

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-38-1131

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SC Supreme Court

Laurance H Davis, Jr , Rhoda G Rentz, Mortimer M Weinberg, Jr ,
Hodge Land Co , Inc and Anna Trotter, individually and in their
capacities as the Limited Partners of Roosevelt Gardens, a South
Carolina Limited Partnership

Appellants,

vs

Roosevelt Gardens, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc , AmReal Corporation
a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr , and John
Doe, a generic designation for a party or parties whose true
identity is unknown

Respondents

AMENDED (INITIAL) BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- 1 Did Judge Early err in dismissing Appellants' claims and requiring them to pay costs and attorneys fees to Respondents because Appellants did not disclose privileged communications with their attorneys, thereby requiring reversal and vacation of his order of April 6, 2010, as well as prior orders upon which it is based? In this regard, (a) did Judge Early err in holding that Appellants, merely by filing their complaints, put at issue the statute of limitations and waived their attorney-client privilege concerning that issue? and (b) did Judge Early err in holding that language in other complaints filed by other litigants in other counties put at issue the statute of limitations in this case and waived their attorney-client privilege concerning that issue?
- 2 Did Judge Early err in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for alleged deficiencies in their discovery responses, thereby requiring reversal and vacation of his order of April 6, 2010, as well as prior orders upon which it is based?
- 3 Was Judge Early legally qualified to accept and/or retain the assignment to preside over this case? Specifically, (a) Did Judge Early violate the duty to fully disclose to Chief Justice Toal and to Appellants and their counsel the full and complete nature of the long-term relationship between him and members of his family with Respondents' counsel, Ellis Johnston, and members of his family? (b) Did Judge Early violate the continuing duty to fully disclose to Chief Justice Toal and to Appellants and their counsel the additional relationships between him and members of his family with Ellis Johnston and members of his family which developed following his acceptance of the assignment of this case, as well as the full and complete nature of any such relationships involving attorneys Anne Ross Rosen and Marvin Infinger after they became counsel of record?
- 4 Did Judge Early err in failing to recuse himself and vacate his prior orders?
- 5 Did Judge Early fail to insure that the Appellants' claims were being litigated in a fair and impartial forum, thereby depriving them of their rights to due process of law under the Constitutions of the State of South Carolina and the United States of America?

STATEMENT OF THE CASE

The complaint in this case was filed in the Orangeburg County Court of Common Pleas on October 17, 2005, alleging seven causes of action at law for damages, including, *inter alia*, a claim for breach of fiduciary duty, and three (3) causes of action for equitable relief (Complaint, p 38-59) Respondents answered on January 17, 2006, setting forth a general denial and twenty-three affirmative defenses including, *inter alia*, the statute of limitations (Answer, p 1-36) Prior to the filing of this case, a similar lawsuit had been filed against the Respondents

in the Beaufort County Court of Common Pleas by the limited partners in Parkview Apartments Limited Partnership (“Parkview”) Three of the Appellants in this case, Rhoda G. Rentz, Mary Jane Pike and Eva Maria Reynolds, are also Appellants in the Parkview case, Appellants’ counsel in this case is also counsel for the Appellants in Parkview Following the filing of the Parkview case, counsel for the parties agreed to postpone any discovery in that case, as well as the filing of this and other related cases, in order to pursue a universal resolution for all cases involved Counsel agreed to jointly employ an independent appraiser to establish fair market values for each of the properties involved, and then to mediate any disputed values The appraiser did not complete the appraisals within the time frame required, and the mediation was canceled Thereafter, in 2005, suits were filed in Beaufort, Charleston and Orangeburg counties against Respondents on behalf of the limited partners in other affordable housing projects/partnerships, *i.e.*, Palmetto Apartments, Pinewood Park Apartments, and Orleans Gardens Apartments¹ On March 7, 2006, South Carolina Supreme Court Chief Justice Toal assigned all five cases to Circuit Judge Doyet A. Early, III (“the judge”) “to hear and decide all pre-trial motions and other matters pertaining to these cases, including the trial and post-trial motions” (Order, 3-7-06, p 1-2)

Between the time of his appointment and the present appeal, the judge held hearings on various motions filed by the parties, including hearings on October 4, 2006, November 19, 2007, July 1, 2008, December 9, 2008, July 6, 2009, August 24, 2009, January 14, 2010 and March 29, 2010 As a result of these hearings, as well as pertinent motions under Rule 59, SCRCp, the judge issued orders dated August 18, 2008, December 17, 2008, March 3, 2009, June 2, 2009, June 16, 2009, July 28, 2009, April 6, 2010, September 16, 2010, October 7, 2010, October 22, 2010, and December 11, 2010, from which this appeal is being taken The hearings and orders

¹ See Appellants’ briefs in the related pending appeals

initially involved Respondents' motions for dismissal and change of venue, but then included discovery issues, and eventually evolved into rulings by the judge requiring disclosure of privileged communications between Appellants and their counsel in this case, as well as the four related cases on appeals. Appellants retained other counsel and sought interim relief in this Court and also in the Court of Appeals, which was denied.²

Following this action by the Appellate Courts, the judge issued his order of April 6, 2010, dismissing Appellants' claims in all cases, as part of the sanctions which he imposed. Appellants' Amended Notice of Appeal was served on January 28, 2011. By Order dated March 9, 2011, these appeals were certified for review by the Supreme Court and transferred from the Court of Appeals.

STATEMENT OF THE FACTS

Appellants are limited partners in Roosevelt Gardens Limited Partnership. This limited partnership was originally a general partnership consisting of Hodge Land Company, Inc. and Coastal Contractors, Inc. The original partnership was formed in 1970 in order to construct and operate Roosevelt Gardens Apartments, an affordable housing project for low-income citizens in Orangeburg, South Carolina. In 1971, it was converted to a limited partnership to include Appellant Laurance H. Davis, Jr., as a limited partner. That same year, the partnership was amended to admit Mortimer M. Weinberg, Jr., and Dan Trotter, as limited partners. In 1975 it was amended again to admit the Respondents and/or their predecessors as general partners, and Carson R. Rentz replaced Coastal Contractors, as a limited partner. A detailed history of this partnership is set forth in the affidavit of Davis dated April 7, 2010, (p. 5, Complaint, p. 3-4).

²

On November 19, 2009, this Court denied Appellants' Petition for writs of prohibition and certiorari, on December 1, 2009, the Court of Appeals dismissed Appellants' appeal.

Appellants incorporate by reference herein the historical statements contained therein

With the exception of Appellant Davis, all of the individual original limited partners are deceased. Anna Trotter, widow of Dan Trotter, acquired her interest from his estate. Rhoda G. Rentz, widow of Carson Rentz, also acquired her interest from his estate. Most of the individual Appellants are elderly and have significant health issues. (*Cf.*, Davis Aff. p. 2, Pike Aff. 4-9-10, p. 2, Rentz Aff. 4-9-10, p. 2.) Appellant Weinberg died during the pendency of this action. Davis owns a thirteen (13%) percent interest in the limited partnership, Rentz owns an eight (8%) percent interest, Hodge Land Company owns a twenty-five (25%) percent interest, Trotter and Weinberg each own a twenty-four and one-half (24 1/2%) percent interest. The remaining five (5%) percent ownership interest is held by the Respondents Tuck (“Tuck”) and AIMCO, either directly or through its subsidiary, AmReal. (Complaint, p. 1-4.)

Following the inclusion of Respondents Tuck and US Shelter as general partners in 1975, the Appellants had little involvement in partnership affairs, as these were handled by the general partners. While Mr. Tuck remained as individual general partner, the corporate general partner changed through a series of mergers and acquisitions which are described more fully in the complaint. Ultimately, Respondent AIMCO, through its subsidiary, Respondent AmReal, acceded to the role of corporate general partner. (Complaint p. 5-8.) In 1984, Respondents notified Appellants that they had contracted to sell the apartment complex to Boston Financial Group (“BFG”) for approximately \$2,000,000.00, plus interest. The terms of the sale called for a small amount to be paid up front but the majority of the sales price was to be in a balloon payment, with accruing interest, to be made several years later. (Complaint, p. 11-12.) Although told by the general partners that they had vetted the purchaser’s ability to pay, the limited partners later discovered that the sale was actually made to a newly formed limited partnership with no assets other than the property being acquired. (Davis Aff. 4-7-10, p. 8-9.)

Prior to 1999, the general partners advised Appellants of the potential for a problem with the final balloon payment, but made repeated assurances that they would make every effort to protect the partnership and to recover any assets due to it (Davis Aff 4-7-10, p 9, Complaint, p 26) Appellants repeatedly informed Respondents of the increasing value of the apartment complex in light of the then-existing real estate market and requested that Respondents pursue retrieval of the property in the event the note was not paid (Davis Aff 4-7-10, p 8-9) In 1999, the purchaser defaulted, and Appellants began to make inquiries of Respondents, as their general partners, concerning the status of any efforts being made to recover the assets of the partnership Respondents provided no substantive information to Appellants (Davis Aff 4-7-10, p 9) As a result, Appellants consulted legal counsel in order to investigate the status of the monies due to the partnership (Davis Aff 4-7-10, p 9-10) When their counsel was unable to obtain information from the general partners, Appellants called for a special meeting of the limited partnership to discuss available options, including replacement of any general partners who were unwilling to pursue recovery of the partnership assets The special meeting took place in Beaufort at the office of attorney Joel D Bailey on September 14, 2000 The general partners sent AIMCO employee George Buchanan to the meeting to provide information to the limited partners Mr Buchanan was not familiar with all of the details of the transaction with BFG, and it was agreed that a subsequent meeting of the partnership would take place which would be attended by other agents of the general partners possessing more knowledge (Davis Aff 4-7-10, p 11, Complaint, p 26-27, Tr 9-14-00, p 1-65)

The subsequent meeting occurred at AIMCO's office in Greenville, South Carolina on October 24, 2000 This meeting was attended by general partners N Barton Tuck, Jr and AIMCO vice president Patrick J Foye Appellants discussed with Mr Tuck and Mr Foye numerous options available to the partnership, including pursuing potential sale of the past-due

note to third parties, as well as legal efforts to recover monies due under the past-due note or, alternatively, recovery of the apartment complex (Davis Aff 4-7-10, p 11-12, Complaint, p 31-35, Buchanan ltr , 11-10-00, 1 page) It was agreed that counsel would be hired for the partnership for this purpose BFG had previously expressed a willingness to return the apartment complex in lieu of paying the note, and Respondents assured Appellants that they would again explore this possibility Both Mr Tuck and Mr Foye indicated, however, that they would not wish to remain as general partners in the event the apartment complex was retrieved by the partnership Years later, as part of the discovery undertaken in this case, Appellants would learn the real reason why the general partners were unwilling to remain in that position if the apartment complex was retrieved (Davis Aff 4-7-10 p 11-12, Tr 10-24-00, p 1-172)

By letter of November 10, 2000, Respondents informed Appellants that attorney Arthur L Howson, Jr had been retained on behalf of the partnership The letter also informed the Appellants that BFG had been acquired by an entity known as Lend Lease, and that former BFG officer Ford Von Weise had become an officer in Lend Lease The letter further advised that the property had been sold, but that the sale was not final and had not been approved by HUD, and that Mr Howson had been retained to represent the partnership interests concerning the pending sale, as well as exploring its options (Appellants' Memorandum in Support of Motion to Compel, 11-19-07, Ex 11, 1 page)

On December 8, 2000, Mr Howson wrote to Mr Von Weise, stating that the partnership intended "to pursue all remedies under the notes and security agreements " Appellants' counsel was provided copies of correspondence from Mr Howson to the defaulting parties On January 30, 2001, attorney Robert W Tomilson of the Washington, DC law firm of Bryan Cave, LLP also wrote to Lend Lease, stating that his firm "represents AIMCO and its subsidiaries with respect to the sale of the Carolina 9 properties," which included the property in this case and the four (4)

related cases Mr Tomilson requested “that all correspondence be directed to me,” and further noted his awareness of Mr Howson’s prior letter of December 8, 2000 Mr Tomilson provided Appellants’ counsel with a copy of this letter (*Ibid*)

In response to the letter from Mr Howson, on February 1, 2001, William Leighton Lord, III, counsel for Lend Lease/BFG, stated his clients “surprise” upon receiving Mr Howson’s letter, and noted that his client “had been working closely with AIMCO on the resolution and final disposition of these troubled properties ” Mr Lord’s letter then described the negotiations which had taken place between his client and AIMCO, specifically including the fact that AIMCO had taken “control of management of the properties in 1998 ” The letter went on to state that his client had offered to return the properties to AIMCO “on two separate occasions,” but AIMCO had declined the offer, “decided not to continue to manage the properties, and terminated the management contracts ” The letter also identified Hediger Enterprises as being “the management agent” for the properties, this entity was owned by Gary Hediger, a former employee of the Respondent US Shelter Finally, the letter noted that the third-party “sale transaction that was eventually concluded was the plan of action discussed with AIMCO after they declined to take title to the properties ” (*Ibid*) The facts as stated by Mr Lord were previously unknown to Appellants, as they had not been disclosed by Respondents

Mr Tomilson was copied with Mr Lord’s letter Nothing in the record indicates that Mr Howson responded Mr Tomilson, however, responded by letter of February 5, 2001, claiming that BFG had sold the collateral without notice and provided a list of questions for BFG Mr Tomilson provided Appellants’ counsel with a copy of this letter (*Ibid*) Appellants’ counsel responded to Tomilson on February 6, 2001, expressing concern that the general partners had not acted properly to recover the partnership assets and that Appellants should be compensated (*Ibid*) Mr Tomilson responded on February 14, 2001, that “talk of settlement is entirely

premature,” stating that “AIMCO will use its best efforts to reclaim” money properly due to the partnership. He further stated, “we must await Boston Financial Group’s reply to my inquiries.” (Ibid.) Appellants were thus left with no other option but to wait for Respondents to act to recover the partnership assets. Respondents had until 2002 to file suit to recover these assets, but failed to do so. (Davis Aff 4-7-10, p 12-14.) At that time, Appellants incurred a legally cognizable injury by Respondents, the Parkview lawsuit was filed the following year, and the filing of this lawsuit was postponed in light of the *status quo* agreement referenced above.

From the time this case was filed, the primary agenda of the Respondents and their counsel was to prevent Appellants’ claims from being heard on the merits. The reason, which was known only to Respondents, did not become known to Appellants until many years later, when the discovery in this litigation revealed the secret which Respondents and their counsel had fought so hard to conceal. The revelation of the secret actually came in the form of three separate discoveries: (1) a memo by BFG employee Ford Von Weise, detailing the transactions between BFG and AIMCO, evidencing a conscious decision by AIMCO to put its own interests ahead of those of the Appellants (Memo 8-31-99, p 1-2), (2) the fact that AIMCO was under significant scrutiny by HUD and the United States Department of Justice as a result of kickback schemes involving management fees charged on properties owned and/or managed by AIMCO, its subsidiaries or affiliates, (3) the fact that the properties involved in this litigation were part of the properties involved in the management fee kickback scheme, but their involvement had been concealed by AIMCO from HUD and/or the Justice Department when AIMCO was negotiating a fine for its participation. (Davis Aff p 19-20) It then became evident that AIMCO, although assuring Appellants it was taking steps to recover the apartments complexes, never had any intention to do so, it was not willing to jeopardize the deal it had struck with HUD and the Justice Department in order to avoid criminal prosecution. (Davis Aff p 19-20.)

Respondents were unsuccessful on two (2) prior attempts before two (2) separate judges

in the Parkview case to have the claims dismissed, and thus avoid a determination on the merits. This did not deter them, however, from making yet a third attempt to do so in this and two other related cases, once they were assigned to the judge. The judge ruled that he was bound by the prior decisions of Judges Buckner and Coltrane in Parkview as to the motions for dismissal in this case, but specifically noted that the issue of whether Appellants' claims were barred under the statute of limitations had not been decided. The judge first heard arguments on this issue on October 4, 2006. Respondents limited their arguments to only the Palmetto, Roosevelt and Orleans cases. Although not revealed at the time, Appellants' counsel later discovered that Respondents' counsel could not include the Pinewood case in the argument because Mr. Johnston had, in fact, filed a suit against the defaulting purchaser but had failed to pursue it and it was dismissed with prejudice. (Pendarvis Aff 4-22-10, p. 26-27, Ex. 93, (54 pages))

Appellants asserted the equitable estoppel doctrine in defense of the statute of limitations argument, based on the "status quo" agreement referenced earlier whereby it was agreed to postpone filing the cases at issue. Appellants also argued that a twenty-year statute of limitations was applicable, since the suits were brought for breach of partnership agreements executed under seal. Appellants further asserted that, in any event, the suits were timely within a three year statute of limitations because there was no legally cognizable injury resulting to them *as a result of Respondents' conduct* until Respondents permitted their statute of limitations to expire without taking action against the defaulting purchasers. The judge made no decision at the time, but later denied the motion to dismiss based on the statute of limitations issue as to the three affected cases, he permitted Respondents to raise the issue again once discovery had been undertaken. (Order 2-13-07, p. 1-5)

Respondents later moved for summary judgment in the Orleans, Palmetto and Roosevelt cases, based upon the statute of limitations defense. Again, this motion was not directed at either the Parkview or Pinewood cases, it was heard on November 19, 2007. The arguments were

virtually identical to those presented earlier in the motion to dismiss (Tr 11-19-07, p 41, ll 9-24) Finding that a genuine issue exists as to material facts concerning the statute of limitations, the judge denied Respondents' motion for summary judgment (Order of 6-5-08, p 1-2) This was the last time that the judge declined any request for substantive relief by counsel for the Respondents Instead, he began to impose a double standard on the parties, holding Appellants to a significantly higher standard than Respondents He ultimately ordered Appellants to produce privileged communications with their counsel in this case and the related cases, and threatened to dismiss their claims if they failed to do so Appellants were thereby put in the untenable position of having to give up their right to privileged communications with their attorney in order to comply with the judge's order and preserve their claims Notwithstanding the detailed nature of Appellants' discovery responses and numerous supplements thereto, the judge adopted the argument of Respondents' counsel that the responses were deficient Appellants sought interim appellate relief, which was denied Appellants declined to produce the privileged documents and were unable to satisfy the judge as to their discovery responses This led to his dismissal of their claims in each of these cases This course of events, and Appellants' efforts to avoid the dismissal of their claims, are hereinafter discussed in greater detail

ARGUMENTS

Given the time and space constraints applicable to these appeals, it is impossible to identify and discuss each abuse of discretion by the judge over the past five (5) years he has presided over these cases, as he repeatedly made rulings which were not supported by the evidence or were controlled by errors of law The arguments in this appeal, therefore, seek to address the more obvious and egregious rulings and conduct on his part

1 Judge Early erred in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for Appellants failure to disclose privileged communications with their attorneys, therefore, his order of April 6, 2010, as well as

prior orders upon which it is based, should be reversed and vacated (Issue 1, Orders dated 12-17-08, 3-3-09, 6-2-09, 6-16-09, 7-28-09, 4-6-10, 9-16-10, 10-22-10, 12-11-10) Dismissal of Appellants' claims, which had been sought from the outset by Respondents' counsel, was the first and only sanction imposed or even seriously considered by the judge for what he perceived to be misconduct on the part of the Appellants Dismissal of Appellants' claims, coupled with an award of attorneys fees and costs, was the harshest sanction short of incarceration that the court could impose, Appellants contend that it should not have been utilized given the facts of this case, and that the judge abused his discretion in doing so This is particularly true in light of the facts that (1) less draconian alternatives were available, (2) Appellants offered to submit to lesser sanctions and took extraordinary steps to avoid the dismissal, (3) the judge repeatedly adopted arguments of Respondents' counsel as evidence for the factual basis to support his decision, and (4) the judge repeatedly deviated from the law of this State in order to effect the dismissal

“When the court orders dismissal, or the sanction itself results in dismissal, the end result is harsh medicine that should not be administered lightly The moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction ” *Griffin Grading and Clearing Inc vs Tire Service Equipment Mfg Co Inc* 334 SC 193, 511 SE2d 716 (Ct App 1999) (striking of pleading as discovery sanction reversed) “The sanction imposed should be reasonable, and not go beyond the necessities of the situation to foreclose a decision on the merits of a case The sanction should be aimed at the specific misconduct of the party sanctioned The sanction should be a rifle shot, not a shotgun blast ” *The Balloon Plantation Inc vs Head Balloons Inc et al* 303 SC 152, 399 SE2d 439 (Ct App 1990) (trial court's dismissal for failure to comply with discovery order reversed, calling the sanction “a hydrogen bomb ”) Dismissal has been held an inappropriate sanction where “any number of lesser, more narrowly tailored sanctions would have sufficed ” *Karppi v Greenville Terrazzo Co Inc* 327 SC 528, 489 SE2d 679 (Ct App 1997) The record in this case is clear that the judge did not

comply with the law of this State, as cited above, in imposing sanctions in this case

The judge dismissed Appellants' claims on April 6, 2010, ("Dismissal Order") finding that Appellants' were in contempt for failing to abide by his orders of March 3, 2009, ("Discovery Order") requiring them to provide "adequate responses to discovery requests" and July 28, 2009 ("Privilege Order") requiring them to produce privileged communications with their counsel. On April 22, 2010, Appellants moved to alter or amend the Dismissal Order (Motion 4-22-10, p 1-52). This motion was denied on September 16, 2010 (Order 9-16-10, p 1-2). A review of the Dismissal Order necessitates a review of the two underlying orders. The present discussion concerns the Privilege Order, the Discovery Order is discussed in detail under Issue 2.

Rule 26(b)(1), SCRCp, excludes privileged materials from documents and information normally subject to discovery. "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter." (Id., Emphasis added). The exemption of privileged materials from discovery, particularly those protected under the attorney-client privilege, rests upon the historical and societal value attributed to that privilege. As this Court has stated:

The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained. The attorney-client privilege belongs to the client and not the attorney, and may be waived only by the client. *Wilson v. Preston*, 378 SC 348, 662 SE2d 580 (2008), citing *State v. Doster*, 276 SC 647, 284 SE2d 218 (1981).

"The attorney-client privilege also applies to communications originating from the lawyer rather than from the client." *Marshall v. Marshall*, 282 SC 534, 320 SE2d 44 (Ct. App. 1984). "The trial court must determine the question of privilege without first requiring disclosure of the substance of the communication." *Wilson supra*. In this regard, the "trial court should not require disclosure of attorney-client communications to other parties without first determining whether the communications are privileged by inquiring into all the facts and circumstances of the communication." *Ibid*. As shown in the following discussion, the judge did not do this.

Both sides sought discovery from attorneys, however, there was a substantial and critical difference in the positions of the respective parties. Appellants sought information relating to attorneys hired by Respondents *to represent the limited partnership in separate proceedings*, ostensibly to recover the partnership assets. Two of these attorneys, Mr. Howson and Mr. Brown, were listed as witnesses by Respondents in their initial discovery responses, a third, Mr. Tomilson of the Bryan Cave law firm, became known to Appellants as a result of communications between Mr. Howson and the defaulting purchaser. The role of these attorneys was a critical component of Appellants' action, particularly with respect to their claim for breach of fiduciary duty. (Bailey Aff 3-30-10, p. 7-8)

Mr. Howson was hired to represent the partnership following the October 2000 meeting. Appellants were unaware at that time of the tremendous conflict of interest on the part of Respondents, whereby their role as general partner directly conflicted with their own self interest in avoiding criminal prosecution. The instructions given to the attorneys by Respondents concerning the nature and scope of their retention were clearly relevant, Respondents, however, asserted a claim of attorney-client privilege to keep this information from Appellants. Mr. Howson contacted the defaulting purchaser, and received a response from their counsel, Leighton Lord, which referenced AIMCO's prior refusals to take the property back when offered. At that point, Mr. Tomilson took over the communications from Mr. Howson, of crucial importance is the fact that Mr. Tomilson was a member of the Bryan Cave law firm - the very firm which represented AIMCO and negotiated a \$5,000,000.00 fine in lieu of criminal prosecution!

Appellants served discovery requests and deposition notices relating to the involvement of these attorneys *with respect to their representation of the limited partnership* they did not seek information concerning any communications between Respondents and their counsel in this case. When Respondents asserted the attorney-client privilege, Appellants filed a motion to compel on November 7, 2007. Appellants' positions were in keeping with the existing law of this State, and

included, *inter alia*, (1) Appellants were members of the partnership “client”, and therefore within the persons entitled to share privileged communications, (2) Respondents had waived the privilege by providing Appellants with communications generated by these attorneys and inviting Appellants to communicate directly with the attorneys, (3) Respondents were required as fiduciaries to make full disclosure to Appellants, including communications with counsel for the partnership, and (4) the evidence of fraud resulting from the Respondents’ conflict of interest was sufficient to place Appellants within the “crime-fraud” exception to the attorney-client privilege³ The judge rejected these arguments at the urging of Respondents, and ruled that, not only were Appellants not entitled to this information, but that every document listed on the 71-page Privilege Log of Respondents was privileged and not discoverable (Order 12-17-08, p 1-2), he made this ruling without ever seeing a single document, notwithstanding that Appellants had specifically asked him to conduct an in-camera review of those documents Furthermore, he received no information concerning the privileged nature of these documents other than from Respondents’ counsel, by way of argument or statements in their memoranda Therefore, there was no proper evidence to support his findings in this regard *Higgins v MUSC*, 326 SC 592, 486 SE2d 269 (Ct App 1997) (“factual statements of the attorneys, whether made during argument or in written briefs or memoranda may not be considered by the court”) Likewise, he clearly did not inquire “into all the facts and circumstances of the communications,” as required by *Wilson supra*, and *Tucker v Honda of SC Mfg Inc* 354 SC 574, 582 SE2d 405 (2003) Accordingly, there was a clear abuse of discretion, as the order was not supported by the evidence and was controlled by an error of law, the order of December 17, 2008 should be vacated

Conversely, Respondents sought documents relating to Appellants’ privileged

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For a detailed discussion of these arguments which were presented to the lower court, see Appellants’ Memoranda dated 11-19-07, p 1-30 and 1-16-09, p 1-4

communications with their attorneys *in this case*. This did not occur until August, 2008, even though many of these documents had been listed by Appellants in Parkview on their Privilege Log since 2005. Respondents claimed that the documents were discoverable because they were relevant to the statute of limitations issue. It is important to note that the communications which Respondents sought were communications between Appellants and their counsel *in this litigation*. The privileged nature of the communications between Appellants and their counsel, and the duty of counsel to protect such communications from disclosure, was acknowledged by counsel for Respondents as early as 2007⁴ (Tr. 11-19-07, p. 40, ll. 22-24.)

In an attempt to get around this obstacle and the prohibition of Rule 26(b), Respondents claimed that Appellants had waived their attorney-client privilege and work product protection. “The definition of waiver, approved by this court in many cases, is ‘the intentional relinquishment of a known right.’ It may be either express or implied. If claimed to have been express, *it must appear to have been a clear, unequivocal, and decisive act showing such a purpose*. If claimed to have been implied, *it must appear that the opposite party has been misled to his prejudice* into the honest belief that such waiver was intended or consented to.” (Emphasis added) *W.S. Gray Cotton Mills v. Spartanburg County Mills*, 139 S.C. 223, 137 S.E. 684 (1927). As herein discussed, Respondents failed to prove that Appellants waived their attorney-client privilege.

There was no express waiver by Appellants, as they had asserted from the outset that their communications with their counsel were privileged. Therefore, Respondents advanced the theory that Appellants had *impliedly* waived their privilege and protection through what they called an “at issue” waiver. Under Respondents’ theory, Appellants, *merely by filing their complaint*, had

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In arguing against Appellants’ request for information and documents concerning attorneys hired for the partnerships, Mr. Johnston stated to the judge, “Clearly Mr. Bailey is not going to turn over what he sent to his limited partners and what they sent to him.”

put the statute of limitations “at issue” and thereby impliedly waived any claim of privilege or protection as to any documents or information which might be relevant to that issue Appellants repeatedly pointed out to the judge that there was absolutely no support for such a position under the law of this State and that, in fact, South Carolina law was exactly the opposite - the statute of limitations is an affirmative defense under Rule 8(c), SCRPC, and must be affirmatively pled or it is waived This requirement was clearly recognized by Respondents, and is confirmed by their own Answer, which asserts the statute of limitations *as an affirmative defense* Furthermore, Respondents never made any showing that they had been misled to their prejudice into believing Appellants had intended or consented to any implied waiver Cf *W S Gray supra*

Nevertheless, the judge again adopted the argument of Respondents’ counsel and held that, *merely by filing their complaint*, Appellants had put the statute of limitations at issue and impliedly waived any privilege or protection concerning any documents which might be relevant to that issue (Order, 7-28-09, p 6, Order, 4-6-10, p 20) The Discovery Order states that the finding of implied waiver was derived exclusively from Respondents’ memorandum and their argument concerning the statute of limitations This reliance upon arguments of counsel is contrary to the laws of this State Cf *Higgins, supra* The Dismissal Order states, “The factual bases for the Court’s rulings on the privilege issues have not changed ” (Order, 4-6-10, p 20) This order states that the judge “considered at length” the arguments and memoranda of Respondents’ counsel, that he “disagrees” with Appellants’ arguments showing the factual and legal errors in the Privilege Order, and concludes, “*Once privilege was waived as to the documents (by mere filing of the suits and/or by reasons of the allegations in the Orleans and Roosevelt complaints) they were subject to discovery in all five cases* ” (*Ibid* , emphasis added) There is no law in this State to support such a finding, the judge abused his discretion and the order should be vacated

The Dismissal Order does not quote language from the Orleans and Roosevelt complaints

which it references, the reference apparently relates to Respondents' assertion, *in their memoranda*, that certain language in the complaints in the two cases impliedly put at issue the statute of limitations. These two complaints refer to the parties' agreement to forgo discovery and the filing of additional lawsuits in order to appraise the properties and mediate all claims, and allege that Respondents misled Appellants, thereby resulting in a delay of their ability to recover their damages. A fair reading of these two complaints reveals that the statute of limitations is not mentioned at all, and that the allegations only serve to provide the basis for Appellants' claims for damages resulting from the delay occasioned by the Respondents' misuse of the appraisal and mediation process. It does not meet the test for implied waiver under South Carolina law. The implied waiver must be "reasonably inferable" from the conduct of the party. *Canal Insurance Company v Caldwell*, 338 SC 1, 524 SE2d 416 (Ct App 1999), it must involve "circumstances *indicating an intent to waive*" (Emphasis added). *Bonnette v State*, 277 SC 17, 282 SE2d 597 (1981). "Waiver will not be implied from doubtful acts." *Zeller v Cumberland Truck Sales*, 272 SC 558, 253 SE2d 111 (1979). The language in the two complaints does not meet this criteria for waiver, to interpret the allegation concerning delay and resulting claim for damages as injecting the issue of the statute of limitations so as to impliedly waive any attorney-client privilege with respect to such issue is a gross distortion of the language of the pleadings, represents a deviation from the law of this State and constitutes an abuse of discretion by the judge. Incredibly, the judge adopted Respondents' arguments and held that such language justified his finding that Appellants had waived their right to claim privilege or protection.

The dismissal of Appellants' claims and imposition of monetary sanctions based on the implied waiver arguments demonstrates a clear abuse of discretion. "An abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an error of law." *Austin v Stokes-Craven Holding Corp*, 387 SC 22, 691 SE2d 135 (2010). The judge's reliance upon arguments of counsel, as set forth in their oral arguments, memoranda and

proposed orders, in order to establish a factual basis for his decision, shows that his orders of July 28, 2009 and April 6, 2010 conflict with *Higgins supra* they were not supported by proper evidence, and were clearly controlled by errors of law Accordingly, they should be vacated

Respondents' argument that Appellants had waived their attorney-client privilege, so readily adopted by the judge, had previously been rejected by the Honorable Gary E Clary, who was appointed as Special Master for the specific purpose of examining this issue The judge, confronted with Appellants' request for an in-camera review of all documents claimed to be privileged by either party, acknowledged that he did not "have the time and the resources to go through all of the attorney-client documents," and referred the privilege issue to Judge Clary, including documents concerning the lawyers hired to represent the partnerships (Tr 12-9-08, pp 49-61, quote at p 59, ll 17-19, Orders, 12-30-08, p 1-3, 1-31-09, p 1-2, 4-9-09, p 1-2) The parties were required to share equally the fees charged by Judge Clary for his services as Special Master

Judge Clary spent several days reviewing the documents Respondents reasserted their arguments concerning implied waiver, Judge Clary rejected these arguments (Amended Report p 4) Judge Clary also ruled that certain documents which Respondents claimed to be privileged were not privileged and were discoverable by Appellants (*Ibid*, p 14) During Judge Clary's review, Appellants' counsel discovered that counsel for Respondents had, for several months, been in possession of documents from the Bryan Cave law firm, which Appellants had sought in their prior discovery requests Respondents had not disclosed that they were in possession of this evidence Once these documents became known to Appellants, Respondents immediately sought to include them on their growing Privilege Log The issue of their "privileged" status was added to the task of Judge Clary He determined that many of these documents were not privileged, and ruled that they were subject to discovery by Appellants

When the judge adopted Judge Clary's rulings *per se* (Order 6-2-09, p 1-2), Respondents moved that Judge Clary's rulings be altered in order to reinstate the protections earlier given by the judge. They also asked that the judge reject Judge Clary's findings concerning the privileged nature of Appellants' communications with their counsel. (Rule 59 Motion of Respondents 6-15-09, p 1-9) Appellants also noted significant errors in Judge Clary's findings, including, *inter alia*

- (1) his adoption of Respondents' "divergence" theory which is not recognized in South Carolina and which materially alters South Carolina law as to fiduciary duties, *Cf, Anthony v Padmar Inc* 320 SC 436, 465 SE2d 745 (Ct App 1995) (general partners owe fiduciary duties to limited partners, and violate such duties when they fail to disclose all known information that is significant and material, especially in transactions in which they have a pecuniary interest), *Beck v Clarkson*, 300 SC 293, 387 SE2d 681 (Ct App 1989) (partners' fiduciary duty is continuous, and extends even past dissolution of the partnership) (Bailey Aff 3-30-10, p 8),
- (2) his rejection of the "common interest doctrine" concerning privileged communications, finding Appellants waiver of the attorney-client privilege concerning communications made to persons possessing a common interest with Appellants. The judge's adoption of Judge Clary's rulings conflict with the law of this State. *Cf Tobaccoville USA Inc vs McMaster*, 387 SC 287, 692 SE2d 526 (2010) (common interest doctrine adopted by Supreme Court under facts presented "The common interest doctrine protects the transmission of data to which the attorney-client privilege or work product protection has attached when it is shared between parties with a common interest in a legal matter. The inquiry is whether or not the matters discussed in the allegedly privileged documents are matters of common interest. So long as the documents at issue were covered by an applicable privilege, when created, that privilege continues until waived. When the common interest doctrine applies, it creates an exception to any potential waiver of privilege.")

Again, based on nothing but the arguments of Respondents' counsel, the judge modified his Order of June 2, 2009 to accommodate the requests of Respondents' counsel and deny the relief sought by Appellants. By Order of July 28, 2009, he altered Judge Clary's rulings, providing Respondents with the protections they sought while requiring Appellants to produce

communications with their counsel which Judge Clary had protected as privileged.⁵ The Privilege Order did not provide for any redaction of counsel's impressions or any other protections, if obeyed, it would render meaningless their attorney-client privilege, and place Appellants in the position of providing Respondents with their "game plan" for this litigation (Bailey Aff 3-30-10, p 8-9) Furthermore, the order applied to all limited partners in all five cases, even though the Parkview Appellants were clearly in a different position than those in the other cases, having filed their case as early as 2003, and the facts and participants in each case were different

Appellants made several attempts and efforts to find some alternative to the dilemma occasioned by the Privilege Order. These included, *inter alia*

- (1) First, they sought to have the order amended under Rule 60, SCRCF, in order to correct mistakes of fact and law. At the urging of Respondents' counsel, this motion was denied by the judge (Order 4-6-10, p 28)
- (2) Appellants were concerned that a partial production of their communications with their counsel could constitute a total waiver of their attorney-client privilege, in light of the decision in *Marshall supra* (disclosure to a third party "waives the attorney client privilege not only to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject ") (Tr 12-9-08, p 55, l 17- p 56, l 7) The judge's ruling also began to cause Appellants to avoid communicating with their counsel, adversely affecting their representation in this case (Davis Aff p 23-24, Bailey Aff 3-30-10, p 18, Pike Aff , p 3, Hinnant Aff , p 15, Rentz Aff p 3, Reynolds Aff , p 3, Hodge Aff p 5, Ivey Aff , p 3-4)
- (3) At the urging of Respondents' counsel, the judge threatened to dismiss their claims if Appellants withheld their privileged communications. Appellants urged the judge to consider lesser sanctions, including a contempt citation which would entitle them to an immediate appeal (Bailey Aff 3-30-10, p 14) This request was opposed by Respondents' counsel and, again, the judge acceded to their wishes, and prepared to dismiss their claims. This placed Appellants in the untenable position of either (1) complying with the order, which would destroy their attorney-client privilege and give Respondents unrestricted access to their confidential communications with their counsel, or (2) declining to comply with

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Prior to the entry of the 7-28-09 order, Appellants' counsel objected to it on the basis that Rule 53, SCRCF, prohibited the judge from altering the rulings of the Special Master. This issue was addressed in Appellants' prior Petition for Writ of Prohibition and the arguments stated therein are adopted and incorporated into this brief. See also Bailey Affidavit 3-30-10, p 11-13

the order, which would put them at risk of having their claims dismissed and deprive them of a trial on the merits

- (4) Through independent counsel, Appellants then sought relief in the appellate courts, as documented above. Simultaneously, Appellants asked Chief Justice Toal to transfer their cases to the Business Court, but their request was denied.
- (5) Appellants filed a motion for protection on February 22, 2010, requesting that the judge consider other options, including permitting them to submit their attorney-client documents under seal for an in-camera review. The judge denied this request. (Motion for Protective Order, p. 1-4, Order 10-22-10, p. 1-4)⁶

On April 6, 2010, the judge executed the order prepared by Respondents' counsel, finding Appellants in contempt of court and imposing the harshest sanction possible: dismissal of their claims and requiring them to pay attorneys fees and costs to Respondents. As shown above, this amounted to an abuse of discretion, it is not supported by the evidence in the case, and is controlled by numerous errors of law. *Cf. Grosshuesch v. Cramer*, 377 SC 12, 659 SE2d 112 (2008) (trial court erred in holding party in contempt for failing to respond to discovery requests which would have required party to waive privilege against self incrimination). If it is allowed to stand, this decision will affect not only the litigants in this case, but litigants in all future cases. Specifically, future litigants, *merely by filing complaints*, will be deemed to have put at issue the statute of limitations and impliedly waived their attorney-client privilege as to that issue, they may be deemed to have waived their attorney-client privilege because of language in other complaints filed by other parties in other cases. Future defendants will no longer have to raise the statute of limitations as an affirmative defense and Rule 8(c), SCRCP will become a nullity. Future litigants standing in a fiduciary relationship will be confronted with a significant change in existing law, as fiduciary duties will no longer include full and complete disclosure of significant and material information, including disclosure of conflicts of interest. Fiduciary duties

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Although the judge denied Appellants' request to submit documents under seal for in-camera review, he earlier granted Respondents' request to submit documents to him under seal for in-camera review as part of their efforts to avoid the rulings of Judge Clary. (Order, 8-31-09, p. 1-2.)

will no longer be continuing in nature, throughout the fiduciary relationship, but will end when there is a “divergence of interest” between members within the relationship Appellants contend that these deviations from existing law should not be adopted by this Court, as they were by the judge, accordingly, the orders discussed above should be reversed and vacated

2 Judge Early erred in imposing the sanctions of dismissal of Appellants’ claims and requiring them to pay costs and attorneys fees to Respondents for alleged deficiencies in their discovery responses, thereby requiring vacation of his order of April 6, 2010, as well as prior orders upon which it is based **(Issue 2) (Orders dated 12-17-08, 3-3-09, 3-3-09 (Granting in Part and Denying in Part) 4-6-10)** Apparently recognizing the deficiencies and reversible error of the rulings in the Privilege Order, Respondents sought to find a back-up excuse to justify the dismissals They did this by accusing Appellants of failing to comply with discovery rules Again, the judge readily adopted Respondents’ position, notwithstanding that it was not supported by proper evidence or existing law In the Dismissal Order, and at the request of Respondents’ counsel, the judge found Appellants in contempt of court for failure to comply with his prior order of March 3, 2009 (Discovery Order), and dismissed Appellants’ claims in all five (5) cases as the sanction for the contempt He further ordered that Respondents were entitled to “receive a monetary award to compensate them for the reasonable costs and attorneys fees incurred in connection with their Motion to Compel Discovery and their two Motions for Sanctions ” Appellants contend that the rulings of the judge in this regard result from and are tainted by the bias and prejudice hereinafter discussed, and evidence the judge’s imposition of a double standard concerning discovery

The finding of contempt and the imposition of sanctions also result from an abuse of discretion on the part of the judge and should accordingly be vacated, as these are unsupported by the evidence and controlled by errors of law *Austin supra* The factual findings in the

Dismissal Order and the Discovery Order were taken from the memoranda supplied to the judge by counsel for Respondents. As previously noted, it is improper for a judge to use the unsworn statements of counsel, whether in argument or in a memorandum, to establish factual findings. Cf., *Higgins supra*. The factual findings of both orders simply parrot the arguments of Respondents' counsel and the language of their memoranda.

