transcripts
7 and ---

8 THE COURT: --- I think it is germane what was
9 presented to the arbitrators.

10 MR. MCCULLOUGH: Then I would suggest that we can
11 together come up with an entire exhibit list and the --

12 THE COURT: I don't need the exhibit list. I take
13 it's just a matter factually what was presented to the
14 arbitrator because I think all of this has already been
15 presented to the arbitrator or those lawyers simply were
16 not doing their jobs.

17 MR. MCCULLOUGH: And my objection would be we can't
18 then cherry pick what we're submitting. We've got to
19 submit all of them. And this is not through ---

20 THE COURT: --- do you have some good faith
21 argument that what is in those documents is not what your
22 posture was before the arbitration panel and those were
23 not the issues that they presented to the arbitrators?

24 MR. MCCULLOUGH: Your Honor, they were probably
25 10,000 pages of briefs filed by both sides. And I will

1 absolutely tell you there is no way that our position was
2 in these two briefs because there was over two weeks'
3 worth of litigation in New York alone. And I strongly
4 object ---

5 THE COURT: --- two weeks of litigation in New York
6 about what?

7 MR. MCCULLOUGH: Both arbitrations. One
8 arbitration, the first one took I think a week, the third
9 one took a week, and the second one took a couple of
10 days.

11 MR. CLEVELAND: Your Honor, may I offer this as a
12 compromise?

13 THE COURT: Uh huh.

14 MR. CLEVELAND: If the court can in going through
15 with the evidence that you have now before you were to
16 have any doubt about whether something was submitted
17 perhaps the court could then identify that issue for us
18 and Mr. McCullough and I could then get together and see
19 if we can agree.

20 THE COURT: I really think it's a simple matter of
21 you all knowing what was already presented. I don't
22 think there is any mystery to it. I suspect the same
23 trend of thought was -- I don't think the briefs are
24 admissible for any purpose. I think what is relevant is
25 what was actually presented.

1 People write briefs all the time and half the stuff
2 they put in the briefs they never talk about and it never
3 comes into evidence. The issue becomes whether all of
4 these contested issues were presented to the arbitrators.
5 And it appears to me from their findings that it was. So
6 I don't know -- I don't have any way of -- and their
7 orders are extensive. Their fact finding is extensive.
8 I don't know that all of this wasn't already presented to
9 them..

10 MR. CLEVELAND: Then I'll withdraw the offer, Your
11 Honor. Thank you.

12 THE COURT: You're welcome. Does the defense then
13 rest as well?

14 MR. CLEVELAND: Yes, Your Honor.

15 THE COURT: What we'll do is we'll reserve
16 arguments for in the morning when we're all fresh. And
17 then we'll proceed with 05-2434. And how many witnesses
18 do you all anticipate having in that case? Mr. Cisa, how
19 many witnesses will you have on your claim?

20 MR. CISA: I've already called my witness, Your
21 Honor.

22 THE COURT: You sure did. I didn't know if you had
23 any additional witnesses?

24 MR. CISA: I have no additional witnesses.

25 THE COURT: And how many witnesses do you have Mr.

1 McCullough?

2 MR. MCCULLOUGH: Two; Mr. Longman and Mr. Williams.

3 THE COURT: You said Mr. Longman and?

4 MR. MCCULLOUGH: Mr. Williams.

5 THE COURT: Okay. And how many witnesses will you
6 have Mr. Cleveland?

7 MR. CLEVELAND: One, Your Honor, Mr. Williams.

8 MR. MCCULLOUGH: I'm sorry?

9 MR. CLEVELAND: Mr. Williams.

10 THE COURT: All right. We're in recess for the
11 day and then we'll start in the morning at 9:30.

12 MR. CLEVELAND: Thank you, Your Honor. Your
13 Honor, during the proceedings today I repeatedly advanced
14 objections based on what was contained in the arbitration
15 demand that was submitted to the arbitration panel in
16 2010. And Mr. Cisa was correct to advise me that the
17 record now won't show what I was even talking about when
18 I submitted that objection and referred to those various
19 paragraphs.

20 I would offer now what has been marked as
21 defendant's ARP II exhibit 2, which is under tab B of our
22 submitted exhibits, which is the second amended
23 arbitration demand that was used in the 2010 arbitration.
24 I took you to heart when you said briefs may or may not
25 reflect what was submitted but I think the formal demand

1 is evidence of what was submitted -- and does frame the
2 issues and therefore should be admitted.

3 THE COURT: Is there any exception?

4 MR. MCCULLOUGH: Your Honor, again I take the
5 position that if we are going to start pulling things out
6 we need the entire record so we can determine what was
7 and was not argued, what was and was not briefed, what
8 was and was not submitted.

9 THE COURT: What's the purpose of submitting a
10 demand?

11 MR. CLEVELAND: The purpose is to frame the issues
12 that the arbitrators ruled on.

13 THE COURT: Do you have your client's as well?

14 MR. CLEVELAND: Our -- the answer is no, I don't.

15 THE COURT: Mr. McCullough, do you have any
16 objection to both of them being submitted?

17 MR. MCCULLOUGH: As long as Mr. Cleveland makes
18 sure -- I don't know if they are amendments amending the
19 pleadings, I don't know if there were responses to that.
20 My concern as I've stated is cherry picking stuff ---

21 THE COURT: --- well it was July of 2010. I have
22 no reason to believe that these were not the last ones
23 that were submitted so...

24 MR. CLEVELAND: Well, I certainly have no objection
25 to allowing whatever responsive pleadings if there are

1 any that ---

2 THE COURT: --- well you all would have made a
3 demand as well would you not?

4 MR. CLEVELAND: Yes, we would have.

5 THE COURT: If I'm going to consider one I should
6 consider both.

7 MR. CLEVELAND: You're correct.. I forgot we had
8 counter claims.

9 THE COURT: So I will admit claimant Emerald
10 Investment, LLC confidential second amended demand for
11 arbitration subject to there not having been another
12 amended request. And I assume you would be able to
13 determine Mr. McCullough. I would want the last demands
14 that were submitted. So if there is a third amended then
15 I would prefer that one but if the second amended is the
16 last one that was submitted then that will come in. And
17 then ARP II and Kriti Ripley LLC submitted a joint
18 demand?

19 MR. CLEVELAND: I believe that's correct. I
20 haven't seen it but judging from what the arbitrators
21 said we made our own demands ---

22 THE COURT: --- that would come in as well. And
23 that's without objection correct, Mr. McCullough?

24 MR. CLEVELAND: And I hope to have that for you
25 tomorrow, Your Honor.

1 THE COURT: If you will give that to the court
2 reporter and have it marked.

3 MR. CLEVELAND: And the demand of Emerald has been
4 marked as defendant's ARP II and I'll provide that --
5 I'll take it out of the notebook and provide it to the
6 court reporter tomorrow when we come in if that's all
7 right.

8 THE COURT: Oh, because you have to take it out of
9 this file?

10 MR. CLEVELAND: Yes, Your Honor.

11 THE COURT: Okay, that's fine.

12 MR. CLEVELAND: Thank you.

13 THE COURT: You're welcome. Okay, anything else?
14 Can counsel approach for me please?

15 [Whereupon, an off the record bench conference is
16 held]

17 [Whereupon, court adjourns at 5:30 p.m.]

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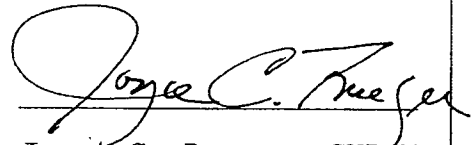
25

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 22nd day of January, 2013.

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

November 6, 2013

A handwritten signature in cursive script, reading "Joyce C. Rueger", written over a horizontal line.

Joyce C. Rueger, CVR-M

Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

EMERALD INVESTMENTS, LLC

Plaintiff

vs.

ASHLEY RIVER PROPERTIES II,
LLC

Defendant

THE COURT OF COMMON PLEAS
DOCKET NO. 2009-CP-10-553

TRANSCRIPT OF RECORD

January 23, 2013
Charleston, South Carolina

VOLUME 2 (OF 2)

B E F O R E:

THE HONORABLE DEADRA JEFFERSON, JUDGE

A P P E A R A N C E S:

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INDEX TO PROCEEDINGS

	PAGE
PROCEEDINGS	202
MOTION FOR DIRECTED VERDICT	
Remarks by Mr. Cleveland	208
Remarks by Mr. McCullough	209
Remarks by Mr. Cleveland	213
MOTION FOR DIRECTED VERDICT	
Remarks by Mr. McCullough	214
Remarks by Mr. Cleveland	215
CLOSING ARGUMENTS	
Remarks by Mr. McCullough	216
Remarks by Mr. Cleveland	235
CERTIFICATE OF THE COURT REPORTER	249

INDEX TO EXHIBITS (continued)

[All exhibits pre-marked prior to start of trial unless otherwise indicated in transcript]

DEFENDANT

<u>No.</u>	<u>Description</u>	<u>Marked / Admitted</u>
3	2010 Arbitration award	204
4	Judgment	205
5	Award	205 (I.D. only)
6	Indemnity Agreement	206 (I.D. only)
13	Assignment/Covenant	206 / 206

PLAINTIFF

<u>No.</u>	<u>Description</u>	<u>Marked / Admitted</u>
26	Arbitration award	207 / 207

PROCEEDINGS

THE COURT: Is the plaintiff ready to proceed?

MR. CLEVELAND: Your Honor?

THE COURT: Yes, Mr. Cleveland? Yes, sir.

MR. CLEVELAND: First, good morning.

THE COURT: Good morning.

MR. CLEVELAND: At the appropriate time whenever the court would like I'd like to take two minutes to put on the record the status of the exhibits. I spent a fair amount of time with Ms. Rueger this morning sort of straightening out what we've withdrawn and what we've marked. And I just wanted to put on the record for all here at the appropriate time.

THE COURT: Okay. Have you gone over that with Mr. McCullough?

MR. CLEVELAND: Well, no.

[Whereupon, Mr. Cleveland and Mr. McCullough confer]

MR. MCCULLOUGH: Okay.

THE COURT: You may proceed, Mr. Cleveland.

MR. CLEVELAND: Thank you.

THE COURT: You're welcome.

MR. CLEVELAND: Your Honor, of the pre-marked exhibits that we had marked yesterday 1 through 14 we have withdrawn the following exhibits because they were introduced and admitted into evidence on behalf of the

1 plaintiff and that would be exhibit -- these would be
2 defendant ARP II exhibits;

3 11 was withdrawn because it's already in evidence;
4 that's the appraisal.

5 Exhibit 7, which is the ARP II operating agreement;
6 it's already in evidence from the plaintiff

7 Exhibit 10, which is the Lussier, Lunar Systems,
8 Ripley Light contract that is already in evidence

9 Exhibit 8, which was the post hearing memorandum
10 that we withdrew from evidence. That's not in evidence
11 but we're withdrawing our request that it be in evidence.

12 The same is true for exhibit 9, which is another
13 post hearing memorandum in the arbitration proceedings.

14 We're withdrawing exhibit 1, which is the consent
15 order that Your Honor signed in April of 2010 because
16 that order was entered in this case and is therefore part
17 of the record in this case.

18 I believe I said we're withdrawing exhibit 12, which
19 was one of the appraisals because that is already in
20 evidence in the 553 case.

21 All of this pertains to the 553 dissolution case
22 that we tried yesterday, which leaves the defendant
23 Ashley River Properties II and Kriti Ripley with having
24 offered the following marked exhibits:

25 Exhibit 2, which is the second amended demand for

1 arbitration that I believe Your Honor ---

2 THE COURT: --- subject to you bringing your
3 whatever your demand was.

4 MR. CLEVELAND: Yes. And that demand I provided to
5 Mr. McCullough and it has now been marked as exhibit 15
6 from defendant's ARP II.

7 We've also offered exhibit ARP II defendant's
8 exhibit 3, which is the award of the arbitrators in the
9 2010 arbitration. There was much discussion about that
10 but we are offering that as an exhibit to be part of the
11 record in the case. I don't know if Your Honor actually
12 ruled on that but I'm offering ---

13 THE COURT: --- you offered it as an exhibit. If
14 Mr. McCullough has no exception then it will be admitted
15 into the record. Is there any exception, Mr. McCullough?

16 MR. MCCULLOUGH: No, Your Honor.

17 THE COURT: Marked and admitted without exception.

18 [Whereupon, defendant ARP II exhibit number 3 is
19 entered into evidence by the court]

20 MR. CLEVELAND: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 MR. CLEVELAND: The defendant ARP II also offers
23 defendant ARP II exhibit 4, which is the order and
24 judgment confirming the 2010 arbitration award.

25 THE COURT: Any exception, Mr. McCullough?

1 MR. MCCULLOUGH: No, Your Honor.

2 THE COURT: Marked and admitted without objection.

3 [Whereupon, defendant ARP II exhibit number 4 is
4 entered into evidence by the court].

5 MR. CLEVELAND: Thank you, Your Honor. We've also
6 offered -- I now offer and did offer yesterday
7 defendant's exhibit 5, which is the December 31, 2011
8 financial statement of ARP II.

9 THE COURT: I think I ruled on that didn't I?

10 MR. CLEVELAND: I just want to have it marked for
11 identification then that we've offered that.

12 [Whereupon, defendant ARP II exhibit number 5 is
13 marked for identification only by the court reporter]

14 THE COURT: If I admitted it I admitted it. If I
15 didn't I didn't; I have no recollection. The court
16 reporter would have to tell me but I'm not going to go
17 back and rule on something.

18 MR. CLEVELAND: Thank you, Your Honor. The same
19 would be true with defendant ARP II's exhibit 6, which is
20 the indemnity agreement that was offered yesterday ---

21 THE COURT: --- I indicated to you on yesterday
22 that it was not relevant in this case. It's relevant in
23 the 2005 case. The 2009 case is not about indemnity.

24 MR. CLEVELAND: I think that was your ruling, Your
25 Honor. We just marked it for identification -- or would

1 ask that it be marked for identification.

2 [Whereupon, defendant ARP II exhibit number 6 is
3 marked for identification only by the court reporter]

4 MR. CLEVELAND: And then finally there is exhibit --
5 defendant's exhibit 13, which is the assignment and
6 covenant not to sue between Lussier and ARP II.

7 THE COURT: That was never offered.

8 MR. CLEVELAND: Well, I'm offering it now then Your
9 Honor.

10 THE COURT: Any exception?

11 MR. MCCULLOUGH: No.

12 THE COURT: Marked and admitted without exception.

13 [Whereupon, defendant ARP II exhibit number 13 is
14 marked by the court reporter]

15 [Whereupon, defendant ARP II exhibit number 13 is
16 entered into evidence by the court]

17 MR. CLEVELAND: Thank you, Your Honor. I'll hand
18 these up to Ms. Rueger now.

19 [Whereupon, exhibits are provided to the court
20 reporter]

21 MR. MCCULLOUGH: Your Honor, we would also move I
22 think without objection the '05 award itself into
23 evidence just because we've talked a lot about it.