In order to understand the deficiencies in the Dismissal Order, it is necessary to examine the underlying Discovery Order upon which it is based. The Discovery Order followed a motion to compel filed by Respondents, which was heard on December 9, 2008. The motion was accompanied by a memorandum containing Respondents' arguments, which was filed the day before the hearing. The Discovery Order mirrors the memorandum and references seventeen (17) answers to interrogatories and forty three (43) responses to production requests which the judge found to be "incomplete and inadequate." This finding is not supported by the evidence. An examination of Appellants' discovery responses clearly shows that they met or exceeded the requirements of the South Carolina Rules of Civil Procedure, and certainly exceeded the discovery responses provided by counsel for Respondents. This Court is respectfully requested to examine these responses in determining whether the judge abused his discretion concerning their adequacy. Appellants' discovery responses are addressed in the affidavit of Thomas A. Pendarvis, 4-22-10, p. 2-24. Due to the voluminous nature of the responses, it is impossible to discuss each of them, however, the Court is directed to the following examples:

- 1 On July 14, 2005, Appellants in Parkview responded to Respondents' initial discovery requests in that case. The responses were based upon the information and documents in the possession of the Parkview Appellants or their counsel at that time, and included, *inter alia* (a) valuation for the Parkview apartments, (b) eleven pages listing persons having knowledge or information concerning the facts of the case and a summary of their testimony, (c) seven pages listing generic categories of witnesses, as the specific individuals were then unknown, (d) twenty four pages specifically identifying documents in their possession, and enclosing copies of any documents not in possession of Respondents, and (e) information relating to the expert witness who had been retained. *The information produced*

was in addition to more than 35 000 pages of documents already produced in the case ⁷ (Appellants' answers to interrogatories, p 4-53) Parkview Appellants also provided Respondents with a privilege log for documents being withheld under a claim of privilege between 2000 and 2003 Counsel for Respondents made no complaint regarding these responses

- 2 Appellants supplemented these discovery responses on November 6, 2007 by adding witnesses and documents relating to insurance valuations for the subject properties (Pendarvis Aff , 4-22-10, p 4, Ex 10, 11) Supplemental responses were provided on numerous occasions prior to the issuance of the Dismissal Order as information became known to Appellants These included, *inter alia*, supplements identifying witnesses and documents relating to (a) assessed values of the subject properties (Pendarvis Aff , p 5-6, Ex 13, 14, 22, 23), (b) a title history for each of the subject properties (Ibid , p 6, Ex 21), and (c) appraised values, HUD rental comparability studies and subsequent sales information for the subject property (Ibid , p 8, Ex 29 and 30) These supplements do not include the discovery responses by Appellants to Respondents' second set of discovery requests dated August 28, 2008
- 3 In August, 2008, more than three years after the filing of this case, less than one year before the trial date in May, 2009, and without having taken a single deposition, counsel for Respondents served a second set of discovery requests (Ibid, p 11, Ex 45) These requests were incredibly vague, burdensome, and overly broad, and far exceeded the abuses described in *Oncology and Hematology Associates of SC vs SC DHEC*, 387 SC 380, 692 SE2d 920 (2010) For example, interrogatory #13 sought voluminous information regarding accountants, financial planners and advisers, tax advisers or preparers, et al with regard to each of the partnerships, properties, notes, sales transactions, purchasers, subsequent sales, Mr Hediger, subsequent purchasers and/or the Respondents (Ibid , p 11, Ex 45, p 17) Interrogatory #17 required Appellants to "describe in detail all actions taken to study, assess, analyze, estimate or project the impact of the changes in the tax laws during the 1980s on the value of, or market for, the Properties or any other low-income housing or HUD-regulated properties " (Ibid , p 11, Ex 45, p 19-20) The interrogatories had no time frames, so that they covered the entire life span of each of the Appellants (Ibid, p 11) The Discovery Order sanctioned these and other interrogatories, finding Appellants' answers to be "incomplete and inadequate "
- 4 Respondents' requests for production were no better, requesting, for example, "all documents concerning any of the properties, the limited partnerships, the notes, the sales transactions, the purchasers, Hediger, subsequent sales transactions, and

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Nearly 34,000 pages of these documents came from one source, *i e*, Gary Hediger d/b/a Hediger Enterprises, Inc Although less than 5,000 pages of these actually related to the five (5) properties involved in the cases on appeal, Appellants' counsel was required to review each page in order to determine any relevancy to the issues involved in this litigation (Tr 7-1-08 p 34, ll 10-24)

subsequent purchasers” (*Ibid* , p 11, Ex 45, p 8-9) They also requested documents regarding tax information, including estate and gift taxes and investments (*Ibid*, p 11, Ex 45, p 9) Incredibly, although the Respondents had managed the respective properties, and the Appellants, as limited partners, had nothing to do with them since 1975, Respondents sought documents concerning the “operating statements, financial statements, balance sheets, rent rolls” and other financial information for these properties, as well as documents concerning the “physical condition” of the properties (*Ibid*, p 11, Ex 45, p-9-10), as former managers, Respondents already had access to these documents *Respondents even sought all documents reflecting criminal activity or suspected criminal activity at the Properties or in the immediate vicinity of the Properties* (*Ibid* , p 11, Ex 45, p 10) The Discovery Order nevertheless sanctioned these requests, finding Appellants’ responses to be “incomplete and inadequate ”

- 5 Based on the ages and health of Appellants, some of whom are widows or heirs of original partners, Appellants responded to the best of their ability Many Appellants did not possess any responsive documents, and Appellants’ counsel specifically pointed these facts out to the judge at the hearings on the Respondents’ motions For example, on December 9, 2008, counsel stated
- a “I can show you 15 supplemental discovery responses or better that we have done Every time we get something, we pass it along to them We send it in If I’ve got it, they’ve got it ” (Tr 12-9-08, p 37, l 18-21)
 - b “There were 4 primary partners originally in Parkview Mr Davis is now almost 80 years old One was Rentz He is dead One was Pike He is dead The fourth was Hodge He is dead The only living creature out of that original group is Mr Davis We didn’t get a lot of materials from the Orleans partnership and different ones The reason is we have asked for these documents but people are either dead or they’re too old ” (*Ibid* , p 40, l 24 - p 41, l 9)
 - c “In the case of Parkview widows have succeeded to their partnership interests and in the case of Mr Hodge, his daughter has as part of the estate So, we have asked them – each of them – to go back and look and see what you can find Get it to us whatever it is Go through old trunks Go through safe deposit boxes Go to anything you can find that relates to this They have presented it to us We have turned it over We have turned over every document that we have been presented with with the exception of documents that are listed on our privilege log It’s just that simple ” (*Ibid* , p 41, ll 11-22)

Furthermore, at a later hearing on August 24, 2009, Appellants’ counsel reiterated these ongoing concerns to the judge

- a “We are having difficulty getting a lot of the documents from people who can’t communicate because of their health issues ” (Tr 8-24-09, p 6, ll 5-7)

- b “We’ve had to send these people out searching for materials not in their immediate control We had our clients looking for these documents ” (Tr 8-24-09, p 6, ll 17-19, 23-24)
- c “This production is all we could do It’s absolutely the best we can do Every time we’ve gotten new documents, we have delivered them Some of the things are things that are just not within the control of these people Life insurance applications they made back in the 60s they’re having to go back We’ve gotten as many of these documents as we can And we’re going to continue to comply as we’re able ” ” (Tr 8-24-09, p 7, ll 10-11, l 21- p 8, l 4)

- 6 The judge also found that Appellants’ responses concerning their damages were deficient, both the Discovery Order and subsequent Dismissal Order specifically rely upon Respondents’ Supplemental Memorandum to support this finding (Dismissal Order, p 10) Notwithstanding that the reliance on the memorandum violates *Higgins supra*, the finding is simply not supported by the evidence Parkview Appellants’ initial discovery responses in 2005 were specifically incorporated into the discovery responses in this case, they set forth the manner in which their damages were calculated, and included the fair market value for the apartment complex as a component of this calculation Appellants had nothing to do with the apartments subsequent to Respondents’ entry into the partnership in 1975, and were not privy to many documents which would establish the fair market value As part of their discovery efforts, however, they were able to obtain a number of values for each of the apartments from which the jury could ascertain the fair market value needed to calculate damages, and provided these to Respondents as noted above With the exception of Pinewood, Appellants provided an itemization of the values for each apartment complex to Respondents on multiple occasions, including following the mediation in March, 2008 and again as to Parkview in their Third Supplemental Response to the August 28, 2008 discovery (Appellants’ Third Supplemental Response and Bailey letter of 1-25-10, (all pages)) The itemizations showed ranges of values for each complex The Appellants are not required to itemize the amount of their damages to a mathematical certainty *Holly Woods Ass vs Hiller*, 392 SC 172, 708 SE2d 787 (Ct App 2011), *Whisenant v James Island Corp* , 277 SC 10, 281 SE2d 794 (1981) (“proof with mathematical certainty of the amount of loss or damage is not required”) These responses clearly comply with the rules of procedure and the laws of this State
- 7 The judge also found that Appellants’ responses relating to their expert witnesses were deficient The Dismissal Order states, “the Parkview Plaintiffs’ Third Supplemental Responses fall well short of what is required by the General Discovery Order, as shown in Defendants’ Second Supplemental Memorandum at pp 9-14, Plaintiffs in the other cases have provided even less ” (Dismissal Order, p 9) (Emphasis added) Again, reliance on the memorandum violates *Higgins supra* furthermore, the finding is simply not supported by the evidence Following the hearing in January, 2010, Appellants’ counsel provided the judge and Respondents with the Third Supplemental Response referenced above Though unmentioned in the Order, Appellants’ counsel also provided a letter which stated that the supplemental responses were limited to Parkview in light of

the judge's comments that it was the first case scheduled for trial. The letter also expressed the belief that the supplemental responses were "in compliance with both your prior order and the South Carolina Rules of Civil Procedure," and added this sentence: "*If you agree we will provide similar updated responses in the other cases*." The judge did not respond, other than to issue the Dismissal Order once he received Respondents' memorandum. The supplemental responses specifically addressed both the damages and expert witness "deficiencies" about which Respondents and the judge had complained. Also, the valuations by the assessors, appraisers, insurance brokers, et al referenced above were included for Parkview, as well as a precise dollar valuation by two (2) experts (Ltr 1-25-10, Third Supplemental Response, (all pages)). In any event, Respondents knew the identities of all Appellants' experts since March 2008, and declined to depose them. Therefore, they were not prejudiced by any alleged deficiencies in Appellants' responses. Cf., *Holly Woods supra*, ("even if there was a discovery violation, we find no prejudice because Appellants failed to depose [the expert]")

The judge's interpretation of Respondents' discovery requests exceed discovery envisioned or permitted under the South Carolina Rules of Civil Procedure. They validate the concern of this Court, as expressed in *Oncology supra*, that "discovery practice has become a cottage industry and the merits of a claim are being relegated to a secondary status." Appellants' counsel informed the judge that the third supplemental responses were "as detailed and complete as I know how to make it in a written discovery response" (Ltr, 1-25-10, (all pages)). Appellants believe that their responses were adequate and that their cases should not have been dismissed based on the discovery responses. Respondents' discovery requests, as was the case in *Oncology supra*, are "abusive and beyond the pale." As the Court there noted, "the trial court must make an effort to impose reasonable discovery limits. The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure." The judge made no such effort and abused his discretion.

It is also apparent that the judge, in order to exercise his discretion as to the discovery issues, failed to weigh the factors required in such undertakings. Cf., *Samples v Mitchell*, 329 SC 105, 495 SE2d 213 (Ct App 1997), and cases cited therein. The order does not address any

weight given to the nature of the discovery requests, the discovery posture of the case, the existence of any wilfulness by Appellants, or the degree of prejudice to Respondents. This omission, in and of itself, is fatal to the judge's findings. As stated in *Samples supra*

A failure to exercise discretion amounts to an abuse of that discretion. When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred. The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised.

Accordingly, there was a clear abuse of discretion on the part of the judge, as both the Discovery Order and the Dismissal Order were not supported by the evidence and were controlled by errors of law, the orders of March 3, 2009 and April 6, 2010 should be reversed and vacated.

3 Judge Early was not legally qualified to accept and/or retain the assignment to preside over this case (Issues 3, Order 3-7-06) The general rule with respect to a judge's qualification to preside over matters before him or her is set forth as follows:

It is the judge's responsibility to disclose sua sponte all information of any potential conflict between himself and the parties or their attorneys when his impartiality might reasonably be questioned; neither the client nor his attorney have any obligation to investigate the judge's impartiality. Litigants have a right to have their causes tried fairly in court by an impartial tribunal, and are entitled to the due process requirement of a hearing before an impartial and disinterested tribunal. Where the circumstances are such as to create in the mind of a reasonable man a suspicion of bias, there may well be a basis for disqualification though in fact no bias exists. For this reason, a judge should disqualify himself where grounds for disqualification exist as well as in situations where his impartiality might reasonably be questioned. A judge should disqualify himself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment. 75 Am. Jur. 2d, Trial, §86 (Emphasis added)

The qualification of a judge in this State to preside over matters brought before them is ostensibly controlled by the Code of Judicial Conduct, which is entirely consistent with the foregoing general proposition of law. The Code, adopted by this Court under Section V of the South Carolina Appellate Court Rules, together with the pertinent canons and sections, is "intended to govern conduct of judges and to be binding upon them." Rule 501, SCACR,

Preamble “An independent and honorable judiciary is indispensable to justice in our society ”

Rule 501, SCACR, Canon 1A “Although judges should be independent, they must comply with the law, including the provisions of this Code *Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility Conversely violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law Ibid , Commentary (Emphasis added)*

Whenever the term “shall” is used in the Code, it imposes mandatory, non-discretionary conduct on judges, “it is intended to impose binding obligations ” Rule 501, SCACR, Preamble Accordingly, “A judge *shall* respect and comply with the law and *shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary*” *Ibid , Canon 2 A (Emphasis added) The Commentary to Canon 2 A explains*

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges *A judge must avoid all impropriety and appearance of impropriety* The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge *Actual improprieties* under this standard include violations of law, court rules or other specific provisions of this Code The test for *appearance of impropriety* is whether the conduct would create in reasonable minds a *perception* that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired (Emphasis added)

Furthermore, “A judge *shall be faithful to the law* and maintain professional competence in it,” “ *shall perform judicial duties without bias or prejudice,*” and “ *shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice* ” *Ibid , Canon 3B(2) & (5) (Emphasis added) As noted in the Commentary to this Canon, “A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute ” (Emphasis added) Additionally, as a general proposition, “A judge shall not initiate permit or consider ex parte communications ” unless such communications are “ expressly authorized by law ” Ibid , Subsection (7) and (7)(e) (Emphasis added) As stated in*

the Commentary to this section, *To the extent reasonably possible all parties or their lawyers shall be included in communications with a judge*

As to the issue of qualification *per se*, the Code provides, “A judge *shall* disqualify himself or herself in a proceeding in which the judge’s impartiality *might reasonably be questioned*, including *but not limited to* instances where (a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer ” *Ibid* , Canon 3E(1) (Emphasis added) Under this Canon, which imposes an *objective standard* of reasonableness as opposed to a subjective standard of impartiality in fact, a judge is *automatically disqualified* if his impartiality might reasonably be questioned *Nothing else need be shown* The specifics mentioned in Canon 3E(1) are simply *examples* of instances when a judge’s impartiality is reasonably at issue This position is supported by the Commentary to the Canon “Under this rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, *regardless whether any of the specific rules in Section 3E(1) apply* ” (Emphasis added)

At the time the judge was assigned by Chief Justice Toal to preside over this case, as well as the aforesaid four (4) related cases, the judge was disqualified to accept the assignment under Canon 3E At that time, he had a *personal* relationship with Ellis Johnston, lead counsel for the Respondents, which was substantially different from the *professional* relationship which he had with counsel for Appellants, and which went beyond the normally expected casual relationships existing between members of the bench and bar His relationship involving Mr Johnston inevitably leads to the conclusion that the judge’s impartiality might reasonably be questioned This relationship between the judge and Mr Johnston involved members of their families and included, *inter alia*, the following information which was *not* disclosed by the judge until years after these cases were assigned to him (a) the judge had known Mr Johnston’s wife for approximately 40 years, and she had been married to the judge’s college fraternity brother (T 3-

29-10, p 10, l 21-22, Order of 10-7-10, p 3), (b) the judge's son (Ross) and Mr Johnston's son (Caldwell) were close friends, had known each other for at least ten (10) years, were fraternity brothers in college, and had traveled together in Europe (T 3-29-10, p 10, l 13-16, Order of 10-7-10, p 3), and (c) the judge had a picture of his son and Mr Johnston's son together, which he keeps in his office (T 3-29-10, p 10, l 17-20)

Appellants and their counsel were totally unaware of *any* personal relationship between the judge and Mr Johnston when this case was assigned to the judge. Their close inter-familial relationship was clearly one whereby the judge's impartiality might reasonably be questioned, accordingly, the judge was automatically disqualified from accepting this assignment and should have made that fact known to Chief Justice Toal and to Appellants and their counsel. At the very least, this was certainly information which was clearly *relevant to the issue* of the judge's qualification to fairly and impartially preside in these cases, and therefore *should have been fully and completely disclosed on the record at the outset*.

Prior to accepting the assignment of these cases, the judge had an initial duty at least to fully disclose to Chief Justice Toal and Appellants the full and complete nature of this relationship with Mr Johnston. This is true even if the judge did not believe that the relationship with Mr Johnston would require his disqualification. As stated in the Commentary to Canon 3E, "A judge should *disclose on the record* information that the judge believes the parties or their lawyers *might consider relevant* to the question of disqualification, *even if the judge believes there is no real basis for disqualification*" (Emphasis added). Canon 3E recognizes that the integrity of the judiciary depends upon the candor of judges not only to disqualify themselves *sua sponte* as stated above, but at the very least to disclose on the record all information potentially relevant to the judge's qualification to preside. There is nothing in the record to indicate that the judge made any such disclosure prior to or contemporaneously with the assignment Order of

Chief Justice Toal In fact, the only time the judge made any disclosures on the record concerning his relationship with counsel for Respondents was not until March 2010, and then only after Appellants filed a motion requesting that he do so (Motion for Disclosure, p 1-3, Tr 3-29-10, (all pages))

A judge's duty to disqualify himself, or to at least disclose on the record all information which the parties or attorneys might consider relevant to the issue of disqualification, is not temporally limited by Canon 3 Therefore, the judge had a *continuing duty* to fully disclose to Chief Justice Toal and Appellants not only the relevant information concerning the relationship with Mr Johnston existing at the time of his assignment to these cases, but also any additional information concerning this relationship which developed subsequent to his assignment Furthermore, this continuing duty required the judge to fully disclose *on the record* all relevant information concerning the full and complete nature of his relationships with attorneys Anne Ross Rosen and Marvin Infinger once they became counsel of record for Respondents in these cases The record in this case clearly reveals that the judge violated this duty by making only cursory and partial disclosures, *off the record*, concerning relationships with Respondents' counsel prior to his formal disclosure in March of 2010 (Bailey Aff 3-30-10, p 2-5) The record also shows that even the one belated disclosure which the judge finally made on the record was not complete, nor was it entirely accurate (Bailey Aff 3-30-10, p 15-17, Bailey Aff 4-7-10, p 1-4) This will be discussed in greater detail in the following section

Based on the relationships described above and the judge's failure and refusal to make a full and complete disclosure concerning those relationships, the judge was not qualified to accept the assignment of the five cases under the Order of March 7, 2006 Appellants believe that such order would not have been issued had Chief Justice Toal been made aware of the full extent of these relationships Accordingly, the order assigning these cases to the judge should be vacated,

and the cases should be reassigned to a fair and impartial judge

4 Judge Early erred in failing to recuse himself and to vacate his prior orders (**Issue 4, Orders 8-18-08, 12-17-08, 3-3-09, 3-3-09 (granting in part, denying in part), 6-2--09, 6-16-09, 7-28-09, 4-6-10, 9-16-10, 10-7-10, 10-22-10, 12-11-10)** By order of October 7, 2010, the judge denied Appellants' motion for recusal. On October 28, 2010 Appellants filed a motion to alter or amend the recusal denial order, the motion was denied by the judge on December 11, 2010 (Motion to alter or amend, p 1-4, Order 12-11-10, p 1-2). As noted above under the Canons, the onus for any inquiry or disclosure concerning a judge's qualification is placed upon the judge, not the litigants or their lawyers. Theoretically, judges who act in accordance with Canon 3 will *sua sponte* disqualify themselves if there is any potential whereby a reasonable person could question their impartiality, if the theory held true, there would never be a need for a litigant or their attorney to request recusal of a judge. In practice, however, it is extremely rare that judges *sua sponte* disqualify themselves. Therefore, it becomes even more important that judges at least honor their obligation to make a full and complete disclosure on the record of any information which might lead a reasonable person to question their impartiality. This will at least permit the litigants and their attorneys to make an informed decision as to whether or not to pursue a motion for recusal.

In the experience of the undersigned, motions to recuse judges are infrequently made. It is axiomatic that such motions run the risk of alienating the presiding judge, not only in the case *sub judice* but in other proceedings as well, and most lawyers refrain from requesting recusal for that reason alone. Furthermore, motions to recuse in this state are decided by the judge whose recusal is sought, so there is little chance that such a motion will be granted. It is human nature for judges to resist any idea that they may not be fair or impartial, so they are not likely to make a ruling which, by its nature, must acknowledge that the possibility of unfairness or partiality

exists. Finally, our appellate court decisions regarding motions to recuse reveal that judges' refusals to recuse themselves are not likely to be overturned on appeal, so the potential benefit of making a recusal motion is far outweighed by the unlikelihood of success. All of these act as deterrents to recusal motions. As a general proposition, this is not necessarily bad. We do not want our judges unnecessarily burdened with recusal requests from disgruntled litigants. Unfortunately, it also creates an atmosphere whereby, as in the present appeal, judges recognize the probable outcome of a recusal request and take advantage of that reality, to the undeserving prejudice of litigants with legitimate grounds for recusal.

An examination of the case law in South Carolina reveals that it is extremely rare for an appellate court to overturn a judge's denial of a motion to recuse, as our courts have imposed the additional burden of showing evidence of bias or prejudice in the record. *Cf., Lyvers v Lyvers*, 280 SC 361, 312 SE2d 590 (Ct. App. 1984), *Burgess v Stern*, 311 SC 326, 428 SE2d 880 (1993) (Even though the trial judge admitted to *ex parte* contacts with counsel for one of the parties, and even though Supreme Court acknowledged the specific prohibitions against *ex parte* communications, no error found in trial court's order emanating from the *ex parte* contact because court concluded "that no prejudice resulted"), *Simpson v Simpson*, 377 SC 519, 660 SE2d 274 (Ct. App. 2008) (court upheld trial judge's subsequent refusal to recuse herself, reversing her prior decision to *sua sponte* recuse herself, again finding no evidence of bias or prejudice), *Eadie v Krause*, 381 SC 55, 671 SE2d 389 (Ct. App. 2008) (court relegated discussion of recusal to a footnote, affirming trial judge's refusal to recuse himself notwithstanding that he was a former law partner of the named defendant, stating "we do not find evidence of bias or prejudice sufficient to warrant reversal").

Given the legal talent in the South Carolina Bar, it is rather astonishing to find that virtually no appellant's counsel has been able to point to any evidence in the record sufficient to

convince an appellate court in this State to reverse the decision of trial judges not to recuse themselves. Unfortunately, the use of the “no evidence of bias or prejudice” standard by our appellate courts on a near universal basis for affirmation of trial judges’ refusals to disqualify or recuse themselves has resulted in the fact that there are virtually no guidelines or criteria which have been established in order to determine precisely *what* evidence of bias or prejudice, or what degree of proof of such evidence, *would* warrant disqualification or recusal. An exception to this, however, was presented in *Ellis v Proctor & Gamble*, 315 SC 283, 433 SE2d 856 (1993). There are three (3) points to be made in light of the *Ellis* decision:

- (1) Justice Moore, author of the opinion, utilized language entirely consistent with the Judicial Canons of Ethics, finding disqualification should occur if a judge’s impartiality “might reasonably be questioned.” Furthermore, Justice Moore set the appellate standard for reviewing disqualification or recusal issues as one which *limits the court’s ability to affirm a trial judge’s failure to disqualify himself*, stating “Under Canon 3(C), a judge *should* disqualify himself if his impartiality might reasonably be questioned. In cases involving a violation of Canon 3, *this Court will affirm a trial judge’s failure to disqualify himself only if there is no evidence of judicial prejudice.*” *Ellis supra* (Emphasis added.)
- (2) *Ellis* addressed the language of Canon 3(C), which was the predecessor to our present Canon 3(E), previously quoted herein. An important distinction exists, however, between Canon 3(C), under review in *Ellis*, and present Canon 3(E). The present language of Canon 3(E) uses the mandatory term “*shall*” as opposed to the discretionary term “*should*” cited in *Ellis*. Accordingly, under the present language of Canon 3, disqualification by the judge is *mandatory* as previously stated herein if his impartiality might reasonably be questioned.
- (3) Justice Moore’s opinion in *Ellis* is unique in that it actually provides a small window for determining the *type of evidence* our appellate courts will deem sufficient to demonstrate a judge’s bias or partiality requiring his recusal. Even though the trial judge in *Ellis*, much like the judge in the present case, gave assurances of his impartiality, Justice Moore found the following: “While we accord great weight to the trial judge’s assurance of his own impartiality, we find *a judge’s impartiality might reasonably be questioned when his factual findings are not supported by the record.*” Accordingly, we find evidence of judicial prejudice in this case.” The evidence of prejudice referenced in *Ellis* consisted of an *ex parte* memorandum provided to the trial judge by counsel for one of the parties. Justice Moore found this single *ex parte* communication sufficient to require recusal, even though the trial judge stated that it “had no bearing on the trial court’s decision,” specifically noting “the prohibition against *ex parte* communications under Canon 3(A)(4) of the Code of Judicial Conduct.”

In the present case, the record is replete with evidence that the judge's findings are not supported by the record, so that his impartiality "might reasonably be questioned," thereby rendering his disqualification mandatory. This evidence includes not only evidence of bias or prejudice against Appellants, but also evidence of partiality and bias in favor of counsel for the Respondents. This is particularly true beginning in the Spring of 2008, when the judge and his son were treated to an all-expense paid fishing trip in Florida by Mr. Johnston's brother, and when Mr. Johnston, whose position as counsel for Respondents was in jeopardy, brought in Mr. Infinger and Ms. Rosen as additional counsel. This evidence includes, *inter alia*

- 1 In the spring of 2008, the judge remarked that his son, Ross, and Mr. Johnston's son, Caldwell, "have become friends." This gave the impression that the relationship between their sons was recent in origin, and was the first time that the judge had made any disclosure concerning any relationship between any member of his family and Mr. Johnston's family since his acceptance of the assignment of these cases approximately two (2) years earlier. (Bailey Aff 3-30-10, p. 2-3.) It was not until 2010, in response to a motion by Appellants for a full and complete disclosure of the relationships between the judge and Respondents' counsel, that the judge made any disclosure on the record, and Appellants then became aware of the following additional facts which the judge had not previously disclosed:
 - a The judge's son and Mr. Johnston's son had not just become friends, but had been friends for years, and were actually college fraternity brothers, (Tr. 3-29-10, p. 10, ll. 14-15.)
 - b The judge's son and Mr. Johnston's son traveled together in Europe, (Tr. 3-29-10, p. 10, ll. 15-16.)
 - c The judge's son had attended and possibly participated in the wedding of Mr. Johnston's son, (Tr. 3-29-10, p. 11, ll. 2-3.)
 - d Mr. Johnston's son and his wife had stayed at the judge's beach house as guests of the judge and his son, (Tr. 3-29-10, p. 11, ll. 7-10.)
 - e The judge kept a picture of Mr. Johnston's son in his office. (Tr. 3-29-10, p. 10, ll. 17-20.)

Other evidence in the record demonstrates that the judge's disclosures on March 29, 2010, concerning the relationship between the judge and Mr. Johnston and members of their respective families were incomplete and/or inaccurate, while he made some disclosures concerning the relationships with Mr. Johnston's son, he omitted any information relating to Mr. Johnston's daughter. In support of their

motion for recusal, Appellants produced evidence that (a) the judge's son, Ross, was also friends with Mr Johnston's daughter, Annie, (b) both Annie Johnston and Respondents' counsel Anne Ross Rosen are listed as friends of Ross Early on his Facebook page, and (c) the judge's picture appeared on the Facebook page of Mr Johnston's daughter, Annie (Bailey Aff 4-7-10, p 2-4) The judge failed to make any disclosure as to these additional relationships

- 2 In 2008 the judge also casually mentioned that his son had been invited by Mr Johnston's son to go on a fishing trip on a boat belonging to Mr Johnston's brother, that the judge had also been invited on the trip and that the judge had accepted the invitation (Bailey Aff 3-30-10, p 2-3) It was not until 2010, in response to Appellants motion for disclosure, that Appellants became aware that the fishing trip took place in Islamorada, Florida, at no cost to the judge, that Mr Johnston's brother was present, and that the judge took Mr Johnston's brother and his wife to dinner on two (2) separate occasions during the trip at the judge's expense (Tr 3-29-10, p 11, l 10-13)
- 3 On a subsequent occasion, the judge stated to Mr Johnston that he had gone to see Mr Johnston's brother when he was in Georgetown and that his brother had invited him to go fishing again (Bailey Aff 3-30-10, p 2-3) The judge did not mention this visit with Mr Johnston's brother in his "disclosure" on the record, nor did he ever indicate whether he accepted the invitation
- 4 On another occasion, Mr Johnston stated to the judge that he was aware that the judge's son, Ross, was going fishing in Islamorada (Florida) and that Mr Johnston thought he would "go with him " (Bailey Aff 3-30-10, p 2-3) The judge denied Appellants' motion to require Respondents' counsel to disclose under oath the full nature and extent of their association with the judge, which prohibited Appellants from determining if, in fact, Mr Johnston ever accompanied the judge's son to Islamorada or to any other destination
- 5 Mr Johnston also casually mentioned on one occasion that he and the judge attend a "white tie and tails" affair each year, and also that there was an "incident in Europe" involving their sons (Bailey Aff 3-30-10, p 2-3) Although the judge, as part of his "disclosure" on the record in 2010, made some comments concerning the common memberships of himself and Mr Johnston in the Caroliniana social organization, he made no reference to the "incident in Europe " Since the judge denied Appellants' motion to require Respondents' counsel to disclose under oath the full nature and extent of their association with the judge, Appellants were prohibited from access to any information concerning the "incident in Europe" involving their sons
- 6 On April 23, 2008, at a status conference before the judge, Mr Infinger appeared with Mr Johnston for the first time At the status conference, Mr Johnston stated to the judge and the others present that Mr Hilty, who was in-house counsel for Respondents, felt Mr Johnston had done "a shitty job" at the mediation the prior month, and that Mr Infinger was being named as an additional counsel of record for the Respondents At that point, the judge welcomed Mr Infinger to the case,

and casually remarked that he had known Mr Infinger for several years, and that Mr Infinger had spent the night on one occasion at the judge's home several years earlier following a wedding All of the above occurred off the record (Bailey Aff 3-30-10, p 4)

7 Additionally, Mr Johnston stated at the status conference that an associate of Mr Infinger's, Ms Anne Ross Rosen, was also being assigned as counsel of record for the Respondents in these cases At that point, the judge commented that he knew Ms Rosen and had, in fact, "married her " He made no other disclosure concerning Ms Rosen This also occurred off the record (Bailey Aff 3-30-10, p 5) It was not until 2010, in response to Appellants' motion for disclosure, that the judge finally disclosed that

- a Ms Rosen was a native of the judge's hometown of Bamberg, South Carolina and that the judge had known her for her entire life
- b Ms Rosen's parents and the judge moved to Bamberg around the same time and their careers grew side by side over the years
- c Ms Rosen's father was a surgeon and the judge had been his patient, specifically, Dr Ross had performed one or two surgical procedures on the judge and had referred him to at least one other physician for another procedure
- d Ms Rosen was the same age as the judge's son, Ross and they went through school together
- e Ms Rosen and her fiance, John Rosen, asked the judge to perform their wedding ceremony and the judge and his wife and son Ross were provided with a room for one (1) night at a condominium at Fripp Island by Dr Ross (Tr 3-29-10 p 6, l 25 - p 8, l 3)

The record demonstrates that the judge's disclosures on March 29, 2010, concerning Ms Rosen were also incomplete and/or inaccurate For example, in response to a subpoena issued by Appellants, the Fripp Island Resort provided documentation which contradicts the "disclosure" made by the judge and reveals that (1) the condominium referenced by the judge was provided to him and a guest at no charge by the Ross family for two (2) nights, not one (1) night as stated by the judge in his "disclosure," and (2) the judge's other son, Will and another guest were also provided accommodations on Fripp Island as part of the Ross-Rosen wedding, at no charge (Bailey Aff 3-30-10, p 15)

All of the foregoing clearly document extrajudicial relationships and conduct on the part

of the judge requiring his disqualification from accepting and from retaining the assignment of these five (5) cases. Had he remained true to the language and intent of Canon 3, he would have recognized that these extrajudicial relationships create a situation whereby his impartiality might reasonably be questioned, and that the circumstances are certainly such as to create in the mind of a reasonable man at least a suspicion of bias. Under Canon 3, this is as far as the situation should have gotten. Since the judge did not *sua sponte* disqualify himself, however, he should have at least timely and fully disclosed the relationships and circumstances on the record, as provided in the Canons.

In spite of his failure to disqualify himself or even to reveal any information concerning his qualifications on the record, the judge should have granted Appellants' motion to recuse. There should be no doubt that these relationships and circumstances create an appearance of impropriety, they create in reasonable minds a perception that the judge's ability to carry out his responsibilities with integrity, impartiality and competence is impaired. Cf, Commentary to Canon 2A, *supra*. Under these circumstances, whether pursuant to a *sua sponte* disqualification or an order of recusal, the judge should have removed himself from this litigation. *A judge should disqualify himself where grounds for disqualification exist as well as in situations where his impartiality might reasonably be questioned. A judge should disqualify himself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment.* 75 Am Jur , 2d, Trial, §86 (Emphasis added)

The record in these cases, apparently unlike virtually any other case besides *Ellis supra*, also demonstrates that the factual findings in the orders issued by the judge, as previously shown herein, are not supported by the record. Accordingly, there is evidence of judicial prejudice, requiring the disqualification or recusal of the judge under the decision in *Ellis*. The record

shows that, subsequent to the said fishing trip, and following Mr Johnston's revelation that Mr Hilty was dissatisfied with his performance and the addition of Mr Infinger and Ms Rosen as counsel of record, the judge's attitude and conduct toward the parties and their counsel began to change significantly. This change in attitude and conduct is reflected in both his comments and the orders which he issued from that point. Although promising to "feed everyone from the same spoon," (Tr , 7-1-08, p 12, ll 1-2) he, in fact, established a double standard for discovery between the two parties, with the Respondents enjoying a lesser and more favorable standard than that imposed upon Appellants, this will be discussed in greater detail below. Almost without exception, the orders which he issued were prepared for his signature by counsel for the Respondents. As demonstrated herein, these orders reflect the double standard which he imposed, were often not based upon proper and credible evidence, misstated or disregarded existing applicable law and/or contained factual findings which were not supported by the record.

For example

1. Order of August 18, 2008, denying Appellants' motion to compel #6. Appellants sought certain financial information which had been requested by Dr. Oliver G. Wood, Jr., an economist and expert witness retained on behalf of Appellants. The information was needed to formulate and support his opinions concerning the issue of punitive damages. (Motion to Compel 6-12-08, p 1-12)
 - a. Appellants' counsel presented the request to the judge at the hearing on this motion to compel, which took place July 1, 2008. (Tr 7-1-08, p 40, ll 6-8) The judge then alluded to personal knowledge which he had concerning Dr. Wood and "his questionnaire," and indicated that Dr. Wood's prior questionnaires had not included information being sought in these cases. (*Ibid* , ll 9-10, l 22 - p 41, l 6) The judge referenced a prior case in which Dr. Wood testified, outlining his recollection of Dr. Wood's testimony. (*Ibid* , p 46, ll 9-16) These are references to matters clearly outside and not supported by the record in this case.
 - b. At the hearing, Respondents' counsel handed to the judge a document identified as "a sampling of one 10K report" of Respondent AIMCO, stating that the document was "available on the SEC website," and expressing the opinion that the information contained was more "than I think an expert could ever use." This document was not marked or

introduced into evidence to be considered by the judge. The judge then stated, "I think that the information that Oliver can get out of the SEC ought to be enough." (Tr 7-1-08 p 42, ll 13-20, p 45, ll 4-6) Accordingly, the record reflects that the judge based his ruling upon a document and information which was not admitted into evidence or properly part of the record.

- c The judge stated that, notwithstanding his oral ruling, he would reconsider that ruling or hold it in abeyance, and require production of the information sought under a protective order if he received an affidavit from Dr. Wood stating that he needed more information than was available through the SEC. (Tr 7-1-08, p 45, ll 7-13, p 46, ll 3-9) By letter of July 30, 2008, Appellants' counsel provided the judge with a copy of a filed affidavit from Dr. Wood dated July 28, 2008, which specifically stated that the items contained in Appellants' discovery requests were needed "to formulate my opinions," and that "*a substantial portion of the information I requested is not publically available*." The affidavit further states that the information sought in Appellants' discovery requests "is what I will need to prepare my opinion." (Affidavit of Oliver G. Wood, Jr., R., p 1-2) (Emphasis added)
- d No counter affidavit to Dr. Wood's affidavit was ever submitted to the judge by Respondents. Instead, they provided the judge with a letter from Mr. Johnston to Appellants' counsel dated July 30, 2008, together with a "Definitive Proxy Statement" which AIMCO had purportedly prepared for submission to the SEC. This information was sent to the judge by Mr. Johnston via an email dated August 12, 2008. Neither the letter nor the "Definitive Proxy Statement" were ever verified through affidavit or filed with the Clerk of Court as part of the record in this case. The statements and information in the proxy statement, which was evidently intended for dissemination to shareholders, were not made under oath. Even if these matters had been properly entered into the record, examination of the proxy statement reveals that it does not provide the information required by Dr. Wood, as it states nothing concerning Appellants' requests for information relating to (1) financial information for the years 2004-2007, (2) profit sharing allocations, (3) specific conditions required in order for executive bonuses to be paid, (4) life or health insurance, (5) professional or social membership dues, (6) reimbursement of entertainment expenses, or (7) allowances for automobile travel, etc. Notwithstanding these facts, the judge issued his order on August 18, 2008, finding "that there is sufficient information publically available through filings with the Securities and Exchange Commission to satisfy this request." (Order 8-18-08, p 1-2) The order does *not* state that the judge ever looked at any SEC filings, other than the 10k report *which was never in evidence or made part of the record*. Since this finding is clearly at odds with the express statements in Dr. Wood's affidavit, and references information which is not part of the record, the judge's factual finding is not supported.

by the record. This is not cured by the fact that counsel for the Respondents attempted to get the information before the judge in the form of memoranda, letters or oral arguments. These do not constitute evidence. Factual statements of an attorney, whether made during argument or in written briefs or memoranda, may not be considered or accepted by the court as proof. *Higgins supra, Gilmore v Ivey*, 290 SC 53, 348 SE2d 180 (Ct App 1986)

- 2 Order of March 9, 2009, continuing the Parkview trial (Order 3-9-09, p 1-2)
The subject of this order was the Respondents' request for a continuance of the Parkview case past the scheduled trial date of May 18, 2009. Appellants' counsel was not included in the communication process whereby the signed order was transmitted from the judge to counsel for the Respondents, and did not become aware of the executed order until receiving a copy of it from Respondents' counsel. It is clear that the findings of the judge in the order are not only erroneous, but are not supported by the record.

- a The order states that the matter was before the judge "on Defendants' motion to continue the trial." In fact, there was no motion by Respondents, and the matter was never properly before the Judge. (*Cf*, Rule 7(b)(1), SCRCF)
- b The order also states that the Respondents' request for a continuance was granted "for good cause having been shown." In fact, *no* cause was shown for the continuance, certainly, no cause was shown which complied with the rules, since no motion was ever made.
- c The order further states that, "by prior order of the court," the Parkview case was to be the first of the assigned cases to be tried. In fact, no such order was ever issued.

All of these deficiencies were among those brought to the judge's attention in Appellants' motion to alter or amend dated March 23, 2009. The judge denied this motion, allowing the defective order to stand.

- 3 Order dated October 7, 2010, denying Appellants' motion for recusal and vacation of orders. The findings of the judge in this order are likewise erroneous and unsupported by the record. These include, *inter alia*,

- a The order states that the judge "complied" with Appellants' request that he "make a full disclosure of any type of relationship he had with the defense lawyers." This finding erroneously narrows the parameters of the disclosure request, which included "a full and complete disclosure on the record of any and all affiliations or relationships which (the judge), or any member of his family, presently has or has previously had with any of the Defendants or counsel of record for any named Defendants in these cases, as well as with family members of such counsel of record." The requested

disclosure specifically included “recreational and/or social activities, and personal visits and/or contacts,” whether “in person, via telephone, mail, electronic means or internet sites ” The judge clearly failed to make a full and complete disclosure on the record relating to his involvement of the marriage of Respondents’ counsel Anne Ross Rosen, as well as the relationships involving Mr Johnston’s daughter The finding that the judge “complied” with Appellants’ request for “full disclosure of any type of relationship” is both erroneous and unsupported by the record

- b The order states that the judge “considered the heartache and loss of position suffered by a family court judge who recently refused to recuse herself in a case ” At no time was the judge presented with any evidence relating to a family court judge who refused to recuse herself, much less any “heartache” or “loss of position suffered” by the unnamed family court judge Consideration of this extraneous matter is clearly erroneous and patently unsupported by the record in this case As such, it represents clear evidence of bias and prejudice under *Ellis supra*
- c The order finds that Appellants’ recusal effort did not commence until “immediately prior to the entry of a April 6, 2010 sanctions order, *after almost a year of sanctions and contempt orders entered against them* ” While counsel for Respondents vigorously requested that the judge sign orders holding Appellants in contempt and imposing dismissal of their claims as an appropriate sanction, and the judge verbally threatened to sign such an order, he did not do so until he signed the order of April 6, 2010, the judge himself acknowledged as of March 29, 2010 that no such order had been filed, *i e* “entered ” (Tr 3-29-10, p 26, ll 16-17) The finding that there have been “sanctions and contempt orders entered” against Appellants for “almost a year” is totally erroneous and is unsupported by the record This is another example of clear evidence of bias and prejudice under *Ellis supra*
- d The order sets forth a finding that the judge “held a hearing on March 29, 2010 and put on the record all of my relationships with counsel for both parties, *most of which had previously been disclosed in the course of litigation* ” As shown in the prior discussion, this finding is patently false, any “disclosures” made by the judge during the course of the litigation prior to the hearing were minimal and cursory at best Accordingly, this finding is not supported by the record and is clear evidence of bias and prejudice
- e The order also states, “at the hearing Plaintiffs made an oral motion to recuse me I respectfully denied it, having thoroughly addressed their concerns ” The record clearly shows, in addition to the fact that the judge did not “thoroughly address” the concerns of Appellants, there was no oral motion for recusal made at the March 29, 2010 hearing (Tr 3-29-10, p 24, l 6 - l 20, p 26, ll 9-14, ll 19-25) The transcript of the hearing

clearly shows that counsel for Appellants proposed, as a possible solution to the judge's reluctance to give Appellants time to review his disclosures before deciding whether or not to make a motion for recusal, that a verbal motion *could* be made and marked heard. The judge denied that proposed option. (Tr 3-29-10, p 27, ll 2-6)

- f The order lists eight "disclosures" which the judge states were revealed not only at the March 29, 2010 hearing, but "openly throughout the litigation." The only *evidence* in the record on this issue contradicts this finding. (Bailey Aff, 3-30-10, p 1-19) The only *reference* in the record to support this statement is found in the Respondents' Memorandum dated April 20, 2010 (Respondents' Memorandum, 4-20-10, p 4) In fact, the language used in the judge's order, in many instances, is taken verbatim from this memorandum. Statements of counsel in a written memoranda cannot be considered by the court in determining factual findings. Cf., *Higgins supra*, *Gilmore supra*. Inasmuch as the trial judge clearly based his findings in this regard solely on unsworn statements of Respondents' counsel set forth in a memorandum, and such reliance is prohibited by the law of this State, these findings are not properly supported by the record.
- g In an attempt to refute Appellants' allegations in their motion and affidavit, the order states that Appellants' motion for recusal is "made *without basis or justification*, with the *sole purpose of polluting the record and intimidating me* into recusal." (Emphasis added) The record shows that separate motions for recusal were made in this case and the four related cases. All of the motions were supported by affidavits from numerous Appellants in each case, as well as their counsel. (Motion to Recuse, p 1-4, Davis Aff, p 1-24, Reynolds Aff, p 1-7, Pike Aff, p 1-6, Rentz Aff, p 1-5, Ivey Aff, p 1-5, Hinnant Aff, p 1-16, Hodge Aff, p 1-7, Bailey Aff 3-30-10, p 1-19, Bailey Aff 4-7-10, p 1-4, Pendarvis Aff, p 29) These affidavits set forth specific facts and circumstances justifying the motion for recusal and vacation of the judge's orders, and amply demonstrate circumstances which would create in the mind of a reasonable man at least a suspicion of bias, as well as demonstrating that his impartiality might reasonably be questioned. While a judge may consider the legal sufficiency of facts alleged in a motion for recusal, he must nonetheless accept as true the factual allegations in the motion. *Shaw v State*, 276 SC 190, 277 SE2d 140 (1981). Where affidavits are submitted in support of a motion for recusal, the judge "is required to accept as true the facts stated in the motion and accompanying affidavits." 46 Am Jur 2d, *Judges*, §214, *Mallett v Mallett*, 323 SC 141, 473 SE2d 804 (Ct App 1996). The judge, by attacking the facts stated by Appellants rather than accepting them, did not follow the law. Since it is obviously controlled by an error of law, there is an abuse of discretion and the order should be vacated.