24 THE COURT: Any exception?

25 MR. CLEVELAND: No, Your Honor.

1 THE COURT: Marked and admitted without exception.

2 [Whereupon, plaintiff exhibit number 26 is marked by
3 the court reporter]

4 [Whereupon, plaintiff exhibit number 26 is entered
5 into evidence by the court]

6 THE COURT: Please make sure the court reporter has
7 all the documents please.

8 MR. MCCULLOUGH: Thank you.

9 MR. CLEVELAND: Your Honor, yesterday you also said
10 that you -- parties should make their motions, post
11 hearing motions this morning. I didn't know if you
12 wanted those now from the ---

13 THE COURT: --- actually I'm going to proceed in
14 the way I intend once you -- you told me you had some
15 preliminary matters you wanted to deal with and then I'll
16 take it from there.

17 MR. CLEVELAND: Thank you, those are done. I
18 appreciate your ---

19 THE COURT: --- you're welcome. Yes sir, Mr.
20 Cisa?

21 MR. CISA: Your Honor, yesterday we talked about my
22 interest calculations on the note. I don't know if you
23 want to ---

24 THE COURT: --- did y'all work that out?

25 MR. CISA: We worked it out and I think we have ---

1 THE COURT: --- let me shift gears for the court
2 reporter just a moment. Bear with me one second.

3 [Off the record in this case momentarily - agreement
4 put on the record in case number 2009-CP-10-4667, which
5 is Ashley River Properties I, LLC versus Lunar Systems,
6 LTD, and Thomas J. Lussier versus Ashley River Properties
7 II, LLC]

8 THE COURT: Okay. The plaintiff has rested its
9 case. I reserved motions -- I'll hear any motions.

10 MR. CLEVELAND: Yes, Your Honor.

11 MOTION FOR DIRECTED VERDICT

12 BY MR. CLEVELAND:

13 Your Honor, at this time the defendant Ashley River
14 Properties II and Kriti Ripley LLC move for a dismissal
15 of the plaintiff's complaint and or directed verdict on
16 the grounds that the only issue before the court is
17 whether or not there are facts that would support the
18 entrance of a judicial decree that there has been
19 oppressive, unfair, or prejudicial conduct on the part of
20 Ashley River Properties II or its manager Kriti Ripley or
21 that the parties -- or the facts are such that the
22 parties cannot be in business together.

23 Both of those factual issues were submitted to the
24 arbitration in New York and both of those issues were the
25 subject of specific findings by the arbitrators in New

1 York to the effect that there was no factual basis to
2 order dissociation the grounds of which under the
3 operating agreement is that the parties cannot do
4 business together. And further the order of judgment
5 confirming the award finds that there was no misconduct
6 and no evidence of the breach of any duty to ARP II or
7 Emerald.

8 And pursuant to your order of April 2010 referring
9 the matter for factual findings by the arbitrators in New
10 York and entering a consent order in which the parties
11 agreed and the court endorsed the principle that the
12 findings in the New York arbitration would be not only
13 admissible but binding in this court on the issue of
14 judicial dissolution specifically.

15 I would move that all of the factual findings have
16 been established by the New York arbitration award and
17 the finding of no misconduct on the part of my client
18 requires the entry of an order dismissing the dissolution
19 case.

20 THE COURT: Would you like to respond Mr.
21 McCullough?

22 MR. CLEVELAND: Thank you.

23 THE COURT: You're welcome.

24 MR. MCCULLOUGH: Your Honor, we spent a great deal
25 of time yesterday discussing these issues and so I'll be

1 brief. We feel that the LLC act provides in section 33-
2 44-409 states that members owe a duty of loyalty and care
3 to one another. We also cited the Ballard case -- excuse
4 me the Bees Ferry case discussing the utmost highest
5 degree of good faith fair dealing among partners in an
6 entity. And we've cited that Justice Toal who ---

7 THE COURT: --- is that the holding of the case or
8 is that --

9 MR. MCCULLOUGH: The holding of the case I believe
10 and I'll read it ---

11 THE COURT: --- I've read it. I don't need you to
12 repeat it to me ---

13 MR. MCCULLOUGH: --- I believe that is the holding
14 of ---

15 THE COURT: --- then how is it -- you need to
16 distinguish for me how that is applicable to LLC's. That
17 decision articulates the duties that are owed to
18 partners; not to managers and shareholders in a limited
19 liability corporation.

20 MR. MCCULLOUGH: Exactly. And to my knowledge
21 there is not a South Carolina case that has gone through
22 in the same degree as the Bees Ferry case did in a
23 partnership which is why I'm referring to Justice Toal's
24 opinion that they are essentially the same. And I've got
25 a copy of her article that I can hand up. And so the

1 statute provides a duty of loyalty and a duty of care in
2 each other. The statute, the LLC act says that an
3 operating agreement cannot modify that section that
4 states that the court has the authority to dissolve an
5 LLC upon a showing of oppression, prejudice, and unlawful
6 conduct.

7 In this case -- well, fraudulent conduct -- in this
8 case we believe all -- what is before you are the
9 arbitration awards that have stated that they were
10 concerned about Kriti's efforts to conjure up these three
11 lawsuits by -- including the Lunar case.

12 They struck down the capital call as invalid on its
13 face and they stated on two separate occasions that their
14 decision making was limited and they said to the extent
15 we are allowed or authorized to opine. The dissolution
16 case was shelved. The arbitration went forward with the
17 understanding that we would be back before this Honorable
18 court on this very decision.

19 We feel that the Bees Ferry case does set forth the
20 standards that you have to treat one another and in this
21 case there is a minority interest holder it's even more
22 important. I would also reference the case of Ballard v
23 Robertson which is a South Carolina Supreme Court
24 decision and I'll cite from this case and I'll provide
25 you the citation -- this is the definition of oppressive

1 or unfairly prejudicial which were the terms used in the
2 LLC act.

3 [Reading] In establishing the proper consideration
4 for finding oppression we observe that the term
5 oppressive and unfairly prejudicial are lasting terms
6 whose meaning varies with the circumstances presented in
7 a particular case.

8 We also note that this fact sensitive review and
9 should therefore be determined through a case by case
10 analysis supplemented by various factors which may be
11 indicative of oppressive behavior.

12 Eliminating minority shareholders from directorate
13 and excluding them from -- failure to enforce contracts
14 for the benefit of the corporation and withholding
15 information from minority shareholders are all evidence
16 of oppression or unfairly prejudicial conduct.

17 The cases are clear that the fact that they are a
18 minority interest holder and in this case Stu Longman has
19 a zero percent voting right the stakes are higher. It
20 means that Mr. Williams and Kriti Ripley LLC have a
21 higher duty, not a lesser duty.

22 The arbitration found that the attempt at the
23 squeeze out on the capital call was invalid on its face.
24 We've shown a history from a month after the operating
25 agreement was entered into up until a week ago when we

1 found out that the permits had been issued, a continued
2 willingness to push down Mr. Longman's interest at every
3 turn as long as it's to the benefit of Kriti Ripley LLC.
4 We believe we have shown that he has been unfairly
5 prejudiced and we've shown by these cases and Justice
6 Toal's article that they don't get to do that. There is
7 a duty of fair dealing. There is a duty of loyalty that
8 is owed especially in light of the fact they have 100
9 percent control of the company.

10 We feel like this is a situation where you are
11 authorized to dissolve this corporation -- or dissolve
12 this LLC. There have been a myriad of lawsuits over --
13 since months after the creation of this organization and
14 it's clear both parties need this to end. And the only
15 way to have this end is with a judicial dissolution.

16 THE COURT: Anything further Mr. Cleveland?

17 MR. CLEVELAND: Yes, Your Honor. I'll be very
18 brief.

19 Your Honor, exhibit ARP II defendant's exhibit 2 is
20 the demand for the relief that was submitted in the
21 arbitration in New York. It alleges in multiple ways the
22 fiduciary duties that the claimant contends were owed.
23 And I don't believe it's necessary for the court to have
24 to define what those duties are given that the
25 arbitrators found that there was no misconduct and no --

1 and that all of their acts were reasonable and none of
2 them constituted a material breach of any duty or -- a
3 material breach of a duty owed to Emerald. And given the
4 findings that there is no breach there cannot be any
5 finding that would support a judicial dissolution in this
6 case. Thank you, Your Honor.