- h The finding of the judge that he had addressed the issue of recusal “repeatedly” is not supported by the record Appellants’ motion was made following the “disclosures” made by the judge and he only addressed the issue briefly at the hearing on March 29, 2010 and in the written order of October 7, 2010 This is evidence of bias and prejudice under *Ellis supra*, as the finding is not supported by the record
- 1 Incredibly, the judge’s order makes a factual finding that Appellants ***“continue to harass and prod me to recuse myself ”*** This is simply untrue and totally unsupported by the record Furthermore, the judge’s finding of harassment on the part of Appellants, most of whom are elderly and in ill health, is ludicrous This statement is not only unsupported by the record, but is in itself a clear indicator of the bias and prejudice exhibited by the judge against Appellants ***“A judge who is presented with a motion for disqualification and who looks beyond the mere legal sufficiency of a suggestion of prejudice and attempts to refute the charges of partiality exceeds the proper scope of his inquiry and on that basis alone establishes grounds for his disqualification ”*** 46 Am Jur 2d, *Judges*, §§95 and 214

Time and space constraints imposed in this appeal do not permit Appellants to address each and every instance whereby the judge made factual findings which were totally unsupported by the record The above instances are included as examples only In addition to these unsupported factual findings, Appellants direct this Court to the following examples in the record of other evidence indicating bias or prejudice on the part of the judge

- a The evidence shows that the judge had completely abandoned any pretense of acting as a fair and impartial arbiter and had totally aligned himself with counsel for the Respondents As shown above, the orders simply parroted the arguments and representations of Respondents’ counsel, and incorporated them as factual findings The orders were either prepared by Respondents’ counsel or the language in his orders was taken straight from memoranda or other arguments which they submitted to him, He also verbally aligned himself with Respondents’ counsel at hearings in this litigation For example, on January 14, 2010 he stated “ when *they* didn't do that, you moved for compelling, and *we* signed the order of March 3, '09 And *we* get in here today and *they* still admit *they* haven't given it to us ” (Tr 1-14-10, p 50, ll 6-9) (Emphasis added) The judge clearly included himself in the same “we” camp as Respondents’ counsel, with Appellants and their counsel clearly being assigned to the opposing “they” camp Such comments and conduct create in the mind of a reasonable man at least a suspicion of bias, and demonstrate that the judge’s impartiality might reasonably be questioned, accordingly, they provide evidence of bias requiring his recusal

- b Additional evidence of the judge's bias and prejudice may be found in his comments at the "disclosure" hearing on March 29, 2010. The judge, referencing his reaction when he first read Mr. Johnston's email enclosing the subpoena issued to Fripp Island by Appellants, stated "I got the thing I looked at it. Of course, you know, when you first read something like that *your blood boils* a little bit" (Tr. 3-29-10, p. 25 ll. 18-20). This statement clearly evidences his bias and prejudice. It also evidences anger and a "combative and defensive attitude" which caused "some concern" to the court in *Mallett supra*, as to whether the trial judge could impartially decide the recusal issue.
- c There is also evidence in the record of prohibited *ex parte* communications between the judge and counsel for Respondents which Appellants contend would at least add to the appearance of impropriety which is attendant to the judge's conduct in this matter. Such evidence includes, *inter alia*,
- (1) The order of March 9, 2009, previously discussed above. Appellants' counsel was not included in the communication process whereby the signed order was transmitted from the judge to counsel for the Respondents, and did not become aware of the executed order until receiving a copy of it from Respondents' counsel (Order, 3-9-09, p. 1-2),
 - (2) The email from Respondents' counsel, Calvin T. Vick, dated February 17, 2010, which precipitated Appellants' motion for a protective order in an effort to avoid the dismissal sanction ultimately imposed by the judge (Motion for Protective Order, p. 1-3). The email is an attempt by Mr. Vick to explain the *ex parte* communication initiated by the judge that same day, wherein the judge ostensibly instructed Mr. Vick to prepare an order holding Appellants in contempt and dismissing their cases. Although the judge had previously indicated an inclination concerning this ruling, he had subsequently been provided with briefs and materials by counsel for both sides and had not announced his final decision before the *ex parte* communication with Mr. Vick. The practice of directing counsel for one party *ex parte* to draft an order prior to the judge announcing his final decision to both sides is prohibited under Opinion 2-1988, Committee on Standards of Judicial Conduct. A judge is prohibited from discussing a proposed order with counsel for one party without giving notice to counsel for the other side, because failure to provide such notice gives rise to an appearance of impropriety (*Ibid*). This opinion has been cited with approval by our courts for many years. *Cf. Higgins supra*.
- d Evidence of bias and prejudice is also found in the judge's imposition of a double standard, as previously noted. Examples of this double standard, include, *inter alia*
- (1) Respondents' initial discovery responses of August 26, 2004 in Parkview contained 15 general objections, followed by specific objections and minimal responses to each discovery request. When Parkview

Appellants moved to compel proper responses, the judge ruled Appellants “have an obligation to take the deposition” of witnesses to get more specific information and, as to documents, would “have to make your own determination as to what’s there ,” ordering Appellants to “go take the depositions and ask them what it meant ” (Tr 7-1-08, p 17, ll 22-25, p 18, ll 12-15, p 35, ll 1-14, p 36, ll 9-16, l 24- p 37, l 2, p 47, ll 20-23) The judge’s ruling affected all related case, including this case Based upon the judge’s promise to “feed both sides from the same spoon” (Tr , 7-1-08 p 12, ll 1-2), Appellants aggressively undertook to depose witnesses who had been listed by Respondents

In responding to the Respondents’ discovery requests, Appellants utilized their discovery technique of asserting general objections, actually using *verbatim* the language employed by Respondents which had been sanctioned by the judge When Respondents complained about these objections, the judge responded by dismissing Appellants’ claims

- (2) When Respondents sought a protective order prohibiting Appellants from deposing Respondents’ officers, the judge granted their request, even though one of the officers was present at the meeting where the “*status quo*” agreement was reached and was a material witness on the issue of the statute of limitations Conversely, when Appellants sought a protective order as a means of complying with the judge’s Privilege Order, their request was denied (Tr 7-1-08, ll 21-25, Order denying Appellants’ motion for protective order, p 1-4)
- (3) When Appellants sought information from the corporate Respondents relating to lawsuits and other claims against them, the judge permitted Respondents to re-write Appellants’ discovery requests In doing so, Respondents eliminated a responding party, as well as the time frame encompassed by the request The effect was to protect disclosures concerning the conflicts of interest which formed the basis of the Appellants’ claims Conversely, the judge approved Respondents’ document request #48, ordering Appellants to produce “all documents concerning any litigation in which any of the Plaintiffs were a party (plaintiff, defendant or third-party plaintiff or defendant), or any person in which any of the Plaintiffs had an ownership or management interest was a party ” Despite the lack of any time limitation or showing of relevancy, this request was included in those found to be deficient by the judge and used by him as a reason for dismissing Appellants’ claims
- (4) The judge required Appellants to produce their confidential communications with their counsel in this case, while protecting Respondents from producing communications with attorneys in other proceedings which were relevant to this case

- (5) The judge granted Respondents' motion to seal certain documents for his in-camera review, while denying relief to Appellants (Order 8-31-09, p 1-2, Order 10-22-10, p 1-4)

Due to time and space constraints, Appellants direct this Court to the affidavit of Joel D Bailey dated March 30, 2010, paragraph 13 (p 5-10) for a more detailed listing of instances wherein the judge imposed a double standard, and incorporate said affidavit herein by reference. Given the abundance of evidence demonstrating bias and partiality on the part of the judge, he erred in failing to disqualify and/or recuse himself and to vacate his orders. The rulings of the judge result from and are tainted by the bias and prejudice herein discussed, they contain factual findings not properly supported by the evidence and are evidence *per se* of the judge's bias and prejudice. Furthermore, they are controlled by errors of law and result from abuses of discretion, and should be vacated on that basis, as well.

5 Judge Early failed to insure that Appellants' claims were being litigated in a fair and impartial forum, thereby depriving them of their rights to due process of law under the Constitutions of the State of South Carolina and the United States of America (Issue 5) The right to due process of law is guaranteed to citizens of this State by the Constitutions of South Carolina (Article I, §3) and the United States (5th and 14th Amendments). It is axiomatic that a fair and impartial forum must include, at a minimum, a presiding judge whose impartiality and lack of bias is beyond question. "Every litigant has the lawful right to expect utter impartiality and neutrality in a judge who tries his case." 46 Am. Jr. 2d, *Judges*, §146. "The right to disqualify a judge for bias and prejudice is substantive and it is included within the right to a fair trial guaranteed by the due process clause of the United States Constitution." *Ibid*. The constitutional guarantee of a fair and impartial judge and forum is recognized in this State. *Mallett supra* ("the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process.") In determining the fairness or impartiality of a judge or tribunal under

a due process inquiry, the United States Supreme Court has determined that the objective test of a reasonable perception of bias, referenced above in the Code of Judicial Conduct, as opposed to the subjective “bias in fact test” is the proper procedure to be followed *Cf Caperton v A T Massey Coal Co Inc* , 129 S Ct 2252 (2009) The decision in *Caperton* has particular application to this case For example

- 1 Part of the alleged bias claimed in *Caperton* involved the judge’s personal relationship with a litigant, and his receipt of personal benefits derived from that relationship, *i e* , donations to his campaign for election In this case, the judge’s personal relationship with counsel for a litigant is at issue, together with his receipt of personal benefits derived from that relationship, *i e* , all expense paid fishing trips and accommodations at an ocean-front resort Canon 3E(1) does not distinguish between “a party or a party’s lawyer” where bias is alleged
- 2 Justice Kennedy’s majority opinion, finding a judge’s refusal to disqualify or recuse himself rose to the level of a denial of constitutional due process, specifically relies upon the language of the Code of Judicial Conduct, including Canon 3E(1) The Court discarded the judge’s assertions of lack of personal interest on his part, as well as his assertion that there was no objective evidence of bias Instead, the Court adopted the “appearance of impropriety” and reasonableness language of the Code consistent with Appellants’ position in this case
- 3 The present case amply demonstrates the concern expressed by Justice Kennedy if the focus is on proof of evidence to show bias in fact, rather than a reasonable perception of bias “This is particularly true where, as here, there is no procedure for judicial fact-finding and the sole trier of fact is the one accused of bias Objective standards may also require recusal whether or not actual bias exists or can be proved Due process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties *The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process* ”

The personal relationships involving the judge and counsel for the Respondents create an appearance of impropriety, as well as a reasonable suspicion of bias, requiring the disqualification and recusal of the judge under the Code of Judicial Conduct and applicable laws These relationships, coupled with the overwhelming evidence that the judge abused his discretion time after time in favor of Respondents, denied Appellants a fair and impartial forum and violated their rights to due process under the Constitutions of the State of South Carolina and the United States

CONCLUSION

For the reasons stated herein, Appellants request that this Court (a) reverse and vacate the order of March 7, 2006 assigning these cases to Judge Early and reverse and vacate the orders issued by Judge Early which are the subject of this appeal and (b) remand this case for a trial on the merits before a fair, unbiased, disinterested and impartial judge

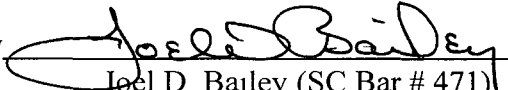
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October 11, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-38-1131

RECEIVED

JUN 24 2011

S C Supreme Court

Laurance H Davis, Jr , Rhoda G Rentz, Mortimer M
Weinberg, Jr , Hodge Land Co , Inc , and Anna Trotter,
individually and in their capacities as the Limited Partners
of Roosevelt Gardens, a South Carolina Limited
Partnership

Appellants

vs

Roosevelt Gardens, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc , AmReal Corporation
a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr , and
John Doe, a generic designation for a party or parties whose
true identity is unknown

Respondents

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STATEMENT OF ISSUES ON APPEAL

- 1 Did Judge Early err in dismissing Appellants' claims and requiring them to pay costs and attorneys fees to Respondents because Appellants did not disclose privileged communications with their attorneys, thereby requiring reversal and vacation of his order of April 6, 2010, as well as prior orders upon which it is based? In this regard, (a) did Judge Early err in holding that Appellants, merely by filing their complaints, put at issue the statute of limitations and waived their attorney-client privilege concerning that issue? and (b) did Judge Early err in holding that language in other complaints filed by other litigants in other counties put at issue the statute of limitations in this case and waived their attorney-client privilege concerning that issue?
- 2 Did Judge Early err in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for alleged deficiencies in their discovery responses, thereby requiring reversal and vacation of his order of April 6, 2010, as well as prior orders upon which it is based?
- 3 Was Judge Early legally qualified to accept and/or retain the assignment to preside over this case? Specifically, (a) Did Judge Early violate the duty to fully disclose to Chief Justice Toal and to Appellants and their counsel the full and complete nature of the long-term relationship between him and members of his family with Respondents' counsel, Ellis Johnston, and members of his family? (b) Did Judge Early violate the continuing duty to fully disclose to Chief Justice Toal and to Appellants and their counsel the additional relationships between him and members of his family with Ellis Johnston and members of his family which developed following his acceptance of the assignment of this case, as well as the full and complete nature of any such relationships involving attorneys Anne Ross Rosen and Marvin Infinger after they became counsel of record?
- 4 Did Judge Early err in failing to recuse himself and vacate his prior orders?
- 5 Did Judge Early fail to insure that the Appellants' claims were being litigated in a fair and impartial forum, thereby depriving them of their rights to due process of law under the Constitutions of the State of South Carolina and the United States of America?

STATEMENT OF THE CASE

The complaint in this case was filed in the Orangeburg County Court of Common Pleas on October 17, 2005, alleging seven causes of action at law for damages, including, *inter alia*, a claim for breach of fiduciary duty, and three (3) causes of action for equitable relief (Complaint, ¶¶ 83-125, R) Respondents answered on January 17, 2006, setting forth a general denial and twenty-three affirmative defenses including, *inter alia*, the statute of limitations (Answer, R) Prior to the filing of this case, a similar lawsuit had been filed against the

Respondents in the Beaufort County Court of Common Pleas by the limited partners in Parkview Apartments Limited Partnership (“Parkview”) Three of the Appellants in this case, Rhoda G Rentz, Mary Jane Pike and Eva Maria Reynolds, are also Appellants in the Parkview case, Appellants’ counsel in this case is also counsel for the Appellants in Parkview Following the filing of the Parkview case, counsel for the parties agreed to postpone any discovery in that case, as well as the filing of this and other related cases, in order to pursue a universal resolution for all cases involved Counsel agreed to jointly employ an independent appraiser to establish fair market values for each of the properties involved, and then to mediate any disputed values The appraiser did not complete the appraisals within the time frame required, and the mediation was canceled Thereafter, in 2005, suits were filed in Beaufort, Charleston and Orangeburg counties against Respondents on behalf of the limited partners in other affordable housing projects/partnerships, *i.e.*, Palmetto Apartments, Pinewood Park Apartments, and Orleans Gardens Apartments ¹ On March 7, 2006, South Carolina Supreme Court Chief Justice Toal assigned all five cases to Circuit Judge Doyet A Early, III (“the judge”) “to hear and decide all pre-trial motions and other matters pertaining to these cases, including the trial and post-trial motions (Order, 3-7-06, R)

Between the time of his appointment and the present appeal, the judge held hearings on various motions filed by the parties, including hearings on October 4, 2006, November 19, 2007, July 1, 2008, December 9, 2008, July 6, 2009, August 24, 2009, January 14, 2010 and March 29, 2010 As a result of these hearings, as well as pertinent motions under Rule 59, SCRCPP, the judge issued orders dated August 18, 2008, December 17, 2008, March 3, 2009, June 2, 2009, June 16, 2009, July 28, 2009, April 6, 2010, September 16, 2010, October 7, 2010, October 22, 2010, and December 11, 2010, from which this appeal is being taken The hearings and orders

¹ See Appellants’ briefs in the related pending appeals

initially involved Respondents' motions for dismissal and change of venue, but then included discovery issues, and eventually evolved into rulings by the judge requiring disclosure of privileged communications between Appellants and their counsel in this case, as well as the four related cases on appeals. Appellants retained other counsel and sought interim relief in this Court and also in the Court of Appeals, which was denied.²

Following this action by the Appellate Courts, the judge issued his order of April 6, 2010, dismissing Appellants' claims in all cases, as part of the sanctions which he imposed. (Order, 4-6-10, R.) Appellants' Amended Notice of Appeal was served on January 28, 2011. By Order dated March 9, 2011, these appeals were certified for review by the Supreme Court and transferred from the Court of Appeals.

STATEMENT OF THE FACTS

Appellants are limited partners in Roosevelt Gardens Limited Partnership. This limited partnership was originally a general partnership consisting of Hodge Land Company, Inc. and Coastal Contractors, Inc. The original partnership was formed in 1970 in order to construct and operate Roosevelt Gardens Apartments, an affordable housing project for low-income citizens in Orangeburg, South Carolina. In 1971, it was converted to a limited partnership to include Appellant Laurance H. Davis, Jr., as a limited partner. That same year, the partnership was amended to admit Mortimer M. Weinberg, Jr., and Dan Trotter, as limited partners. In 1975 it was amended again to admit the Respondents and/or their predecessors as general partners, and Carson R. Rentz replaced Coastal Contractors, as a limited partner. A detailed history of this partnership is set forth in the affidavit of Davis dated April 7, 2010, (¶ 8(b), R., Complaint, ¶ 6,

²

On November 19, 2009, this Court denied Appellants' Petition for writs of prohibition and certiorari, on December 1, 2009, the Court of Appeals dismissed Appellants' appeal.

R) Appellants incorporate by reference herein the historical statements contained therein

With the exception of Appellant Davis, all of the individual original limited partners are deceased Anna Trotter, widow of Dan Trotter, acquired her interest from his estate Rhoda G Rentz, widow of Carson Rentz, also acquired her interest from his estate Most of the individual Appellants are elderly and have significant health issues (Cf, Davis Aff ¶3, R , Pike Aff 4-9-10, ¶¶ 3, 4, R , Rentz Aff 4-9-10, ¶¶ 3, 4, R) Appellant Weinberg died during the pendency of this action Davis owns a thirteen (13%) percent interest in the limited partnership, Rentz owns an eight (8%) percent interest, Hodge Land Company owns a twenty-five (25%) percent interest, Trotter and Weinberg each own a twenty-four and one-half (24 5%) percent interest The remaining five (5%) percent ownership interest is held by the Respondents Tuck (“Tuck”) and AIMCO, either directly or through its subsidiary, AmReal (Complaint, ¶¶ 1- 6, R)

Following the inclusion of Respondents Tuck and US Shelter as general partners in 1975, the Appellants had little involvement in partnership affairs, as these were handled by the general partners While Mr Tuck remained as individual general partner, the corporate general partner changed through a series of mergers and acquisitions which are described more fully in the complaint Ultimately, Respondent AIMCO, through its subsidiary, Respondent AmReal, acceded to the role of corporate general partner (Complaint ¶¶ 10-16, R) In 1984, Respondents notified Appellants that they had contracted to sell the apartment complex to Boston Financial Group (“BFG”) for approximately \$2,000 000 00, plus interest The terms of the sale called for a small amount to be paid up front but the majority of the sales price was to be in a balloon payment, with accruing interest, to be made several years later (Complaint, ¶¶ 27-28, R) Although told by the general partners that they had vetted the purchaser’s ability to pay, the limited partners later discovered that the sale was actually made to a newly formed limited partnership with no assets other than the property being acquired (Davis Aff 4-7-10, ¶12)

Prior to 1999, the general partners advised Appellants of the potential for a problem with the final balloon payment, but made repeated assurances that they would make every effort to protect the partnership and to recover any assets due to it (Davis Aff 4-7-10, ¶13, R , Complaint, ¶62, R) Appellants repeatedly informed Respondents of the increasing value of the apartment complex in light of the then-existing real estate market and requested that Respondents pursue retrieval of the property in the event the note was not paid (Davis Aff 4-7-10, ¶12, R) In 1999, the purchaser defaulted, and Appellants began to make inquiries of Respondents, as their general partners, concerning the status of any efforts being made to recover the assets of the partnership Respondents provided no substantive information to Appellants (Davis Aff 4-7-10, ¶13, R) As a result, Appellants consulted legal counsel in order to investigate the status of the monies due to the partnership (Davis Aff 4-7-10) When their counsel was unable to obtain information from the general partners, Appellants called for a special meeting of the limited partnership to discuss available options, including replacement of any general partners who were unwilling to pursue recovery of the partnership assets The special meeting took place in Beaufort at the office of attorney Joel D Bailey on September 14, 2000 The general partners sent AIMCO employee George Buchanan to the meeting to provide information to the limited partners Mr Buchanan was not familiar with all of the details of the transaction with BFG, and it was agreed that a subsequent meeting of the partnership would take place which would be attended by other agents of the general partners possessing more knowledge (Davis Aff 4-7-10, ¶16, R , Complaint, ¶65-67, R , Tr 9-14-00, R)

The subsequent meeting occurred at AIMCO's office in Greenville, South Carolina on October 24, 2000 This meeting was attended by general partners N Barton Tuck, Jr and AIMCO vice president Patrick J Foye Appellants discussed with Mr Tuck and Mr Foye numerous options available to the partnership, including pursuing potential sale of the past-due

note to third parties, as well as legal efforts to recover monies due under the past-due note or, alternatively, recovery of the apartment complex (Davis Aff 4-7-10, ¶¶ 16-18, R , Complaint, ¶¶72-73, R , Buchanan ltr , 11-10-00, R) It was agreed that counsel would be hired for the partnership for this purpose BFG had previously expressed a willingness to return the apartment complex in lieu of paying the note, and Respondents assured Appellants that they would again explore this possibility Both Mr Tuck and Mr Foye indicated, however, that they would not wish to remain as general partners in the event the apartment complex was retrieved by the partnership Years later, as part of the discovery undertaken in this case, Appellants would learn the real reason why the general partners were unwilling to remain in that position if the apartment complex was retrieved (Davis Aff 4-7-10 ¶¶17-18, R , Tr 10-24-00, R)

By letter of November 10, 2000, Respondents informed Appellants that attorney Arthur L Howson, Jr had been retained on behalf of the partnership The letter also informed the Appellants that BFG had been acquired by an entity known as Lend Lease, and that former BFG officer Ford Von Weise had become an officer in Lend Lease The letter further advised that the property had been sold, but that the sale was not final and had not been approved by HUD, and that Mr Howson had been retained to represent the partnership interests concerning the pending sale, as well as exploring its options (Appellants' Memorandum in Support of Motion to Compel, 11-19-07, Ex 11, R)

On December 8, 2000, Mr Howson wrote to Mr Von Weise, stating that the partnership intended "to pursue all remedies under the notes and security agreements " Appellants' counsel was provided copies of correspondence from Mr Howson to the defaulting parties On January 30, 2001, attorney Robert W Tomilson of the Washington, DC law firm of Bryan Cave, LLP also wrote to Lend Lease, stating that his firm "represents AIMCO and its subsidiaries with respect to the sale of the Carolina 9 properties," which included the property in this case and the four (4)

related cases Mr Tomilson requested “that all correspondence be directed to me,” and further noted his awareness of Mr Howson’s prior letter of December 8, 2000 Mr Tomilson provided Appellants’ counsel with a copy of this letter (*Ibid*)

In response to the letter from Mr Howson, on February 1, 2001, William Leighton Lord, III, counsel for Lend Lease/BFG, stated his clients “surprise” upon receiving Mr Howson’s letter, and noted that his client “had been working closely with AIMCO on the resolution and final disposition of these troubled properties ” Mr Lord’s letter then described the negotiations which had taken place between his client and AIMCO, specifically including the fact that AIMCO had taken “control of management of the properties in 1998 ” The letter went on to state that his client had offered to return the properties to AIMCO “on two separate occasions,” but AIMCO had declined the offer, “decided not to continue to manage the properties, and terminated the management contracts ” The letter also identified Hediger Enterprises as being “the management agent” for the properties, this entity was owned by Gary Hediger, a former employee of the Respondent US Shelter Finally, the letter noted that the third-party “sale transaction that was eventually concluded was the plan of action discussed with AIMCO after they declined to take title to the properties (*Ibid*) The facts as stated by Mr Lord were previously unknown to Appellants, as they had not been disclosed by Respondents

Mr Tomilson was copied with Mr Lord’s letter Nothing in the record indicates that Mr Howson responded Mr Tomilson, however, responded by letter of February 5, 2001, claiming that BFG had sold the collateral without notice and provided a list of questions for BFG Mr Tomilson provided Appellants’ counsel with a copy of this letter (*Ibid*) Appellants’ counsel responded to Tomilson on February 6, 2001, expressing concern that the general partners had not acted properly to recover the partnership assets and that Appellants should be compensated (*Ibid*) Mr Tomilson responded on February 14, 2001, that “talk of settlement is entirely

premature,” stating that “AIMCO will use its best efforts to reclaim” money properly due to the partnership. He further stated, “we must await Boston Financial Group’s reply to my inquiries.” (Ibid.) Appellants were thus left with no other option but to wait for Respondents to act to recover the partnership assets. Respondents had until 2002 to file suit to recover these assets, but failed to do so. (Davis Aff 4-7-10, ¶¶ 20-23, R) At that time, Appellants incurred a legally cognizable injury by Respondents, the Parkview lawsuit was filed the following year, and the filing of this lawsuit was postponed in light of the *status quo* agreement referenced above.

From the time this case was filed, the primary agenda of the Respondents and their counsel was to prevent Appellants’ claims from ever being heard on the merits. The reason, which was known only to Respondents, did not become known to Appellants until many years later, when the discovery in this litigation revealed the secret which Respondents and their counsel had fought so hard to conceal. The revelation of the secret actually came in the form of three separate discoveries: (1) a memo by BFG employee Ford Von Weise, detailing the transactions between BFG and AIMCO, evidencing a conscious decision by AIMCO to put its own interests ahead of those of the Appellants (Memo 8-31-99, R), (2) the fact that AIMCO was under significant scrutiny by HUD and the United States Department of Justice as a result of kickback schemes involving management fees charged on properties owned and/or managed by AIMCO, its subsidiaries or affiliates, and (3) the fact that the properties involved in this litigation were part of the properties involved in the management fee kickback scheme, but their involvement had been concealed by AIMCO from HUD and/or the Justice Department when AIMCO was negotiating a fine for its participation. (Davis Aff ¶36, R) It then became evident that AIMCO, although assuring Appellants that it was taking steps to recover the apartments complexes, never had any intention to do so, it was not willing to jeopardize the deal it had struck with HUD and the Justice Department in order to avoid criminal prosecution. (Davis Aff ¶36,

R)

Respondents were unsuccessful on two (2) prior attempts before two (2) separate judges in the Parkview case to have the claims dismissed, and thus avoid a determination on the merits. This did not deter them, however, from making yet a third attempt to do so in this and two other related cases, once they were assigned to the judge. The judge ruled that he was bound by the prior decisions of Judges Buckner and Coltrane in Parkview as to the motions for dismissal in this case, but specifically noted that the issue of whether Appellants' claims were barred under the statute of limitations had not been decided. The judge first heard arguments on this issue on October 4, 2006. Respondents limited their arguments to only the Palmetto, Roosevelt and Orleans cases. Although not revealed at the time, Appellants' counsel later discovered that Respondents' counsel could not include the Pinewood case in the argument because Mr. Johnston had, in fact, filed a suit against the defaulting purchaser but had failed to pursue it and it was dismissed with prejudice. (Pendarvis Aff Ex 93, R)

Appellants asserted the equitable estoppel doctrine in defense of the statute of limitations argument, based on the "status quo" agreement referenced earlier whereby it was agreed to postpone filing the cases at issue. Appellants also argued that a twenty-year statute of limitations was applicable, since the suits were brought for breach of partnership agreements executed under seal. Appellants further asserted that, in any event, the suits were timely within a three year statute of limitations because there was no legally cognizable injury resulting to them *as a result of Respondents' conduct* until Respondents permitted their statute of limitations to expire without taking action against the defaulting purchasers. The judge made no decision at the time, but later denied the motion to dismiss based on the statute of limitations issue as to the three affected cases, he permitted Respondents to raise the issue again once discovery had been undertaken. (Order 2-13-07, R)

Respondents later moved for summary judgment in the Orleans, Palmetto and Roosevelt cases, based upon the statute of limitations defense. Again, this motion was not directed at either the Parkview or Pinewood cases, it was heard on November 19, 2007. The arguments were virtually identical to those presented earlier in the motion to dismiss. (Tr 11-19-07, p 41, ll 9-24, R) Finding that a genuine issue exists as to material facts concerning the statute of limitations, the judge denied Respondents' motion for summary judgment (Order of 6-5-08, R). This was the last time that the judge declined any request for substantive relief by counsel for the Respondents. Instead, he began to impose a double standard on the parties, holding Appellants to a significantly higher standard than Respondents. He ultimately ordered Appellants to produce privileged communications with their counsel in this case and the related cases, and threatened to dismiss their claims if they failed to do so. Appellants were thereby put in the untenable position of having to give up their right to privileged communications with their attorney in order to comply with the judge's order and preserve their claims. Notwithstanding the detailed nature of Appellants' discovery responses and numerous supplements thereto, the judge adopted the argument of Respondents' counsel that the responses were deficient. Appellants sought interim appellate relief, which was denied. Appellants declined to produce the privileged documents and were unable to satisfy the judge as to their discovery responses. This led to his dismissal of their claims in each of these cases. This course of events, and Appellants' efforts to avoid the dismissal of their claims, are hereinafter discussed in greater detail.

ARGUMENTS

Given the time and space constraints applicable to these appeals, it is impossible to identify and discuss each abuse of discretion by the judge over the past five (5) years he has presided over these cases, as he repeatedly made rulings which were not supported by the evidence or were controlled by errors of law. The arguments in this appeal, therefore, seek to

address the more obvious and egregious rulings and conduct on his part

1 Judge Early erred in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for Appellants failure to disclose privileged communications with their attorneys, therefore, his order of April 6, 2010, as well as prior orders upon which it is based, should be reversed and vacated (**Issue 1, Orders dated 12-17-08, 3-3-09, 6-2-09, 6-16-09, 7-28-09, 4-6-10, 9-16-10, 10-22-10, 12-11-10**) Dismissal of Appellants' claims, which had been sought from the outset by Respondents' counsel, was the first and only sanction imposed or even seriously considered by the judge for what he perceived to be misconduct on the part of the Appellants. Dismissal of Appellants' claims, coupled with an award of attorneys fees and costs, was the harshest sanction short of incarceration that the court could impose, Appellants contend that it should not have been utilized given the facts of this case, and that the judge abused his discretion in doing so. This is particularly true in light of the facts that (1) less draconian alternatives were available, (2) Appellants offered to submit to lesser sanctions and took extraordinary steps to avoid the dismissal, (3) the judge repeatedly adopted arguments of Respondents' counsel as evidence for the factual basis to support his decision, and (4) the judge repeatedly deviated from the law of this State in order to effect the dismissal.

“When the court orders dismissal, or the sanction itself results in dismissal, the end result is harsh medicine that should not be administered lightly. The moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction.” *Griffin Grading and Clearing Inc vs Tire Service Equipment Mfg Co Inc* 334 SC 193, 511 SE2d 716 (Ct App 1999) (striking of pleading as discovery sanction reversed) “The sanction imposed should be reasonable, and not go beyond the necessities of the situation to foreclose a decision on the merits of a case. The sanction should be aimed at the specific misconduct of the party sanctioned. The sanction should be a rifle shot, not a shotgun blast.” *The Balloon Plantation,*

Inc vs Head Balloons Inc et al 303 SC 152, 399 SE2d 439 (Ct App 1990) (trial court's dismissal for failure to comply with discovery order reversed, calling the sanction "a hydrogen bomb ") Dismissal has been held an inappropriate sanction where "any number of lesser, more narrowly tailored sanctions would have sufficed " *Karppi v Greenville Terrazzo Co Inc* 327 SC 528, 489 SE2d 679 (Ct App 1997) The record in this case is clear that the judge did not comply with the law of this State, as cited above, in imposing sanctions in this case

The judge dismissed Appellants' claims on April 6, 2010, ("Dismissal Order") finding that Appellants' were in contempt for failing to abide by his orders of March 3, 2009, ("Discovery Order") requiring them to provide "adequate responses to discovery requests" and July 28, 2009 ("Privilege Order") requiring them to produce privileged communications with their counsel On April 22, 2010, Appellants moved to alter or amend the Dismissal Order (Motion 4-22-10, R) This motion was denied on September 16, 2010 (Order 9-16-10, R) A review of the Dismissal Order necessitates a review of the two underlying orders The present discussion concerns the Privilege Order, the Discovery Order is discussed in detail under Issue 2

Rule 26(b)(1), SCRCP, excludes privileged materials from documents and information normally subject to discovery "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter " (Id , Emphasis added) The exemption of privileged materials from discovery, particularly those protected under the attorney-client privilege, rests upon the historical and societal value attributed to that privilege As this Court has stated

The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained The attorney-client privilege belongs to the client and not the attorney, and may be waived only by the client *Wilson v Preston*, 378 SC 348, 662 SE2d 580 (2008), citing *State v Doster*, 276 SC 647, 284 SE2d 218 (1981)

“The attorney-client privilege also applies to communications originating from the lawyer rather than from the client ” *Marshall v Marshall*, 282 SC 534, 320 SE2d 44 (Ct App 1984) “The trial court must determine the question of privilege without first requiring disclosure of the substance of the communication ” *Wilson supra* In this regard, the “trial court should not require disclosure of attorney-client communications to other parties without first determining whether the communications are privileged by inquiring into all the facts and circumstances of the communication ” *Ibid* As shown in the following discussion, the judge did not do this

Both sides sought discovery from attorneys, however, there was a substantial and critical difference in the positions of the respective parties Appellants sought information relating to attorneys hired by Respondents *to represent the limited partnership in separate proceedings*, ostensibly to recover the partnership assets Two of these attorneys, Mr Howson and Mr Brown, were listed as witnesses by Respondents in their initial discovery responses, a third, Mr Tomilson of the Bryan Cave law firm, became known to Appellants as a result of communications between Mr Howson and the defaulting purchaser The role of these attorneys was a critical component of Appellants’ action, particularly with respect to their claim for breach of fiduciary duty (Bailey Aff 3-30-10, ¶13r, R)

Mr Howson was hired to represent the partnership following the October 2000 meeting Appellants were unaware at that time of the tremendous conflict of interest on the part of Respondents, whereby their role as general partner directly conflicted with their own self interest in avoiding criminal prosecution The instructions given to the attorneys by Respondents concerning the nature and scope of their retention were clearly relevant, Respondents, however, asserted a claim of attorney-client privilege to keep this information from Appellants Mr Howson contacted the defaulting purchaser, and received a response from their counsel, Leighton Lord, which referenced AIMCO’s prior refusals to take the property back when offered At that

point, Mr Tomilson took over the communications from Mr Howson, of crucial importance is the fact that Mr Tomilson was a member of the Bryan Cave law firm - the very firm which represented AIMCO and negotiated a \$5,000,000 00 fine in lieu of criminal prosecution¹

Appellants served discovery requests and deposition notices relating to the involvement of these attorneys *with respect to their representation of the limited partnership, they did not seek information concerning any communications between Respondents and their counsel in this case* When Respondents asserted the attorney-client privilege, Appellants filed a motion to compel on November 7, 2007 (R) Appellants' positions were in keeping with the existing law of this State, and included, *inter alia*, (1) Appellants were members of the partnership "client", and therefore within the persons entitled to share privileged communications, (2) Respondents had waived the privilege by providing Appellants with communications generated by these attorneys and inviting Appellants to communicate directly with the attorneys, (3) Respondents were required as fiduciaries to make full disclosure to Appellants, including communications with counsel for the partnership, and (4) the evidence of fraud resulting from the Respondents' conflict of interest was sufficient to place Appellants within the "crime-fraud" exception to the attorney-client privilege ³ The judge rejected these arguments at the urging of Respondents, and ruled that, not only were Appellants not entitled to this information, but that every document listed on the 71-page Privilege Log of Respondents was privileged and not discoverable (Order 12-17-08, R), he made this ruling without ever seeing a single document, notwithstanding that Appellants had specifically asked him to conduct an in-camera review of those documents Furthermore, he received no information concerning the privileged nature of these documents other than from Respondents' counsel, by way of argument or statements in their memoranda Therefore, there

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For a detailed discussion of these arguments which were presented to the lower court, see Appellants' Memoranda dated 11-19-07, R and 1-16-09, R

was no proper evidence to support his findings in this regard *Higgins v MUSC*, 326 SC 592, 486 SE2d 269 (Ct App 1997) (“factual statements of the attorneys, whether made during argument or in written briefs or memoranda may not be considered by the court”) Likewise, he clearly did not inquire “into all the facts and circumstances of the communications,” as required by *Wilson, supra*, and *Tucker v Honda of SC Mfg, Inc* 354 SC 574, 582 SE2d 405 (2003) Accordingly, there was a clear abuse of discretion, as the order was not supported by the evidence and was controlled by an error of law, the order of December 17, 2008 should be vacated

Conversely, Respondents sought documents relating to Appellants’ privileged communications with their attorneys *in this case* This did not occur until August, 2008, even though many of these documents had been listed by Appellants in Parkview on their Privilege Log since 2005 Respondents claimed that the documents were discoverable because they were relevant to the statute of limitations issue It is important to note that the communications which Respondents sought were communications between Appellants and their counsel *in this litigation* The privileged nature of the communications between Appellants and their counsel, and the duty of counsel to protect such communications from disclosure, was acknowledged by counsel for Respondents as early as 2007 ⁴ (Tr 11-19-07, p 40, ll 22-24, R)

In an attempt to get around this obstacle and the prohibition of Rule 26(b), Respondents claimed that Appellants had waived their attorney-client privilege and work product protection “The definition of waiver, approved by this court in many cases, is ‘the intentional relinquishment of a known right ’ It may be either express or implied If claimed to have been express, *it must appear to have been a clear unequivocal and decisive act showing such a purpose* If claimed

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In arguing against Appellants’ request for information and documents concerning attorneys hired for the partnerships, Mr Johnston stated to the judge, “Clearly Mr Bailey is not going to turn over what he sent to his limited partners and what they sent to him ”

to have been implied, *it must appear that the opposite party has been misled to his prejudice* into the honest belief that such *waiver was intended or consented to* (Emphasis added) *W S Gray Cotton Mills v Spartanburg County Mills* 139 SC 223, 137 SE 684 (1927) As herein discussed, Respondents failed to prove that Appellants waived their attorney-client privilege

There was no express waiver by Appellants, as they had asserted from the outset that their communications with their counsel were privileged Therefore, Respondents advanced the theory that Appellants had *impliedly* waived their privilege and protection through what they called an “at issue” waiver Under Respondents’ theory, Appellants, *merely by filing their complaint*, had put the statute of limitations “at issue” and thereby impliedly waived any claim of privilege or protection as to any documents or information which might be relevant to that issue Appellants repeatedly pointed out to the judge that there was absolutely no support for such a position under the law of this State and that, in fact, South Carolina law was exactly the opposite - the statute of limitations is an affirmative defense under Rule 8(c), SCRPC, and must be affirmatively pled or it is waived This requirement was clearly recognized by Respondents, and is confirmed by their own Answer, which asserts the statute of limitations *as an affirmative defense* Furthermore, Respondents never made any showing that they had been misled to their prejudice into believing Appellants had intended or consented to any implied waiver *Cf W S Gray supra*

Nevertheless, the judge again adopted the argument of Respondents’ counsel and held that, *merely by filing their complaint*, Appellants had put the statute of limitations at issue and impliedly waived any privilege or protection concerning any documents which might be relevant to that issue (Order, 7-28-09, p 6, R , Order, 4-6-10, p 20, R) The Discovery Order states that the finding of implied waiver was derived exclusively from Respondents’ memorandum and their argument concerning the statute of limitations This reliance upon arguments of counsel is contrary to the laws of this State *Cf Higgins, supra* The Dismissal Order states, “The factual

bases for the Court's rulings on the privilege issues have not changed ” (Order, p 20, R) This order states that the judge “considered at length” the arguments and memoranda of Respondents' counsel, that he “disagrees” with Appellants' arguments showing the factual and legal errors in the Privilege Order, and concludes, “*Once privilege was waived as to the documents (by mere filing of the suits and/or by reasons of the allegations in the Orleans and Roosevelt complaints) they were subject to discovery in all five cases* ” (*Ibid* , emphasis added) There is no law in this State to support such a finding, the judge abused his discretion and the order should be vacated

The Dismissal Order does not quote language from the Orleans and Roosevelt complaints which it references, the reference apparently relates to Respondents' assertion, *in their memoranda*, that certain language in the complaints in the two cases impliedly put at issue the statute of limitations These two complaints refer to the parties' agreement to forgo discovery and the filing of additional lawsuits in order to appraise the properties and mediate all claims, and allege that Respondents misled Appellants, thereby resulting in a delay of their ability to recover their damages A fair reading of these two complaints reveals that the statute of limitations is not mentioned at all, and that the allegations only serve to provide the basis for Appellants' claims for damages resulting from the delay occasioned by the Respondents' misuse of the appraisal and mediation process It does not meet the test for implied waiver under South Carolina law The implied waiver must be “reasonably inferable” from the conduct of the party *Canal Insurance Company v Caldwell*, 338 SC 1, 524 SE2d 416 (Ct App 1999), it must involve “circumstances *indicating an intent to waive* ” (Emphasis added) *Bonnette v State*, 277 SC 17, 282 SE2d 597 (1981) “Waiver will not be implied from doubtful acts ” *Zeller v Cumberland Truck Sales*, 272 SC 558, 253 SE2d 111 (1979) The language in the two complaints does not meet this criteria for waiver, to interpret the allegation concerning delay and resulting claim for damages as injecting the issue of the statute of limitations so as to impliedly waive any attorney-

client privilege with respect to such issue is a gross distortion of the language of the pleadings, represents a deviation from the law of this State and constitutes an abuse of discretion by the judge. Incredibly, the judge adopted Respondents' arguments and held that such language justified his finding that Appellants had waived their right to claim privilege or protection.

The dismissal of Appellants' claims and imposition of monetary sanctions based on the implied waiver arguments demonstrates a clear abuse of discretion. "An abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an error of law." *Austin v Stokes-Craven Holding Corp*, 387 SC 22, 691 SE2d 135 (2010). The judge's reliance upon arguments of counsel, as set forth in their oral arguments, memoranda and proposed orders, in order to establish a factual basis for his decision, shows that his orders of July 28, 2009 and April 6, 2010 conflict with *Higgins supra*, they were not supported by proper evidence, and were clearly controlled by errors of law. Accordingly, they should be vacated.

Respondents' argument that Appellants had waived their attorney-client privilege, so readily adopted by the judge, had previously been rejected by the Honorable Gary E. Clary, who was appointed as Special Master for the specific purpose of examining this issue. The judge, confronted with Appellants' request for an in-camera review of all documents claimed to be privileged by either party, acknowledged that he did not "have the time and the resources to go through all of the attorney-client documents," and referred the privilege issue to Judge Clary, including documents concerning the lawyers hired to represent the partnerships. (Tr 12-9-08, pp 49-61, R, quote at p 59, ll 17-19, R, Orders, 12-30-08, 1-31-09, 4-9-09, R.) The parties were required to share equally the fees charged by Judge Clary for his services as Special Master.

Judge Clary spent several days reviewing the documents. Respondents reasserted their arguments concerning implied waiver, Judge Clary rejected these arguments. (Amended Report p 4, R.) Judge Clary also ruled that certain documents which Respondents claimed to be

privileged were not privileged and were discoverable by Appellants (Ibid, p 14, R) During Judge Clary's review, Appellants' counsel discovered that counsel for Respondents had, for several months, been in possession of documents from the Bryan Cave law firm, which Appellants had sought in their prior discovery requests Respondents had not disclosed that they were in possession of this evidence Once these documents became known to Appellants, Respondents immediately sought to include them on their growing Privilege Log The issue of their "privileged" status was added to the task of Judge Clary He determined that many of these documents were not privileged, and ruled that they were subject to discovery by Appellants

When the judge adopted Judge Clary's rulings *per se* (Order 6-2-09, R), Respondents moved that Judge Clary's rulings be altered in order to reinstate the protections earlier given by the judge They also asked that the judge reject Judge Clary's findings concerning the privileged nature of Appellants' communications with their counsel (Rule 59 Motion of Respondents 6-15-09, R) Appellants also noted significant errors in Judge Clary's findings, including, *inter alia*

- (1) his adoption of Respondents' "divergence" theory which is not recognized in South Carolina and which materially alters South Carolina law as to fiduciary duties, *Cf, Anthony v Padmar Inc* 320 SC 436, 465 SE2d 745 (Ct App 1995) (general partners owe fiduciary duties to limited partners, and violate such duties when they fail to disclose all known information that is significant and material, especially in transactions in which they have a pecuniary interest), *Beck v Clarkson*, 300 SC 293, 387 SE2d 681 (Ct App 1989) (partners' fiduciary duty is continuous, and extends even past dissolution of the partnership) (Bailey Aff 3-30-10, ¶13f, R),
- (2) his rejection of the "common interest doctrine" concerning privileged communications, finding Appellants waiver of the attorney-client privilege concerning communications made to persons possessing a common interest with Appellants The judge's adoption of Judge Clary's rulings conflict with the law of this State *Cf Tobaccoville USA Inc vs McMaster*, 387 SC 287, 692 SE2d 526 (2010) (common interest doctrine adopted by Supreme Court under facts presented "The common interest doctrine protects the transmission of data to which the attorney-client privilege or work product protection has attached when it is shared between parties with a common interest in a legal matter The inquiry is whether or not the matters discussed in the allegedly privileged documents are matters of common interest So long as the documents at issue

were covered by an applicable privilege, when created, that privilege continues until waived. When the common interest doctrine applies, it creates an exception to any potential waiver of privilege.”)

Again, based on nothing but the arguments of Respondents’ counsel, the judge modified his Order of June 2, 2009 to accommodate the requests of Respondents’ counsel and deny the relief sought by Appellants. By Order of July 28, 2009, he altered Judge Clary’s rulings, providing Respondents with the protections they sought while requiring Appellants to produce communications with their counsel which Judge Clary had protected as privileged.⁵ The Privilege Order did not provide for any redaction of counsel’s impressions or any other protections, if obeyed, it would render meaningless their attorney-client privilege, and place Appellants in the position of providing Respondents with their “game plan” for this litigation. (Bailey Aff 3-30-10, ¶13g, 16, R.) Furthermore, the order applied to all limited partners in all five cases, even though the Parkview Appellants were clearly in a different position than those in the other cases, having filed their case as early as 2003, and the facts and participants in each case were different.

Appellants made several attempts and efforts to find some alternative to the dilemma occasioned by the Privilege Order. These included, *inter alia*

- (1) First, they sought to have the order amended under Rule 60, SCRCF, in order to correct mistakes of fact and law. At the urging of Respondents’ counsel, this motion was denied by the judge. (Order 4-6-10, p. 28, R.)
- (2) Appellants were concerned that a partial production of their communications with their counsel could constitute a total waiver of their attorney-client privilege, in light of the decision in *Marshall supra* (disclosure to a third party “waives the attorney client privilege not only to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject.”) (Tr. 12-9-08, p. 55, l. 17- p. 56, l. 7, R.) The judge’s ruling also began to cause Appellants to avoid communicating with their counsel, adversely

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Prior to the entry of the 7-28-09 order, Appellants’ counsel objected to it on the basis that Rule 53, SCRCF, prohibited the judge from altering the rulings of the Special Master. This issue was addressed in Appellants’ prior Petition for Writ of Prohibition and the arguments stated therein are adopted and incorporated into this brief. (R.) See also Bailey Affidavit 3-29-10, ¶ 17, R.

affecting their representation in this case (Davis Aff ¶ 42, R , Bailey Aff 3-29-10, ¶25, R , Pike Affidavit, ¶8, R , Hinnant Aff , ¶27, R , Rentz Aff ¶8, R , Reynolds Aff , ¶6, R , Hodge Aff ¶ R , Ivey Aff , ¶9, R)

- (3) At the urging of Respondents' counsel, the judge threatened to dismiss their claims if Appellants withheld their privileged communications. Appellants urged the judge to consider lesser sanctions, including a contempt citation which would entitle them to an immediate appeal (Bailey Aff 3-30-10, ¶21, R). This request was opposed by Respondents' counsel and, again, the judge acceded to their wishes, and prepared to dismiss their claims. This placed Appellants in the untenable position of either (1) complying with the order, which would destroy their attorney-client privilege and give Respondents unrestricted access to their confidential communications with their counsel, or (2) declining to comply with the order, which would put them at risk of having their claims dismissed and deprive them of a trial on the merits.
- (4) Through independent counsel, Appellants then sought relief in the appellate courts, as documented above. Simultaneously, Appellants asked Chief Justice Toal to transfer their cases to the Business Court, but their request was denied.
- (5) Appellants filed a motion for protection on February 22, 2010, requesting that the judge consider other options, including permitting them to submit their attorney-client documents under seal for an in-camera review. The judge denied this request (Motion for Protective Order, R , Order 10-22-10, R)⁶

On April 6, 2010, the judge executed the order prepared by Respondents' counsel, finding Appellants in contempt of court and imposing the harshest sanction possible: dismissal of their claims and requiring them to pay attorneys fees and costs to Respondents. As shown above, this amounted to an abuse of discretion, it is not supported by the evidence in the case, and is controlled by numerous errors of law. Cf. *Grosshuesch v Cramer*, 377 SC 12, 659 SE2d 112 (2008) (trial court erred in holding party in contempt for failing to respond to discovery requests which would have required party to waive privilege against self incrimination). If it is allowed to stand, this decision will affect not only the litigants in this case, but litigants in all future cases. Specifically, future litigants, *merely by filing complaints*, will be deemed to have put at issue the

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Although the judge denied Appellants' request to submit documents under seal for in-camera review, he earlier granted Respondents' request to submit documents to him under seal for in-camera review as part of their efforts to avoid the rulings of Judge Clary (Order, 8-31-09, R).

statute of limitations and impliedly waived their attorney-client privilege as to that issue, they may be deemed to have waived their attorney-client privilege because of language in other complaints filed by other parties in other cases. Future defendants will no longer have to raise the statute of limitations as an affirmative defense and Rule 8(c), SCRCP will become a nullity. Future litigants standing in a fiduciary relationship will be confronted with a significant change in existing law, as fiduciary duties will no longer include full and complete disclosure of significant and material information, including disclosure of conflicts of interest. Fiduciary duties will no longer be continuing in nature, throughout the fiduciary relationship, but will end when there is a “divergence of interest” between members within the relationship. Appellants contend that these deviations from existing law should not be adopted by this Court, as they were by the judge, accordingly, the orders discussed above should be reversed and vacated.

2 Judge Early erred in imposing the sanctions of dismissal of Appellants’ claims and requiring them to pay costs and attorneys fees to Respondents for alleged deficiencies in their discovery responses, thereby requiring vacation of his order of April 6, 2010, as well as prior orders upon which it is based **(Issue 2) (Orders dated 12-17-08, 3-3-09, 3-3-09 (Granting in Part and Denying in Part) 4-6-10)** Apparently recognizing the deficiencies and reversible error of the rulings in the Privilege Order, Respondents sought to find a back-up excuse to justify the dismissals. They did this by accusing Appellants of failing to comply with discovery rules. Again, the judge readily adopted Respondents’ position, notwithstanding that it was not supported by proper evidence or existing law. In the Dismissal Order, and at the request of Respondents’ counsel, the judge found Appellants in contempt of court for failure to comply with his prior order of March 3, 2009 (Discovery Order), and dismissed Appellants’ claims in all five (5) cases as the sanction for the contempt. He further ordered that Respondents were entitled to “receive a monetary award to compensate them for the reasonable costs and attorneys fees incurred in

connection with their Motion to Compel Discovery and their two Motions for Sanctions ” Appellants contend that the rulings of the judge in this regard result from and are tainted by the bias and prejudice hereinafter discussed, and evidence the judge’s imposition of a double standard concerning discovery

The finding of contempt and the imposition of sanctions also result from an abuse of discretion on the part of the judge and should accordingly be vacated, as these are unsupported by the evidence and controlled by errors of law *Austin supra* The factual findings in the Dismissal Order and the Discovery Order were taken from the memoranda supplied to the judge by counsel for Respondents As previously noted, it is improper for a judge to use the unsworn statements of counsel, whether in argument or in a memorandum, to establish factual findings Cf, *Higgins supra* The factual findings of both orders simply parrot the arguments of Respondents’ counsel and the language of their memoranda

In order to understand the deficiencies in the Dismissal Order, it is necessary to examine the underlying Discovery Order upon which it is based The Discovery Order followed a motion to compel filed by Respondents, which was heard on December 9, 2008 The motion was accompanied by a memorandum containing Respondents’ arguments, which was filed the day before the hearing The Discovery Order mirrors the memorandum and references seventeen (17) answers to interrogatories and forty three (43) responses to production requests which the judge found to be “incomplete and inadequate ” This finding is not supported by the evidence An examination of Appellants’ discovery responses clearly shows that they met or exceeded the requirements of the South Carolina Rules of Civil Procedure, and certainly exceeded the discovery responses provided by counsel for Respondents This Court is respectfully requested to examine these responses in determining whether the judge abused his discretion concerning their adequacy Appellants’ discovery responses are addressed in the affidavit of Thomas A

Pendarvis, (R) Due to the voluminous nature of the responses, it is impossible to discuss each of them, however, the Court is directed to the following examples

- 1 On July 14, 2005, Appellants in Parkview responded to Respondents' initial discovery requests in that case. The responses were based upon the information and documents in the possession of the Parkview Appellants or their counsel at that time, and included, *inter alia* (a) valuation for the Parkview apartments, (b) eleven pages listing persons having knowledge or information concerning the facts of the case and a summary of their testimony, (c) seven pages listing generic categories of witnesses, as the specific individuals were then unknown, (d) twenty four pages specifically identifying documents in their possession, and enclosing copies of any documents not in possession of Respondents, and (e) information relating to the expert witness who had been retained. *The information produced was in addition to more than 35 000 pages of documents already produced in the case*⁷ (Appellants' answers to interrogatories, R) Parkview Appellants also provided Respondents with a privilege log for documents being withheld under a claim of privilege between 2000 and 2003. Counsel for Respondents made no complaint regarding these responses.
- 2 Appellants supplemented these discovery responses on November 6, 2007 by adding witnesses and documents relating to insurance valuations for the subject properties (Pendarvis Aff, Ex 10, 11, R). Supplemental responses were provided on numerous occasions prior to the issuance of the Dismissal Order as information became known to Appellants. These included, *inter alia*, supplements identifying witnesses and documents relating to (a) assessed values of the subject properties (Pendarvis Aff, Ex 13, 14, 22, 23, R), (b) a title history for each of the subject properties (Ibid, Ex 21, R), and (c) appraised values, HUD rental comparability studies and subsequent sales information for the subject property (Ibid, Ex 29 and 30, R). These supplements do not include the discovery responses by Appellants to Respondents' second set of discovery requests dated August 28, 2008.
- 3 In August, 2008, more than three years after the filing of this case, less than one year before the trial date in May, 2009, and without having taken a single deposition, counsel for Respondents served a second set of discovery requests (Ibid, Ex 45, R). These requests were incredibly vague, burdensome, and overly broad, and far exceeded the abuses described in *Oncology and Hematology Associates of SC vs SC DHEC*, 387 SC 380, 692 SE2d 920 (2010). For example, interrogatory #13 sought voluminous information regarding accountants, financial planners and advisers, tax advisers or preparers, et al with regard to each of the

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Nearly 34,000 pages of these documents came from one source, *i e*, Gary Hediger d/b/a Hediger Enterprises, Inc. Although less than 5,000 pages of these actually related to the five (5) properties involved in the cases on appeal, Appellants' counsel was required to review each page in order to determine any relevancy to the issues involved in this litigation (Tr 7-1-08 p 34, ll 10-24, R)

partnerships, properties, notes, sales transactions, purchasers, subsequent sales, Mr Hediger, subsequent purchasers and/or the Respondents Interrogatory #17 required Appellants to “describe in detail all actions taken to study, assess, analyze, estimate or project the impact of the changes in the tax laws during the 1980s on the value of, or market for, the Properties or any other low-income housing or HUD-regulated properties ” The interrogatories had no time frames, so that they covered the entire life span of each of the Appellants (*Ibid*, R) The Discovery Order sanctioned these and other interrogatories, finding Appellants’ answers to be “incomplete and inadequate ”

- 4 Respondents’ requests for production were no better, requesting, for example, “all documents concerning any of the properties, the limited partnerships, the notes, the sales transactions, the purchasers, Hediger, subsequent sales transactions, and subsequent purchasers ” (*Ibid*, Requests 1-10, R) They also requested documents regarding tax information, including estate and gift taxes and investments (*Ibid*, requests #11 and 12) Incredibly, although the Respondents had managed the respective properties, and the Appellants, as limited partners, had nothing to do with them since 1975, Respondents sought documents concerning the “operating statements, financial statements, balance sheets, rent rolls” and other financial information for these properties, as well as documents concerning the “physical condition” of the properties (*Ibid*, requests #13 and 16), as former managers, Respondents already had access to these documents *Respondents even sought “all documents reflecting criminal activity or suspected criminal activity at the Properties or in the immediate vicinity of the Properties” (request #17)* The Discovery Order nevertheless sanctioned these requests, finding Appellants’ responses to be “incomplete and inadequate ”
- 5 Based on the ages and health of Appellants, some of whom are widows or heirs of original partners, Appellants responded to the best of their ability Many Appellants did not possess any responsive documents, and Appellants’ counsel specifically pointed these facts out to the judge at the hearings on the Respondents’ motions For example, on December 9, 2008, counsel stated
 - a “I can show you 15 supplemental discovery responses or better that we have done Every time we get something, we pass it along to them We send it in If I’ve got it, they’ve got it ” (Tr 12-9-08, p 37, l 18-21, R)
 - b “There were 4 primary partners originally in Parkview Mr Davis is now almost 80 years old One was Rentz He is dead One was Pike He is dead The fourth was Hodge He is dead The only living creature out of that original group is Mr Davis We didn’t get a lot of materials from the Orleans partnership and different ones The reason is we have asked for these documents but people are either dead or they’re too old ” (*Ibid*, p 40, l 24 - p 41, l 9, R)
 - c “In the case of Parkview widows have succeeded to their partnership interests and in the case of Mr Hodge, his daughter has as part of the

estate So, we have asked them – each of them – to go back and look and see what you can find Get it to us whatever it is Go through old trunks Go through safe deposit boxes Go to anything you can find that relates to this They have presented it to us We have turned it over We have turned over every document that we have been presented with with the exception of documents that are listed on our privilege log It’s just that simple ” (Ibid , p 41, ll 11-22, R)

Furthermore, at a later hearing on August 24, 2009, Appellants’ counsel reiterated these ongoing concerns to the judge

- a “We are having difficulty getting a lot of the documents from people who can’t communicate because of their health issues ” (Tr 8-24-09, p 6, ll 5-7, R)
- b “We’ve had to send these people out searching for materials not in their immediate control We had our clients looking for these documents ” (Tr 8-24-09, p 6, ll 17-19, 23-24, R)
- c “This production is all we could do It’s absolutely the best we can do Every time we’ve gotten new documents, we have delivered them Some of the things are things that are just not within the control of these people Life insurance applications they made back in the 60s they’re having to go back We’ve gotten as many of these documents as we can And we’re going to continue to comply as we’re able ” ” (Tr 8-24-09, p 7, ll 10-11, l 21- p 8, l 4, R)

- 6 The judge also found that Appellants’ responses concerning their damages were deficient, both the Discovery Order and subsequent Dismissal Order specifically rely upon Respondents’ Supplemental Memorandum to support this finding (Dismissal Order, p 10, R) Notwithstanding that the reliance on the memorandum violates *Higgins supra*, the finding is simply not supported by the evidence Parkview Appellants’ initial discovery responses in 2005 were specifically incorporated into the discovery responses in this case, they set forth the manner in which their damages were calculated, and included the fair market value for the apartment complex as a component of this calculation Appellants had nothing to do with the apartments subsequent to Respondents’ entry into the partnership in 1975, and were not privy to many documents which would establish the fair market value As part of their discovery efforts, however, they were able to obtain a number of values for each of the apartments from which the jury could ascertain the fair market value needed to calculate damages, and provided these to Respondents as noted above With the exception of Pinewood, Appellants provided an itemization of the values for each apartment complex to Respondents on multiple occasions, including following the mediation in March, 2008 and again as to Parkview in their Third Supplemental Response to the August 28, 2008 discovery (Appellants’ Third Supplemental Response and Bailey letter of 1-25-10, R) The itemizations showed ranges of values for each complex The Appellants are not required to itemize the amount of their damages to a mathematical certainty *Holly Woods Ass vs Hiller*, 392 SC 172, 708 SE2d 787 (Ct App 2011), *Whisenant v James Island Corp* , 277 SC 10, 281 SE2d 794

(1981) (“proof with mathematical certainty of the amount of loss or damage is not required”) These responses clearly comply with the rules of procedure and the laws of this State

- 7 The judge also found that Appellants’ responses relating to their expert witnesses were deficient. The Dismissal Order states, “the Parkview Plaintiffs’ Third Supplemental Responses fall well short of what is required by the General Discovery Order, *as shown in Defendants’ Second Supplemental Memorandum at pp. 9-14*, Plaintiffs in the other cases have provided even less.” (Dismissal Order, p. 9, R.) (Emphasis added.) Again, reliance on the memorandum violates *Higgins supra*. Furthermore, the finding is simply not supported by the evidence. Following the hearing in January, 2010, Appellants’ counsel provided the judge and Respondents with the Third Supplemental Response referenced above. Though unmentioned in the Order, Appellants’ counsel also provided a letter which stated that the supplemental responses were limited to Parkview in light of the judge’s comments that it was the first case scheduled for trial. The letter also expressed the belief that the supplemental responses were “in compliance with both your prior order and the South Carolina Rules of Civil Procedure,” and added this sentence: “*If you agree we will provide similar updated responses in the other cases*.” The judge did not respond, other than to issue the Dismissal Order once he received Respondents’ memorandum. The supplemental responses specifically addressed both the damages and expert witness “deficiencies” about which Respondents and the judge had complained. Also, the valuations by the assessors, appraisers, insurance brokers, et al. referenced above were included for Parkview, as well as a precise dollar valuation by two (2) experts. (Ltr. 1-25-10, R. , Third Supplemental Response, R.) In any event, Respondents knew the identities of all Appellants’ experts since March 2008, and declined to depose them. Therefore, they were not prejudiced by any alleged deficiencies in Appellants’ responses. Cf., *Holly Woods supra*, (“even if there was a discovery violation, we find no prejudice because Appellants failed to depose [the expert]”)

The judge’s interpretation of Respondents’ discovery requests exceed discovery envisioned or permitted under the South Carolina Rules of Civil Procedure. They validate the concern of this Court, as expressed in *Oncology supra*, that “discovery practice has become a cottage industry and the merits of a claim are being relegated to a secondary status.” Appellants’ counsel informed the judge that the third supplemental responses were “as detailed and complete as I know how to make it in a written discovery response.” (Ltr. 1-25-10, R.) Appellants believe that their responses were adequate and that their cases should not have been dismissed based on the discovery responses. Respondents’ discovery requests, as was the case in *Oncology, supra*,

are “abusive and beyond the pale” As the Court there noted, “ the trial court must make an effort to impose reasonable discovery limits The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure ” The judge made no such effort and abused his discretion

It is also apparent that the judge, in order to exercise his discretion as to the discovery issues, failed to weigh the factors required in such undertakings Cf, *Samples v Mitchell*, 329 SC 105, 495 SE2d 213 (Ct App 1997), and cases cited therein The order does not address any weight given to the nature of the discovery requests, the discovery posture of the case, the existence of any wilfulness by Appellants, or the degree of prejudice to Respondents This omission, in and of itself, is fatal to the judge’s findings As stated in *Samples, supra*

A failure to exercise discretion amounts to an abuse of that discretion When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised It should be stated on what basis that discretion was exercised

Accordingly, there was a clear abuse of discretion on the part of the judge, as both the Discovery Order and the Dismissal Order were not supported by the evidence and were controlled by errors of law, the orders of March 3, 2009 and April 6, 2010 should be reversed and vacated

3 Judge Early was not legally qualified to accept and/or retain the assignment to preside over this case (Issues 3, Order 3-7-06) The general rule with respect to a judge’s qualification to preside over matters before him or her is set forth as follows

It is the judge’s responsibility to disclose sua sponte all information of any potential conflict between himself and the parties or their attorneys when his impartiality might reasonably be questioned neither the client nor his attorney have any obligation to investigate the judge’s impartiality Litigants have a right to have their causes tried fairly in court by an impartial tribunal, and are entitled to the due process requirement of a hearing before an impartial and disinterested tribunal Where the circumstances are such as to create in the mind of a reasonable man a suspicion of bias, there may well be a basis for disqualification though in fact no bias exists For this reason, a judge should disqualify himself where grounds for disqualification exist as well as in situations where

his impartiality might reasonably be questioned A judge should disqualify himself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment 75 Am Jur , 2d, Trial, §86 (Emphasis added)

The qualification of a judge in this State to preside over matters brought before them is ostensibly controlled by the Code of Judicial Conduct, which is entirely consistent with the foregoing general proposition of law The Code, adopted by this Court under Section V of the South Carolina Appellate Court Rules, together with the pertinent canons and sections, is “intended to govern conduct of judges and to be binding upon them ” Rule 501, SCACR, Preamble “An independent and honorable judiciary is indispensable to justice in our society ” Rule 501, SCACR, Canon 1A “Although judges should be independent, they must comply with the law, including the provisions of this Code *Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility Conversely violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law* ’ *Ibid* , Commentary (Emphasis added)

Whenever the term “shall” is used in the Code, it imposes mandatory, non-discretionary conduct on judges, “it is intended to impose binding obligations ” Rule 501, SCACR, Preamble Accordingly, “A judge *shall* respect and comply with the law and *shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary*” *Ibid* , Canon 2 A (Emphasis added) The Commentary to Canon 2 A explains

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges *A judge must avoid all impropriety and appearance of impropriety* The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge *Actual improprieties* under this standard include violations of law, court rules or other specific provisions of this Code The test for *appearance of impropriety* is whether the conduct would create in reasonable minds a *perception* that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired (Emphasis added)

Furthermore, “A judge *shall be faithful to the law* and maintain professional competence in it,” “ *shall perform judicial duties without bias or prejudice,*” and “ *shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice* ” *Ibid* , Canon 3B(2) & (5) (Emphasis added) As noted in the Commentary to this Canon, “A judge who manifests bias *on any basis* in a proceeding *impairs the fairness of the proceeding and brings the judiciary into disrepute* ” (Emphasis added) Additionally, as a general proposition, “A judge *shall not initiate permit or consider ex parte communications* ” unless such communications are “ expressly authorized by law ” *Ibid* , Subsection (7) and (7)(e) (Emphasis added) As stated in the Commentary to this section, *To the extent reasonably possible all parties or their lawyers shall be included in communications with a judge* ’

As to the issue of qualification *per se*, the Code provides, “A judge *shall* disqualify himself or herself in a proceeding in which the judge’s impartiality *might reasonably be questioned*, including *but not limited to* instances where (a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer ” *Ibid* , Canon 3E(1) (Emphasis added) Under this Canon, which imposes an *objective standard* of reasonableness as opposed to a subjective standard of impartiality in fact, a judge is *automatically disqualified* if his impartiality might reasonably be questioned *Nothing else need be shown* The specifics mentioned in Canon 3E(1) are simply *examples* of instances when a judge’s impartiality is reasonably at issue This position is supported by the Commentary to the Canon “Under this rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, *regardless whether any of the specific rules in Section 3E(1) apply* ” (Emphasis added)

At the time the judge was assigned by Chief Justice Toal to preside over this case, as well as the aforesaid four (4) related cases, the judge was disqualified to accept the assignment under Canon 3E At that time, he had a *personal* relationship with Ellis Johnston, lead counsel for the

Respondents, which was substantially different from the *professional* relationship which he had with counsel for Appellants, and which went beyond the normally expected casual relationships existing between members of the bench and bar. His relationship involving Mr. Johnston inevitably leads to the conclusion that the judge's impartiality might reasonably be questioned. This relationship between the judge and Mr. Johnston involved members of their families and included, *inter alia*, the following information which was *not* disclosed by the judge until years after these cases were assigned to him: (a) the judge had known Mr. Johnston's wife for approximately 40 years, and she had been married to the judge's college fraternity brother, (T 3-29-10, p. 10, l. 21-22, Order of 10-7-10, p. 3); (b) the judge's son (Ross) and Mr. Johnston's son (Caldwell) were close friends, had known each other for at least ten (10) years, were fraternity brothers in college, and had traveled together in Europe, (T 3-29-10, p. 10, l. 13-16, Order of 10-7-10, p. 3); and (c) the judge had a picture of his son and Mr. Johnston's son together, which he keeps in his office. (T 3-29-10, p. 10, l. 17-20.)

Appellants and their counsel were totally unaware of *any* personal relationship between the judge and Mr. Johnston when this case was assigned to the judge. Their close inter-familial relationship was clearly one whereby the judge's impartiality might reasonably be questioned, accordingly, the judge was automatically disqualified from accepting this assignment and should have made that fact known to Chief Justice Toal and to Appellants and their counsel. At the very least, this was certainly information which was clearly *relevant to the issue* of the judge's qualification to fairly and impartially preside in these cases, and therefore *should have been fully and completely disclosed on the record at the outset*.

Prior to accepting the assignment of these cases, the judge had an initial duty at least to fully disclose to Chief Justice Toal and Appellants the full and complete nature of this relationship with Mr. Johnston. This is true even if the judge did not believe that the relationship

with Mr. Johnston would require his disqualification. As stated in the Commentary to Canon 3E, “A judge should *disclose on the record* information that the judge believes the parties or their lawyers *might consider relevant* to the question of disqualification, *even if the judge believes there is no real basis for disqualification*” (Emphasis added). Canon 3E recognizes that the integrity of the judiciary depends upon the candor of judges not only to disqualify themselves *sua sponte* as stated above, but at the very least to disclose on the record all information potentially relevant to the judge’s qualification to preside. There is nothing in the record to indicate that the judge made any such disclosure prior to or contemporaneously with the assignment Order of Chief Justice Toal. In fact, the only time the judge made any disclosures on the record concerning his relationship with counsel for Respondents was not until March 2010, and then only after Appellants filed a motion requesting that he do so (Motion for Disclosure, R. , Tr. 3-29-10, R.).

A judge’s duty to disqualify himself, or to at least disclose on the record all information which the parties or attorneys might consider relevant to the issue of disqualification, is not temporally limited by Canon 3. Therefore, the judge had a *continuing duty* to fully disclose to Chief Justice Toal and Appellants not only the relevant information concerning the relationship with Mr. Johnston existing at the time of his assignment to these cases, but also any additional information concerning this relationship which developed subsequent to his assignment. Furthermore, this continuing duty required the judge to fully disclose *on the record* all relevant information concerning the full and complete nature of his relationships with attorneys Anne Ross Rosen and Marvin Infinger once they became counsel of record for Respondents in these cases. The record in this case clearly reveals that the judge violated this duty by making only cursory and partial disclosures, *off the record*, concerning relationships with Respondents’ counsel prior to his formal disclosure in March of 2010 (Bailey Aff. 3-30-10 ¶¶ 6, 7, 10, 12, R.). The record also shows that even the one belated disclosure which the judge finally made on the record was not

complete, nor was it entirely accurate (Bailey Aff 3-30-10 ¶¶ 23, 24, R , Bailey Aff 4-7-10, R) This will be discussed in greater detail in the following section

Based on the relationships described above and the judge's failure and refusal to make a full and complete disclosure concerning those relationships, the judge was not qualified to accept the assignment of the five cases under the Order of March 7, 2006 Appellants believe that such order would not have been issued had Chief Justice Toal been made aware of the full extent of these relationships Accordingly, the order assigning these cases to the judge should be vacated, and the cases should be reassigned to a fair and impartial judge

4 Judge Early erred in failing to recuse himself and to vacate his prior orders **(Issue 4, Orders 8-18-08, 12-17-08, 3-3-09, 3-3-09 (granting in part, denying in part), 6-2--09, 6-16-09, 7-28-09, 4-6-10, 9-16-10, 10-7-10, 10-22-10, 12-11-10)** By order of October 7, 2010, the judge denied Appellants' motion for recusal (R) On October 28, 2010 Appellants filed a motion to alter or amend the recusal denial order, the motion was denied by the judge on December 11, 2010 (Motion to alter or amend, R , 12-11-10 Order, R) As noted above under the Canons, the onus for any inquiry or disclosure concerning a judge's qualification is placed upon the judge, not the litigants or their lawyers Theoretically, judges who act in accordance with Canon 3 will *sua sponte* disqualify themselves if there is any potential whereby a reasonable person could question their impartiality, if the theory held true, there would never be a need for a litigant or their attorney to request recusal of a judge In practice, however, it is extremely rare that judges *sua sponte* disqualify themselves Therefore, it becomes even more important that judges at least honor their obligation to make a full and complete disclosure on the record of any information which might lead a reasonable person to question their impartiality This will at least permit the litigants and their attorneys to make an informed decision as to whether or not to pursue a motion for recusal

In the experience of the undersigned, motions to recuse judges are infrequently made. It is axiomatic that such motions run the risk of alienating the presiding judge, not only in the case *sub judice* but in other proceedings as well, and most lawyers refrain from requesting recusal for that reason alone. Furthermore, motions to recuse in this state are decided by the judge whose recusal is sought, so there is little chance that such a motion will be granted. It is human nature for judges to resist any idea that they may not be fair or impartial, so they are not likely to make a ruling which, by its nature, must acknowledge that the possibility of unfairness or partiality exists. Finally, our appellate court decisions regarding motions to recuse reveal that judges' refusals to recuse themselves are not likely to be overturned on appeal, so the potential benefit of making a recusal motion is far outweighed by the unlikelihood of success. All of these act as deterrents to recusal motions. As a general proposition, this is not necessarily bad. We do not want our judges unnecessarily burdened with recusal requests from disgruntled litigants. Unfortunately, it also creates an atmosphere whereby, as in the present appeal, judges recognize the probable outcome of a recusal request and take advantage of that reality, to the undeserving prejudice of litigants with legitimate grounds for recusal.

An examination of the case law in South Carolina reveals that it is extremely rare for an appellate court to overturn a judge's denial of a motion to recuse, as our courts have imposed the additional burden of showing evidence of bias or prejudice in the record. *Cf., Lyvers v Lyvers*, 280 SC 361, 312 SE2d 590 (Ct App 1984), *Burgess v Stern*, 311 SC 326, 428 SE2d 880 (1993) (Even though the trial judge admitted to *ex parte* contacts with counsel for one of the parties, and even though Supreme Court acknowledged the specific prohibitions against *ex parte* communications, no error found in trial court's order emanating from the *ex parte* contact because court concluded "that no prejudice resulted"), *Simpson v Simpson*, 377 SC 519, 660 SE2d 274 (Ct App 2008) (court upheld trial judge's subsequent refusal to recuse herself, reversing her

prior decision to *sua sponte* recuse herself, again finding no evidence of bias or prejudice), *Eadie v Krause*, 381 SC 55, 671 SE2d 389 (Ct App 2008) (court relegated discussion of recusal to a footnote, affirming trial judge's refusal to recuse himself notwithstanding that he was a former law partner of the named defendant, stating "we do not find evidence of bias or prejudice sufficient to warrant reversal ")

Given the legal talent in the South Carolina Bar, it is rather astonishing to find that virtually no appellant's counsel has been able to point to any evidence in the record sufficient to convince an appellate court in this State to reverse the decision of trial judges not to recuse themselves. Unfortunately, the use of the "no evidence of bias or prejudice" standard by our appellate courts on a near universal basis for affirmation of trial judges' refusals to disqualify or recuse themselves has resulted in the fact that there are virtually no guidelines or criteria which have been established in order to determine precisely *what* evidence of bias or prejudice, or what degree of proof of such evidence, *would* warrant disqualification or recusal. An exception to this, however, was presented in *Ellis v Proctor & Gamble*, 315 SC 283, 433 SE2d 856 (1993). There are three (3) points to be made in light of the *Ellis* decision.

- (1) Justice Moore, author of the opinion, utilized language entirely consistent with the Judicial Canons of Ethics, finding disqualification should occur if a judge's impartiality "might reasonably be questioned." Furthermore, Justice Moore set the appellate standard for reviewing disqualification or recusal issues as one which *limits the court's ability to affirm a trial judge's failure to disqualify himself*, stating "Under Canon 3(C), a judge *should* disqualify himself if his impartiality might reasonably be questioned. In cases involving a violation of Canon 3, *this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice.*" *Ellis supra* (Emphasis added.)
- (2) *Ellis* addressed the language of Canon 3(C), which was the predecessor to our present Canon 3(E), previously quoted herein. An important distinction exists, however, between Canon 3(C), under review in *Ellis*, and present Canon 3(E). The present language of Canon 3(E) uses the mandatory term "*shall*" as opposed to the discretionary term "*should*" cited in *Ellis*. Accordingly, under the present language of Canon 3, disqualification by the judge is *mandatory* as previously stated herein if his impartiality might reasonably be questioned.

- (3) Justice Moore's opinion in *Ellis* is unique in that it actually provides a small window for determining the *type of evidence* our appellate courts will deem sufficient to demonstrate a judge's bias or partiality requiring his recusal. Even though the trial judge in *Ellis*, much like the judge in the present case, gave assurances of his impartiality, Justice Moore found the following: "While we accord great weight to the trial judge's assurance of his own impartiality, we find *a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record*." Accordingly, we find evidence of judicial prejudice in this case." The evidence of prejudice referenced in *Ellis* consisted of an *ex parte* memorandum provided to the trial judge by counsel for one of the parties. Justice Moore found this single *ex parte* communication sufficient to require recusal, even though the trial judge stated that it "had no bearing on the trial court's decision," specifically noting "the prohibition against *ex parte* communications under Canon 3(A)(4) of the Code of Judicial Conduct."

In the present case, the record is replete with evidence that the judge's findings are not supported by the record, so that his impartiality "might reasonably be questioned," thereby rendering his disqualification mandatory. This evidence includes not only evidence of bias or prejudice against Appellants, but also evidence of partiality and bias in favor of counsel for the Respondents. This is particularly true beginning in the Spring of 2008, when the judge and his son were treated to an all-expense paid fishing trip in Florida by Mr. Johnston's brother, and when Mr. Johnston, whose position as counsel for Respondents was in jeopardy, brought in Mr. Infinger and Ms. Rosen as additional counsel. This evidence includes, *inter alia*

- 1 In the spring of 2008, the judge remarked that his son, Ross, and Mr. Johnston's son, Caldwell, "have become friends." This gave the impression that the relationship between their sons was recent in origin, and was the first time that the judge had made any disclosure concerning any relationship between any member of his family and Mr. Johnston's family since his acceptance of the assignment of these cases approximately two (2) years earlier. (Bailey Aff. 3-29-10, ¶ 7, R.) It was not until 2010, in response to a motion by Appellants for a full and complete disclosure of the relationships between the judge and Respondents' counsel, that the judge made any disclosure on the record, and Appellants then became aware of the following additional facts which the judge had not previously disclosed:
 - a The judge's son and Mr. Johnston's son had not just become friends, but had been friends for years, and were actually college fraternity brothers, (Tr. 3-29-10, p. 10, ll. 14-15, R.)

- b The judge's son and Mr Johnston's son traveled together in Europe, (Tr 3-29-10, p 10, ll 15-16, R)
- c The judge's son had attended and possibly participated in the wedding of Mr Johnston's son, (Tr 3-29-10, p 11, ll 2-3, R)
- d Mr Johnston's son and his wife had stayed at the judge's beach house as guests of the judge and his son, (Tr 3-29-10, p 11, ll 7-10, R)
- e The judge kept a picture of Mr Johnston's son in his office (Tr 3-29-10, p 10, ll 17-20, R)

Other evidence in the record demonstrates that the judge's disclosures on March 29, 2010, concerning the relationship between the judge and Mr Johnston and members of their respective families were incomplete and/or inaccurate, while he made some disclosures concerning the relationships with Mr Johnston's son, he omitted any information relating to Mr Johnston's daughter. In support of their motion for recusal, Appellants produced evidence that (a) the judge's son, Ross, was also friends with Mr Johnston's daughter, Annie, (b) both Annie Johnston and Respondents' counsel Anne Ross Rosen are listed as friends of Ross Early on his Facebook page, and (c) the judge's picture appeared on the Facebook page of Mr Johnston's daughter, Annie (Bailey Aff 4-7-10, R) The judge failed to make any disclosure as to these additional relationships

- 2 In 2008 the judge also casually mentioned that his son had been invited by Mr Johnston's son to go on a fishing trip on a boat belonging to Mr Johnston's brother, that the judge had also been invited on the trip and that the judge had accepted the invitation (Bailey Aff 3-29-10, ¶ 7, R) It was not until 2010, in response to Appellants motion for disclosure, that Appellants became aware that the fishing trip took place in Islamorada, Florida, at no cost to the judge, that Mr Johnston's brother was present, and that the judge took Mr Johnston's brother and his wife to dinner on two (2) separate occasions during the trip at the judge's expense (Tr 3-29-10, p 11, l 10-13, R)
- 3 On a subsequent occasion, the judge stated to Mr Johnston that he had gone to see Mr Johnston's brother when he was in Georgetown and that his brother had invited him to go fishing again (Bailey Aff 3-29-10, ¶7, R) The judge did not mention this visit with Mr Johnston's brother in his "disclosure" on the record, nor did he ever indicate whether he accepted the invitation
- 4 On another occasion, Mr Johnston stated to the judge that he was aware that the judge's son, Ross, was going fishing in Islamorada (Florida) and that Mr Johnston thought he would "go with him " (Bailey Aff 3-29-10, ¶7, R) The judge denied Appellants' motion to require Respondents' counsel to disclose under oath the full nature and extent of their association with the judge, which prohibited Appellants from determining if, in fact, Mr Johnston ever accompanied the judge's son to Islamorada or to any other destination

- 5 Mr Johnston also casually mentioned on one occasion that he and the judge attend a “white tie and tails” affair each year, and also that there was an “incident in Europe” involving their sons (Bailey Aff 3-29-10 ¶ 7, R) Although the judge, as part of his “disclosure” on the record in 2010, made some comments concerning the common member ships of himself and Mr Johnston in the Caroliniana social organization, he made no reference to the “incident in Europe ” Since the judge denied Appellants’ motion to require Respondents’ counsel to disclose under oath the full nature and extent of their association with the judge, Appellants were prohibited from access to any information concerning the “incident in Europe” involving their sons
- 6 On April 23, 2008, at a status conference before the judge, Mr Infinger appeared with Mr Johnston for the first time At the status conference, Mr Johnston stated to the judge and the others present that Mr Hilty, who was in-house counsel for Respondents, felt Mr Johnston had done “a shitty job” at the mediation the prior month, and that Mr Infinger was being named as an additional counsel of record for the Respondents At that point, the judge welcomed Mr Infinger to the case, and casually remarked that he had known Mr Infinger for several years, and that Mr Infinger had spent the night on one occasion at the judge’s home several years earlier following a wedding All of the above occurred off the record (Bailey Aff 3-29-10 ¶¶ 9-10, R)
- 7 Additionally, Mr Johnston stated at the status conference that an associate of Mr Infinger’s, Ms Anne Ross Rosen, was also being assigned as counsel of record for the Respondents in these cases At that point, the judge commented that he knew Ms Rosen and had, in fact, “married her ” He made no other disclosure concerning Ms Rosen This also occurred off the record (Bailey Aff 3-29-10 ¶12, R) It was not until 2010, in response to Appellants’ motion for disclosure, that the judge finally disclosed that
- a Ms Rosen was a native of the judge’s hometown of Bamberg, South Carolina and that the judge had known her for her entire life
 - b Ms Rosen’s parents and the judge moved to Bamberg around the same time and their careers grew side by side over the years
 - c Ms Rosen’s father was a surgeon and the judge had been his patient, specifically, Dr Ross had performed one or two surgical procedures on the judge and had referred him to at least one other physician for another procedure
 - d Ms Rosen was the same age as the judge’s son, Ross and they went through school together
 - e Ms Rosen and her fiance, John Rosen, asked the judge to perform their wedding ceremony and the judge and his wife and son Ross were provided with a room for one (1) night at a condominium at Fripp Island by Dr Ross (Tr 3-29-10 p 6, l 25 - p 8, l 3, R)

The record demonstrates that the judge's disclosures on March 29, 2010, concerning Ms Rosen were also incomplete and/or inaccurate. For example, in response to a subpoena issued by Appellants, the Fripp Island Resort provided documentation which contradicts the "disclosure" made by the judge and reveals that (1) the condominium referenced by the judge was provided to him and a guest at no charge by the Ross family for two (2) nights, not one (1) night as stated by the judge in his "disclosure," and (2) the judge's other son, Will and another guest were also provided accommodations on Fripp Island as part of the Ross-Rosen wedding, at no charge (Bailey Aff 3-29-10 ¶23, R)

All of the foregoing clearly document extrajudicial relationships and conduct on the part of the judge requiring his disqualification from accepting and from retaining the assignment of these five (5) cases. Had he remained true to the language and intent of Canon 3, he would have recognized that these extrajudicial relationships create a situation whereby his impartiality might reasonably be questioned, and that the circumstances are certainly such as to create in the mind of a reasonable man at least a suspicion of bias. Under Canon 3, this is as far as the situation should have gotten. Since the judge did not *sua sponte* disqualify himself, however, he should have at least timely and fully disclosed the relationships and circumstances on the record, as provided in the Canons.