7 THE COURT: You're welcome.

8 [Whereupon, the court reviews documents]

9 THE COURT: The defense has rested. Are there any
10 motions?

11 MOTION FOR DIRECTED VERDICT

12 BY MR. MCCULLOUGH:

13 Your Honor, we would affirmatively move for a
14 directed verdict as well -- in one trial the case was --
15 questions of law the Judge gave a directed verdict. And
16 at this point we feel that we have shown that the LLC act
17 violated -- the LLC act is different than the operating
18 agreement and the arbitrations.

19 The arbitrations were focused on the conduct and
20 continued business of ARP II where the LLC act looks to
21 how the petitioner in this case Stu Longman and Emerald
22 has been treated. In this case we feel that it is clear
23 that he has been unfairly prejudiced, oppressed, and
24 there has been fraudulent behavior. As a result we feel
25 that there is only a question of law for you to decide

1 and so we would affirmatively move for a directed verdict
2 on the dissolution of the entity.

3 THE COURT: Would you like to respond?

4 MR. CLEVELAND: Yes, Your Honor. Thank you. Your
5 Honor, for all the reasons that I asserted previously
6 this morning as to why I believe that Ashley River
7 Properties II is entitled to a directed verdict or non
8 suit or entry of an order dismissing the complaint.

9 In addition to that in reviewing all of the evidence
10 and considering that the plaintiff has the burden of
11 proving that there was oppressive or unfairly prejudicial
12 or unfair conduct the plaintiff has fallen far short of
13 that.

14 Even if there weren't the 2010 arbitration award the
15 items that the plaintiff complains of I believe can best
16 be summarized by a comment I hope I'm correctly restating
17 it Your Honor when you said in response to something that
18 Mr. Longman was saying that there appeared their actions
19 seemed to be reasonable in light of the circumstance and
20 relationship of the parties.

21 So for that and for the previous reasons we would
22 oppose the motion and seek entry of a judgment in favor
23 of the defendant. Thank you, Your Honor.

24 THE COURT: You're welcome. Are there any closing
25 arguments from the plaintiff?

1 MR. MCCULLOUGH: No further motions, Your Honor.

2 THE COURT: Are there any closing arguments from
3 the defense ---

4 MR. MCCULLOUGH: --- oh closing arguments, I'm
5 sorry. Yes please. Your Honor, I will be very brief.

6 CLOSING ARGUMENTS

7 BY MR. MCCULLOUGH:

8 The LLC statute states that members owe a duty of
9 loyalty and a duty of care to one another. That includes
10 an obligation of good faith and fair dealing.

11 Partnership cases which Chief Justice Toal has
12 authored an opinion that they should be treated virtually
13 the same as LLC members states that the law holds each
14 member to the highest degree of good faith in its
15 dealings with reference to any matter which concerns the
16 business of the common engagement and each partner being
17 the agent of the firm must be held to the same
18 accountability as other trustees in all matters which
19 effect the common interest.

20 The Ballard case which is a Supreme Court opinion
21 from August of 2012; it's opinion number 27161 states --
22 and this is to the definitions of oppressive and unfairly
23 prejudicial which of course is included in the non-
24 waivable provisions of the LLC act. It talks about --
25 and I just read so I won't read it again -- but with

1 minority shareholders some of the factors to consider as
2 to whether ---

3 THE COURT: --- the defendant is not a minority
4 shareholder is he?

5 MR. MCCULLOUGH: Pardon me?

6 THE COURT: Your client is not a minority
7 shareholder is he?

8 MR. MCCULLOUGH: Exactly. As I stated before there
9 are no cases finding the rights between members of an LLC
10 but there are numerous cases between members of
11 partnerships, which is why I keep referring back to Chief
12 Justice Toal's opinion that they should be virtually the
13 same.

14 I will also state that this is dealing with the
15 exact same language of a different section of the act. I
16 think that's important to consider. This case deals with
17 section 33-14-300 which talks about the dissolution of a
18 corporation. And I'll read what that act says.

19 [Reading] It should be dissolved if there is action
20 in a manner that is illegal, fraudulent, oppressive, or
21 unfairly prejudicial -- which is exactly the same
22 language from the LLC act. And that case goes on to
23 define oppression and unfairly prejudicial. And it says
24 it's a case by case review, their -- terms and
25 circumstances presented in each particular case. And

1 they reference -- and they talk about some of the
2 specific factors and that includes withholding
3 information from minority shareholders, failure to
4 enforce contracts for the benefit of the entity,
5 eliminating minority shareholders from a directorate or
6 excluding them from employment.

7 And then it goes on, [Reading] The concern and focus
8 in shareholder oppression cases is that the minority
9 faces a trapped investment and an indefinite exclusion
10 from participation in business returns.

11 Your Honor, we understand that the arbitration panel
12 decided Mr. Longman and Emerald has no voting interest.
13 That does not mean that Kriti, Davidson Williams, gets to
14 disregard his ownership interest. It's to disregard his
15 good faith and fair dealing responsibility that the LLC
16 act states -- the LLC act states is non-waivable.

17 The facts in this case are undisputed or that there
18 was an attempted squeeze down by Mr. Williams and that
19 that squeeze down through the capital call, those were
20 his terms not mine, that the capital call was invalidated
21 on its face in not one but two arbitrations.

22 THE COURT: The arbitrators don't use those terms
23 do they?

24 MR. MCCULLOUGH: It was invalid on its face, yes
25 ma'am I believe they do ---

1 THE COURT: --- they didn't say squeeze down. They
2 did not sue that ---.

3 MR. MCCULLOUGH: --- that's why I say that was Mr.
4 Williams' term in his email in within a month of signing
5 the operating agreement. He writes to his Greek
6 investors and says any effort if he so much as hiccups;
7 that was the testimony yesterday.

8 What the arbitrators found was that the capital call
9 was ineffective on its face because it included
10 prerequisites and they list them in the page -- the '05
11 arbitration. There is almost a half page of all the
12 reasons the capital call was invalid on its face.

13 Despite that the evidence produced yesterday was
14 that Kriti continued to claim a significantly higher
15 proportionate share of ARP II despite the fact that the
16 2005 award had confirmed that the capital call was
17 ineffective. And it was confirmed again in 2010.

18 Your Honor, again the arbitrators were bound to look
19 to the operating agreement and to the authority provided
20 in the operating agreement. You have a much broader
21 ability to dissolve this entity per the act. And again
22 the 2010 arbitration award not once but twice the
23 arbitrators define the limitations of their ability per
24 the operating agreement and says, to the extent we are
25 allowed or authorized to opine. And they even take great

1 detail in specifying the four ways they can dissolve this
2 entity which are the four ways that are in the operating
3 agreement.

4 There is nothing in the operating agreement and
5 there was nothing before the New York arbitration panel
6 that allowed them to dissolve this company if there was a
7 showing that Kriti had been unfairly prejudicial or
8 oppressive to Emerald. That was before Your Honor's
9 court and they didn't have the authority to do it. They
10 couldn't dissolve this entity pursuant to South Carolina
11 law even if they wanted to.

12 The evidence showed that there were K-1's sent to
13 the government specifying an ownership interest that had
14 been struck down by the arbitrators. The evidence showed
15 that Williams and Kriti were making every effort to get
16 these three folks to file lawsuits against Longman.

17 The evidence in the record shows that there was a
18 manufactured default and a manufactured assignment of the
19 Lunar claim in an effort to have a lis pendens on ARP I's
20 property. And Mr. Williams own words said I'll need that
21 for backstop protection and for additional leverage on
22 Longman. That is not the words of somebody who is
23 treating their co-member with good faith and fair
24 dealing.

25 THE COURT: As an officer of the court can you tell

1 me that all these things were not presented to the
2 arbitrators in their fact finding capacity?

3 MR. MCCULLOUGH: I think they were and I think
4 that's why the records -- the 2005 arbitration panel said
5 they were concerned by Kriti's efforts at getting these
6 third party vendees to come forward and assert claims.
7 But again, they didn't have the authority to dissolve
8 this LLC based on anything beyond those four very limited
9 issues ---

10 THE COURT: --- I don't think -- even if the
11 operating agreement were more expansive and the
12 arbitration agreement in their -- the arbitration
13 provision of their operating agreement is broad.

14 MR. MCCULLOUGH: But they still ---

15 THE COURT: --- it does not leave anything that
16 they can't decide. They could not -- even if specified
17 in that agreement dissolve this corporation. That is a
18 ministerial duty preserved to this court.

19 MR. MCCULLOUGH: Your Honor, the arbitration
20 agreement provides four ways and only four ways ---

21 THE COURT: --- the operating agreement has a very
22 broad arbitration provision.

23 MR. MCCULLOUGH: Sure. It says you arbitrate
24 everything. But the only way to dissolve -- the 2010
25 arbitration award take great pains to discuss the only

1 way they could dissolve this company ---

2 THE COURT: --- an arbitration panel could not
3 dissolve a South Carolina corporation. Even if they said
4 it in the agreement; it's a ministerial duty preserved to
5 a court. They wouldn't be able to dissolve it in any
6 event would they?

7 MR. MCCULLOUGH: You would have to -- the order
8 would have to be ---

9 THE COURT: --- would they ---

10 MR. MCCULLOUGH: --- submitted to South Carolina and
11 it would be judicially dissolved here. However, the
12 ability for them to dissolve the entity in whatever --
13 the fourth page I believe in the 2010 arbitration award
14 they go through and specify it's got to be through either
15 the administrative dissolution of the entity, through a
16 bankruptcy, through -- I could read it to you; there were
17 four limiting ways that it could be dissolved.

18 It was far more limited to than the LLC statute
19 which focuses on Emerald and Stu Longman, not on the
20 entity. Your Honor, the reason -- we're forced to look
21 at these documents and guess as to the basis for their
22 decisions.

23 THE COURT: I don't have to guess. They were very
24 articulate in their fact findings.

25 MR. MCCULLOUGH: I agree. And they said we can

1 only dissolve it based on these.

2 THE COURT: They could make a recommendation for it
3 to be dissolved. They would not have the authority to
4 dissolve it. I've read the arbitration findings; I've
5 read them all several times. I don't need you to ---

6 MR. MCCULLOUGH: --- I understand ---

7 THE COURT: --- and it's in the record so I know
8 what they said, I've read it; I've read it several times.
9 And we're talking about two different things and my
10 question is about something totally different, which is
11 the scope of the arbitration agreement which goes to the
12 scope of their ability to make findings of fact.

13 MR. MCCULLOUGH: Based on the operating agreement
14 and if I ---

15 THE COURT: --- the scope of the arbitration -- you
16 need to -- the scope of the arbitration agreement is very
17 broad. It doesn't limit them in that way. It says any
18 dispute arising under this contract.

19 MR. MCCULLOUGH: Right. But the only way they can
20 -- they spent a page in the operating agreement, page 4
21 of 6, page 4 details their limitations as to their
22 ability to dissolve the company. They go into great
23 detail about their limitations. And admittedly none of
24 those four have occurred. And so you -- there was a
25 consent order that this Honorable court signed because

1 everybody recognized that the issue of whether this
2 company should be dissolved pursuant to the South
3 Carolina LLC act had to be decided here; not in New York.

4 THE COURT: I agree.

5 MR. MCCULLOUGH: And so the LLC act is broader than
6 those four prongs of the operating agreement which define
7 -- there are only four reasons per the operating
8 agreement that the company can be dissolved. And so the
9 arbitrators didn't have the ability or authority to
10 decide on the act, which is what we are here about today.

11 And so again, the facts that we've got are that they
12 have conjured up efforts to squeeze down Mr. Longman;
13 it's marginally successful. They took an assignment,
14 they took a default, and then they have continued to --
15 they continued even after the 2010 arbitration they
16 refused to provide financial information.

17 They spent from 2007 to 2012 getting these permits
18 tripling the size of this marina. They didn't provide
19 the 2011 and 2012 appraisal to Mr. Longman. They didn't
20 provide notification that the permits had been approved.

21 THE COURT: Is there any evidence they had any duty
22 to do that?

23 MR. MCCULLOUGH: Absolutely.

24 THE COURT: What is the evidence in the record they
25 had a duty to notify him of the ---

1 MR. MCCULLOUGH: --- the LLC act states that there
2 is a duty of loyalty and a duty of care; obligation of
3 good faith and fair dealing. The case law ---

4 THE COURT: --- you would agree ---

5 MR. MCCULLOUGH: --- is clear they wanted ---

6 THE COURT: --- that the facts ---

7 MR. MCCULLOUGH: --- the ability to put those
8 things ---

9 THE COURT: --- the facts of this -- please, the
10 court reporter is only going to record what I'm saying.

11 MR. MCCULLOUGH: Sorry.

12 THE COURT: Please, what I need you to distinguish
13 because your client's situation is not like a regular
14 situation of an LLC. Your client was stripped of his
15 rights to manage basically or have any voting or say
16 about the everyday operation of this company and for some
17 very valid reasons which were articulated in the
18 arbitration findings, which I assume they did not take
19 particularly lightly when they made those.

20 And so duties are created either by common law or
21 statute. And I agree the LLC act says that but where you
22 have been stripped of your rights to vote or have any
23 managerial say what duty do they have to advise him of
24 the day to day operations of this business other than
25 one) that he is going to get a distribution or that they

1 plan or that they've sold something and he is entitled to
2 a reimbursement of what he has invested or some
3 distribution. Other than that what duty do they have --
4 and if you have a -- and I digress for a moment -- if you
5 have a business whose operation is to build boat slips it
6 is -- it would seem common sense to me that a part of the
7 day to day operations of that business is to get DHEC and
8 other type permits to facilitate that business.

9 So what duty do they have to advise him of that
10 because that's a day to day operation of business coupled
11 with the fact that it is a public record that he could
12 discover on his own if he -- there is nothing secretive
13 about dock permits. Notice is given to the public so
14 that they can be heard; there are a series of hearings.

15 And then the Corp of Engineers and other folk get
16 involved. So how really secret can dock permitting be
17 because most folks especially on that side of town are
18 going to complain about folk trying to get dock permits
19 because they don't want any more boats on that pristine
20 part of the water.

21 So what -- again my question becomes what duty do
22 they have to notify him of the day to day operations of
23 this business where theoretically he has no vote; he has
24 no say. And the other -- and what evidence is there in
25 the record that somehow they nefariously did this, that

1 somehow something that is part of the public record that
2 they actively tried to keep from him? The other question
3 that I have is what evidence is there contrary to the
4 arbitrator's findings that there was no breach of duty
5 coupled with the fact that you are bound by that finding.

6 But what I'm curious to know is you can't sort of
7 just argue things and just sort of say that they -- or
8 advocate that that is the posture. I need to know what
9 factual support you have for that argument.

10 MR. MCCULLOUGH: All right. Two -- let me take
11 the last one first. I have a fundamental disagreement
12 that the arbitrators decided anything related to whether
13 or not Emerald, Stu Longman, had been treated unfairly,
14 prejudicially because that issue was not before them.