In spite of his failure to disqualify himself or even to reveal any information concerning his qualifications on the record, the judge should have granted Appellants' motion to recuse. There should be no doubt that these relationships and circumstances create an appearance of impropriety, they create in reasonable minds a perception that the judge's ability to carry out his responsibilities with integrity, impartiality and competence is impaired. *Cf.* Commentary to Canon 2A, *supra*. Under these circumstances, whether pursuant to a *sua sponte* disqualification

or an order of recusal, the judge should have removed himself from this litigation *A judge should disqualify himself where grounds for disqualification exist, as well as in situations where his impartiality might reasonably be questioned A judge should disqualify himself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment* 75 Am Jur ,2d, Trial, §86 (Emphasis added)

The record in these cases, apparently unlike virtually any other case besides *Ellis supra*, also demonstrates that the factual findings in the orders issued by the judge, as previously shown herein, are not supported by the record Accordingly, there is evidence of judicial prejudice, requiring the disqualification or recusal of the judge under the decision in *Ellis* The record shows that, subsequent to the said fishing trip, and following Mr Johnston's revelation that Mr Hilty was dissatisfied with his performance and the addition of Mr Infinger and Ms Rosen as counsel of record, the judge's attitude and conduct toward the parties and their counsel began to change significantly This change in attitude and conduct is reflected in both his comments and the orders which he issued from that point Although promising to "feed everyone from the same spoon," (Tr , 7-1-08, p 12, ll 1-2, R) he, in fact, established a double standard for discovery between the two parties, with the Respondents enjoying a lesser and more favorable standard than that imposed upon Appellants, this will be discussed in greater detail below Almost without exception, the orders which he issued were prepared for his signature by counsel for the Respondents As demonstrated herein, these orders reflect the double standard which he imposed, were often not based upon proper and credible evidence, misstated or disregarded existing applicable law and/or contained factual findings which were not supported by the record For example

1 Order of August 18, 2008, denying Appellants' motion to compel #6 Appellants sought certain financial information which had been requested by Dr Oliver G Wood, Jr , an economist and expert witness retained on behalf of Appellants The information was needed to formulate and support his opinions concerning the issue of punitive damages (Motion to Compel 6-12-08, R)

a Appellants' counsel presented the request to the judge at the hearing on this motion to compel, which took place July 1, 2008 (Tr 7-1-08, p 40, ll 6-8, R) The judge then alluded to personal knowledge which he had concerning Dr Wood and "his questionnaire," and indicated that Dr Wood's prior questionnaires had not included information being sought in these cases (Ibid , ll 9-10, l 22 - p 41, l 6 R) The judge referenced a prior case in which Dr Wood testified, outlining his recollection of Dr Wood's testimony (Ibid , p 46, ll 9-16, R) These are references to matters clearly outside and not supported by the record in this case

b At the hearing, Respondents' counsel handed to the judge a document identified as "a sampling of one 10K report" of Respondent AIMCO, stating that the document was "available on the SEC website," and expressing the opinion that the information contained was more "than I think an expert could ever use " This document was not marked or introduced into evidence to be considered by the judge The judge then stated, "I think that the information that Oliver can get out of the SEC ought to be enough " (Tr 7-1-08 p 42, ll 13-20, p 45, ll 4-6) Accordingly, the record reflects that the judge based his ruling upon a document and information which was not admitted into evidence or properly part of the record

c The judge stated that, notwithstanding his oral ruling, he would reconsider that ruling or hold it in abeyance, and require production of the information sought under a protective order if he received an affidavit from Dr Wood stating that he needed more information than was available through the SEC (Tr 7-1-08, p 45, ll 7-13, p 46, ll 3-9, R) By letter of July 30, 2008, Appellants' counsel provided the judge with a copy of a filed affidavit from Dr Wood dated July 28, 2008, which specifically stated that the items contained in Appellants' discovery requests were needed "to formulate my opinions," and that "*a substantial portion of the information I requested is not publically available* " The affidavit further states that the information sought in Appellants' discovery requests "is what I will need to prepare my opinion " (Affidavit of Oliver G Wood, Jr , R) (Emphasis added)

d No counter affidavit to Dr Wood's affidavit was ever submitted to the judge by Respondents Instead, they provided the judge with a letter from Mr Johnston to Appellants' counsel dated July 30, 2008, together with a "Definitive Proxy Statement" which AIMCO had purportedly prepared for submission to the SEC This information was sent to the judge by Mr

Johnston via an email dated August 12, 2008. Neither the letter nor the “Definitive Proxy Statement” were ever verified through affidavit or filed with the Clerk of Court as part of the record in this case. The statements and information in the proxy statement, which was evidently intended for dissemination to shareholders, were not made under oath. Even if these matters had been properly entered into the record, examination of the proxy statement reveals that it does not provide the information required by Dr. Wood, as it states nothing concerning Appellants’ requests for information relating to (1) financial information for the years 2004-2007, (2) profit sharing allocations, (3) specific conditions required in order for executive bonuses to be paid, (4) life or health insurance, (5) professional or social membership dues, (6) reimbursement of entertainment expenses, or (7) allowances for automobile travel, etc. Notwithstanding these facts, the judge issued his order on August 18, 2008, finding “that there is sufficient information publically available through filings with the Securities and Exchange Commission to satisfy this request.” (Order 8-18-08, R.) The order does *not* state that the judge ever looked at any SEC filings, other than the 10k report *which was never in evidence or made part of the record*. Since this finding is clearly at odds with the express statements in Dr. Wood’s affidavit, and references information which is not part of the record, the judge’s factual finding is not supported by the record. This is not cured by the fact that counsel for the Respondents attempted to get the information before the judge in the form of memoranda, letters or oral arguments. These do not constitute evidence. Factual statements of an attorney, whether made during argument or in written briefs or memoranda, may not be considered or accepted by the court as proof. *Higgins supra, Gilmore v Ivey*, 290 SC 53, 348 SE2d 180 (Ct. App. 1986).

2. Order of March 9, 2009, continuing the Parkview trial. (Order 3-9-09, R.) The subject of this order was the Respondents’ request for a continuance of the Parkview case past the scheduled trial date of May 18, 2009. Appellants’ counsel was not included in the communication process whereby the signed order was transmitted from the judge to counsel for the Respondents, and did not become aware of the executed order until receiving a copy of it from Respondents’ counsel. It is clear that the findings of the judge in the order are not only erroneous, but are not supported by the record.

a. The order states that the matter was before the judge “on Defendants’ motion to continue the trial.” In fact, there was no motion by Respondents, and the matter was never properly before the Judge. (*Cf.*, Rule 7(b)(1), SCRCP).

b. The order also states that the Respondents’ request for a continuance was granted “for good cause having been shown.” In fact, *no* cause was shown for the continuance, certainly, no cause was shown which complied with the rules, since no motion was ever made.

- c The order further states that, “by prior order of the court,” the Parkview case was to be the first of the assigned cases to be tried. In fact, no such order was ever issued.

All of these deficiencies were among those brought to the judge’s attention in Appellants’ motion to alter or amend dated March 23, 2009 (Motion 3-23-09, R). The judge denied this motion, allowing the defective order to stand.

3 Order dated October 7, 2010, denying Appellants’ motion for recusal and vacation of orders. The findings of the judge in this order are likewise erroneous and unsupported by the record. These include, *inter alia*,

- a The order states that the judge “complied” with Appellants’ request that he “make a full disclosure of any type of relationship he had with the defense lawyers.” This finding erroneously narrows the parameters of the disclosure request, which included “a full and complete disclosure on the record of any and all affiliations or relationships which (the judge), or any member of his family, presently has or has previously had with any of the Defendants or counsel of record for any named Defendants in these cases, as well as with family members of such counsel of record.” The requested disclosure specifically included “recreational and/or social activities, and personal visits and/or contacts,” whether “in person, via telephone, mail, electronic means or internet sites.” The judge clearly failed to make a full and complete disclosure on the record relating to his involvement of the marriage of Respondents’ counsel Anne Ross Rosen, as well as the relationships involving Mr. Johnston’s daughter. The finding that the judge “complied” with Appellants’ request for “full disclosure of any type of relationship” is both erroneous and unsupported by the record.
- b The order states that the judge “considered the heartache and loss of position suffered by a family court judge who recently refused to recuse herself in a case.” At no time was the judge presented with any evidence relating to a family court judge who refused to recuse herself, much less any “heartache” or “loss of position suffered” by the unnamed family court judge. Consideration of this extraneous matter is clearly erroneous and patently unsupported by the record in this case. As such, it represents clear evidence of bias and prejudice under *Ellis supra*.
- c The order finds that Appellants’ recusal effort did not commence until “immediately prior to the entry of a April 6, 2010 sanctions order, *after almost a year of sanctions and contempt orders entered against them*.” While counsel for Respondents vigorously requested that the judge sign orders holding Appellants in contempt and imposing dismissal of their claims as an appropriate sanction, and the judge verbally threatened to sign such an order, he did not do so until he signed the order of April 6, 2010, the judge himself acknowledged as of March 29, 2010 that no such order had been filed, *i.e.* “entered.” (Tr. 3-29-10, p. 26, ll. 16-17, R). The

finding that there have been “sanctions and contempt orders entered” against Appellants for “almost a year” is totally erroneous and is unsupported by the record. This is another example of clear evidence of bias and prejudice under *Ellis supra*

- d The order sets forth a finding that the judge “held a hearing on March 29, 2010 and put on the record all of my relationships with counsel for both parties, *most of which had previously been disclosed in the course of litigation*.” As shown in the prior discussion, this finding is patently false, any “disclosures” made by the judge during the course of the litigation prior to the hearing were minimal and cursory at best. Accordingly, this finding is not supported by the record and is clear evidence of bias and prejudice.
- e The order also states, “at the hearing Plaintiffs made an oral motion to recuse me. I respectfully denied it, having thoroughly addressed their concerns.” The record clearly shows, in addition to the fact that the judge did not “thoroughly address” the concerns of Appellants, there was no oral motion for recusal made at the March 29, 2010 hearing (Tr 3-29-10, p 24, l 6 - l 20, p 26, ll 9-14, ll 19-25, R). The transcript of the hearing clearly shows that counsel for Appellants proposed, as a possible solution to the judge’s reluctance to give Appellants time to review his disclosures before deciding whether or not to make a motion for recusal, that a verbal motion *could* be made and marked heard. The judge denied that proposed option (Tr 3-29-10, p 27, ll 2-6).
- f The order lists eight “disclosures” which the judge states were revealed not only at the March 29, 2010 hearing, but “openly throughout the litigation.” The only *evidence* in the record on this issue contradicts this finding (Bailey Aff, 3-30-10, R). The only *reference* in the record to support this statement is found in the Respondents’ Memorandum dated April 20, 2010 (Respondents’ Memorandum, 4-20-10, R). In fact, the language used in the judge’s order, in many instances, is taken verbatim from this memorandum. Statements of counsel in a written memoranda cannot be considered by the court in determining factual findings. Cf, *Higgins supra*, *Gilmore supra*. Inasmuch as the trial judge clearly based his findings in this regard solely on unsworn statements of Respondents’ counsel set forth in a memorandum, and such reliance is prohibited by the law of this State, these findings are not properly supported by the record.
- g In an attempt to refute Appellants’ allegations in their motion and affidavit, the order states that Appellants’ motion for recusal is “made *without basis or justification*, with the *sole purpose of polluting the record and intimidating me* into recusal.” (Emphasis added.) The record shows that separate motions for recusal were made in this case and the four related cases. All of the motions were supported by affidavits from numerous Appellants in each case, as well as their counsel (Motion to

Recuse, R , Davis Aff , R , Reynolds Aff , R , Pike Aff , R , Rentz Aff R , Ivey Aff , R , Hinnant Aff , R , Hodge Aff R , Bailey Aff 3-29-10, R , Bailey Aff 4-7-10, R , , Pendarvis Aff ¶104, R) These affidavits set forth specific facts and circumstances justifying the motion for recusal and vacation of the judge's orders, and amply demonstrate circumstances which would create in the mind of a reasonable man at least a suspicion of bias, as well as demonstrating that his impartiality might reasonably be questioned While a judge may consider the legal sufficiency of facts alleged in a motion for recusal, he must nonetheless accept as true the factual allegations in the motion *Shaw v State*, 276 SC 190, 277 SE2d 140 (1981) Where affidavits are submitted in support of a motion for recusal, the judge "is required to accept as true the facts stated in the motion and accompanying affidavits" 46 Am Jur 2d, *Judges*, §214, *Mallett v Mallett*, 323 SC 141, 473 SE2d 804 (Ct App 1996) The judge, by attacking the facts stated by Appellants rather than accepting them, did not follow the law Since it is obviously controlled by an error of law, there is an abuse of discretion and the order should be vacated

- h The finding of the judge that he had addressed the issue of recusal "repeatedly" is not supported by the record Appellants' motion was made following the "disclosures" made by the judge and he only addressed the issue briefly at the hearing on March 29, 2010 and in the written order of October 7, 2010 This is evidence of bias and prejudice under *Ellis, supra*, as the finding is not supported by the record
- I Incredibly, the judge's order makes a factual finding that Appellants ***"continue to harass and prod me to recuse myself"*** This is simply untrue and totally unsupported by the record Furthermore, the judge's finding of harassment on the part of Appellants, most of whom are elderly and in ill health, is ludicrous This statement is not only unsupported by the record, but is in itself a clear indicator of the bias and prejudice exhibited by the judge against Appellants ***"A judge who is presented with a motion for disqualification and who looks beyond the mere legal sufficiency of a suggestion of prejudice and attempts to refute the charges of partiality exceeds the proper scope of his inquiry and on that basis alone establishes grounds for his disqualification"*** 46 Am Jur 2d, *Judges*, §§95 and 214

Time and space constraints imposed in this appeal do not permit Appellants to address each and every instance whereby the judge made factual findings which were totally unsupported by the record The above instances are included as examples only In addition to these unsupported factual findings, Appellants direct this Court to the following examples in the record of other evidence indicating bias or prejudice on the part of the judge

- a The evidence shows that the judge had completely abandoned any pretense of acting as a fair and impartial arbiter and had totally aligned himself with counsel for the Respondents. As shown above, the orders simply parroted the arguments and representations of Respondents' counsel, and incorporated them as factual findings. The orders were either prepared by Respondents' counsel or the language in his orders was taken straight from memoranda or other arguments which they submitted to him. He also verbally aligned himself with Respondents' counsel at hearings in this litigation. For example, on January 14, 2010 he stated "when *they* didn't do that, you moved for compelling, and *we* signed the order of March 3, '09. And *we get in here today* and *they* still admit *they* haven't given it to *us*." (Tr 1-14-10, p 50, ll 6-9, R) (Emphasis added) The judge clearly included himself in the same "we" camp as Respondents' counsel, with Appellants and their counsel clearly being assigned to the opposing "they" camp. Such comments and conduct create in the mind of a reasonable man at least a suspicion of bias, and demonstrate that the judge's impartiality might reasonably be questioned, accordingly, they provide evidence of bias requiring his recusal.
- b Additional evidence of the judge's bias and prejudice may be found in his comments at the "disclosure" hearing on March 29, 2010. The judge, referencing his reaction when he first read Mr. Johnston's email enclosing the subpoena issued to Fripp Island by Appellants, stated "I got the thing. I looked at it. Of course, you know, when you first read something like that *your blood boils* a little bit." (Tr 3-29-10, p 25 ll 18-20, R) This statement clearly evidences his bias and prejudice. It also evidences anger and a "combative and defensive attitude" which caused "some concern" to the court in *Mallett supra*, as to whether the trial judge could impartially decide the recusal issue.
- c There is also evidence in the record of prohibited *ex parte* communications between the judge and counsel for Respondents which Appellants contend would at least add to the appearance of impropriety which is attendant to the judge's conduct in this matter. Such evidence includes, *inter alia*,
 - (1) The order of March 9, 2009, previously discussed above. Appellants' counsel was not included in the communication process whereby the signed order was transmitted from the judge to counsel for the Respondents, and did not become aware of the executed order until receiving a copy of it from Respondents' counsel (Order, 3-9-09, R),
 - (2) The email from Respondents' counsel, Calvin T. Vick, dated February 17, 2010, which precipitated Appellants' motion for a protective order in an effort to avoid the dismissal sanction ultimately imposed by the judge (Motion for Protective Order, R). The email is an attempt by Mr. Vick to explain the *ex parte* communication initiated by the judge that same day, wherein the judge ostensibly instructed Mr. Vick to prepare an order holding Appellants in contempt and dismissing their cases. Although the judge had previously indicated an inclination concerning this ruling, he had subsequently been provided with briefs and materials by counsel for

both sides and had not announced his final decision before the *ex parte* communication with Mr. Vick. The practice of directing counsel for one party *ex parte* to draft an order prior to the judge announcing his final decision to both sides is prohibited under Opinion 2-1988, Committee on Standards of Judicial Conduct. A judge is prohibited from discussing a proposed order with counsel for one party without giving notice to counsel for the other side, because failure to provide such notice gives rise to an appearance of impropriety (Ibid). This opinion has been cited with approval by our courts for many years. *Cf. Higgins supra*

d Evidence of bias and prejudice is also found in the judge's imposition of a double standard, as previously noted. Examples of this double standard, include, *inter alia*

- (1) Respondents' initial discovery responses of August 26, 2004 in Parkview contained 15 general objections, followed by specific objections and minimal responses to each discovery request. When Parkview Appellants moved to compel proper responses, the judge ruled Appellants "have an obligation to take the deposition" of witnesses to get more specific information and, as to documents, would "have to make your own determination as to what's there," ordering Appellants to "go take the depositions and ask them what it meant" (Tr. 7-1-08, p. 17, ll. 22-25, R., p. 18, ll. 12-15, R., p. 35, ll. 1-14, R., p. 36, ll. 9-16, l. 24- p. 37, l. 2 R., p. 47, ll. 20-23, R.). The judge's ruling affected all related cases, including this case. Based upon the judge's promise to "feed both sides from the same spoon" (Tr. 7-1-08 p. 12, ll. 1-2), Appellants aggressively undertook to depose witnesses who had been listed by Respondents.

In responding to the Respondents' discovery requests, Appellants utilized their discovery technique of asserting general objections, actually using *verbatim* the language employed by Respondents which had been sanctioned by the judge. When Respondents complained about these objections, the judge responded by dismissing Appellants' claims.

- (2) When Respondents sought a protective order prohibiting Appellants from deposing Respondents' officers, the judge granted their request, even though one of the officers was present at the meeting where the "*status quo*" agreement was reached and was a material witness on the issue of the statute of limitations. Conversely, when Appellants sought a protective order as a means of complying with the judge's Privilege Order, their request was denied (Tr. 7-1-08, ll. 21-25, R., Order denying Appellants' motion for protective order, R.).
- (3) When Appellants sought information from the corporate Respondents relating to lawsuits and other claims against them, the judge permitted Respondents to re-write Appellants' discovery requests. In doing so, Respondents eliminated a responding party, as well as the time frame

encompassed by the request. The effect was to protect disclosures concerning the conflicts of interest which formed the basis of the Appellants' claims. Conversely, the judge approved Respondents' document request #48, ordering Appellants to produce "all documents concerning any litigation in which any of the Plaintiffs were a party (plaintiff, defendant or third-party plaintiff or defendant), or any person in which any of the Plaintiffs had an ownership or management interest was a party." Despite the lack of any time limitation or showing of relevancy, this request was included in those found to be deficient by the judge and used by him as a reason for dismissing Appellants' claims.

- (4) The judge required Appellants to produce their confidential communications with their counsel in this case, while protecting Respondents from producing communications with attorneys in other proceedings which were relevant to this case.
- (5) The judge granted Respondents' motion to seal certain documents for his in-camera review, while denying relief to Appellants (Order 8-31-09, R., Order 10-22-10, R.).

Due to time and space constraints, Appellants direct this Court to the affidavit of Joel D. Bailey dated March 30, 2010, paragraph 13 (R.) for a more detailed listing of instances wherein the judge imposed a double standard, and incorporate said affidavit herein by reference. Given the abundance of evidence demonstrating bias and partiality on the part of the judge, he erred in failing to disqualify and/or recuse himself and to vacate his orders. The rulings of the judge result from and are tainted by the bias and prejudice herein discussed, they contain factual findings not properly supported by the evidence and are evidence *per se* of the judge's bias and prejudice. Furthermore, they are controlled by errors of law and result from abuses of discretion, and should be vacated on that basis, as well.

5 Judge Early failed to insure that Appellants' claims were being litigated in a fair and impartial forum, thereby depriving them of their rights to due process of law under the Constitutions of the State of South Carolina and the United States of America (Issue 5) The right to due process of law is guaranteed to citizens of this State by the Constitutions of South Carolina (Article I, §3) and the United States (5th and 14th Amendments). It is axiomatic that a

fair and impartial forum must include, at a minimum, a presiding judge whose impartiality and lack of bias is beyond question “Every litigant has the lawful right to expect utter impartiality and neutrality in a judge who tries his case” 46 Am Jr 2d, *Judges*, §146 “The right to disqualify a judge for bias and prejudice is substantive and it is included within the right to a fair trial guaranteed by the due process clause of the United States Constitution” *Ibid* The constitutional guarantee of a fair and impartial judge and forum is recognized in this State *Mallett supra* (“the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process”) In determining the fairness or impartiality of a judge or tribunal under a due process inquiry, the United States Supreme Court has determined that the objective test of a reasonable perception of bias, referenced above in the Code of Judicial Conduct, as opposed to the subjective “bias in fact test” is the proper procedure to be followed *Cf Caperton v A T Massey Coal Co Inc*, 129 S Ct 2252 (2009) The decision in *Caperton* has particular application to this case For example

- 1 Part of the alleged bias claimed in *Caperton* involved the judge’s personal relationship with a litigant, and his receipt of personal benefits derived from that relationship, *i e*, donations to his campaign for election In this case, the judge’s personal relationship with counsel for a litigant is at issue, together with his receipt of personal benefits derived from that relationship, *i e*, all expense paid fishing trips and accommodations at an ocean-front resort Canon 3E(1) does not distinguish between “a party or a party’s lawyer” where bias is alleged
- 2 Justice Kennedy’s majority opinion, finding a judge’s refusal to disqualify or recuse himself rose to the level of a denial of constitutional due process, specifically relies upon the language of the Code of Judicial Conduct, including Canon 3E(1) The Court discarded the judge’s assertions of lack of personal interest on his part, as well as his assertion that there was no objective evidence of bias Instead, the Court adopted the “appearance of impropriety” and reasonableness language of the Code consistent with Appellants’ position in this case
- 3 The present case amply demonstrates the concern expressed by Justice Kennedy if the focus is on proof of evidence to show bias in fact, rather than a reasonable perception of bias “This is particularly true where, as here, there is no procedure for judicial fact-finding and the sole trier of fact is the one accused of bias Objective standards may also require recusal whether or not actual bias exists or

can be proved Due process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties *The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process ”*

The personal relationships involving the judge and counsel for the Respondents create an appearance of impropriety, as well as a reasonable suspicion of bias, requiring the disqualification and recusal of the judge under the Code of Judicial Conduct and applicable laws These relationships, coupled with the overwhelming evidence that the judge abused his discretion time after time in favor of Respondents, denied Appellants a fair and impartial forum and violated their rights to due process under the Constitutions of the State of South Carolina and the United States

CONCLUSION

For the reasons stated herein, Appellants request that this Court (a) reverse and vacate the order of March 7, 2006 assigning these cases to Judge Early and reverse and vacate the orders issued by Judge Early which are the subject of this appeal and (b) remand this case for a trial on the merits before a fair, unbiased, disinterested and impartial judge

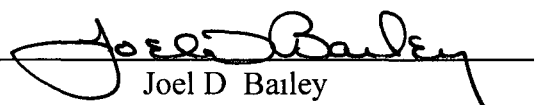
Respectfully submitted,

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Attorneys for Appellants

By  Joel D Bailey

June 21, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court
APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

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JUN 24 2011

Doyet A Early, III, Circuit Court Judge

SC Supreme Court

Case No 2005-CP-38-1131

Laurance H Davis, Jr , Rhoda G Rentz, Mortimer M Weinberg, Jr ,
Hodge Land Co , Inc and Anna Trotter, individually and in their
capacities as the Limited Partners of Roosevelt Gardens, a South
Carolina Limited Partnership

Appellants,

vs

Roosevelt Gardens, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc , AmReal Corporation
a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr , and John
Doe, a generic designation for a party or parties whose true
identity is unknown

Respondents

**APPELLANTS' DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Appellants designate the following documents for inclusion in the Record on Appeal

Order of Judge Perry Buckner dated 12-15-03

Order of Judge Curtis L Coltrane dated 2-11-05

Order of Chief Justice Toal dated 3-7-06

Order of Doyet A Early, III dated 3-13-07

Order of Doyet A Early, III dated 6-5-08

Order of Doyet A Early, III dated 8-18-08

Order of Doyet A Early, III dated 12-17-08

Order of Doyet A Early, III dated 12-30-08

Order of Doyet A Early, III dated 1-31-09

Order of Doyet A Early, III dated 3-3-09, Granting in Part and Denying Part Plaintiffs' Motion to Compel

Order of Doyet A Early, III dated 3-3-09, Granting Defendants' Motion to Compel

Order of Doyet A Early, III dated 4-9-09

Amended Report of Special Master dated 4-15-09

Order of Doyet A Early, III dated 6-2-09

Order of Doyet A Early, III dated 6-16-09

Order of Doyet A Early, III dated 7-28-09

Order of Doyet A Early, III dated 8-31-09

Order of Doyet A Early, III dated 4-6-10

Order of Doyet A Early dated 9-16-10

Order of Doyet A Early, III dated 10-7-10

Order of Doyet A Early, III dated 10-22-10

Order of Doyet A Early, III dated 12-11-10

Parkview Amended Complaint dated 3-23-04 (C/A # 03-CP-07-00726)

Parkview Answer dated 4-9-04 (C/A # 03-CP-07-00726)

Palmetto Complaint dated 10-6-05 (C/A # 05-CP-07-1989)

Palmetto Answer dated 1-17-06 (C/A # 05-CP-07-1989)

Orleans Complaint dated 10-6-05 (C/A # 05-CP-10-4229)

Orleans Answer dated 1-17-06 (C/A # 05-CP-10-4229)

Roosevelt Complaint dated 10-6-05 (C/A # 05-CP-38-1131)

Roosevelt Answer dated 1-17-06 (C/A # 05-CP-38-1131)

Pinewood Complaint dated 10-6-05 (C/A # 05-CP-07-1990)

Pinewood Answer dated 1-17-06 (C/A # 05-CP-07-1990)

Transcript of hearing held on 10-4-06

Transcript of hearing held on 11-19-07

Transcript of hearing held on 7-1-08

Transcript of hearing held on 12-9-08

Transcript of hearing held on 7-6-09

Transcript of hearing held on 8-24-09

Transcript of hearing held on 1-14-10

Transcript of hearing held on 3-29-10

Transcript of Special Meeting of Limited Partnership held on 9-14-00

Transcript of Special Meeting of Limited Partnership held on 10-24-00

Appellants' Petition for Writ of Prohibition filed in the Supreme Court

Appellants' Motion to Compel dated 7-29-05

Appellants' Motion to Compel dated 10-5-07

Appellants' Motion to Compel dated 11-7-07

Appellants' Memorandum in Support of Motion to Compel dated 11-19-07

Appellants' Motion to Compel dated 6-12-08

Appellants' Memorandum to Special Master in Opposition to Respondents'

Motion to Compel dated 1-16-09

Appellants' Motion to Alter or Amend dated 3-23-09

Respondents' Motion to Alter or Amend dated 6-15-09

Appellants' Motion for Protective Order dated 2-22-10

Appellants' Motion for Disclosure dated 2-22-10

Appellants' Motion for Recusal and Vacation of Orders dated 3-30-10

Respondents' Motion to Strike and Memorandum in Opposition to Appellants' Motion for Recusal and Vacation of Orders dated 4-20-10

Appellants' Motion to Alter or Amend dated 4-22-10

Appellants' Motion to Alter or Amend dated 10-28-10

Appellants' Answers to Interrogatories and Responses to Request for Production dated 7-14-05, with privilege log

Appellants' Third Supplemental Response to discovery with letter of Joel D Bailey dated 1-25-10

Affidavit of Joel D Bailey dated 3-30-10

Affidavit of Joel D Bailey dated 4-7-10

Affidavit of Laurance H Davis, Jr , dated 4-7-10

Affidavit of Whaley R Hinnant dated 4-13-10

Affidavit of Miles Hodge dated 4-8-10

Affidavit of James and Erin Ivey dated 4-15-10

Affidavit of Mary Jane Pike dated 4-9-10

Affidavit of Rhoda G Rentz dated 4-9-10

Affidavit of Thomas A Pendarvis dated 4-22-10

Affidavit of Eva Maria Reynolds dated 4-15-10

Affidavit of Oliver G Wood dated 7-28-08

Memorandum of Ford Von Weise dated 8-31-99

Letter of George Buchanan dated 11-10-00

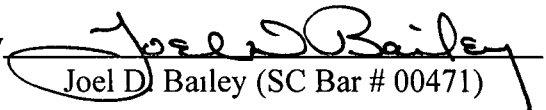
I certify that this designation contains no matter which is irrelevant to this appeal

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Attorneys for Appellants

By 
Joel D Bailey (SC Bar # 00471)

June 21, 2011

THE SUPREME COURT OF SOUTH CAROLINA

Laurance H Davis, Jr , Rhoda G Rentz,) Transfer from Court of Appeals
Mortimer M Weinberg, Jr , Hodge Land) Case No 2010180086
Co , Inc , and Anna Trotter, Individually)
and in their capacities as the Limited)
Partners of Roosevelt Gardens, a South)
Carolina Limited Partnership,) Appellants,

vs

Roosevelt Gardens, a South Carolina)
Limited Partnership, Apartment)
Investment and Management Company)
a/k/a AIMCO, Insignia Financial Group,)
Inc , AmReal Corporation a/k/a and f/k/a)
USS Corporation a/k/a and f/k/a U S)
Shelter Corporation, ISTC Corporation,)
N Barton Tuck, Jr , and John Doe, a)
generic designation for a party or parties)
whose true identity is unknown,) Respondents

RECEIVED

NOV 14 2011

S C Supreme Court

Carolina Management Corporation of) Transfer from Court of Appeals
Beaufort, James B Jackson, Whaley R) Case No 2010180088
Hinnant, Jr , Mary Gasser Rawl, and)
Rhoda Rentz, Individually and in their)
capacities as the Limited Partners of)
Pinewood Park Apartments, a South)
Carolina Limited Partnership,) Appellants,

vs

Pinewood Park Apartments, a South)
Carolina Limited Partnership, Apartment)
Investment and Management Company)
a/k/a AIMCO, Insignia Financial Group,)
Inc , AmReal Corporation a/k/a and f/k/a)
USS Corporation a/k/a and f/k/a U S)
Shelter Corporation, ISTC Corporation,)
N Barton Tuck, Jr , and John Doe, a)
generic designation for a party or parties)
whose true identity is unknown,) Respondents

Laurance H Davis, Jr , Mary Jane R	)	Transfer from Court of Appeals
Pike, Eva Marie Reynolds, and Rhoda G	)	Case No 2010180666
Rentz, individually and in their capacities	)	
as the Limited Partners of Parkview	)	
Apartments, a South Carolina Limited	)	Appellants,
Partnership,	)	
	)	
vs	)	
	)	
Parkview Apartments, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Laurance H Davis, Jr , Marvin D	)	Transfer from Court of Appeals
McCarthy, James W Ivey, and Erin E	)	Case No 2010180087
Ivey, Individually and in their capacities	)	
as the Limited Partners of Palmetto	)	
Apartments, a South Carolina Limited	)	Appellants,
Partnership,	)	
	)	
vs	)	
	)	
Palmetto Apartments, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Rhoda G Rentz, Mary Jane Pike, Eva	)	Transfer from Court of Appeals
Marie Reynolds, and Joanne O Mercy,	)	Case No 2010176826
Individually and in their capacities as the	)	
Limited Partners of Orleans Gardens, a	)	
South Carolina Limited Partnership,	)	
	)	Appellants,
vs	)	
	)	
Orleans Gardens, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Pursuant to Rule 209, SCACR, Respondents propose the following be included in the Record on Appeal

- 1) 04/22/2003 Complaint (Parkview)
- 2) 03/23/2004 Amended Complaint (Parkview)
- 3) 04/09/2004 Answer (Parkview) with Exhibits
- 4) 10/06/2005 Complaint (Roosevelt)
- 5) 10/06/2005 Complaint (Pinewood)
- 6) 10/06/2005 Complaint (Orleans)
- 7) 10/06/2005 Complaint (Palmetto)
- 8) 01/17/2006 Defendants' Motion to Dismiss Counts 1 Through 7 (Orleans, Palmetto, Roosevelt)

- 9) 01/17/2006 Answer (Orleans) with Exhibit 1
- 10) 01/17/2006 Answer (Pinewood)
- 11) 01/17/2006 Answer (Roosevelt) with Exhibit 1
- 12) 01/17/2006 Answer (Palmetto) with Exhibit 1
- 13) 03/07/2006 Order
- 14) 7/14/2006 Defendant's First Request for Admissions with Exhibits A-KK (Orleans)
- 15) 7/14/2006 Defendant's First Request for Admissions with Exhibits A-LL (Palmetto)
- 16) 7/14/2006 Defendant's First Request for Admissions with Exhibits A-KK (Roosevelt)
- 17) 08/04/2006 Defendants' Consolidated Brief in Support of Their Motions to Dismiss, or in the Alternative for Summary Judgment, in the Above-Captioned Actions with Exhibits A-J
- 18) 08/25/2006 Plaintiffs' Combined Memorandum of Law in Opposition to Defendants' Motions to Dismiss Counts 1-7 and Defendants' Motions to Dismiss for Improper Venue Pursuant to SCRPC 12(B)(3) with Exhibits 1-10
- 19) 09/20/2006 Defendants' Reply Brief with Exhibits A-C
- 20) 09/30/2006 Affidavit of Laurance H Davis, Jr with Exhibits 1-16
- 21) 10/04/2006 Transcript of Hearing
- 22) 02/13/2007 Order Denying Defendants' Motions to Dismiss, or in the Alternative for Summary Judgment, and to Change Venue
- 23) 11/19/2007 Memorandum In Support of Plaintiffs' Motion to Compel with Exhibits 1-11
- 24) 11/19/2007 Transcript of Hearing
- 25) 11/19/2007 Defendants' Brief in Opposition to Plaintiffs' Motion to Compel Production with Exhibits A-E

- 26) 11/19/2007 Plaintiffs' Combined Submissions Re Statute of Limitations with Tabs 1-7
- 27) 06/05/2008 Order Denying Defendants' Motion for Summary Judgment
- 28) 06/12/2008 Plaintiffs' Motion to Compel #6 (Concerning Plaintiffs' Discovery Requests (Dated April 25, 2008) with Exhibits 1-3
- 29) 06/30/2008 Defendants' Brief In Opposition to Plaintiffs' Motion To Compel #6 (Concerning Plaintiffs' Discovery Requests Dated April 25, 2008) with Exhibit A
- 30) 07/01/2008 Transcript of Hearing
- 31) 07/28/2008 Affidavit of Oliver G Wood, Jr with Exhibit 1
- 32) 08/18/2008 Order
- 33) 08/21/2008 Defendants' Motion for Protective Order
- 34) 11/06/2008 Defendants' Motion to Compel Discovery Responses from All Plaintiffs in Above-Captioned Actions with Exhibit A
- 35) 12/08/2008 Defendants' Memorandum in Support of Motion to Compel Discovery Responses from all Plaintiffs in Above-Captioned Actions with Exhibits A-F
- 36) 12/09/2008 Transcript of Hearing
- 37) 12/17/2008 Order Denying Plaintiffs' Motion to Compel #2
- 38) 12/30/2008 Order Appointing the Honorable Gary E Clary as Special Master for Resolution of Specified Discovery Disputes
- 39) 01/31/2009 Consent Order Regarding Scope of Authority for Special Master
- 40) 02/09/2009 Defendants' Memorandum in Support of Motion for Protective Order with Exhibits A-G
- 41) 03/03/2009 Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel, Dated July 29, 2005
- 42) 03/03/2009 Order Granting Defendants' Motion to Compel, Dated November 6, 2008

- 43) 03/09/2009 Order
- 44) 04/03/2009 Defendants' Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend Order Granting Defendants' Motion to Compel, Dated November 6, 2008
- 45) 04/09/2009 Order Regarding Scope of Authority for Special Master
- 46) 06/02/2009 Order Adopting Findings and Conclusions of Special Master Clary
- 47) 06/11/2009 Plaintiffs' Motion to Alter or Amend Order Adopting Findings and Conclusions of Special Master Clary, Dated June 2, 2009
- 48) 06/15/2009 Defendants' Motion to Alter or Amend Order
- 49) 06/16/2009 Order
- 50) 07/02/2009 Memorandum in Support of Defendants' Motion to Alter or Amend Order with Exhibits 1-9
- 51) 07/02/2009 Plaintiffs' Memorandum in Support of their Motion to Alter or Amend Order Adopting Findings and Conclusions of Special Master Clary, Dated June 2, 2009
- 52) 07/02/2009 Confidential and Privileged In Camera Supplement to Memorandum in Support of Defendants' Motion to Alter or Amend Order (SEALED) with Exhibits 1-8

(To be filed by Respondents as a separate Appendix to the Record on Appeal pursuant to Supreme Court Order dated October 5, 2011)
- 53) 07/06/2009 Transcript of Hearing
- 54) 07/24/2009 Defendants' Motion for Sanctions with Exhibits A-F
- 55) 07/28/2009 Order Amending Court's Order Dated June 2, 2009
- 56) 08/10/2009 Defendants' Second Motion for Sanctions with Exhibits A-B
- 57) 08/10/2009 Letter to Judge Early from Ellis M Johnston enclosing Defendants' Second Motion for Sanctions
- 58) 08/21/2009 Memorandum in Support of Defendants' Two Motions for Sanctions with Exhibits A-G

- 59) 08/24/2009 Transcript of Hearing
- 60) 08/27/2009 Supplemental Memorandum in Support of Defendants' Motions for Sanction with Exhibits A-B
- 61) 08/31/2009 Order Granting Defendants' Motion to Seal
- 62) 01/04/2010 Consent Order Granting Defendants' Motion for Continuance
- 63) 01/14/2010 Transcript of Hearing
- 64) 02/11/2010 Defendants' Second Supplemental Memorandum in Support of Motion for Sanctions Re General Discovery Order with Exhibits 1-3
- 65) 02/16/2010 Defendants' Supplemental Memorandum in Support of Their Motion for Sanctions, and in Opposition to Plaintiffs' Rule 60(b) Motions, Re Privilege Discovery Order
- 66) 02/22/2010 Plaintiffs' Motion for Protective Order (Orleans) with Attachment
- 67) 02/22/2010 Plaintiffs' Motion for Disclosure & Discovery (Parkview) with Attachment
- 68) 03/1/2010 Defendants' Memorandum Opposing Plaintiffs' Motion for Protective Order
- 69) 03/29/2010 Transcript of Hearing
- 70) 03/29/2010 Notice of Motion & Motion for Recusal and for Vacation of Prior Orders
- 71) 03/30/2010 Affidavit of Joel D Bailey (Parkview, Palmetto, Roosevelt, Orleans, Pinewood)
- 72) 04/06/2010 Order Granting Defendants' Two Motions for Sanctions, Finding Plaintiffs in Contempt of Court, and Dismissing the Above-Captioned Actions as Sanctions for Plaintiffs' Contempt
- 73) 04/07/2010 Affidavit of Joel D Bailey with Exhibits 1-4
- 74) 04/07/2010 Affidavit of Laurance H Davis, Jr
- 75) 04/08/2010 Affidavit of Miles Hodge
- 76) 04/09/2010 Affidavit of Jane Pike

- 77) 04/09/2010 Affidavit of Rhoda G Rentz
- 78) 04/13/2010 Affidavit of Whaley R Hinnant
- 79) 04/15/2010 Affidavit of James and Erin Ivey
- 80) 04/15/2010 Affidavit of Maria R Reynolds
- 81) 04/16/2010 Affidavit of Eric Hilty
- 82) 04/20/2010 Affidavit of Ellis M Johnston, II
- 83) 04/20/2010 Defendants' Motion to Strike and Memorandum in Opposition to Plaintiffs' Motion for Recusal and for Vacation of Prior Orders with Exhibit 1
- 84) 04/22/2010 Plaintiffs' Notice of Motion and Motion for Reconsideration, Alteration or Amendment
- 85) 04/22/2010 Affidavit of Thomas A Pendarvis with Exhibits 1-93
- 86) 06/07/2010 Affidavit of Ellis M Johnston II with Exhibits A-Q
- 87) 06/07/2010 Defendants' Memorandum in Opposition to Plaintiffs' Motion for Reconsideration, Alteration or Amendment of the Court's April 6, 2010 Order Granting Sanctions with Exhibits A-L
- 88) 06/07/2010 Affidavit of Calvin T Vick, Jr with Exhibits A-II
- 89) 09/16/2010 Order
- 90) 10/07/2010 Order
- 91) 10/22/2010 Order Denying Plaintiffs' Motion for Protective Order
- 92) 11/17/2010 Defendants' Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend Order Denying Plaintiffs' Motion for a Protective Order with Exhibits 1-2B
- 93) 12/11/2010 Order

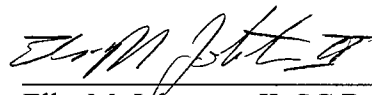
Respondents designate all pages and exhibits of the above-referenced documents be included in the Record on Appeal

Respondents object to Appellants' inclusion of the following five (5) documents, which were never filed in or presented to the lower court

- Transcript of Special Meeting of Limited Partnerships held on 9-14-00,
- Transcript of Special Meeting of Limited Partnership held on 10-24-00,
- Appellants' Petition for Writ of Prohibition filed in the Supreme Court,
- Appellants' Answers to Interrogatories and Responses to Request for Production dated 7-14-05, and
- Memorandum of Ford Von Weise dated 8-31-99

See Respondents' Motion to Stay, Dismiss and/or Strike, which was filed in the instant appeals on July 13, 2011, at pp 5-8, Respondents' Reply, which was filed in the instant appeals on August 1, 2011, at pp 4-11 and Ex 2-7

I certify that this designation contains no matter which is irrelevant to these appeals



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Calvin T Vick, Jr , SC Bar #68187
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Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200

ATTORNEYS FOR RESPONDENTS

November 10, 2011

THE SUPREME COURT OF SOUTH CAROLINA

Laurance H Davis, Jr , Rhoda G Rentz,)
Mortimer M Weinberg, Jr , Hodge Land)
Co , Inc , and Anna Trotter, Individually)
and in their capacities as the Limited)
Partners of Roosevelt Gardens, a South)
Carolina Limited Partnership,) Appellants,

vs

Roosevelt Gardens, a South Carolina)
Limited Partnership, Apartment)
Investment and Management Company)
a/k/a AIMCO, Insignia Financial Group,)
Inc , AmReal Corporation a/k/a and f/k/a)
USS Corporation a/k/a and f/k/a U S)
Shelter Corporation, ISTC Corporation,)
N Barton Tuck, Jr , and John Doe, a)
generic designation for a party or parties)
whose true identity is unknown,) Respondents

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NOV 14 2011

SC SUPREME COURT

Carolina Management Corporation of)
Beaufort, James B Jackson, Whaley R)
Hinnant, Jr , Mary Gasser Rawl, and)
Rhoda Rentz, Individually and in their)
capacities as the Limited Partners of)
Pinewood Park Apartments, a South)
Carolina Limited Partnership,) Appellants,

vs

Pinewood Park Apartments, a South)
Carolina Limited Partnership, Apartment)
Investment and Management Company)
a/k/a AIMCO, Insignia Financial Group,)
Inc , AmReal Corporation a/k/a and f/k/a)
USS Corporation a/k/a and f/k/a U S)
Shelter Corporation, ISTC Corporation,)
N Barton Tuck, Jr , and John Doe, a)
generic designation for a party or parties)
whose true identity is unknown,) Respondents

RECEIVED

NOV 14 2011

SC SUPREME COURT

Laurance H Davis, Jr , Mary Jane R	)	Transfer from Court of Appeals
Pike, Eva Marie Reynolds, and Rhoda G	)	Case No 2010180666
Rentz, individually and in their capacities	)	
as the Limited Partners of Parkview	)	
Apartments, a South Carolina Limited	)	Appellants,
Partnership,	)	
	)	
vs	)	
	)	
Parkview Apartments, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Laurance H Davis, Jr , Marvin D	)	Transfer from Court of Appeals
McCarthy, James W Ivey, and Erin E	)	Case No 2010180087
Ivey, Individually and in their capacities	)	
as the Limited Partners of Palmetto	)	
Apartments, a South Carolina Limited	)	
Partnership,	)	Appellants,
	)	
vs	)	
	)	
Palmetto Apartments, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Rhoda G Rentz, Mary Jane Pike, Eva	)	Transfer from Court of Appeals
Marie Reynolds, and Joanne O Mercy,	)	Case No 2010176826
Individually and in their capacities as the	)	
Limited Partners of Orleans Gardens, a	)	
South Carolina Limited Partnership,	)	
	)	Appellants,
vs	)	
	)	
Orleans Gardens, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1 Did the court abuse its discretion by compelling Appellants to produce 96 documents for which they claimed attorney-client privilege and/or work product protection (see 6/2/09 and 7/28/09 Orders (R))?