15 THE COURT: Did you present all this evidence to
16 them? Did -- was all of this presented? I find it a
17 little difficult to believe that it wasn't the more I
18 thought about it last night because clearly these parties
19 over the years they don't work well together.

20 It's clearly an acrimonious situation. And I don't
21 mean that in any pejorative sense; it's just the reality
22 of it. I find it difficult to believe that once they had
23 the opportunity to present evidence to the arbitrator
24 they didn't tell them everything that had ever happened
25 or transpired between them.

1 MR. MCCULLOUGH: I liken those to the same evidence
2 presented in a criminal case and a subsequent civil case
3 for damages arising out of the criminal act. We've got
4 the same set of facts applying different law. They were
5 applying the operating agreement.

6 And they even stated in the 2010 award although it's
7 probably in the best interest to separate these two there
8 is nothing to stop the continued operation of the marina.
9 That was what they were considering. Would the
10 continuing operation of the marina be allowed based on
11 these two guys not getting along?

12 That is not what is before you. What is before you
13 is pursuant to the act was there a violation of the good
14 faith and fair dealing requirement of the LLC act and was
15 it to the unfairly prejudicial impact to my client
16 Emerald and Stu Longman. That issue was not before the
17 arbitrators because that law was not before the
18 arbitrators because that is not in the operating
19 agreement.

20 So I would wholeheartedly agree with you that the
21 facts were presented. However, they didn't have the
22 authority or the ability to apply the LLC act to those
23 facts. That is what we are here today to do. And so the
24 fact that there was an effort at a capital call that was
25 invalidated on its face, the fact that there was an

1 assignment that was done for additional leverage, the
2 fact that there was a default that was later set aside
3 based on the manner of that default. The fact that the
4 financial information has continued not to be
5 forthcoming; none of that -- they could not apply all of
6 those facts to the issue of whether or not it unfairly
7 prejudiced Stu Longman.

8 Your Honor, the Clark v Regency case states the
9 exact same standard as the LLC act; unfairly oppressive,
10 fraudulent, unlawful conduct. It states in here that one
11 of the elements of unfairly prejudicial conduct would be
12 withholding information from minority shareholders.

13 Well, in this case we've got ---

14 THE COURT: --- your client is not -- he is not a
15 minority shareholder. He owns 70 percent. He's just
16 been divested of his voting rights because of his
17 behavior. That doesn't convert him into a minority
18 shareholder. A minority shareholder by its very
19 definition is someone who holds very miniscule shares in
20 a company.

21 And by virtue of how the company is run doesn't have
22 the ability to vote and is therefore disadvantaged
23 because of a myriad of reasons. But I don't think your
24 client could be characterized as a minority shareholder.

25 MR. MCCULLOUGH: He certainly -- he's been treated

1 as one as a result of the 2005 arbitration award. And
2 the idea that the as a 70 percent owner having a permit
3 approved tripling the size of the marina is not an
4 everyday occurrence. They spent five years and over
5 100,000 dollars trying to get that permit.

6 The idea that he has to go search public records to
7 obtain the fact that it has been tripled -- and that's
8 the reason obviously that those two appraisals weren't
9 forthcoming, and I do not believe that purports with the
10 good faith and fair dealing requirements that are un-
11 waivable pursuant to the act. They don't get to do that.

12 And the arbitrators were not able to decide that
13 because that law was not before them. Your Honor, you
14 have broad authority in this case to do pretty much what
15 you want to do to unwind the mess. And it is a mess.

16 THE COURT: I don't think I have the authority to
17 disregard the arbitrators' factual findings that you all
18 agreed to be binding.

19 MR. MCCULLOUGH: Absolutely. But you have the
20 ability to take the facts as you've heard today and
21 decide whether or not there has been a violation of the
22 good faith and fair dealing requirement and decide that
23 it has been unfairly prejudicial to Emerald, Longman.
24 And once you make that determination you should decide
25 that this entity should be dissolved. Now we discussed

1 last night there are plenty of ways to unwind this
2 situation ---

3 THE COURT: --- on that point have y'all talked
4 anymore?

5 MR. MCCULLOUGH: We did and I don't want to speak
6 for Will but there's no more -- there are no settlement
7 offers forthcoming either as to selection of a price or
8 any monies offered. We were told no and no.

9 THE COURT: Is that correct, Mr. Cleveland?

10 MR. CLEVELAND: I wouldn't have phrased it so. I
11 would have tried to sugar coat it. I would ---

12 THE COURT: --- I'm sorry. I didn't hear you.

13 MR. CLEVELAND: I would have tried to sugar coat it
14 for you.

15 THE COURT: You don't have to. We're all adults.

16 MR. CLEVELAND: I can explain it. The ---

17 THE COURT: --- nothing like the truth. I mean lay
18 it out.

19 MR. CLEVELAND: My client is not interested and
20 doesn't believe negotiations over a purchase price would
21 be meaningful and are not willing to engage in those. So
22 the answer is no on paying him any money. And secondly
23 they ---

24 THE COURT: --- so they don't plan to sell it?

25 MR. CLEVELAND: No, they have no current plans to

1 sell it. But they are considering that but they see lots
2 of problems in trying to enter some agreement with Mr.
3 Longman that increases or changes what their obligations
4 under the operating agreement are. They believe -- they
5 understand their obligations under the operating
6 agreement and trying to modify those at this time is not
7 something ---

8 THE COURT: --- how do you modify them?

9 MR. CLEVELAND: Well if you -- he's got whatever
10 rights he's got under the operating agreement. They
11 agree with that. And they have their obligations under
12 the operating agreement. And so if he wants them to
13 commit to do something else other than make the best
14 decisions they can going forward then that starts to
15 modify and limit ---

16 THE COURT: --- that wasn't what we discussed so
17 I'm trying to figure out what you're talking about.
18 Y'all must have talked about something else after y'all
19 left.

20 MR. CLEVELAND: Let me give you -- can we -- when I
21 talked to Mr. Williams about whether they ---

22 THE COURT: --- we can go off the record. These
23 are settlement negotiations. Go ahead.

24 [Off the record momentarily]

25 THE COURT: Anyway, you may continue your argument.

1 MR. MCCULLOUGH: Thank you. Your Honor, the off the
2 record discussion highlights why we are here. There have
3 been within ---

4 THE COURT: --- just so the record is clear any off
5 the record discussion we had was a culmination of
6 potential settlement negotiations in this case that
7 started on last evening that went to 6 o'clock which
8 regard the parties trying to minimize or mitigate their
9 losses in placing this property on the market for sale
10 potentially or the assignment of boat slips.

11 I don't want there to be any mystery about what
12 we've said. Sometimes I go off the record on things like
13 that because people tend to talk more freely when the
14 court reporter is not taking it down. But I understand
15 in this litigious world probably -- and y'all are
16 probably the only few lawyers that I still talk to
17 without a court reporter because there are very few that
18 I do that with; that I trust enough to do that with.

19 Most lawyers I don't speak to them unless there is a
20 court reporter recording every word we say because
21 hindsight is always 20/20. And my recollection is often
22 different from other folk's recollection so I don't take
23 that chance very often. You may continue Mr. McCullough.

24 MR. MCCULLOUGH: Your Honor, if Mr. Longman walked
25 outside and said it was day Mr. Williams would probably

1 say no its night; and the reverse is true. It is clear
2 and I think they both have testified at the arbitration
3 that this -- I think Mr. Williams testified this
4 nightmare needs to be over. I think Mr. Longman would
5 probably say the same thing.

6 It doesn't appear that they can work or play well
7 together. It does not appear that they can negotiate
8 together. This is an entity that needs to be dissolved.
9 We think the LLC act and the case law I've cited gives
10 you the authority to do that based on the conduct to
11 date.

12 And as a practical matter we've got a large new
13 asset that needs to be either developed or sold to
14 maximize the outcome for this entity. And based on the
15 years of conduct by everybody involved the likelihood
16 that this will just miraculously end well without some
17 court order is remote.

18 And I don't mean to be negative or pessimistic but
19 it's just what has happened to date. These two guys are
20 handcuffed to each other and you're the only one with a
21 key to those handcuffs. We feel like you've got the
22 authority to act. We feel like we've presented the facts
23 and the evidence to establish the need for you to act.
24 And we would ask that this company be dissolved and that
25 you use your equitable powers to craft the fairest remedy

1 as you see fit.

2 THE COURT: Mr. Cleveland, any closing argument?

3 MR. CLEVELAND: I'll be very brief, Your Honor. I
4 want to thank you for all the attention that you've given
5 us Your Honor.

6 THE COURT: You're welcome, sir.

7 MR. CLEVELAND: I just have three points to make.

8 THE COURT: Yes, sir.

9 CLOSING ARGUMENT

10 BY MR. CLEVELAND:

11 Mr. McCullough seems to be arguing that the findings
12 of the New York arbitration award, albeit it interesting,
13 are not relevant because the arbitrators there did not
14 have the legal power to order judicial dissolution.

15 He seems to be arguing that all those findings go to
16 something else other than judicial dissolution. They
17 really don't pertain to the underlying facts the court
18 would have to find in order to be able to order judicial
19 dissolution.

20 And I would submit that that flies in the face of
21 the paragraph of the consent order you entered in this
22 case that says in the last paragraph, the parties further
23 stipulate and agree with the findings of the above
24 referenced New York arbitration and upon confirmation of
25 the award shall be admissible in and binding upon the

1 parties in any action including but not limited to this
2 action seeking an order of judicial dissolution of ARP
3 II. The parties agreed and the court accepted that the
4 parties would go out and fight for God knows how long
5 before coming back here and they would be bound by the
6 findings of facts that they submitted in New York.

7 And the second point is I would just offer for the
8 court was in introducing evidence as defendant ARP
9 exhibit 2, which is the 25 page demand that covers every
10 conceivable allegation of breach of fiduciary duty,
11 misconduct, claims for damages; all of which were
12 rejected upon the findings that there was no misconduct,
13 no breach of any material duty in this case.

14 And finally just to put some gloss on this, Your
15 Honor, Mr. McCullough keeps arguing that there is
16 something nefarious about these permits. Mr. Longman
17 well knew that the permits had been applied for at the
18 time of the New York arbitration award and he complained
19 about it.

20 He objected to the plans to expand the marina
21 because he thought it was an excuse for not selling the
22 marina. And that can be found, Your Honor, in the
23 demand, which is defendant ARP exhibit 2 on page 13
24 paragraph 29 subsection (c) in which one of the
25 itemizations of misconduct that Mr. Longman complains of

1 is Kriti's -- and I'm quoting, [Reading] Kriti's plans to
2 expand the marina that had been offered by Kriti as an
3 excuse for rejecting bona fide offers for the Ripley
4 Light project. If there are any questions the court has
5 for me I'd be happy to answer them. Otherwise I've
6 concluded my remarks.

7 THE COURT: Thank you, sir.

8 MR. CLEVELAND: Thank you, Your Honor.

9 [Whereupon, the court reviews documents]

10 THE COURT: Both parties have moved for a directed
11 verdict, but actually their motions are considered under
12 Rule 41 as this matter is being tried in a non-jury
13 capacity.

14 And since the court reserved motions what it
15 basically is is a motion by the defendant to dismiss the
16 case articulating that the Judge as the Trier of facts
17 should weigh the evidence and determine the facts and
18 render judgment against the plaintiff as the plaintiff
19 has not presented sufficient evidence to support its
20 claim.

21 Considering the posture of this case I think it is
22 appropriate to deny both motions and to resolve the case
23 on its merits. And while I'm going to take the case
24 under advisement there are some observations that I am
25 going to make and then I'm going to have you all to

1 provide the court with proposed orders. In those orders
2 you should send those to us in Word format to
3 djeffersonsc@sccourts.org. Please advise your staff not
4 to send them to me directly because they will probably go
5 in my junk box and I never check it so it will be
6 deleted.

7 And I have a system in place where I need to
8 document when things come into the office. So if you
9 would send them to that email address it would be very
10 helpful. You should make any findings of fact and
11 conclusions of law that you feel are supported and cite
12 any authorities that you feel support those findings of
13 fact and conclusions of law as they relate to the record.

14 I will make the following observations, however, and
15 I will not restate arbitration law because I think we are
16 all clear about it. But there are some very valid
17 reasons for arbitration that is favored in our public
18 policy, which has been articulated in a myriad of cases
19 that I really don't need to cite.

20 But our case law is very clear that whenever there
21 are factual allegations that underlie a claim and they
22 are within the scope of the arbitration agreement they
23 are to be tried by the arbitrators. And it is very clear
24 in this case that there is a very broad arbitration
25 agreement that was entered into by the parties in their

1 operating agreement at section 12.1 (a) and it states:

2 Any dispute or controversy arising under or in
3 connection with this agreement shall be submitted to
4 binding arbitration in accordance with the requirements
5 of the American Arbitration Association or successor
6 thereto the triple A.

7 And then it goes on to talk about how it is to be
8 conducted in New York and how the arbitrators would be
9 selected and that the decision of the arbitrators shall
10 be binding upon the parties and may be entered as a
11 judgment with any court of competent jurisdiction. And
12 it deals with some other things about application of law
13 and some other standard provisions.

14 It is my perception that is a very broad arbitration
15 agreement and that it was intended to encompass every
16 dispute or any dispute of controversy that arose between
17 these parties and that it was to be resolved in
18 arbitration.

19 Of course that was their agreement. It was -- it
20 reached at arm's length and they voluntarily entered into
21 it. In addition to that they submitted a consent order
22 to this court in conformance with that arbitration
23 proceeding that reads in relevant part: the parties
24 further stipulate and agree that the findings of the
25 above referenced New York arbitration upon confirmation

1 of the award shall be admissible and binding upon the
2 parties in any action including, but not limited to, this
3 action seeking an order of judicial dissolution of A-R-P
4 II. And I will find for the record that the findings of
5 the arbitration panel, which were confirmed by subsequent
6 award, are binding on this court pursuant to the parties'
7 agreement. And I am not at liberty to reconsider those
8 findings as the parties made that agreement and they are
9 bound by it.

10 Those findings were as follows and I'm referring to
11 exhibit D, page 3, which I believe is the defendant's
12 exhibit but I am certain there is a corresponding
13 plaintiff's exhibit, which is the arbitration award and
14 then the continuation of that award, which deals with
15 impertinent part all previous actions in managing A-R-P
16 II complained of by Emerald were well within reasonable
17 business efforts to manage a complex piece of waterfront
18 property; such that Kriti's decision did not constitute
19 corporate waste, wrongful conduct adverse to A-R-P II's
20 business, a material breach of the operating agreement,
21 or a material breach of a duty owed to A-R-P II or
22 Emerald.

23 So clearly that panel considered the conduct of the
24 parties in conducting the business because it deals with
25 corporate waste, wrongful conduct adverse to A-R-P II's

1 business as well as any material breaches of the
2 operating agreement as well as any material breach of a
3 duty owed to A-R-P II or Emerald. They also found there
4 is no basis to disassociate Kriti or Emerald from A-R-P
5 II or to dissolve A-R-P II.

6 They also found there were insufficient facts to
7 authorize dissolution of A-R-P II pursuant to Article 9.1
8 of the operating agreement. And there were insufficient
9 facts to authorize disassociation or expulsion of a
10 member of A-R-P II pursuant to Article 10.5 of the
11 operating agreement.