2 Did the court abuse its discretion by finding that Appellants failed to comply with its 3/3/09 and 7/28/09 Discovery Orders, finding that Appellants were in contempt of court, and imposing sanctions, including, *inter alia*, dismissal of the five lawsuits, subject to Appellants' ability to purge the sanction of dismissal by complying with the discovery orders within 25 days (see 4/6/10 Order (R))?

3 Did the Honorable Doyet A Early, III, Circuit Court Judge,¹ abuse his discretion by denying Appellants' motion for recusal and for vacation of his prior orders in the five lawsuits?

STATEMENT OF THE CASE

Respondents do not object to or disagree with the Statement of the Case set forth in each of Appellants' five initial briefs, **except** for the statements contained therein that are inconsistent with or contrary to the following facts

- Appellants falsely state that Respondents did not affirmatively plead statute of limitations as to all claims in the Pinewood case In each of the five lawsuits addressed in these appeals, including Pinewood, Respondents filed answers to Appellants' complaints, which included the statute of limitations defense as a bar to the legal claims asserted by Appellants (Pinewood Ans , ¶¶ 148-149 (R))
- Appellants and Respondents in the Parkview lawsuit (filed 4/22/03) agreed to postpone discovery in that lawsuit pending mediation, **but** Respondents **did not** agree to stay the statute of limitations applicable to Appellants' claims or enter into a tolling agreement with any of the Appellants The parties attempted to negotiate a compromise of Appellants' disputed claims and agreed to a mediation, but nothing more ² The scheduled mediation was cancelled as of 7/26/04, but Appellants did not file the other four lawsuits until October 2005
- The appealed Orders primarily involve discovery disputes, Appellants' failure to comply with discovery orders, and sanctions for Appellants' continuing contempt of court
- One of the discovery orders Appellants disobeyed required Appellants to produce 96 documents which Appellants claimed were privileged or work product (7/28/09

¹ Judge Early is hereinafter referred to as the "court" or "Judge Early "

² Appellants falsely claim that Respondents' counsel insisted that Appellants postpone the filing of the Palmetto, Orleans, Roosevelt and Pinewood cases Respondents' counsel did no such thing, and at a minimum this is a contested matter (see *infra* at 9-10)

Privilege Order (R))³ The compelled documents included communications between Appellants, Appellants and third parties, and Appellants and their attorney The documents were all dated between 1998 and mid-October 2002, more than three years before four of these lawsuits were filed Several were dated more than three years before the first suit, Parkview, was filed

- Appellants also disobeyed a separate discovery order that required them to fully and completely answer discovery requests that were served upon them on 8/28/08 (3/3/09 Discovery Order (R))⁴

ARGUMENT

I BACKGROUND

A The Critical Issues Presented in These Appeals

The most critical issues presented in these appeals are whether, in light of the evidence presented to the court, Appellants can satisfy their burden of showing that the court abused its discretion by (1) finding Appellants failed to answer discovery as required in the 3/3/09 Discovery Order, (2) compelling Appellants to produce specific documents as set forth in the 7/28/09 Privilege Order, and (3) dismissing the five lawsuits as sanctions for Appellants' willful and continuing disobedience of these Discovery Orders (see 4/6/10 Order (R))⁵ The remainder of the orders appealed are secondary to the above issues and generally concern Appellants' improper attempts to avoid the consequences of their willful disobedience of the Discovery Orders Similarly, large portions of Appellants' briefs in this Court are dedicated to the distortion of the lower court record and misrepresentation of evidence, much of which was not even presented to the court before it entered the pivotal Discovery Orders and the Sanctions Order (see *infra* at 49-50, 78 (note 86))

³ The 7/28/09 Order is sometimes referred to hereinafter as the "Privilege Order "

⁴ The 3/3/09 Order, which granted Respondents' motion to compel, is referred to hereinafter as the "3/3/09 Discovery Order" or the "Discovery Order " A different order dated 3/3/09 (granting/denying Appellants' motion to compel) is also among the orders appealed, and it is hereinafter referred to as the "3/3/09 Order (App Mot) "

⁵ The 3/3/09 Discovery Order and the 7/28/09 Privilege Order are hereinafter referred to collectively as the "Discovery Orders " The 4/6/10 Order is sometimes referred to hereinafter as the "Sanctions Order "

B Appellants' Claims and the Statute of Limitations Defense

Issues relating to Respondents' statute of limitations defense played a central role in the key orders appealed. The following is a summary of Appellants' claims and the history of the statute of limitations defense in these lawsuits.

1 Appellants' Claims

In the late 1960's and early 1970's, Appellants became investors in HUD affordable housing complexes *vis a vis* partnerships that were the predecessors of the five Respondent Limited Partnerships. The advantages of such an investment were tax driven and dependent on being able to take advantage of the tax benefits. Certain disadvantages also existed, which limited the marketability of such properties.⁶ Other significant risks included changes in the tax laws (which occurred), changes in HUD policies and regulations (which also occurred), and exit taxes (recapture).

In 1975, U S Shelter Corporation (the other corporate Respondents are successors in interest to U S Shelter) and Respondent Barton Tuck became general partners in the five Respondent Limited Partnerships and began to manage the apartment complexes. By 1984, it was widely anticipated that the tax laws would change, and the depreciation deductions were petering out such that the limited partners would be recognizing phantom income. Thus, the limited partners (Appellants) and the general partners (Respondents) determined that it would be prudent to sell the complexes.

The Parkview, Palmetto, Orleans and Roosevelt complexes (as well as 15 others not involved in these lawsuits) were sold to entities created by Boston Financial Group ("BFG") and Pinewood was sold to Magi. The consideration for each was a short term note payable

⁶ The disadvantages included restrictions on conveyance of the property and on prepayment of the mortgage, controlled rent (but not expenses), and a return restricted to no more than six percent of the initial equity investment, and then only from surplus cash left over after payment of all current amounts due under the mortgage, deposits to the reserve fund for replacement, and other segregated expenses.

over five years (paid) and a balloon note that would become due in 1999 HUD regulations would not allow a second mortgage to secure the notes, so the limited partnerships took a security interest in the purchasing limited partnerships

In 1986, Congress passed the Tax Reform Act of 1986 (Pub L 99-514, 100 Stat 2084), which destroyed the ongoing value of tax sheltered investments such as these The Act eliminated tax deductions for accrued but unpaid interest expenses, took away the accelerated depreciation benefits, and deductions could no longer be taken against ordinary income, only against passive income See 26 U S C § 469 In short, the effect of the Act was to put HUD deals on a purely economic footing, and the immediate downward impact on market values of the properties was profound

In light of these changes, the general partners warned the limited partners in 1987 that collection of the largest portion of the sales proceeds due in 1999 might not occur (Def Br 8/4/06, Ex A(1)-(3)(R)) Respondents provided similar warnings over the ensuing years (Def Br 8/4/06, Ex B(1)-(3)(R))

As 1999 approached, BFG evaluated the portfolio of properties that it acquired in the 1984 transaction and determined that nine, sometimes called the "orphans," had no value above the HUD mortgages (Tr 10/4/06, 45 17-20 (R)) For those that BFG determined had value, it offered to satisfy the balloon notes at a steep discount (paying approximately 10% of the face value of the note plus interest), which those partnerships accepted As for the "orphans," which included the Parkview, Palmetto, Orleans, and Roosevelt properties, BFG offered the properties back to the limited partnerships Respondents evaluated the properties and came to the same conclusion, *i e* the properties had no value above the HUD mortgages An independent brokerage firm came to the same conclusion Further, adverse tax consequences would pass to the limited partners if they took the properties back, and additional capital contributions would be required to bring the properties up to HUD

standards. Also, HUD had embarked on a program of "Mark-to-Market" for the subsidized rental properties, which likely would have significantly reduced the subsidies (Def Mem in Supp 2/9/09, Ex C at 1-2 (R))

In light of these facts, the general partners declined to take these properties back. BFG agreed to sell the four properties (along with five others not at issue in these cases) in late 1999 to Hediger Enterprises for \$100 plus \$100,000 closing costs, plus assumption or satisfaction of the HUD mortgages. HUD's approval of the sale was not forthcoming, and Hediger Enterprises assigned its contracts to a non-profit entity, Carolina IX, LLC, which purchased the properties and satisfied the HUD mortgages on 12/31/00. Respondents notified the limited partners of the BFG/Hediger sales agreement (and their decision not to take the properties back) no later than 1/18/00 (Def Mem in Supp 2/9/09, Ex C at 1-2 (R)), and the actual sale in early 2001 (Def Br 8/4/06, Ex E(1)-(3)(R))

Shortly after the January 2000 notification of the BFG/Hediger sales agreement, Appellant Davis retained Joel Bailey on behalf of some or all of the Appellants (Pendarvis Aff 4/22/10, Ex 53 at 1-25 (Pl Priv Log 12/31/08)(R))⁷ In April 2003, more than three years after retaining Bailey, Davis and other limited partners in Parkview filed the first of these lawsuits against Respondents. In October 2005, the limited partners (including Davis) of Orleans, Roosevelt, Palmetto and Pinewood filed the other four suits against Respondents. All Appellants have been represented by Bailey throughout the litigation.

As for the Pinewood case, it is important to note that

- Appellants mischaracterize and misrepresent certain evidence to this Court, as they did to the lower court *after* entry of the 4/6/10 Sanctions Order,
- the alleged "evidence" Appellants rely upon in their brief was available to them prior to entry of the Discovery Orders and the Sanctions Order, but Appellants did not present such materials and issues to the court before those orders were entered such

⁷ Appellants refused to divulge when each Appellant retained Bailey to investigate/pursue claims against Respondents. See *infra* at 12 (note 16), 15-20

that the lower court could not, and this Court can not, consider such materials and issues with respect to the Discovery Orders and Sanctions Order (see infra at 49-50),

- Respondents did, in fact, plead the statute of limitations defense as to the Pinewood Appellants' legal claims (Pinewood Ans , ¶¶ 148-149 (R)), and
- the statute of limitations defense was viable in the Pinewood case because the alleged injury that was the basis of each of the Pinewood Appellants' claims (*i e* , Respondents' failure to pay the Pinewood Appellants their shares of the amount due on the 1999 balloon note) was known to Appellants since the purchaser defaulted on the 1999 note, and the Pinewood Appellants did not file this lawsuit until October 2005 ⁸

Unlike the other properties, at the time the 1999 note became due, Pinewood was thought to have some value above the HUD mortgage Respondents attempted to negotiate a compromise with the purchaser, which would be acceptable to the Pinewood Appellants Respondents made various proposals to the Pinewood Appellants, which included sale of the Note, renegotiation of the Note's terms, taking the property back, and even replacement of the general partners such that the limited partners could do what they wished The limited partners either rejected or ignored each proposal and failed to suggest any alternatives (Johnston Aff 6/7/10, Ex A, D-G, I-J, L-M (R)) Due to the Pinewood Appellants' continuing vacillation, Respondents entered into tolling agreements with the owners On two occasions, when timely extensions of the tolling agreements could not be accomplished, a suit was filed to protect the Pinewood Limited Partnership's interest ⁹ Appellants' attorney

⁸ To the extent the Pinewood Appellants had any claim when they filed their suit in 2005, those claims were based on the same alleged injury that was known to them in 1999 Though Respondents attempted to negotiate a compromise with Appellants (*i e* , negotiate a resolution with the defaulting purchaser on behalf of the Limited Partnership, which would be acceptable to Appellants) both before and after the filing of the Pinewood Appellants' lawsuit, those attempts were unsuccessful Respondents' efforts to reach a compromise of Appellants' demands/claims did not serve to delay the accrual of their causes of action or stay the statute of limitations (see infra at 10)

⁹ Appellants claim for the first time, here, that the Rule 41 dismissal of the second suit, without prejudice, was, nonetheless, with prejudice However, the dismissal of the first suit was pursuant to Rule 5(d), SCRCF The trial court never obtained jurisdiction, so it was an adjudication of nothing

was well aware of the tolling agreements and suits (see Johnston Aff 6/7/10, Ex G at 2, Def Mem 6/7/10, Ex E-F (R))¹⁰

In March 2007, an offer was received to purchase Pinewood for \$500,000 with a net to the partnership, after fees and expenses, of \$425,000. The limited partners claimed not to have sufficient information, despite being provided a contemporaneous appraisal which included all past and current financial information, and withheld their approval of the sale (Johnston Aff 6/7/10, Ex N-O (R))¹¹. On 7/5/07, the general partner agreed to the sale of the property, and the Pinewood Limited Partnership received a net of \$425,000 (Johnston Aff 6/7/10, Ex P at 1, Q at 2 (R))

Seven years after Pinewood Appellants received notice that Ellis Johnston was negotiating with the owner on behalf of Pinewood Limited Partnership, and two and one-half years after the 7/5/07 sale of the property, Pinewood Appellants first claimed this was all part of a grand conspiracy and constituted fraud (Pl Mot 4/22/10, 47 (R)) Their theory is clearly betrayed by the above-cited evidence. More importantly, they did not present their “evidence” for the court’s consideration (and Respondents’ rebuttal) until after the 4/6/10 Sanctions Order was entered.

The 60-plus-page Complaints in each of these cases allege breach of fiduciary duty and several other legal claims, which all hinge upon the business judgment of the Respondents in 1999 when they concluded that the properties had no value above the HUD mortgage (with the exception of Pinewood) and that taking the properties back was not in the best interests of the Limited Partnerships. Nonetheless, Appellants chose to *allege* wrong

¹⁰ Appellants misrepresented to the lower court, under oath, that they first learned of the earlier Pinewood litigation and tolling agreements with the defaulting purchaser in April 2010 (Pl Mot 4/22/10, 47, Pendarvis Aff 4/22/10, ¶102 (R)) This was false, and Appellants have now corrected their misrepresentation (See Def Mem 6/7/10, 26-29 & Ex E-H (R))

¹¹ In fact, this was Appellants’ response in almost all instances, even though they were furnished the year-end and year-to-date operating statements and all other information in Respondents’ possession (Johnston Aff 6/7/10, Ex C, E, G, N, O (R))

doings and injury going back to the early 1980's in each case, including, *inter alia* failure to entertain other offers to purchase the properties in the 1980's, misrepresenting that the purchaser was financially solvent and possessed other assets, not selling the property to BFG but to an entity created by BFG, failing to forward appropriate documentation of the sale, failing to properly secure the Notes, and embarking upon a scheme whereby they would acquire various limited partnership interests by undervaluing the property

In fact, of Appellants' 40-plus separate claims of misconduct (Parkview Amended Compl , ¶120, Palmetto Compl , ¶117, Pinewood Compl , ¶121, Orleans Compl , ¶102, Roosevelt Compl , ¶104 (R)), only six are alleged to have occurred after the 1999 notes became due, and none after the 12/31/00 sale of the properties The exceptions are Orleans and Roosevelt, in which Appellants also affirmatively alleged that Respondents interfered with their investigation and pursuit of claims in those lawsuits and others (*see infra* at 31-32)

2 Statute of Limitations and Appellants' Estoppel Argument

A 2006-2008 legal battle over Respondents' statute of limitations defense set the tone for the 2008-2010 discovery and sanctions disputes that ultimately resulted in the dismissal of these lawsuits On 1/17/06, Respondents moved for summary judgment on Appellants' legal claims in the Palmetto, Orleans and Roosevelt cases based on the statute of limitations defense (Def Mot 1/17/06 (Palmetto, Orleans, Roosevelt), 3 (R))¹²

In support of their motion for summary judgment, Respondents served Requests for Admission which principally concerned Appellants' receipt and possession of documents that put them on notice of their alleged injuries (Def First Request for Adm 7/14/06 (Palmetto, Orleans, Roosevelt), all pages incl exhibits of each (R)) Among the most critical of the

¹² Contrary to Appellants' erroneous supposition, Pinewood was not included in the motion because, as stated in Respondents' Memorandum, "It [was] not clear at [the] time if all or parts of the Pinewood action are time barred " (Def Br 8/4/06, 2 (R))

documents was a 6/14/01 letter from Respondents to Appellants (four years and four months before Orleans, Roosevelt and Palmetto were filed) informing them, *inter alia*

After a detailed review of the [BFG] sales documents, we have determined that the sale [of the property] was to an unaffiliated third party and that there were no net proceeds from the sale. Given the result of this review, we do not believe that the Partnership has a claim against [the purchaser]

With the property now sold, **the Partnership's note is of no value and the Partnership will be terminated** for tax purposes during 2001 (Def Br 8/4/06, Ex F(1)-(3), Def First Request for Adm 7/14/06 (Orleans, Palmetto, Roosevelt) at RFA 29 & Ex FF (R))

Though Appellants admitted that the 6/14/01 letter was a true and accurate copy, they were evasive as to who, if, and when each received it (Def Br 8/4/06, Ex C at 11, 25, 39 (responses to RFA 29)(R)) Appellants gave identical evasive responses to almost all of the other requests for admission (Def Br 8/4/06, Ex C at 1-42 (R))

In opposition to the motion for summary judgment, Appellants *argued* that Respondents were estopped from asserting the statute of limitations defense¹³ Elaborating on allegations in the Orleans and Roosevelt Complaints (*see infra* at 31-32), Appellants claimed that the parties' efforts to negotiate and/or mediate all claims between 8/11/03 (Pl Mem 8/25/06, Ex 8 at 3 (Johnston ltr to Bailey 8/5/03)(R)) and 7/26/04 somehow tolled

¹³ Appellants also argued that the parties' Limited Partnership agreements were "sealed instruments," so a 20-year statute of limitations applied. But the 6/1/75 agreements between Respondents and Appellants (Davis Aff 9/30/06, Ex 3 at 1-6, Ex 8 at 1-9, Ex 13 at 1-7, Ex 15 at 1-12)(R)) did not contain a "seal" of any of the signatures. Nor did the documents meet the criteria for sealed instruments set forth in Carolina Marine Handling, Inc., v. Lasch, 363 S C 169, 609 S E 2d 548 (Ct App 2005) (*See* Def Br 9/20/06, 1-5 (R)) They also argued that, even if the three-year statute of limitations applied, their injury was not complete and their claims did not accrue until the statute of limitations ran for the Respondents to sue BFG (*i.e.*, three years after the notes became due, despite the 2000-2001 notice that Respondents declined to take the properties back and determined that there was no viable opportunity to recover damages from the BFG debtors (*see e.g.* Compl (Palmetto), ¶¶ 84-85)(R)) This theory is contrary to the law governing accrual, as set forth in Epstein v. Brown, 363 S C 372, 610 S E 2d 816 (2005), among other South Carolina precedent (*See* Def Br 8/4/06, 10-16 (R)) Entries on Appellants' own privilege logs show that some or all of them had already hired an attorney no later than February 2000 (and had even hired an expert no later than August 2000) (*see infra* at 18-19, 58 (note 59)(R))

the statute of limitations (*i e* , estoppel) ¹⁴ However, the evidence and applicable law did not support Appellants' estoppel argument (Def Br 8/4/06, 16-18 & Ex I (R)) Appellants never requested, nor did Respondents grant, a tolling agreement Under South Carolina law, **settlement discussions and mediation preparations, such as existed in these cases, are not a basis for denying summary judgment on a statute of limitations defense** based on the doctrine of equitable estoppel See Black v Lexington School District No 2, 327 S C 55, 61-63, 488 S E 2d 327, 330-31 (1997), Vines v Self Memorial Hospital, 314 S C 305, 308-09, 443 S E 2d 909, 911 (1994), Gadsden v Southern Railroad, 262 S C 590, 592, 206 S E 2d 882, 883 (1974), Moates v Bobb, 322 S C 172, 175-76, 470 S E 2d 402, 403-04 (Ct App 1996)

Even if Appellants had presented evidence which supported a finding that the statute of limitations was tolled from 8/11/03 until 7/26/04 (the negotiation/mediation period), it would not have mattered For the purposes of their motion for summary judgment, Respondents focused on the 6/14/01 letter (Answer (Orleans, Roosevelt, Palmetto), Ex 1 (R)) as representing the latest possible date that Appellants' claims accrued ¹⁵ The suits in Orleans, Roosevelt and Palmetto were filed in October 2005, four years and four months later Even giving Appellants the benefit of the doubt and tolling the limitations period from August 2003 to July 2004, Appellants' claims were still time barred

However, as a result of the murkiness Appellants successfully created as to the facts (no doubt including Appellants' evasive responses to the Requests for Admission regarding the 6/14/01 letter and other documents), the court ruled "that a genuine issue exists as to

¹⁴ On 7/26/04, Appellants' counsel advised Respondents' counsel "[W]e are not in a position to delay proceeding with these claims any longer " He requested responses to discovery in the Parkview case within ten days and stated he would be preparing pleadings and discovery in the other four cases "for service within the next couple of weeks " (Def Br 9/20/06, 5-14 (more detailed account of the evidence debunking Appellants' estoppel claim) & Ex B at 1 (7/26/04 letter)(R))

¹⁵ There was substantial evidence that the claims arose earlier (Def Br 8/4/06, 6-7 & Ex D-E (R))

material facts involving the statute of limitations” and denied Respondents’ motion for summary judgment (Order 6/5/08, 2 (R)) Yet, the statute of limitations issues would remain a key factor in the later discovery disputes, Appellants’ willful disobedience of the Discovery Orders, and the court’s dismissal of the five cases due to Appellants’ persistent refusal to comply with the Discovery Orders, as shown below

II STANDARD OF REVIEW AS TO DISCOVERY ORDERS

These appeals primarily involve discovery orders and the sanctions imposed due to Appellants’ refusal to comply with two of the discovery orders Thus, the standard of review applicable to discovery orders is of paramount importance “[T]he scope and conduct of discovery are within the sound discretion of the trial court ” Palmetto Alliance, Inc v South Carolina Public Service Com, 282 S C 430, 436, 319 S E 2d 695, 698 (1984) (citation omitted) Lower courts “have broad discretion in [their] resolution of discovery problems that arise in cases pending before [them] ” Carefirst of Md , Inc v Carefirst Pregnancy Ctrs , Inc, 334 F 3d 390, 402 (4th Cir 2003) (citation omitted) “The rulings of a trial judge in matters involving discovery **will not be disturbed on appeal absent a clear showing of an abuse of discretion** ” Hedgepath v AT&T, 348 S C 340, 353, 559 S E 2d 327, 335 (Ct App 2001) (citation omitted) (emphasis added) An abuse of discretion may be found where “the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law ” Dunn v Dunn, 298 S C 499, 502, 381 S E 2d 734, 735 (1989) (citation omitted) The party appealing the discovery order has the burden of demonstrating that the trial court abused its discretion See id Appellants have not met their burden with regard to *any* of the appealed orders

III PRIMARY ORDERS ON APPEAL NO ABUSE OF DISCRETION IN THE 3/3/09 DISCOVERY ORDER, THE 7/28/09 PRIVILEGE ORDER, AND THE 4/6/10 SANCTIONS ORDER (Re Issues 1-2 and Appealed Orders dated 3/3/09, 6/2/09, 6/16/09, 7/28/09, 4/6/10, 9/16/10)

A The 3/3/09 Discovery Order

1 Discovery Order was Supported by the Record

The 3/3/09 Discovery Order simply compelled Appellants to comply with the South Carolina Rules of Civil Procedure by fully and completely answering Respondents' 8/28/08 discovery requests, which they had not done. The Discovery Order was supported by the South Carolina Rules of Civil Procedure governing discovery and the following

- After Appellants failed to respond to the 8/28/08 discovery requests (Def Mot 11/6/08, Ex A at 1-21 (R)), Respondents filed a motion to compel on 11/6/08
- Appellants' initial responses to the discovery, served on 11/14/08 (Def Mem 12/8/08, Ex A at 1-89 (R)), were evasive, non-responsive and incomplete, and their numerous objections were not applicable or appropriate (Def Mem 12/8/08, 15-28 & Ex B at 1-11, Tr 12/9/08, 14 8-34 12 (R))
- The court afforded Appellants an opportunity to address the deficiencies (Tr 12/9/08, 59 12-15 (R)) On 1/26/09, *Appellants in the Parkview case alone* served Supplemental Responses (Pendarvis Aff 4/22/10, Ex 58 at 1-99 (R)) Their responses continued to be evasive, non-responsive and incomplete (Pendarvis Aff 4/22/10, Ex 58 at 2-59, 76-98 (deficient responses to Document Requests 1-8, 10-16, 19-34, 36-43, 45-48 and Interrogatories 3, 6-18, 20 and 22-23) (R)) Appellants in the other four cases provided no supplemental responses whatsoever¹⁶

¹⁶ Exemplifying why the Discovery Order was necessary (with a May 2009 trial date less than three months away), **Appellants failed to disclose their testifying expert witnesses' opinions and bases for same** (responses to Int 6 Def Mem 12/8/08, Ex A at 71-73, Pendarvis Aff 4/22/10, Ex 58 at 79-81 (R)) **and when each Appellant first discussed the investigation/pursuit of claims against Respondents with other Appellants or an attorney, and when each Appellant retained Joel Bailey to investigate/pursue claims against Respondents** (responses to Int 9, 10 and 12 Def Mem 12/8/08, Ex A at 75-77, Pendarvis Aff 4/22/10, Ex 58 at 83-85 (R)) (See also Def Mem 12/8/08, Ex A at 68-69, Pendarvis Aff 4/22/10, Ex 58 at 76-77 (non-responsive answer to Int 3 regarding itemized statement of damages)(R)) The scope of these and the other discovery requests at issue in the Discovery Order were reasonably tailored to issues relevant to the catalogue of claims set forth in Appellants' 60-plus-page Complaints and the defenses to such claims (Def Mem 12/8/08, 15-28 & Ex A-B (R)) For this reason, Appellants' reliance on Oncology and Hematology Assoc of S C, LLC v S C D H E C, 387 S C 380, 692 S E 2d 920 (2010), is misplaced

The particulars of the Discovery Order and Appellants' evasive, non-responsive and incomplete answers to the 8/28/08 discovery requests are discussed in greater detail with regard to Appellants' failure to comply with the Discovery Order (see infra part III A 2)

On 3/13/09, Appellants filed a motion to amend the Discovery Order, which the court denied on 6/16/09 (Order 6/16/09 (R)) The purported basis of the motion was that Appellants complied with the Rules of Civil Procedure and that the court had somehow treated them unfairly when compared to Respondents Appellants' first ground was clearly wrong, as evidenced by their own deficient responses, and there was nothing unfair about requiring Appellants to comply with the Rules (see Def Mem 4/3/09, 2-11 (debunking Appellants' "double-standard" argument)(R))

2 Appellants Refused to Comply with the Discovery Order

a Key Terms of the 3/3/09 Discovery Order, and the Filing of Respondents' First Motion for Sanctions

The 3/3/09 Discovery Order compelled each of the Appellants in all five cases to "provide full and complete responses" and to "produce all documents in their possession, custody or control, which are responsive to" the requests (Order 3/3/09, 3 (R))

In addition, the court provided specific instructions as to the information Appellants must produce with respect to their expert witnesses' opinions and the bases of those opinions

[I]f the experts identified by Plaintiffs have produced written reports setting forth the opinions held by the experts and the bases for such opinions, Plaintiffs may produce such reports to the extent the reports contain all of the information requested **If the Plaintiffs' experts have not produced such written reports, Plaintiffs must provide a summary of the important opinions held by each expert (i.e., the opinion testimony the expert is expected to give in these cases), as well as the factual bases for such opinions A description of the expert's general experience is not sufficient** (Order 3/3/09, 4 (emphasis added)(R))

The court also addressed Appellants' practice of couching their answers such that it was impossible to discern whether they were withholding materials based on objections the court previously overruled

This blanket method of objecting to all of the Discovery Requests, *coupled with Plaintiffs subsequent failure to respond in any meaningful way to the particular complaints raised in Defendants [12/8/08] Memorandum*, make it impossible for Defendants to know if responsive information and/or documents are being withheld To the extent that Plaintiffs have withheld any information or documents that would otherwise be responsive to the Discovery Requests on the grounds of any of the other General Objections contained in Plaintiffs' discovery responses, **Plaintiffs are hereby compelled to provide full and complete responses to all such Interrogatories and to produce the documents responsive to all such Requests for Production** (Order 3/3/09, 4-5 (emphasis added)(R))

The court also disapproved of the fact that the Parkview Appellants alone provided the first supplemental responses to the discovery, even though the 8/28/08 discovery requests were directed to *all* plaintiffs in *all* five cases (Order 3/3/09, 3 (R)) The court held, "**Each and every Plaintiff** is required to provide all information **reasonably available to him or her**, which would be responsive to any of the Interrogatories Further, **each and every Plaintiff** is required to produce all documents **in his or her possession, custody or control**, which would be responsive to any of the Requests for Production " (Order 3/3/09, 5 (emphasis added)(R))

Appellants' failed to comply with each of the above terms, which simply required compliance with the Rules of Civil Procedure, as shown below

Due to Appellants' failure to produce any of the information required by the 3/3/09 Discovery Order, Respondents filed their 7/24/09 Motion for Sanctions (See Def Mem 8/21/09, 2-3 (partial description of information compelled), Order 3/3/09, 3, 5 (requiring full compliance with the Order within 30 days), Def Mot 11/6/08, Ex A at 8-21 (R))

b Non-Compliance After Motion for Sanctions Filed

1 Appellants' Representations at 8/24/09 Hearing and Court's Warnings to Appellants

At the 8/24/09 hearing on the Motion for Sanctions, Appellants informed the court that they were finally providing supplemental responses to the discovery requests that day (Tr 8/24/09, 4 4-6 (R)) The court found that Appellants had no legitimate excuse for their

non-compliance to that point (Tr 8/24/09, 4 12-15, 5 11, 8 14-19, 25, 11 24-12 8 (R)), and warned Appellants that their non-compliance, coupled with the looming January 2010 trial date in the Parkview case,¹⁷ was placing the court in the position of having no viable alternative but to dismiss the lawsuits (Tr 8/24/09, 4 23-25 (“It’s [Parkview case] going to be tried in January, whenever it’s set for If they don’t get the discovery I’m going to throw the case out ”), 12 2-8, 17 18-24 (materials compelled are important to the statute of limitations issue), 18 11-16 (R)) Appellants’ counsel assured the court that they were now in compliance (Tr 8/24/09, 12 15-20 (R)) As a result, the court took the Motion for Sanctions under advisement (Tr 8/24/09, 30 10-17 (R)) As shown below, the representation was false

11 Second Supplemental Responses Grossly Inadequate

After the hearing, Respondents received a copy of Appellants’ second supplemental responses to discovery (Def Mem 8/27/09, Ex A (R)) It was immediately apparent that Appellants had not complied with the 3/3/09 Discovery Order They had not even come close Among the most critical deficiencies were Appellants’ incomplete and evasive responses to the discovery relevant to the statute of limitations issue and their testifying experts’ opinions Respondents immediately informed the court of Appellants’ continuing non-compliance (Def Mem 8/27/09, 1-13 & Ex A-B (R))

Statute of Limitations Discovery Requests

Appellants again failed to provide complete responses to Interrogatories 9, 10 and 12, asserting inapplicable objections and failing to avail themselves of non-privileged information in their possession Interrogatories 9 and 10 concerned the *first* communication between two or more Appellants, and/or between an Appellant and an attorney, concerning the investigation or pursuit of legal claims against any of the Respondents (Def Mot

¹⁷ The trial of the Parkview case had already been continued from a May 2009 trial date due to the ongoing discovery disputes (Order 3/9/09 (R))

11/6/08, Ex A at 16-17 (R)) Appellants responded that they “do not recall the details of the first communication” concerning these subject matters, and they gave no estimated date or even a timeframe (Def Mem 8/27/09, Ex A at 107-109 (R)) Then, in classic “answer the question that was not asked” style, Appellants said they did recall that, at some unspecified time, they discussed Respondents’ purported lack of communication with Appellants and the pursuit of the Limited Partnerships’ claims against the defaulting purchasers (Def Mem 8/27/09, Ex A at 108-109 (R)) Interrogatory 12 sought the date(s) upon which each of the Appellants agreed to retain Bailey to investigate/pursue claims against Respondents (Def Mot 11/6/08, Ex A at 17 (R)) Appellants objected based on the attorney/client privilege and/or work product doctrine, and stated, “*No information is being provided at this time pending Plaintiffs decision to seek review by the Appellate Courts of the Circuit Court s order relating to privileged documents*” (Def Mem 8/27/09, Ex A at 110-111 (emphasis added))(R)) Appellants **never** provided an additional response Compounding the evasiveness of their answers, all Appellants in all five cases answered as a consolidated group, rather than individually as required by the Rules of Civil Procedure and the Discovery Order (“Each and every Plaintiff is required to provide all information reasonably available to him or her ” (Order 3/3/09, 5 (R))¹⁸

Even putting aside Appellants’ group claim that they had no independent recollection of the information sought, and putting aside their simultaneous refusal to comply with the 7/28/09 Privilege Order (see *infra* part III B), Appellants could have provided more

¹⁸ For instance, how could Appellant Weinberg or his estate “not recall” any responsive information considering he threatened a lawsuit against the general partners on 12/9/99 and 2/22/00? (Def Mem 7/2/09, Ex 1-2 (R)) How could Appellant Davis “not recall” any responsive information considering the Appellants’ Privilege Log indicates that, after Respondent Tuck told him on 1/18/00 that the general partners declined BFG’s offer to return the properties to the Limited Partnerships and BFG then sold the properties for \$1 and assumption of the mortgages, Davis sought Joel Bailey’s advice on 2/21/00 concerning a letter Davis drafted to the other limited partners, and by 3/28/00 Davis forwarded escrow funds to Bailey for other limited partners to engage counsel? (Def Mem 7/2/09, Ex 5 (1/18/00 letter), Pendarvis Aff 4/22/10, Ex 53 at 3, 5 (Nos 14, 18)(R))

responsive and accurate information by reviewing the content of the documents identified in their Privilege Log. Those documents are dated between 1998 and 2004 and reportedly involve numerous communications between and among the Appellants themselves and Appellants and Bailey. (Pendarvis Aff 4/22/10, Ex 53 at 1-25 (R))

It is black letter law that Appellants' claims of privilege with respect to those documents did not extend to the facts contained therein, which were responsive to the discovery requests. The subject matter, purpose and mere fact of representation are not protected by the attorney-client privilege even if such facts are contained within privileged communications. See State v Conyers, 268 S C 276, 283-84, 233 S E 2d 95, 98 (1977) (the fact that a party sought representation from an attorney and the general purpose of the representation are not privileged), McDonald v Berry, 243 S C 453, 457, 134 S E 2d 392, 393-94 (1964), Chaudhry v Gallerizzo, 174 F 3d 394, 402 (4th Cir 1999) ("The identity of the client, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege"), In Re Grand Jury Subpoena, 204 F 3d 516, 520 (4th Cir 2000), U S v Swain, 1991 U S Dist LEXIS 6841, 23 (D S C 1991) (Privilege "does not apply to the description of the general nature of legal services rendered or the dates when such services were provided"), U S v Legal Servs., 249 F 3d 1077, 1081 (D C Cir 2001), Upjohn Co v United States, 449 U S 383, 395 (1981) ("The [attorney-client] privilege only protects disclosure of communications, it does not protect disclosure of the underlying facts by those who communicated with the attorney "), 1 Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 88 (5th ed 2007)

Appellants could not simply avoid answering the discovery by failing to avail themselves of the non-privileged factual information reasonably available to them and/or their attorneys. "A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney." Hickman v Taylor,

329 U S 495, 504 (1947), see also 8B Charles Alan Wright, Arthur R Miller & Richard L Marcus, Federal Practice and Procedure § 2177 (3d ed 2010) (“A party is charged with knowledge of what its agents know, or what is in records available to it A party must disclose facts in its attorney’s possession even though the facts have not been transmitted to the party”), Oklahoma v Tyson Foods, Inc., 262 F R D 617, 629 (N D Okla 2009) (“Neither can a party refuse to respond to an interrogatory requesting factual information because that information is known only to its attorney”), Essex Builders Group, Inc v Amerisure Ins Co., 230 F R D 682, 685 (M D Fla 2005) (“The answering party cannot limit his answers to matters within his own knowledge and ignore information immediately available to him or under his control ”)

The entries in Appellants’ Privilege Log reveal that each of the Appellants (or their attorney) had non-privileged factual information available to him, which would allow him to answer more fully, completely and accurately than Appellants’ group response of “do not recall ” Yet Appellants’ evasive answers continued to conceal this information, which was critical to the statute of limitations defense The bits of information known to Respondents from Appellants’ Privilege Log and other documents were enough to show that Appellants were clearly capable of responding more fully and accurately than they did, but those bits of information did not provide Respondents with full and accurate answers to their interrogatories, nor did Appellants ever claim that those bits of information (or *any* information for that matter) constituted the best responsive information available to them For example, Appellants’ 12/31/08 Privilege Log (Pendarvis Aff 4/22/10, Ex 53 (R)) indicates that

- no later than 2/16/00 Joel Bailey was in contact with unidentified limited partner “clients” relative to investigation of the Respondents (Ex 53 at 3 (No 12)(R)),
- by 2/21/00, limited partner Davis had asked his attorney, Bailey, for comments on a letter Davis drafted to “other limited partners” concerning the engagement of counsel (Ex 53 at 3 (No 14)(R)), and

- by 3/23/00, Davis had forwarded “funds for escrow” to Bailey in connection with “other limited partners” engaging counsel (Ex 53 at 5 (No 18)(R))

All of this transpired more than three years before the first suit, Parkview, was filed in April 2003

Further “garbling”¹⁹ the information relevant to the statute of limitations issues, many entries in Appellants’ Privilege Log could not possibly accurately describe the documents identified²⁰ Appellants applied a “canned” and misleading description to the three documents described above and numerous others identified in their Privilege Log, spanning the time frame 2/9/99 through 6/28/04 Appellants’ “canned” descriptions indicated that the purpose of the retention of counsel was merely to investigate or inquire about the status of negotiations with, and/or pursuit of claims against, the purchasing entities (BFG or Magi) to collect on the notes and/or recover the properties, *implicitly* denying that the subject documents described related to the investigation or pursuit of claims against Respondents For example, a document dated 6/28/04, **15 months after the Parkview Appellants filed suit against Respondents**, was described as “concerning status of negotiations with and/or pursuit of claims against purchasing entities (BFG) to collect on the notes and/or recover properties” (Pendarvis Aff 4/22/10, Ex 53 at 19 (No 100)(R))

Appellants’ “canned” description of these documents is obviously a “ruse” considering that the vast majority of the documents were dated **after**

- Appellant Weinberg threatened to sue the general partners on **12/9/99** and **2/22/00** (Def Mem 7/2/09, Ex 1-2 (R)), and
- Bailey, while representing all of the Appellants, informed an attorney for BFG on **8/9/00 that he was in the process of bringing action against the general partners**

¹⁹ See *infra* at 30 (Justice Hand quotation)

²⁰ Noticeably absent from Appellants’ Privilege Log is any description of a written contingency fee agreement between Bailey and any Appellant Given that such an agreement is required under Rule 1.5(c), RPC, Rule 407, SCACR, Respondents can only assume that Appellants omitted that information from the Privilege Log’s descriptions of such documents

(Respondents), to include claims for mismanagement, failure to collect on the notes, and fraud (Vick Aff 6/7/10, Ex L at Ex 15, see also Vick Aff 6/7/10, Ex L at 2-5 & Ex 5-21 (additional evidence as to Appellants' investigation/pursuit of claims against Respondents between late 1999 and September 2000)(R))

Of the 20 documents identified on Appellants' Privilege Log (Pendarvis Aff 4/22/10, Ex 53 (R)), which are subject to Appellants' "canned" description or a close variation thereof,

- one is dated *well after* the Parkview suit was filed against Respondents (Ex 53 at 19 (No 100) (R)),
- an additional ten are dated *after* Bailey informed BFG's attorney that he was preparing to sue the general partners on behalf of Appellants (Ex 53 at 7, 9-11, 18, 20, 22 (Nos 32, 43-44, 47, 49-51, 94, 109, 120)(R)),
- an additional eight are dated *after* Weinberg threatened to sue the general partners (Ex 53 at 3-6, 20 (Nos 12, 14, 15, 17-19, 25, 108)(R)), and
- only one is dated before Weinberg threatened to sue (Ex 53 at 20 (No 106)(R))

The above facts indicate Appellants intentionally concealed information responsive to Interrogatories 9, 10 and 12 and, at a minimum, it is clear that they failed to avail themselves of non-privileged factual information reasonably available to them. Though Appellants were well aware of these deficiencies in their Second Supplemental Responses, none of them ever attempted to comply with the Discovery Order in this regard (Def Mem 8/27/09, 11-12, Tr 1/14/10, 14 1-15 20, 22 1-8, Def Mem 2/11/10, 3-9 (R))

Testifying Experts' Opinions

Appellants' Second Supplemental Responses still provided no meaningful response to discovery concerning Appellants' testifying expert witnesses' opinions and the bases for those opinions (Def Mem 8/27/09, 2-4 & Ex A at 99-106 (supp response to Int 6)(R)) The evasive responses as to the opinions of their valuation experts (Chambers, Keyserling, Henson) (Def Mem 8/27/09, Ex A at 102-104 (R)) and their sole liability expert (Higgins) (Def Mem 8/27/09, Ex A at 103-104 (R)) were particularly troubling. The court was exceptionally clear in the 3/3/09 Discovery Order that Appellants' prior responses were "incomplete and inadequate" and Appellants must "provide a summary of the important

opinions held by each expert (i.e., the opinion testimony the expert is expected to give in these cases), as well as the factual bases for such opinions. A description of the expert's general experience is not sufficient." (Order 3/3/09, 3-4 (R.))