12 They also found that neither Kriti nor the company
13 committed corporate waste or engaged in any misconduct
14 which would support a finding of fact requiring
15 disassociation, dissolution, or an award to Emerald for
16 damages. And thus to the extent that the panel was
17 empowered to opine on the request for disassociation,
18 dissolution, or damages against Kriti such request is
19 denied.

20 And also that Emerald did not commit sufficient
21 facts to support a finding of disassociation and to the
22 extent that the panel is empowered to opine on the
23 request for disassociation of Emerald such request for
24 relief is denied. In addition to that it makes reference
25 to 10.5 of the parties operating agreement, which is

1 wrongful disassociation. And I'm going to make reference
2 to two provisions in the operating agreement. One is
3 9.1, which is disassociation, winding up and termination,
4 which is on page 25 of the agreement and provision 10.5,
5 which is on page 29 of the agreement, which is wrongful
6 disassociation.

7 And that provision -- and when read in connection
8 with one another, that being provisions 9.1 of the
9 operating agreement and 10.5 they actually mirror the
10 language of 33-44-801, which is our judicial dissolution
11 statute. And the pertinent language being from section
12 10.1 when you talk about -- and it refers to a provision
13 of the judicial dissolution act, which deals with --
14 well, it talks about the expulsion of a member.

15 But it talks about such conduct that has been
16 contemplated by the arguments, which is engaged in
17 wrongful conduct that adversely and materially affected
18 the company's business, willfully or persistently
19 committed a material breach of this agreement, or of a
20 duty owed to the company or the other members under
21 sections 33-44-409 the act, or engaged in conduct related
22 to the company's business that makes it not reasonably
23 practical to carry on the business with the member.

24 While I think the plaintiff's argument is novel I
25 think it is an attempt to if I were to allow the argument

1 and if I were to adopt it I really think it would have
2 the effect of circumventing the binding affect for the
3 factual findings of the arbitration. I think it would
4 defeat the purpose of arbitration. You don't arbitrate
5 piecemeal unless of course there is a subject matter that
6 is not contemplated by the party's arbitration agreement.

7 And as I've already observed the arbitration
8 agreement in this case was very broad. It articulates
9 any dispute or controversy arising under or in connection
10 with this agreement shall be submitted to binding
11 arbitration. The party's written agreement manifests
12 their intention to resolve any dispute that arose between
13 them in an alternative manner; that being binding
14 arbitration.

15 I have not heard anything really at this point that
16 indicates, and that being the basis of the argument that
17 somehow the plaintiff in this case was treated unfairly
18 because he was not notified of permits or otherwise, that
19 the defendants had any duty to provide him with that
20 information.

21 But there is contradicting testimony that he did in
22 fact already know about it and made some argument
23 regarding that indicating that he did not agree with the
24 party's attempts to obtain those permits. So I'm
25 concerned about the creditability or at least the

1 veracity of that argument that he did not know that these
2 permits were being obtained or the substantial efforts
3 that were being exercised to obtain those permits. But
4 in any event I would believe, and it is my perception,
5 that the arbitrator's findings are binding in that regard
6 and that they find that there was no breach of duty.

7 And I do not perceive that that finding of fact is
8 bound by or is limited by the operating agreement because
9 it also involves section 10.5, which mirrors the statute
10 as well as 9.1 that very clearly states that they did not
11 in any way materially breach a duty owed to Emerald.

12 Again, I do not -- I have not heard anything in the
13 record nor have I heard any statute or common law the
14 creation of a duty to advise the plaintiff of the
15 everyday managerial functions of the company especially
16 in light of the unusual fact that the arbitrator's had
17 stripped him of his voting power for very valid reasons
18 that they articulated in their arbitration findings.

19 The arbitration panel has not characterized the
20 capital call as a squeeze down and in my reading of that
21 -- those arbitration findings I could find no support for
22 that characterization.

23 This was a very complicated venture that these
24 parties entered into and it became acrimonious at some
25 point and I think the lot of behavior that was manifested

1 was because of the parties' just inability to work
2 together. But the arbitrator's did not -- and I am
3 firmly convinced that they heard all of this in the
4 arbitration.

5 Based on my observation of these proceedings I would
6 find it very difficult to believe that they did not in
7 six days present everything involving their business
8 involvement from the beginning of their relationship
9 through that point that everything was presented to the
10 arbitrators.

11 I do believe that the factual findings are
12 completely, and that being the arbitrators are completely
13 encompassed and clearly within the scope of the
14 arbitration agreement and I do believe that all the facts
15 that have been argued now were argued before the
16 arbitrators.

17 I do not perceive that the party's inability to play
18 well together is the basis to dissolve a limited
19 liability corporation pursuant to the statute because
20 really that is about what this amounts to and is best
21 characterized as a continued breakdown of their inability
22 to do business together for many reasons I think
23 compounded by many of the fact findings that were made
24 within the scope of the arbitration agreement -- I mean
25 the arbitrators findings and those things which have

1 taken place during the course of these parties
2 relationship with one another. I'm going to think about
3 it some more and then I will make -- upon receipt of
4 those proposed orders will go from there.

5 I generally write my own orders but I find that when
6 attorney's provide me with proposed orders in a very
7 succinct way it boils down their argument and the
8 findings of fact that they have relied on in that
9 argument. So it's very helpful to the court. I'm not
10 trying to put y'all to extra work but I appreciate y'all
11 accommodating the court.

12 So we will -- I try -- if you all could get those to
13 me within ten days of today that would be helpful. I'd
14 like to try to -- now that I'm not Chief Judge anymore I
15 have my life back after four years, I can devote some
16 time to actually -- so hopefully would be able to get
17 that out within 15 days.

18 So if you all get it to us within ten then I can get
19 that back to you within -- I'm hoping within 15 days of
20 the -- of receiving those. And I would say that you know
21 business is hard; business is like a marriage.

22 For those of us who practiced law with partners we
23 know that and you have to almost choose your law partner
24 better than you choose your spouse because you spend more
25 time with them. And when it goes bad it goes bad very

1 quick -- as I niece would say that could go bad real
2 quick. But the bottom line is the reason I made that
3 observation is not lost on me. How very difficult
4 position this is is not lost on me that the market -- I'm
5 anticipating probably by three quarters of the population
6 went south very quickly. And many people really have
7 been substantially damaged by that economically.

8 And so I have to as the person -- the only person in
9 this room who doesn't have anybody to reward or punish
10 try to figure out what the applicable remedy is in this
11 case and so that beyond the emotion of this make sure
12 that the parties are not substantially damaged
13 financially.

14 And so I'll do a lot of thinking about it and we'll
15 see where the logic leads me. I'm really hoping in the
16 interim though that you all may be able to -- the
17 unfortunate thing about the court making a decision is
18 nobody is going to be happy.

19 Again, because I don't have anybody to reward or
20 punish so there are never any winners once you get to
21 this stage of the process.

22 But I'm hoping to the extent that you all still have
23 the ability to maybe have some say in how you resolve
24 your dispute that you may take advantage of that for what
25 it's worth, okay. Y'all want to take a quick break and

1 then we'll start with 2009-4667.

2 [Whereupon, trial concludes at 11:10 a.m.]

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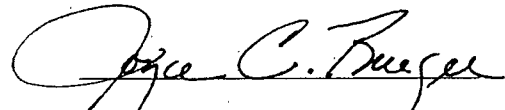
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, excerpt of the Transcript
of Record of the proceedings had and evidence introduced
in the trial of the captioned case, relative to appeal,
in the Court of Common Pleas for Charleston County, South
Carolina on the 23rd day of January, 2013.

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

November 6, 2013


Joyce C. Rueger, EVR-M
Court Reporter