In light of the unambiguous directions from the court and the gross inadequacy of Appellants' supplemental response to Interrogatory 6, Appellants' non-compliance was clearly willful. Appellants' response concerning Chambers is set forth below *with all of the changes made from their prior response to their Second Supplemental Response in bold*

Mr. Chambers is expected to give an opinion as to the valuation for Parkview Apartments and Palmetto Apartments **a) in 1999 when Boston Financial/Lend Lease offered to convey the properties back to each of the subject limited partnerships, excluding Pinewood and b) as of their value on the date of trial**

His opinion is believed to be based upon his knowledge of real estate values in and around Beaufort, South Carolina.

Mr. Chambers is the former mayor of Beaufort, South Carolina and has extensive experience in matters concerning property values in the Beaufort area, and is also a real estate agent and broker licensed by the State of South Carolina. Additionally, he is personally familiar with the two apartment complexes in question.

(Def. Mem. 8/27/09, Ex. A at 99-100 (initial response), 102 (supplemental response) (emphasis added to denote all changes made)(R.)) Appellants provided no information as to what Chamber's opinion actually was, the value he assigned to the properties at any point, how he determined value, or what he considered in determining value. Appellants' responses as to Keyserling and Henson were virtually identical to their evasive response concerning Chambers (Def. Mem. 8/27/09, Ex. A at 100-101 (initial responses) and 103-104 (supplemental responses)(R.)) Nor did Appellants produce any written report or statement disclosing these experts' opinions or the bases for their opinions.²¹

²¹ Yet, in response to Interrogatory 7, Appellants stated that Chambers, Keyserling and Henson "are prepared to offer opinions regarding the value of the [designated properties]" (Def. Mem. 8/27/09, Ex. A at 106 (R.))

Appellants provided *no additional information* concerning their liability expert, Higgins They merely copied verbatim their prior deficient response

Attorney Higgins is expected to give an opinion regarding the relationship between HUD and AIMCO as it concerned the subject properties and the impact of AIMCO's previous history with HUD with regard to AIMCO's unilateral decision to decline the Subsequent Purchasers' [BFG's] offer to return the subject properties to the Limited Partnerships

His opinion is believed to be based upon his knowledge and experience with HUD

Atty Higgins is an attorney practicing in Columbia, South Carolina with substantial experience with HUD and Section 8 Housing (Def Mem 8/27/09, Ex A at 100-101 (initial response), 103-104 (supplemental response)(R))

The above deficiencies are merely representative samples of Appellants' non-compliance²²

111 1/14/10 Hearing Court Again Admonishes Appellants for Continuing Non-Compliance

The court addressed Appellants' deficient Second Supplemental Responses at a 1/14/10 hearing (Tr 1/14/10, 9 17-10 13 (R)) Respondents reiterated the most critical deficiencies in Appellants' responses (Tr 1/14/10, 11 8-24 8 (R)) Appellants merely

²² Appellants also continued to provide evasive and incomplete responses as to, *inter alia*, their itemized damages (Def Mem 8/27/09, 9-10 & Ex A at 96-97 (Int 3), Tr 12/9/08, 27 16-28 2, 46 2-3 (R)), income and financial benefits derived from their interests in the subject properties and Limited Partnerships (Def Mem 8/27/09, 10-11 & Ex A at 57-59, 106-107 (Int 8)(R)), and familiarity with similar types of HUD-regulated properties as an owner, manager or investor (Def Mem 8/27/09, 12-13 & Ex A at 123-125 (Int 18)(R)) They continued to disobey the 3/3/09 Discovery Order by answering discovery as a consolidated group and being evasive as to which responsive documents were in the possession of Appellants (Def Mem 8/27/09, 7-8 & Ex A at 6-77, Tr 12/9/08, 22 8-23, Order 3/3/09, 3-4, 5 (R)) This deficiency was exacerbated because Appellants produced 2,586 pages of documents but only identified 38 of those pages as belonging to a specific (or any) Appellant (Vick Aff 6/7/10, ¶ 4 (R)) Further, when Respondents served Requests for Admission to clarify each Appellant's receipt and possession of several of the documents, Appellants provided evasive group responses, answering, "Plaintiffs admit the subject document(s) is a true and correct copy, but deny the Request to Admit with regard to the date alleged to have been received by Plaintiffs " (Def Br 8/4/06, Ex C at 3-13, 17-27, 31-40, Def First Request for Adm 7/14/06 (Orleans, Palmetto, Roosevelt), all pages incl exhibits of each (R))

insisted that they had complied with the 3/3/09 Discovery Order, without addressing in any meaningful way the specific deficiencies identified by Respondents and/or the court (Tr 1/14/10, 27 15-21 (R)) They argued that Respondents would not be prejudiced as long as Appellants provided the compelled materials on the eve of trial (literally), to which the court responded, “This case has been going on for seven years, a long time And don’t hand me this about getting an expert on Friday This is not an expert-to-be-given-on-Friday case ” (Tr 1/14/10, 33 23-34 11 (R))

The court addressed Appellants’ evasive responses, obvious non-compliance, and the effect their misconduct continued to have on discovery and the ability to proceed to trial (Tr 1/14/10, 29 10-19, 31 23-32 3, 32 12-13, 33 3-5, 50 3-8 (R)) The court pressed Appellants’ counsel for a viable explanation as to why they had still not divulged their testifying experts’ opinions and the basis for those opinions, especially considering trial was set for 1/19/10, less than a week away Appellants’ response illustrates their pervasive and inexcusable disobedience of the court’s Discovery Order more than 16 months after the 8/28/08 discovery requests were served

PENDARVIS Your Honor, **part of the problem is we, you know, we don’t have a final opinion from the experts** They’ve got a preliminary opinion They’ve given their, their views on the preliminary opinions, and that’s just the first part, Your Honor²³

COURT **Well, trial was set for next week How can you not have a final opinion?**

PENDARVIS **It will be completed prior to trial, Your Honor**

COURT Mr Pendarvis, if you wanted to know what my expert’s opinion was a in particular case, I would have to tell you You would expect me to tell you I expect you to tell them **I’ve ordered you to tell them, and you refuse to do so**

(Tr 1/14/10, 29 10-32 13 (emphasis added)(R))

Nevertheless, the court allowed Appellants yet another opportunity to comply with the Order

²³ Not even “preliminary” opinions were provided in their responses

c Appellants' Non-Compliance Continues to This Day

On 1/25/10, one week after the Parkview case was supposed to go to trial, Appellants served their Third Supplemental Responses, which expressly applied to the *Parkview case only*, contrary to the Discovery Order (Def Mem 2/11/10, Ex 1 at 1-12 (Third Supp Responses), Order 3/3/09, 3, 5 (R)) Appellants' responses were evasive and grossly inadequate, yet again²⁴ They provided no information as to the expert opinions (or bases of opinions) of Higgins, their purported liability expert (Def Mem 2/11/10, 9 (R)) Chambers was said to have a "preliminary" opinion that Parkview had a fair market value of \$1,650,855 (Def Mem 2/11/10, Ex 1 at 2-3 (R)) They stated his opinion was based upon recognized valuation methodology, *e g* income, comparable sales and replacement cost approaches, but they did not disclose any calculations or summaries thereof, nor did they disclose the factual bases he relied upon in deriving his opinion of value

Each of the recognized methodologies require the factual bases to be supplied by the valuation expert See S C Hwy Dept v Booker, 260 S C 245, 259, 195 S E 2d 615, 622 (1973) (expert real estate appraisers' knowledge concerning subject property, methods of appraising property, comparable sales and other information they considered in forming their opinions and conclusions of value are discoverable and must be produced) Despite being ordered to disclose the "factual bases" for his opinions, Appellants did not disclose a single fact, actual (*i e* , supported by evidence) or assumed, relied upon by Chambers in arriving at his opinion of value²⁵ Appellants did not provide any of the information necessary for

²⁴ Among other things, the Parkview Appellants only supplemented their deficient responses to Interrogatories 6 and 18 They made no attempt to address their deficient responses to the other discovery requests as required by the 3/3/09 Discovery Order (at 3 (R)), including, *inter alia*, no attempt to answer Interrogatories 9, 10 and 12 (Def Mem 2/11/10, 3-9 (R))

²⁵ These actual and/or assumed facts would include, *inter alia* for comparables, adjustments to include physical, financial and locational dissimilarities, lapses of time between sales, changes in market condition, etc , for the income approach, future rental income, future cost to maintain, market discount rates (to include all calculations that are implied within such a calculation), etc , and for the replacement approach, facts with respect to the scope of work,

Respondents to understand and evaluate his expected testimony, to meaningfully prepare for his deposition, and to develop needed testimony from Respondents' own experts

The disclosure with respect to Keyserling suffered similar shortcomings. He was said to have an opinion that

- (1) Parkview could be "flipped" "as is" to a third party for a \$300,000 to \$500,000 gain to the partnership,
- (2) Parkview could be converted to market-based multifamily units for resale at the targeted price of \$225,000 to \$150,000 per unit,
- (3) Parkview could be maintained "as is" or taken out of the HUD program, retrofitted, and brought up to market-based rental prices (no opinion as to value or the cost to retrofit was given under this scenario), and
- (4) The HUD mortgage on Parkview could be paid off, the buildings demolished, and the real estate held for sale or development at a later date (no dollar figure was given for this scenario)

(Def Mem 2/11/10, Ex 1 at 3-6 (R))

What facts Keyserling relied upon in deriving these opinions, the materials he reviewed, and the methodology he employed are still a mystery²⁶. This is **not** what the Rules of Civil Procedure or the 3/3/09 Discovery Order required.

Appellants made no further attempt to comply with the Discovery Order

the depreciated value of the property, lost rental, etc

²⁶ As for the "exhibit" attached to the Parkview Third Supplemental Responses, it was prepared by Appellants' attorneys years earlier for the sole purpose of mediation as the attorneys estimate of damages for negotiation purposes. Recall that a week before the Parkview supplemental response, Appellants' experts had not yet formed their opinion of value. In their discovery responses, Appellants steadfastly objected to the use of the document and all other materials created solely for mediation. The document also contained information that the parties agreed in or before 2004 was for purposes of settlement discussion only and could not be used in court. (Def Mem 2/11/10, 12-14, Def Mem 8/27/09, Ex A at 6, 16 (R))

1 Privilege Order was Supported by the Record

a Relevant Background

Along with the 3/3/09 Discovery Order, the court's 7/28/09 Privilege Order lies at the heart of the parties' discovery and sanctions disputes. In the Privilege Order, the court compelled Appellants to produce 96 documents identified on their privilege log. Though Appellants would have this Court believe that Judge Early's ruling represents a radical departure from the State's attorney-client privilege jurisprudence, nothing could be farther from the truth.

Before examining the bases for the court's ruling, it is important to understand the context in which this dispute arose. A month *after* the court denied Respondents' motion for summary judgment based on the statute of limitations defense, Appellants' counsel admitted that they had failed to provide a complete privilege log (Tr. 7/1/08, 60:9-24 (R)). The court ordered Appellants to produce a complete privilege log within 30 days (Tr. 7/1/08, 61:2-4 (R)). Appellants' 7/28/08 Privilege Log identified, for the first time in the litigation, 90 documents, which were created between 1998 and 2004, many of which were authored by or addressed to Appellants' attorney, Bailey (compare Appellants' 7/28/08 Privilege Log and the Parkview Appellants' 7/21/05 Privilege Log, Def. Mem. 8/21/09, Ex. B at 4-16 (7/28/08 Priv. Log) and Ex. C at 2-7 (7/21/05 Priv. Log)(R)).²⁷

The 7/28/08 Privilege Log provided no description of the documents beyond the date, author and recipient of each document, and whether each document was a fax, letter or memo (Def. Mem. 12/8/08, Ex. C at 1-14 (R)). It was not until January 2009 that Appellants

²⁷ Of the 96 documents Appellants were compelled to produce in the 7/28/09 Privilege Order, 53 of them were not identified by Appellants until they were listed in their 7/28/08 (and subsequent) privilege logs (Pendarvis Aff. 4/22/10, Ex. 53 (12/31/08 Priv. Log) at 1, 6-8, 10, 13-22 (documents first identified in 7/28/08 Priv. Log Nos. 1, 5, 27-29, 34-35, 39, 48, 66, 71-81, 84-86, 88-91, 94-97, 99, 104-114, 117-119, 121-126)(R)).

finally provided a privilege log (“12/31/08 Privilege Log”) that contained more descriptive information about the documents listed therein (*i e*, more informative than “fax,” “letter,” or “memo”) (Pendarvis Aff 4/22/10, Ex 53 at 1-25 (R))²⁸ Respondents addressed the privilege dispute in their motion to compel (Def Mem 12/8/08, 2-15 & Ex C-D (R))

At the 12/9/08 hearing on their motion to compel, Respondents argued their grounds for production of certain documents identified on Appellants’ privilege log (Tr 12/9/08, 4-14 (R)) With the express consent of the parties, the court appointed a former judge, Gary Clary (“Clary”), to review the documents *in camera* and report his findings to the court, which Clary did (see infra at 63-64 (note 64)) On 6/2/09, the court issued its Order adopting the findings and conclusions contained in Clary’s reports The parties then filed motions to amend the 6/2/09 Order (Def Mot 6/15/09, 3-5, Def Mem 7/2/09, 17-24 (R)) After thoroughly reviewing the parties’ arguments, the court issued the 7/28/09 Privilege Order, granting in part and denying in part both parties’ motions to amend the 6/2/09 Order

b Law of Implied Waiver of Privilege Applied to These Cases

Appellants claimed attorney-client privilege and/or work product protection for 91 documents created prior to 10/16/02 (Pendarvis Aff 4/22/10, Ex 53 at 3-11, 13-22 (R)), more than three years before the last of these cases were filed²⁹ A three-year statute of limitations applied to Appellants’ legal claims See S C Code Ann §§15-3-530, 540 (2005) and §39-5-150 (1976) Sixteen of the documents were created prior to 4/21/00, more than three years before the first of these cases, Parkview, was filed (Pendarvis Aff 4/22/10, Ex 53 at 3-5, 13-16, 20 (Nos 12-19, 66, 71-73, 84, 105-106, 108)(R)) The 91 documents range in date between 10/30/98 and 9/19/02 (Pendarvis Aff 4/22/10, Ex 53 at 11, 20 (Nos 54, 105)(R)), and they involved communications between and among some of the Appellants

²⁸ The 12/31/08 Privilege Log was the log referred to in subsequent arguments and orders

²⁹ The lawsuits were filed on the following dates Roosevelt and Orleans on 10/17/05, Palmetto and Pinewood on 10/13/05, Parkview on 4/22/03 (See generally Complaints (all cases)(R))

themselves (most often between Appellant Davis and other limited partners), Appellants and their attorney, Bailey (most often between Bailey and Appellant Davis, who acted as the liaison for the other limited partners), Appellants and third parties, and Bailey and third parties (Pendarvis Aff 4/22/10, Ex 53 at 1-25 (R))

The above-referenced 91 documents are clearly relevant to Respondents' statute of limitations defense in each of the five cases. When Appellants first identified most of these documents in July 2008, their relevance was readily apparent to Respondents and the court, which emphasized to Appellants' counsel, "[T]he statute of limitations is a big issue in this case" (Tr 12/9/08, 44 19-20 (emphasis added)(R)) However, relevance alone does not justify a finding of waiver of privilege. Rather, the court's ruling that Appellants must produce the subject documents was based on its finding that Appellants affirmatively waived privilege by placing the subject matter of the documents directly at issue in these lawsuits. They did so in their initial pleadings, and in their arguments opposing Respondents' motion for summary judgment, and even by the mere filing of these lawsuits in light of the unusual circumstances presented.

Hearn v Rhay, 68 F R D 574 (E D Wash 1975), is widely regarded as the seminal case involving "at issue" implied waiver of the attorney-client privilege and work product protection. In Hearn, the court held that, for an implied waiver to be found, there must be (1) an assertion of the privilege through some "**affirmative act, such as filing suit**, by the asserting party," (2) through the affirmative act, the asserting party put the protected information at issue by making it relevant to the case, and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Id. at 581 (emphasis added). See also In Re Long Point Limited Partnership, 1997 Bankr LEXIS 2403 (Bankr D S C 1997)(applying the Hearn test and finding "at issue" waiver). Hearn has been the majority approach for more than two decades. See T Maxfield Bahner & Michael

L. Gallion, Waiver of Attorney-Client Privilege Via Issue Injection: A Call for Uniformity, 65 Def. Couns. J. 199, 204 (1998)

In the recent case of City of Myrtle Beach v. United Nat'l Ins. Co., 2010 U.S. Dist. LEXIS 89725 (Aug. 27, 2010 D.S.C.), the federal district court considered the Hearn analysis and determined that it is consistent with South Carolina law.

Under South Carolina law, lack of waiver is a necessary element to establish the attorney-client privilege. **Under South Carolina law, the waiver may be explicit or a waiver may be implied by making communications with counsel an issue.** See Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465, 484 (S.C. App. 2005) (implied waiver of privilege by making communications with counsel an issue). **The approach first espoused in [Hearn] sets forth a framework that provides a balance between the two competing policies of attorney-client privilege and the administration of justice and is consistent with established South Carolina law.** Additionally, the Hearn approach is the most widely accepted approach. **[I]f a [party] voluntarily injects an issue in the case, whether legal or factual, the [party] voluntarily waives, explicitly or impliedly, the attorney-client privilege.** Thus, “voluntarily injecting” the issue is not limited to asserting the advice of counsel as an affirmative defense. **A party’s assertion of a new position of law or fact may be the basis of waiver.**

Id. at 13-15 (internal citations omitted) (emphasis added) ³⁰

As recognized by the court in City of Myrtle Beach, the Hearn analysis is entirely consistent with the South Carolina Court of Appeals’ opinion in Floyd. The Court of Appeals acknowledged that the attorney-client privilege is far from absolute, and otherwise privileged materials may be admitted into evidence if the party claiming privilege places the privileged materials and their subject matter at issue. See Floyd, 615 S.E.2d at 483-84. The holdings in Floyd, Hearn and similar federal decisions, as well as the lower court’s ruling in the 7/28/09 Privilege Order in these cases, are based on the same principles of fairness, completeness, and the just consequences of a party claiming privilege affirmatively placing

³⁰ South Carolina courts often rely on federal court decisions in determining issues related to the attorney-client privilege. See e.g. Marshall v. Marshall, 282 S.C. 534, 320 S.E.2d 44, 46-47 (Ct. App. 1984) (citing Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974) and U.S. v. Jones, 696 F.2d 1069 (4th Cir. 1982)), Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465, 480-82 (Ct. App. 2005) (citing Upjohn Co. v. U.S., 449 U.S. 383 (1981)).

the privileged materials at issue in a case “The public policy of protecting confidential communications must be balanced against the public interest in the proper administration of justice” Floyd, 615 S E 2d at 483 (quoting State v. Doster, 276 S C 647, 284 S E 2d 218, 220 (1981)) See also Felder v. Wyman, 139 F R D 85, 88 (D S C 1991) (“The privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative, its obstruction is plain and concrete. It is an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle”) (quoting N L R B v. Harvey, 349 F 2d 900, 907 (4th Cir 1965)) As the esteemed Justice Learned Hand wrote, “It must be conceded that the privilege is to suppress the truth, **but that does not mean that it is a privilege to garble it**,³¹ although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition” U S v. St. Pierre, 132 F 2d 837, 840 (9th Cir 1942) (addressing privilege against self-incrimination) (emphasis added), *cert granted* 318 U S 751 (1943), *cert dismissed as moot* 319 U S 41 (1943)

In Floyd, the Court of Appeals held that the defendant “opened the door” with respect to letters he claimed to be privileged communications from his attorney when, in his testimony, he “professed that he relied on the advice of various attorneys in formulating his position” regarding the subject of the parties’ dispute. Id. at 484. The primary purpose of this doctrine “is that of fairness and completeness. If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go into, then it is unfair not to allow the opposing party to go into the matter and provide more information to the fact-finder.” Id. (quoting Danny R. Collins, *South Carolina Evidence* §2.9 (2d ed. 2000))

³¹ See *supra* at 8-11, 19-20, *infra* at 31-32 (examples of Appellants’ “garbling” of the truth relating to the accrual of their claims and the filing of these suits)

Some courts applying Hearn have specifically recognized that the mere filing of a complaint may be sufficient to place the statute of limitations at issue if the circumstances warrant such a result. In Aloe Vera of Am., Inc. v. United States, 2003 U.S. Dist. LEXIS 18317 (D. Ariz. 2003), the court held that, **where plaintiffs' privilege log contained documents dated prior to the earliest time the claim could have accrued, if the claim was timely filed under the applicable statute of limitations, the plaintiffs' affirmative act of filing suit was sufficient to give rise to a statute of limitations issue.** Id. at 9 (granting defendants access to otherwise privileged documents to prove defendants' statute of limitations defense). "By allowing 'filing suit' to constitute an affirmative act, the *Hearn* test explicitly contemplates allowing a party's pleadings to raise an issue giving rise to an implied privilege waiver." Rambus Inc. v. Samsung Elecs. Co., 2007 U.S. Dist. LEXIS 97619, 12-13 (N.D. Cal. 2007).

It might make more sense and be more consistent with other privilege doctrines to analyze this situation from the perspective that each time a plaintiff brings a suit, he tacitly puts into issue the question of whether the statute of limitations [has] run. We do not generally require the plaintiff to affirmatively prove that it has not. Rather, we require the defendant to prove that it has. **But since the plaintiff's (and arguably his counsel's) state of mind is thereby put into issue, in certain cases, plaintiff puts into issue what he and his counsel knew and when they knew it.**

Edna Selan Epstein, The Attorney-Client Privilege and the Work-Products Doctrine 544 (5th ed. 2007) (citing Aloe Vera) (emphasis added).

Though the facts in the instant cases certainly warrant a finding of waiver by Appellants under the holding in Aloe Vera (*i.e.*, Appellants' privilege log contained documents dated more than three years prior to the date each of the lawsuits was filed), the court's ruling that Appellants' waived their privilege was based on evidence that was even more compelling. In the Roosevelt and Orleans cases, **Appellants alleged, in their Complaints, that Respondents caused Appellants to delay their investigation and pursuit of claims in those and the other cases** (except Parkview, which was filed in April

2003) Not only did these allegations serve to set up Appellants' claim of estoppel with respect to Respondents' statute of limitations defense in each case, the allegations were actually pled as a basis for the recovery of damages from Respondents' In the Orleans Complaint, Appellants alleged

- Respondents conspired to injure and harm them by “misleading the Plaintiffs concerning the Defendants’ willingness to resolve the issue of the damages to the Plaintiffs *via* the mediation process, **in order to cause the Plaintiffs to delay in their investigation of the Defendants’ conduct with respect to the said Defendant Limited Partnership and a fortiori, to delay in the filing of this legal action**” (§82(e) (emphasis added)(R)),
- “Defendants also required that litigation of any claims against them by the Plaintiffs be postponed and/or held in abeyance ” and Respondents otherwise induced Appellants **to delay filing “suit in this and other cases”** (§§76-78 (emphasis added)(R)),
- Respondents’ purported breach of contract was accompanied by fraudulent acts because they “used false and misleading information in order to delay discovery in existing litigation [Parkview], as well as the filing of additional litigation, including the action *sub judice* ” (§91(l)(R)),
- Respondents represented to the Appellants that they “should delay in proceeding with litigation against the Defendants ” (§92(m)(R)),
- Respondents breached their duty of care to Appellants by “using false and misleading information to delay discovery in existing litigation, as well as the filing of additional litigation, including the action *sub judice*” (§102(rr)(R)), and
- “As a direct and proximate result of the conduct of the Defendant General Partners as set forth above, the Plaintiffs have sustained injuries and damages in that they **have been delayed and damaged in their investigation and/or prosecution of this and other claims against the Defendants** ” (Compl (Orleans), 58-59 (first paragraph of “Damages” section) (emphasis added)(R))

See also Roosevelt Complaint (Compl (Roosevelt), §§78-80, 84(e), 93(l), 94(m), 104(rr) and the first paragraph of “Damages” section on p 60 (allegations identical to those made in the Orleans Complaint, quoted above)(R))

Appellants’ affirmative allegations, which injected the issues of the timeliness of Appellants’ investigation and pursuit of claims against Respondents, grounds for the avoidance of a statute of limitations defense, and even the recovery of damages from

Respondents due to their alleged interference with the investigation and pursuit of Appellants' claims, clearly constitute an "affirmative act" under Hearn³² See e.g., Imperial Corp. of America v. Shields, 179 F.R.D. 286 (S.D. Cal. 1998) (finding "at issue" waiver where the plaintiff alleged facts to support avoidance of the statute of limitations), Rambus, 2007 U.S. Dist. LEXIS 97619, at 14 (finding "at issue" waiver of privilege where counterclaimant asserted discovery rule and equitable tolling in its counterclaim, and "placed the timing and scope of its investigation of these claims at issue by alleging that it did not and could not investigate potential claims until 2005"), WLIG-TV, Inc. v. Cablevision Sys. Corp., 879 F. Supp. 229 (E.D.N.Y. 1994) (finding "at issue" waiver where plaintiff, in an attempt to overcome the statute of limitations bar, alleged in its complaint that it was unable to discover the basis for its claims due to defendants' fraudulent concealment and fraudulent inducement), League v. Vanice, 374 N.W.2d 849, 856 (Neb. 1985) (in finding "at issue" waiver via plaintiff's attempt to avoid the statute of limitations by alleging defendant's concealment of the questioned events, the court held that the plaintiff "injected his knowledge, or lack of knowledge, into the litigation as a crucial issue relevant to disposition of the claims [Plaintiff] is not permitted to thrust his lack of knowledge into the litigation as a foundation or condition necessary to sustain his claim against [defendant] while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted against

³² Appellants' allegations of delay/interference with their investigation/pursuit of claims against Respondents opened the door to numerous issues, such as when did their causes of action accrue (i.e., when did they know, or reasonably should have known, of the injuries now complained of), how and when did Respondents interfere with Appellants' investigation/pursuit of claims, how long was the period of delay caused by such alleged interference, were Appellants, in fact, delayed or interfered with by Respondents, what was the effect of such delay, if any, on the limitations period, and what damages did Appellants incur as a result of the alleged interference/delay. Communications among the Appellants, and between Appellants, their attorney (Bailey), and third parties, all of which were dated more than three years before four of these cases were filed (several dated more than three years before the first suit was filed), clearly contained information relevant to these critical questions raised by Appellants.

[defendant] ”), Bohack Corp v Iowa Beef Processors, Inc., 1981 U S Dist LEXIS 11002, 4 (E D N Y 1981) (finding “at issue” waiver where plaintiff affirmatively alleged that defendant fraudulently concealed the claimed violation, and, concomitantly, created “a question of its knowledge or what it should have known regarding defendant’s activities more than four years prior to the commencement of [the] action ”)

Appellants in the Orleans, Roosevelt and Palmetto cases argued their grounds for avoidance of the statute of limitations defense, first raised in the Orleans and Roosevelt Complaints, in opposition to Respondents’ motion for summary judgment based on the statute of limitations (*see supra* at 9-10) They argued that Respondents were estopped from asserting a statute of limitations defense due to the parties’ alleged agreement to maintain the “status quo” during settlement negotiations and mediation (Pl Mem 8/25/06, 13-16, Pl Submission 11/19/07, Tab 1 at 4, Tab 3 at 13-16, Tab 5, Tr 11/19/07, 54 14-16, 68 13-14 (R))

Appellants’ *affirmative* claim of estoppel in opposition to Respondents’ motion for summary judgment also warrants a finding of waiver of privilege with respect to the 91 documents on their privilege log dated prior to October 2002 In Connell v Bernstein-Macaulay, Inc., 407 F Supp 420 (S D N Y 1976), the court found “at issue” waiver where, in response to defendants’ motion for summary judgment on statute of limitations grounds, plaintiffs claimed defendants were estopped to assert such a defense because defendants asked plaintiffs to withhold suit while they took steps to resolve the underlying issue *Id* at 422 The court reasoned

[W]here a litigant seeks to avoid a statutory protection which has been established for the benefit of his adversary (*e g* a statute of limitations), by a claim that his adversary is estopped to assert such protection, and where it appears that there is a good faith basis for believing that invasion of the attorney-client privilege would shed light on the validity of such claim of estoppel, the party making such assertion must be deemed to have waived the privilege

Id See also Conkling v Turner, 883 F 2d 431 (5th Cir 1989) (finding “at issue” waiver where, in response to defendants’ motion for summary judgment on statute of limitations grounds, plaintiff filed an affidavit claiming lack of knowledge of the falsity of the operative fact giving rise to the litigation), 3M Co v Engle, 328 S W 3d 184 (Ky 2010) (finding “at issue” waiver where, in response to defendants’ motion for summary judgment on statute of limitations grounds, plaintiffs filed an affidavit stating that they were not aware of their claim until they were informed by their attorneys)

The effect of Appellants’ “at issue” waiver is the same for their claims of attorney work product protection with respect to the 91 documents dated prior to mid-October 2002. In Byers v Burleson, 100 F R D 436 (D C 1983), the court compelled production of materials over plaintiff’s attorney-client privilege and work product objections, holding that “the plaintiff has waived the privilege because the information which the defendant seeks is necessary to resolve the precise statute of limitations issue which the plaintiff has interjected into the case.” Id at 440 (“Thus, this case may present the unusual situation where a showing that the material sought was prepared in anticipation of litigation would also illustrate the substantial need for that information by the opposing party.” Id at 439-40) “For indeed [work product protection] must give way when the exigencies of the case are such that the statements involved were made at such a time and under such circumstances that they become ‘unique catalysts in the search for truth.’” Foley v Juron Associates, 1986 U S Dist LEXIS 25535, 11-12 (E D Pa 1986) (discussing “at issue” waiver in the context of “opinion work product,” which is normally given a higher degree of protection from disclosure, but “exceptions have been made where such information is directly at issue and the need for its production is compelling.” Id at 13)

The court’s Privilege Order properly applied to Appellants in all cases, even if this Court were to determine that the implied waiver of privilege is based solely on the

affirmative allegations contained in the Orleans and Roosevelt Complaints. Once the Appellants in the Orleans and Roosevelt cases made the allegations in their October 2005 Complaints, the documents dated more than three years before the cases were filed were no longer privileged and protected from discovery. Once the privilege was waived in October 2005, it could not be reasserted, and the documents were not protected from discovery in any case. See U S v Suarez, 820 F 2d 1158, 1160 (11th Cir 1987) (“[It] has long been held that once waived, the attorney-client privilege cannot be reasserted”), U S v Krasnov, 143 F Supp 184, 191 (E D Pa 1956) (“The privilege once waived cannot be regained”), U S v Blackburn, 446 F 2d 1089, 1091 (5th Cir 1971), Bowne of New York City, Inc v Ambase Corp., 150 F R D 465, 478-79 (S D N Y 1993), Drimmer v Appleton, 628 F Supp 1249, 1252 (S D N Y 1986).

Further, the Appellants, the allegations, and the claims in all five cases, as well as Appellants’ **collective** “privileged” documents (a **single** privilege log for all Appellants in all five cases), are so intertwined and intermingled that the subject documents can not be differentiated from one case to another, let alone from one plaintiff to another. At least one plaintiff in the Orleans and Roosevelt cases appears as a plaintiff in the other three cases. Documents produced in the litigation and the information provided in Appellants’ **joint** privilege log show that Appellants in all cases, led by Appellant Davis and Appellants’ attorney, Bailey, pooled and shared all of their documents and information³³. In fact, many of the communications to or from Appellants, both produced and withheld, concern all of the

³³ Appellants’ privilege log makes no distinction between the five cases (i.e., there is only one privilege log, not five, and entries are not separated by case or plaintiff). The privilege log is entitled “Plaintiffs’ Supplemental Privilege Log,” referring to all Appellants collectively. The form of the privilege log, and the information contained therein, indicate that the documents were shared among all Appellants at the time of their making and/or in the investigation and pursuit of their collective claims. (Pendarvis Aff 4/22/10, Ex 53 at 1-25 (R.))

properties and the Appellants *en masse* ³⁴ The facts of these cases are nearly identical, as are Appellants' claims in each of the cases They involve the same defendants, the defaulted notes came due at or around the same time, the properties were sold at the same time under the same terms, the allegations in the Complaints and the causes of action are essentially the same, and all Appellants have been represented by the same attorney, Bailey, since 2000 (See generally, Compl (all five cases)(R))

In light of the above, Appellants **affirmatively** placed the statute of limitations at issue in the five cases by the mere filing of these lawsuits more than three years after the date of the documents identified in their privilege log, **and** by specifically alleging in the Orleans and Roosevelt Complaints that Respondents interfered with their investigation/pursuit of the claims in those and the other lawsuits, **and** by arguing avoidance of the statute of limitations defense based on estoppel in opposition to Respondents' motions for summary judgment ³⁵ Under the majority rule set forth in Hearn, Appellants impliedly waived their claims of privilege and work product protection with respect to all documents identified in their privilege log dated prior to 10/16/02 (16 of which are dated prior to 4/21/00, *i e* , more than three years before the first suit was filed) Thus, the court's ruling based on "at issue" waiver

³⁴ For example, Bailey often sent communications addressed to all of the Appellants concerning all of the Limited Partnerships (sometimes directly to all Appellants, sometimes to the Appellants c/o Davis) (Pendarvis Aff 4/22/10, Ex 53 at Nos 37, 49, 51, 52, 75, 92, 115 (communications dated between 10/11/00 and 6/27/01)(R)) Davis often served as the client representative for all Appellants (Pendarvis Aff 4/22/10, Ex 53 at Nos 12, 14, 15, 17, 18, 19, 25, 32, 40, 41, 43, 44, 47, 93, 116, 120 (communications dated between 2/16/00 and 3/18/01)(R)) Mercy, a limited partner in Orleans only, and Davis, a limited partner (or owner of a limited partner) in all of the Limited Partnerships *except* Orleans, shared information with one another and Bailey despite their lack of a mutual legal interest in any of the Limited Partnerships (Pendarvis Aff 4/22/10, Ex 53 at Nos 90 (9/5/00), 96 (6/18/01), 97 (6/26/01)(R))

³⁵ The critical need for production of the subject documents was only compounded by Appellants' stubborn refusal to comply with the 3/3/09 Discovery Order, which compelled them to fully answer discovery requests concerning the first communications among Appellants or between Appellants and an attorney (including the retention of Bailey) regarding the investigation/pursuit of claims against Respondents See supra at 12 (note 16), 15-20

was supported by the evidence and the law, and the court did not abuse its discretion in this discovery matter

**c Court Compelled Production of Some of the 96 Documents
because They Were Never Subject to Any Privilege**

Appellants were compelled to produce 96 documents in the 7/28/09 Privilege Order, but not all of those documents were compelled based on the court's finding of implied waiver of privilege. Clary's reports (findings adopted in the 6/2/09 Order) concluded that a number of the documents identified on Appellants' privilege log were "not subject to any privilege claimed by Plaintiffs and shall be produced" (Def. Mem. 8/21/09, Ex. D at 7-8, Ex. E at 2, Order 6/2/09, 1-2 (R)). The court agreed with this finding with respect to 17 of those documents³⁶ (Order 7/28/09, 2 ("6/2/09 Order and the Special Master's reports incorporated therein are sustained in all respects, except for the following amendments thereto"), 8-10 (R)). Appellants failed to raise any argument in opposition to these findings of "no privilege" in their motion to amend the 6/2/09 Order (Pl. Mot. 6/11/09, 1-3 (R)).

2 Appellants Refused to Comply with 7/28/09 Privilege Order

It is undisputed that, to this day, Appellants have refused to produce *any* of the 96 documents they were compelled to produce in the 7/28/09 Privilege Order (Tr. 8/24/09, 26:15-22, Def. Mem. 8/21/09, 7-9, 11-12, Def. Mot. 8/10/09, Ex. A (R))³⁷. On 8/24/09, the court warned Appellants that it would not be able to proceed with the trial scheduled in the

³⁶ The 17 documents compelled in both the 6/2/09 Order (adopting Clary's findings) and the 7/28/09 Order, which Clary and the court agreed were simply not attorney-client privileged communications, were identified in Clary's reports (Def. Mem. 8/21/09, Ex. D at 7-8, Ex. E at 2) and the 7/28/09 Order (8-10) as Nos. 1, 5, 16, 33, 35-36, 50, 71, 84, 90, 96, 104-109 (R)). Examples of these non-privileged documents include a third party communication to Appellant Davis (No. 16), a letter from Davis to third party Ruff (No. 36), a 2/15/99 letter from Davis to other limited partners (No. 71), three letters between Davis and Arthur D. Mercy (Nos. 84, 90 and 96), three letters between Davis and third party Wildman, dated 10/30/98, 2/9/99, and 9/5/00, respectively (Nos. 105, 106, 109), and a 3/16/00 memo between Davis and Appellant Ivey (No. 108).

³⁷ While Appellants' arguments focused on the court's ruling that they impliedly waived privilege as to most of the 96 documents, they have never produced any of the documents, including the 17 that Clary and the court agreed were never subject to a claim of privilege.

Parkview case for January 2010 if the compelled documents were not produced, that it was taking the matter under advisement, and that it “very well could be that my order is, as drastic as it may be is that I will dismiss the action for failure to comply I’ll give them x amount of days to comply with it to remedy that I’d rather not do that but I’m backed into a corner ” (Tr 8/24/09, 30 10-17 (R)) The court instructed Appellants’ counsel “to report to your clients that I’m taking this under advisement this afternoon with strong leans towards dismissing the action for them failing to comply ” (Tr 8/24/09, 31 9-17, 34 22-36 4 (R))

More than four months later, the court again warned Appellants that their continuing willful disobedience would result in entry of an order dismissing the five lawsuits as sanctions (Tr 1/14/10, 6 5-22 (R)) However, before issuing the order imposing the sanctions, the court encouraged Appellants to address any concerns they had with the *proposed* sanctions/dismissal order (Tr 1/14/10, 56 8-18 (R)), which Respondents submitted to the court and Appellants’ counsel per the court’s instructions Instead, Appellants filed motions under Rule 60(b), SCRCP, on 1/28/10, seeking amendment or vacation of the 7/28/09 Privilege Order ³⁸

Appellants’ motions under Rule 60(b), SCRCP, did not apply to the Privilege Order, because the Order was not a final order or judgment and Appellants otherwise failed to show that they were entitled to relief under Rule 60(b), SCRCP (Def Mem 2/16/10, 15-19 (R)) Appellants’ Rule 60(b) motions were actually untimely motions for reconsideration of the Privilege Order, and were properly denied as such (Order 4/6/10, 27-28 (R)) See Grosshuesch v Cramer, 377 S C 12, 659 S E 2d 112, 122 (2008) (holding “discovery orders, in general, are interlocutory”), Ex Parte Missy Wilson, In Re BB&T of S C v Pender, 367 S C 7, 625 S E 2d 205, 208 (2005), Hamm v S C Public Service Commission, 312 S C

³⁸ Appellants complain that the court signed the order proposed by Respondents, but when the court asked them to address any perceived errors in the proposed order or to suggest any changes, Appellants provided none

238, 439 S E 2d 852, 853 (1994) Rule 60(b), by its express terms, only applies to the review of final orders (or final judgments or proceedings) See Rule 60(b), SCRCP See also NationsBank of North Carolina, N A v Parsons, 324 S C 506, 477 S E 2d 735, 739 (Ct App 1996), Top Value Homes, Inc v Harden, 319 S C 302, 460 S E 2d 427, 429 (Ct App 1995), Thynes v Lloyd, 294 S C 152, 363 S E 2d 122, 123 (Ct App 1987) Motions for reconsideration of an interlocutory discovery order are properly construed as motions under Rule 59(e), SCRCP See Elam v S C Dept of Transportation, 361 S C 9, 602 S E 2d 772, 778 (2004) ³⁹

C 4/6/10 Sanctions Order

1 Respondents' Two Motions for Sanctions

The court's 4/6/10 Sanctions Order granted Respondents' two separate Motions for Sanctions (Order 4/6/10, 1-28 (R)) Respondents' first Motion for Sanctions, dated 7/24/09, concerned Appellants' failure to comply with the 3/3/09 Discovery Order (Def Mot 7/24/09 1-3 and Ex A-F (R)) ⁴⁰ Respondents' second Motion for Sanctions, dated 8/10/09, concerned Appellants' refusal to comply with the 7/28/09 Privilege Order (Def Mot 8/10/09, 1-6 & Ex A-B, Johnston 8/10/09 ltr to Judge Early, 1-4, Order 7/28/09, 8-10 (R)) After three additional hearings and several "second chances" afforded to Appellants to comply with the Discovery Orders, the court entered the Sanctions Order, finding all Appellants in contempt of court and dismissing the five lawsuits as sanctions for their willful non-compliance, subject to Appellants' ability to purge the dismissals if they complied with the Discovery Orders within 25 days (Order 4/6/10, 1-2, 28 (R)), which they did not do

³⁹ The arguments raised in Appellants' Rule 60(b) motions were more fully addressed and rebutted in Respondents' 2/16/10 memorandum (Def Mem 2/16/10, 3-15 (R))

⁴⁰ Appellants argue that Respondents filed their first Motion for Sanctions due to the alleged weakness of their arguments supporting the Privilege Order The 7/24/09 Motion for Sanctions was filed before the 7/28/09 Privilege Order was even entered

2 Sanctions of Dismissal Were Both Necessary and Appropriate

a Sanctions Under Rule 37(b), SCRPC

As the court deliberated over the two Motions for Sanctions for seven and a half months (8/21/09 to 4/6/10), it repeatedly advised Appellants' attorneys that it wished to avoid dismissing the cases but it had no viable alternative if Appellants' non-compliance persisted. Just prior to entry of the 4/6/10 Sanctions Order (amid Appellants' spurious claims that Judge Early had been biased against them), the court stated

I don't like dismissing the lawsuit because somebody won't comply with an order. I don't have any other choice when there was total noncompliance with the order. I've sat on it, and this motion for disclosure and protective order you asked me not to sign the [sanctions/dismissal] order that I intend to sign until we can have this hearing today and I have honored that request, but, gentlemen, if I thought for one minute that my position as Judge was being compromised because of any relationship that I have with any of y'all I would step out in a second and I say that from the bottom of my heart (Tr 3/29/10, 14 11-25 (R))

Appellants never complied with either of the Discovery Orders, and the court dismissed the cases in light of the clear and convincing evidence of their willful non-compliance (*see supra* parts III A 2 and III B 2) and the applicable law discussed below (Order 4/6/10, 2-16 (findings of fact), 16-27 (application of applicable law)(R))

The sanctions imposed by the court, dismissal of the five lawsuits and the award of Respondents' reasonable expenses (amount yet to be determined), are authorized by Rule 37(b)(2), SCRPC ("If a party fails to obey an order to provide or permit discovery," the court "may make such orders in regard to the failure as are just," including dismissing the action, holding the party in contempt of court, and requiring the party to pay reasonable expenses, including attorney's fees, caused by the failure) See also McNair v Fairfield County, 379 S C 462, 465, 665 S E 2d 830, 832 (Ct App 2008) ("Under Rule 37(b)(2)(C), SCRPC, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action ")

“The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court ” Karppi v Greenville Terrazzo Co., Inc., 327 S C 538, 489 S E 2d 679, 681 (Ct App 1997) Discovery sanctions will not be disturbed on appeal unless the trial court clearly abused its discretion See id., Halverson v Yawn, 328 S C 618, 493 S E 2d 883 (Ct App 1997) Generally, the “sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case **The sanction should be aimed at the specific misconduct of the party sanctioned** Furthermore, **whatever sanction is imposed should serve to protect the rights of discovery** provided by the Rules of Civil Procedure ” Karppi 489 S E 2d at 682 (internal citations omitted) (emphasis added) In light of Appellants’ misconduct and the extreme prejudice to Respondents, the **only** sanctions that could have achieved justice were the dismissal of Appellants’ five lawsuits and the award of expenses incurred by Respondents as a direct result of Appellants’ discovery abuses and non-compliance⁴¹ These sanctions were justified in response to Appellants’ failure to comply with the Discovery Order **or** the Privilege Order Appellants’ failure to comply with both of the Orders deprived Respondents of their ability to defend against Appellants’ claims, based on the statute of limitations and other defenses, including defenses to liability and damages

Appellants intentionally deprived Respondents of evidence that would have better enabled (if not guaranteed) Respondents to obtain judgment in their favor The record shows that much of the information wrongfully withheld was relevant to, and likely supported, Respondents’ statute of limitations defense Appellants wrongfully withheld such evidence to avoid the entry of judgment against them, and so it was both reasonable and necessary that the sanction imposed equate to the very result they **wrongfully** sought to avoid No other

⁴¹ The court awarded expenses in connection with Respondents’ 11/6/08 Motion to Compel and the two Motions for Sanctions (Order 3/3/09, 5 (holding award of expenses related to Discovery Order in abeyance), Order 4/6/10, 26-28 (R))

sanction could have adequately addressed Appellants' specific misconduct and the resulting prejudice to Respondents

Alternative sanctions were either inadequate or would have also resulted in dismissal or judgment for Respondents⁴² Rule 37(b)(2)(A), SCRCF, permits the court to order that designated facts be taken as established for the purposes of the action in accordance with Respondents' claims Under the circumstances, those facts would have had to include (1) that all Appellants knew, or reasonably should have known, of the injury complained of in these cases as of some date in 1999 or, at the latest, by February 2000, by which time some or all of the Appellants had engaged their attorney in these cases (Bailey),⁴³ and (2) that Appellants' pursuit of their claims was not delayed by Respondents such that the statute of limitations was tolled for any period of time As a result, it would be inescapable that Appellants' claims accrued no later than February 2000 and, given that their claims are subject to a three-year statute of limitations and that the lawsuits were not filed until April 2003 (Parkview) and October 2005 (Palmetto, Pinewood, Orleans, Roosevelt), Respondents would be entitled to judgment as a matter of law in all cases⁴⁴ Sanctions under Rule 37(b)(2)(B), SCRCF, which permits the court to enter an order refusing to allow Appellants

⁴² Appellants have never identified, in the lower court or to this Court, lesser sanctions that might have been appropriate

⁴³ Documents compelled in the Privilege Order, but wrongfully withheld by Appellants, included documents dated in or before 1999, which was when the purchasers defaulted on the notes, and communications between some or all of Appellants and Bailey in February 2000 (Pendarvis Aff 4/22/10, Ex 53 (12/31/08 Privilege Log) at 3 (Nos 12, 13 & 14, dated 2/16/00, 2/17/00 & 2/21/00, respectively, which were between Bailey and Davis and were described as involving "meeting with clients," and communications with "other limited partners" concerning "engaging counsel"), 4 (Nos 15 & 16, dated 2/24/00 & 2/25/00, respectively, which were between Bailey, Davis and Reynolds), 14 (No 71, dated 2/15/99), 20 (Nos 105 & 106, dated 10/30/98 & 2/9/99, respectively)(R)) Non-privileged information available in such documents was also withheld in violation of the Discovery Order

⁴⁴ If the sanctions imposed were anything less than dismissal, other prejudice resulting from Appellants' non-compliance would also have to be addressed, including, *inter alia*, exclusion of critical expert witnesses as to liability (Higgins) and damages (Chambers, Keyserling, Henson), which would be fatal to Appellants' claims

to support or oppose designated claims or defenses, would also result in the same outcome (*i.e.*, Respondents would be entitled to judgment as a matter of law on the statute of limitations defense, and likely other defenses)

The sanction of dismissal also clearly served to protect the rights of discovery. If Appellants are going to file lawsuits, engage in discovery and receive the benefits thereof (including documents produced by Respondents as required by the Privilege Order, despite Respondents' claims of privilege), but refuse to produce their discoverable information after being ordered to do so by the court, twice, then they should be deemed to have forfeited their right to pursue their claims in the courts.

In accordance with South Carolina law, the court specifically considered the following factors in imposing the sanctions in these cases: (1) the "precise nature of the discovery," (2) "the discovery posture of the case," (3) "willfulness," and (4) "degree of prejudice." See Griffin Grading and Clearing, Inc. v. Tire Service Equipment Mfg. Co., Inc., 334 S.C. 193, 551 S.E.2d 716, 719 (Ct. App. 1999) (citing Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974)), see also Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213, 216 (Ct. App. 1997). As to the nature of the discovery, Appellants' failure to comply with the Discovery Order concerned their failure to provide full and complete responses to discovery requests that were served on 8/28/08.⁴⁵ The discovery requests were not unusual and they sought critical information and documents that were relevant to both Appellants' claims and Respondents' defenses, including, *inter alia*, the statute of limitations defense, testifying experts' opinions (liability and damages), and other information as to Appellants' and their agents' prior opinions of value of the properties. As for Appellants' failure to comply with the Privilege Order, the discovery was clearly directed at the statute of limitations defense.

⁴⁵ Actually, some of the information not produced dated back to Respondents' 11/17/04 discovery requests in the Parkview case (Def. Mem. 2/11/10, Ex. 2 at 4-6 (Int. 3, 10, 14)(R.)).

and related issues, including, among other things, *Appellants' claims for damages as a result of Respondents' alleged interference with their investigation/pursuit of the claims in these lawsuits*. The materials wrongfully withheld go to the very essence of the claims and defenses in these cases.

With regard to the discovery posture of these cases, at the time of dismissal the Parkview case was seven years old and the other four cases were more than four years old. The cases were scheduled to go to trial, starting with the Parkview case, almost a year before the court entered the Sanctions Order, but had to be continued twice (Order 3/9/09 (continuing May 2009 trial date), Order 1/4/10 (continuing January 2010 trial date)(R)) due to the subject discovery disputes and Appellants' refusal to comply with the Discovery Orders. Given the consistency and longevity of Appellants' disobedience, dating back to entry of the 3/3/09 Discovery Order, and the amount of discovery that remained if Appellants ever chose to comply with the Discovery Orders, a viable trial date could not even be determined at the time the cases were dismissed. The age of these cases, the fact that the cases involved events occurring between 1975 and 1999, and the delays caused by Appellants' non-compliance had, undoubtedly, already combined to deprive Respondents of relevant evidence.

The evidence leaves no doubt as to the willfulness of Appellants' non-compliance, and the court properly considered this critical factor (Order 4/6/10, 16-17 (R)) Appellants should have started compiling the information and documents sought in the 8/28/08 discovery requests when they were served. They repeatedly promised to provide the responsive materials (except for the 96 documents compelled by the Privilege Order), but repeatedly failed to do so. Even the court's pleas and warnings of impending sanctions, including dismissal of the lawsuits, were not sufficient to coerce legitimate compliance with either of the Discovery Orders, despite the fact that the Motions for Sanctions had been

pending for more than seven months when the court entered the Sanctions Order. The evidence shows that Appellants' non-compliance was in bad faith, was in willful disobedience to the court's Discovery Orders, and was with gross indifference to Respondents' rights to discovery and to present their full defenses (see supra parts III A 2 and III B 2), such that dismissal was warranted in these cases. See Griffin, 551 S E 2d at 719 (For sanction tantamount to judgment by default, the moving party must show "bad faith, willful disobedience or gross indifference to its rights. ")

The prejudice to Respondents as a result of Appellants' non-compliance was specifically addressed in the Sanctions Order (at 17-18 (R)). In addition, when a party is deprived of his rights to discovery, "**prejudice must be presumed**." Samples, 495 S E 2d at 217 (emphasis added). **The party refusing to submit to discovery must bear the burden of proving lack of prejudice.** See id. Appellants did not and could not prove a lack of prejudice to Respondents. The sanctions were reasonable and necessary in order to counter the specific prejudice to Respondents, and under the circumstances the court would have erred had it not dismissed the cases or imposed sanctions that would lead to the same result. "Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery." Id.

The court considered and properly applied all of the applicable law cited above to the facts of these cases (Order 4/6/10, 21-26 (R)), and it did not abuse its discretion. The South Carolina appellate courts have affirmed identical sanctions where a party has willfully disobeyed discovery orders as Appellants did here. See Barnette v Adams Bros Logging, Inc., 355 S C 588, 593-95, 586 S E 2d 572, 575-76 (2003) ("Given [plaintiff's] persistent refusal to comply with the trial court's orders, we find the court acted within its discretion in dismissing her action."), McNair, 665 S E 2d at 832-33 (affirming dismissal with prejudice where the record revealed persistent disobedience of a discovery order very similar to

Appellants' misconduct in these cases), Halverson, 493 S E 2d at 884-85, see also Griffin, 551 S E 2d at 717-19 (affirming order striking defendant's answer for failure to comply with discovery orders) ⁴⁶

b The Law of Civil Contempt

The court declared all Appellants to be in contempt of court as a result of their refusal to comply with the Discovery Orders, and sought to coerce Appellants' compliance by dismissing the cases *subject to Appellants ability to purge the dismissals* if they complied with the Discovery Orders within 25 days (Order 4/6/10, 2, 16-21, 28 (R)) The South Carolina Court of Appeals summarized the law applicable to civil contempt in Ex Parte David G Cannon, In Re The Estate of James Brown, 385 S C 643, 660-62, 685 S E 2d 814, 824 (Ct App 2009) In accordance with the applicable law, the court found that there was clear and convincing evidence in the record that Appellants willfully, voluntarily and intentionally disobeyed the discovery orders, Respondents made a *prima facie* case for contempt, and Appellants did not carry their burden of establishing any defense or their inability to comply with the Discovery Orders (Order 4/6/10, 17-20 (R)) See id There is no doubt that Appellants disagreed with the Discovery Orders and did not *want* to comply with the orders, but there was no evidence that they were *unable* to comply

⁴⁶ Appellants misrepresent the holding in Griffin, 551 S E 2d 716, which *affirmed* (not reversed) the lower court's sanction of striking defendant's answer for its "willful disobedience of previous orders " Id at 719 ("If there was ever a case where striking a party's pleading was an appropriate sanction, it is this case where the record is full of multiple, egregious discovery abuses that blocked the opposing party's attempts to conduct meaningful discovery ") The other cases cited by Appellants are not controlling as to the cases at bar See e.g Balloon Plantation, Inc v Head Balloons, Inc, 303 S C 152, 399 S E 2d 439 (Ct App 1990) (reversal of a discovery sanction as unduly harsh where discovery responses were mailed in time, but not delivered by the postal service until a few hours after a noon deadline), Karppi, 489 S E 2d at 683 (reversing the lower court's sanction, in part, because it was overly broad in that it created a windfall for a co-defendant whose discovery rights were not at issue), Grosshuesch v Cramer, 377 S C 12, 659 S E 2d 112 (2008) (based on the lower court's use of an improper standard when considering a claim of privilege under the Fifth Amendment's protection against self-incrimination, not the harshness of a discovery sanction)

The court appropriately sought to coerce Appellants' compliance with the Discovery Orders, imposing sanctions but providing them with an *opportunity to purge the dismissal* of the lawsuits. "The purpose of civil contempt is to coerce the [party] to do the thing required by the order for the benefit of the complainant.' When sanctions are conditioned on compliance with the court's order, the contempt is civil in nature." Id. After the court informed Appellants of its intent to dismiss the cases, Appellants argued that the court should merely find them in contempt, without more. The finding of contempt would not have been an appropriate sanction in and of itself. Rather, the finding of contempt was a precursor to sanctions designed to coerce compliance with the Discovery Orders, which is the very purpose of a civil contempt order. Id. A finding of contempt, without more, would have no more effect than the terms of the Discovery Orders themselves, which already directed Appellants to comply.⁴⁷ Appellants could have simply continued their non-compliance, resulting in further delay to the cases which were already delayed by their non-compliance for far too long. A simple finding of contempt, without the corresponding *appropriate* sanction to coerce compliance, would be an incomplete and meaningless exercise of the court's powers to compel compliance with its orders. All courts have the power to impose sanctions for contempt, and that power is "essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." Id. (citation omitted). The court's contempt power is not intended to be exercised as a mere circuitous route for parties to avoid the rule that discovery orders are interlocutory and not subject to immediate appeal.

The court noted that its contempt powers also applied to Appellants' persistent disobedience as it undermined the court's administration of justice in these cases (Order 4/6/10, 18-19 (R)). Id. (authorizing use of contempt power "to preserve the authority and

⁴⁷ Months of warning of the impending dismissal sanctions were not enough to bring Appellants into compliance with either of the Discovery Orders.

dignity of the courts”) Finally, the court determined that an award of expenses to Respondents was appropriate under both Rule 37, SCRCp, and the law applicable to civil contempt (Order 4/6/10, 26-27 (R)) Id at 827 (“Courts, by exercising their contempt power, can award attorneys’ fees under a compensatory contempt theory ”)

The Sanctions Order clearly shows that the court examined all of the relevant evidence presented to it, properly applied the law governing civil contempt and sanctions, and entered the coercive sanctions (dismissal, subject to purge) and compensatory award (Respondents’ expenses) as a result of Appellants’ willful disobedience of the Discovery Orders (Order 4/6/10, 2, 16-21, 26-28 (R))

3 9/16/10 Order Denying Appellants’ Motion for Reconsideration

On 4/22/10, Appellants filed a Motion for Reconsideration of the Sanctions Order pursuant to Rule 59(e), SCRCp, and the lower court denied the motion on 9/16/10 (Order 9/16/10 (R)) A substantial portion of Appellants’ Rule 59(e) motion was devoted, *not* to the Sanctions Order, but to repetitive and untimely attacks on the Discovery Orders **Appellants also attempted to utilize their Rule 59(e) motion to improperly introduce purported “evidence” that was available to Appellants, but not filed of record or presented to the court, prior to entry of the 4/6/10 Sanctions Order**⁴⁸ As a matter of black letter law, **the court could not consider such materials or issues in conjunction with Appellants’ Rule 59(e) motion** Such materials **cannot be considered on appeal, either** See Spreuw v Barker, 385 S C 45, 68-69, 682 S E 2d 843, 855 (Ct App 2009) (“Father’s Form 2106-EZ appears only as an attachment to his Rule 59(e) motion Accordingly, it cannot be considered on appeal See Hickman v Hickman, 301 S C 455, 456, 392 S E 2d 481, 482

⁴⁸ The materials that were not provided to the court prior to the 4/6/10 Sanctions Order included the following affidavits filed by Appellants in connection with their motion for recusal or their 4/22/10 motion for reconsideration of the Sanctions Order Davis Aff (4/7/10), Bailey Aff (4/7/10), Rentz Aff (4/9/10), Pike Aff (4/9/10), Hodge Aff (4/8/10), Reynolds Aff (4/15/10), Hinnant Aff (4/13/10), Ivey Aff (4/15/10), Pendarvis Aff (4/22/10)(R)

(Ct App 1990) (‘A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not ’) ” See also Brailsford v Brailsford, 380 S C 443, 669 S E 2d 342, 345 (Ct App 2008), Boryan v United States, 884 F 2d 767, 771 (4th Cir 1989), Pacific Insurance Co v American Nat’l Fire Insurance Co, 148 F 3d 396, 403 (4th Cir 1998)

In light of the above, this Court should not consider the numerous affidavits of the Appellants and their attorneys, which Appellants filed *after* the 4/6/10 Sanctions Order,⁴⁹ with the lone exception being *some* of the documents attached as *exhibits* to the 4/22/10 Pendarvis Affidavits (such documents were previously submitted to the court) Respondents’ 6/7/10 memorandum (Def Mem 6/7/10, 13-17 (R)) identifies the portions of the 4/22/10 Pendarvis Affidavits and the exhibits thereto that should not be considered by this Court **This issue is noteworthy**, because Appellants’ briefs in these appeals frequently cite the unsubstantiated and misleading arguments and opinions stated in their post-4/6/10 affidavits as if they were evidence of *fact* The cited materials are not evidence of fact, and for the reasons set forth above, they should not be considered by this Court in conjunction with the appeal of the Sanctions Order, any preceding order, or the 9/16/10 Order (denying Appellants’ 4/22/10 motion for reconsideration), as a matter of law⁵⁰

IV NO ABUSE OF DISCRETION IN OTHER DISCOVERY ORDERS APPEALED (Re Issue 3 and Appealed Orders dated 8/18/08, 12/17/08, 3/3/09 (App Mot), 6/2/09, 10/22/10, 12/11/10)

A Appeal of Certain Orders and Issues Abandoned by Appellants

In their briefs to the Court, Appellants generally allege error in the Orders dated

⁴⁹ The materials were, for the most part, unsubstantiated and misleading argument and opinion that Appellants and their attorneys submitted in the *form* of affidavits (Def Mem 6/7/10, 11-17, see also Vick Aff 6/7/10, ¶¶ 2-3 & Ex A-II, Johnston Aff 6/7/10, ¶¶ 2-3 & Ex A-Q (R))

⁵⁰ Respondents further opposed Appellants’ Rule 59(e) motion by rebutting each of the grounds for amendment alleged by Appellants (Def Mem 6/7/10, 3-11, 17-39 & Ex A-L, Vick Aff 6/7/10, ¶¶ 3(n), (x), (y), (dd), 4 & Ex E, I, J, M, O, Y, Z, EE, GG (R))

8/18/08, 3/7/06 (Supreme Court), 12/17/08, 3/3/09 (App Mot), 6/16/09, 9/16/10, 10/22/10, and 12/11/10 However, they failed to cite evidence of record and authority to support such allegations, relying entirely on vague and conclusory arguments, opinion and conjecture, or omitting argument altogether ⁵¹ It is well settled in South Carolina that, where an issue is treated in a conclusory manner and without citation to authority in an appellate brief, the issue is deemed abandoned See First Sav Bank v McLean, 314 S C 361, 363, 444 S E 2d 513, 514 (1994) (“Appellant fail[ed] to provide arguments or supporting authority for his assertion Thus, he is deemed to abandon [the] issue Mere allegations of error are not sufficient to demonstrate an abuse of discretion ” (citations omitted)), see also R & G Constr , Inc v Lowcountry Reg'l Transp Auth , 343 S C 424, 437, 540 S E 2d 113, 120 (Ct App 2000) (issue abandoned where appellate brief cited no authority and merely made a conclusory argument supporting its position) As a result, Appellants’ appeals as to these orders should be deemed abandoned as a matter of law

Appellants also failed to identify any issue with regard to the Orders dated 3/7/06 (Supreme Court), 8/18/08, 12/17/08, 3/3/09 (Discovery Order), 3/3/09 (App Mot), 6/2/09, 6/16/09, 9/16/10, 10/22/10, and 12/11/10 in their respective Statements of Issues on Appeal For this additional reason, Appellants have abandoned any issues with respect to these orders See Rule 208(b)(1)(B), SCACR

In an abundance of caution, and without waiving the above arguments as to Appellants’ abandonment of their appeals of certain orders and issues, Respondents oppose Appellants’ general conclusory arguments by briefly showing the Court that the additional

⁵¹ The treatment given the subject Orders varies as follows 8/18/08 (no citation of authority supporting Appellants’ motion, which was denied), 3/7/06 (nothing as to error by Supreme Court, which issued the Order), 12/17/08 (mere passing reference to Appellants’ memoranda in lower court), 3/3/09 (App Mot) (mere passing reference), 6/16/09 (no discussion), 9/16/10 (no discussion), 10/22/10 (mere passing reference), 12/11/10 (no discussion)

orders appealed were supported by the evidence presented to the court and the applicable law⁵²

B Two Orders Denying Appellants' Motion to Compel the Production of Respondents' Privileged Documents

1 Two Attempts to Compel Respondents' Privileged Documents

Appellants filed what became known as their Motion to Compel #2 on 11/7/07, seeking to compel the production of privileged documents created within the attorney-client relationship between the Limited Partnerships' general partners (Respondents) and their attorneys. Appellants also sought to prevent Respondents from objecting, based on the attorney-client privilege, to unspecified questions that would be posed to their attorneys in future depositions of those attorneys.⁵³ The court announced its ruling denying the motion on 7/1/08 (Tr 12/9/08, 44 3-6, 58 5-9 (R)), but did not sign the written order until 12/17/08 (Tr 12/9/08, 50 1-18, Order 12/17/08 (R)) **However**, after entering the 12/17/08 Order, the court gave Appellants a second bite at the apple, rendering the 12/17/08 Order of little practical effect. This culminated in the 7/28/09 Privilege Order.⁵⁴

The scope of Respondents' privileged documents at issue, the evidence presented, and the arguments made differ somewhat between the first time the court considered Appellants' motion (*i e* , 12/17/08 Order (R)) and the second time it considered the motion

⁵² Respondents' showing that the subject orders were supported by the evidence and the applicable law is also made as further evidence that Judge Early did not abuse his discretion in denying Appellants' motion for recusal (Order 10/7/10 (R)) *See infra* at 70-77

⁵³ The lower court denied the motion with respect to the *future* depositions of Respondents' former attorneys, because it was not ripe (Order 12/17/08, 2, Def Mot 8/21/08, 1-5 (R)) The denial was reaffirmed by the court's 6/2/09 Order adopting Clary's findings (Order 6/2/09, 1-2, Def Mem 8/21/09, Ex D at 17 (R))

⁵⁴ The court compelled Respondents to produce 29 of their privileged documents to Appellants (Order 7/28/09, 8, 10-11 (R)), and Respondents promptly complied. The court otherwise denied Appellants' motion to compel (Order 6/2/09, Def Mem 8/21/09, Ex D at 12-15 & Ex E at 3, Order 7/28/09, 2-4, 7-8 (R))

(i.e., 7/28/09 Privilege Order) Nevertheless, the same basic issues were presented each time, and so they are discussed together, with significant differences noted⁵⁵

2 Appellants' Argument Based on the Fiduciary Exception to the Attorney-Client Privilege

Appellants' principal argument was that Respondents' privileged documents should be produced under the fiduciary exception to the attorney-client privilege, relying on Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970). This appears to be an issue of first impression in South Carolina appellate courts. Appellants argued that, as a result of the general partners' fiduciary duties to the limited partners, the general partners are obligated to share all partnership information, including communications between the general partners and their attorneys concerning the affairs of the Limited Partnerships, despite the otherwise available attorney-client privilege. To the extent this Court would recognize a fiduciary exception to the attorney-client privilege, the analysis applied in Garner and its progeny is the approach taken by the majority of courts and it should be applied here. See also Fortson v. Winstead, McGuire, Sechrest & Minick, 961 F.2d 469, 475 n.5 (4th Cir. 1992) (following Garner), Ferguson v. Lurie, 139 F.R.D. 362, 365 (N.D. Ill. 1991) (Garner "appears to be the leading authority with respect to this doctrine"), Metropolitan Bank and Trust Co. v. Dovenmuehle Mortgage, Inc., 2001 Del. Ch. LEXIS 153 (Ct. of Chancery of Del. December 20, 2001) (the fiduciary exception to attorney-client privilege is generally traced back to Garner), In Re ML-Lee Acquisition Fund II, LP, 848 F. Supp. 527, 564 (D. Del. 1994).

⁵⁵ Appellants narrowed the scope of their 11/7/07 motion to compel to the first three documents and the "GWB" (Gallivan White & Boyd) documents identified on the 11/15/07 Privilege Log (Tr. 11/19/07, 17:2-20, Pl. Mem. 11/19/07, Ex. 9 at 1-2, 55-67, see also Pendarvis Aff. 4/22/10, Ex. 20 at 1-72 (12/5/07 Priv. Log)(R.)). Appellants' second opportunity to argue for the production of Respondents' privileged documents resulted in the 7/28/09 Privilege Order. In these proceedings, Appellants sought the GWB documents, Bryan Cave documents (obtained and identified by Respondents' counsel after the initial arguments on Appellants' motion to compel), and several others (Pendarvis Aff. 4/22/00, Ex. 59 (1/26/09 Priv. Log) at 1-2, 55-84 (R.)). Appellants acknowledged that all of the documents were attorney-client privileged (Tr. 11/19/07, 6:19-25, Def. Mem. 8/21/09, Ex. D at 8 (R.)).

(citing and following Garner) **However**, in light of the evidence, the Garner analysis dictates that Respondents' privileged documents **are not subject to disclosure under the fiduciary exception**, because some of the Appellants threatened to sue and/or remove the general partners and, therefore, the requisite **mutuality of interest** between them ceased to exist, *before* the privileged documents were created

In Garner, the court recognized the competing interests of corporate management's need to manage, including the ability to seek legal counsel without the risk of having the communications revealed at the instance of one or more dissatisfied stockholders, and the stockholders right to know whether the corporation is being adequately managed See Garner, 430 F 2d at 1101 The court struck a balance between the competing interests of corporate management (here, the general partners) and the corporation's shareholders (here, the limited partners), holding that, **where there is mutuality of interest**, stockholders may, upon a showing of "good cause," obtain information that would otherwise be protected from disclosure by the attorney-client privilege Id See also Fortson, 961 F 2d at 475 n 5 (Fourth Circuit, citing Garner, agreed that general partners may assert attorney-client privilege against limited partners), Ferguson, 139 F R D at 366 (applying Garner and recognizing substantial difference in potential liability of general partners, who can be held jointly and severally liable for partnership actions, and limited partners, who enjoy limited liability), S C Code Ann § 33-42-630 (2006) (liability of general partner), S C Code Ann § 33-42-430 (2006) (limited liability of limited partner), S C Code Ann § 33-42-450 (2006) (limited partner is entitled to "information regarding the affairs of the limited partnership as is just and reasonable" (emphasis added))

Under the Garner analysis, **the limited partners must "first establish that a mutuality of interest existed between the parties "** The Continental Ins Co v Rutledge & Co., Inc., 1999 Del Ch LEXIS 12, at 6 (Ct of Chancery of Delaware 1/26/99) (emphasis

added) Only then should a court examine the limited partners' showing of good cause 'If such a showing is made, and an exception to the attorney-client privilege will not yield an inequitable result, the fiduciary duty exception applies' " Id

In Continental, the court determined that, as of a specific date, a dispute arose between the limited partners and the general partner, as evidenced by the limited partners' indication that they intended to withdraw from the limited partnership At that point, the parties no longer shared the requisite mutuality of interest The court explained

[N]otwithstanding the fact that the general partner may have continued to owe duties to the limited partners and the Partnership, the general partner's subjective interests, the Partnership's interests, and the subjective interests of the limited partners diverged [S]ince that mutuality of interest was obviously lacking at a point where an attempt to withdraw was understood by all, any communications between the general partner, the Partnership, and their counsel at that point are not an appropriate subject of the fiduciary duty exception

Id at 10-11

In Metropolitan Bank and Trust, the court found that the requisite mutuality of interest ceased to exist once the general partner and the limited partners could reasonably anticipate litigation between them

In order for the Plaintiffs to take advantage of the fiduciary duty exception, the documents which they seek must have been created while there was a mutuality of interest with the general partner Because the exception is premised upon common purpose and common interest, once those purposes and interests diverge, the exception no longer applies I am satisfied that the "mutuality of interest" will have lapsed by the time that the general partner and the limited partners can reasonably anticipate litigation about an identified dispute Once litigation can reasonably be anticipated, the interests of the parties are sufficiently adverse that the general partner should be able to communicate with the partnership's counsel about the matters likely to be litigated without fear that the fiduciary duty exception might be invoked to deny continuing confidentiality to those communications

Metropolitan Bank and Trust, 2001 Del Ch LEXIS 153, at 9-10

Here, the evidence shows that the requisite mutuality of interest ceased to exist *before* Respondents' privileged documents were created

- Appellant M M Weinberg, Jr, an attorney and a limited partner in Roosevelt, **threatened to sue the individual and corporate general partners on 12/9/99 and 2/22/00**, respectively On 12/9/99, Weinberg, wrote to Tuck, a general partner, stating

I have an outstanding Note that I should be able to collect for a serious amount of money I have relied on you people getting in this deal and allowing you all to handle it throughout However, I don't believe I am justified in any further reliance upon you, if I can't hear from you If I don't hear from you, **I am going to sue somebody, and it will probably include you in the pot** (Def Mem 7/2/09, Ex 1 (emphasis added)(R))

- On 2/22/00, Weinberg wrote to Pat Foye of AIMCO, stating that (1) he is writing on behalf of himself and Daniel Trotter, both limited partners in Roosevelt, (2) the balloon note held by Roosevelt was payable in February 1999, and (3) **"It is our intention to collect our share of this Note, and we would like to hear from you as to your position in the matter before suit is filed I would appreciate any information you could give me, in order that litigation will not be necessary"** (Def Mem 7/2/09, Ex 2 (emphasis added)(R))
- See also Respondents' *In Camera* Memo (**SEALED** *In Camera* Memo, 7/2/09, 2-3 & Ex 1-3 (R)),⁵⁶ for additional **confidential and privileged documents** that show how the general partners and their attorneys perceived Weinberg's threats of litigation, and that the parties' mutuality of interest ceased no later than the date that Weinberg threatened to sue the general partners⁵⁷
- The only documents at issue in Appellants' motion to compel (first or second time), which were created *prior* to the **12/9/99** threat of litigation, are the documents identified in the 7/28/09 Privilege Order as GWB Nos 70-71 and Bryan Cave Nos 39 and 41-57 (Order 7/28/09, 10-11 (R)), **which Respondents produced to Appellants following entry of the Order**
- Weinberg's threats to sue the general partners were made and received in the context of the following communications, which alerted all parties to the fact that the limited partners and the general partners did not agree on which course of action was in the best interests of the Limited Partnerships On 10/25/99, limited partner Davis had written to Tuck, stating

Early this year I realized that we had interest in several partnerships that had notes which should be maturing I found notes suggesting maturity dates as early as March of this year, and **I began locating partners in the seven partnerships remaining** [including the Limited Partnerships in these cases] As you know three partnerships accepted a **token payment** [from the BFG entities] for their notes in 1997 or 1998 **The partners or agents that I**

⁵⁶ Respondents' *In Camera* Memo, dated 7/2/09, was **filed under seal** with this Court, as a Sealed Appendix to the Record on Appeal, pursuant to this Court's 10/5/11 Order

⁵⁷ See also (Def Mem 7/2/09, 2-17 & Ex 1-8 (discussing more fully the arguments and evidence that the fiduciary exception did not apply to privileged documents that were created on or after 12/9/99), Def Br 11/19/07, 15-17 & Ex A-E (R))

have spoken with feel they have been neglected and have not received reports and projections from management or the general partners that represent us In some cases I am satisfied that the land is more valuable than the notes in question **We all prefer that the note be paid as issued, however, we will consider accepting the real property if necessary** (Def Mem 7/2/09, Ex 3 at 1-2 (letter copied to “Partners” and regarding “Past Due Payments to Partnerships”) (emphasis added)(R))

- In response, Tuck wrote on 10/28/99

Your comment in the first paragraph that the partnerships accepted a token payment on certain of the properties, quite frankly, surprises me I do not remember what the percentage of the collections of the gross receivables were, but it was certainly not token These properties are obviously still limited as to the amount of any distributions or rents unless you are able to take them out from under HUD, which once again, limits their value (Def Mem 7/2/09, Ex 4 (R))

- On 1/18/00, Tuck sent another letter to Davis, stating that both Lend Lease (BFG’s successor) and the general partners had concluded that the properties had no value above the amounts due on the HUD mortgages “[T]here was no value to the partnership and the second mortgages [the Limited Partnerships’ notes]” Tuck further advised that the general partners declined Lend Lease’s offer to return the properties to the Limited Partnerships, and Lend Lease then “sold all of the properties for the mortgage and \$1 00 to Hediger Enterprises” in October 1999 (Def Mem 7/2/09, Ex 5 at 1-2 (R)) Thus, Respondents advised the limited partners of their opinion that it would not be in the best interests of the Limited Partnerships to take the properties back ⁵⁸
- Prior to a 9/14/00 meeting called by the limited partners, Appellants’ attorney (Bailey) sent Respondents a “Notice of Special Meeting,” which advised that the purpose of the meeting would be “to consider and act upon ”

Propriety of actions/conduct of General Partners *et al vis-a-vis* Limited Partners, including, *inter alia*, action/inaction of General Partners regarding partnership assets,

Actions to be taken regarding actions/conduct of General Partners, including, *inter alia*, **removal/replacement of General Partners** and/or successors per the Limited Partnership agreement(s) and/or applicable law (Def Br 11/19/07, 16-17 & Ex E (emphasis added)(R))

It is clear that by late 1999, the limited partners and the general partners had expressed their fundamental disagreement with one another as to what was in the Limited

⁵⁸ These exchanges took place **after** the general partners had been warning of non-payment for years The warnings sounded by the general partners began in 1987 and continued through 1998 (Def Mem 7/2/09, Ex 6-8 (R))

Partnerships' best interests. This fundamental disagreement, whether the general partners' decision not to take the troubled properties back was based on their business judgment or constituted breach of their fiduciary duties, is at the very heart of these lawsuits. The divergence of interests between the general partners and the limited partners clearly escalated when Weinberg expressly threatened to sue the general partners in December 1999 and February 2000, and that divergence of interests never abated.⁵⁹

In analyzing the mutuality of interest issue, the Continental court deemed it proper to look first and foremost at the general partner's perspective (*i.e.*, when the general partner reasonably perceived that its interests diverged from the interests of the limited partners). See Continental, 1999 Del. Ch. LEXIS 12 at 11, n. 16. This is entirely consistent with the purpose of the attorney-client privilege, which "is to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice.'" Id. at 3 (citing and quoting Upjohn Co. v. United States, 449 U.S. 383 (1981)). The general partner's perception of whether he has a reasonable expectation of confidentiality, even to the exclusion of his limited partners, is the central question.

⁵⁹ In response to Appellants' argument that the 9/14/00 "Special Meeting" called by the limited partners' attorney (Def. Br. 11/19/07, Ex. E (R.)) was a "Kumbaya" moment between the general partners and the limited partners (Tr. 7/6/09, 19:2-4 (R.)), Respondents provided the lower court with *additional* evidence that emphatically showed that was not the case (Vick Aff. 6/7/10, Ex. L at 2-5 & Ex. 5-21 (R.)). The additional evidence included Appellants' attorney's April 2000 FOIA requests to HUD and the SEC, requesting documents relating to, among other things, complaints against or investigations of the Respondents (Vick Aff. 6/7/10, Ex. L at Ex. 5-6 (R.)), a *lis pendens* filed by Appellants' attorney on behalf of the limited partners with respect to the Parkview property on 7/14/00 (Vick Aff. 6/7/10, Ex. L at Ex. 12 (R.)), BFG's attorney's notes pertaining to an 8/9/00 phone call he had with Appellants' attorney, **in which Bailey stated that he represented the limited partners, he was in the process of bringing action against the general partners, to include claims for mismanagement, failure to collect the outstanding debt on the 1999 notes, and fraud against general partner Tuck, and that he had filed *lis pendens* on the properties in Charleston, Allendale, Orangeburg and Beaufort Counties** (Vick Aff. 6/7/10, Ex. L at Ex. 15 (R.)), and Appellants' attorney's August and September 2000 letters to USC Professor Greg Adams, retaining him as an expert witness for the limited partners (Vick Aff. 6/7/10, Ex. L at Ex. 19-20 (R.)).

There is no doubt that Respondents reasonably anticipated litigation with the limited partners after they received Weinberg's threatening letters. In Continental, the court made it clear that **the requisite mutuality of interest may cease to exist long before the parties, or any one of them, resigns themselves to litigation such that they are anticipating litigation within the meaning of the work product doctrine**. "[T]he work product doctrine should be seen as much more limited in its effect than the mutuality of interest requirement, the lack of a mutuality of interest may preclude production of counsel's advice, legal memoranda, or other documents long before the work product doctrine is ever effective." Continental at 16-17. "[T]he mutuality of interest that is the rationale behind the fiduciary exception expires [at the latest] upon anticipation of litigation." Id. at 5 (citation omitted).

In Metropolitan, the court relied on significantly less evidence than was presented in the instant cases in finding that, once the general partner and the limited partners could reasonably anticipate litigation between them, there was no longer the requisite mutuality of interest for the fiduciary exception to apply. The only evidence cited by the court was that Regency (a limited partner) refused to participate in a subordinated debt transaction proposed by the general partner, Regency apparently indicated to the general partner that it believed the proposed transaction would be a violation of the partnership agreement, and the general partner perceived "the potential that Regency might commence litigation." Metropolitan, 2001 Del. Ch. LEXIS 153 at 3-4.

Under the circumstances, the divergence of interest between the general partners and one or more of the limited partners (Weinberg, Trotter, Davis) necessarily rendered the fiduciary exception to privilege unavailable to all of the limited partners. This was demonstrated in Metropolitan, where certain privileged documents were created after the general partner anticipated litigation with Regency, but before the general partner's relationship with another limited partner (Metropolitan) deteriorated to the point where,

viewed independently, it would be denied the benefit of the fiduciary exception. The court denied Metropolitan's motion to compel, as well, holding

I see no practical method that would allow for preservation of the attorney-client privilege in this action as to Regency but, at the same time, allow Metropolitan, assuming that it could demonstrate good cause, to have access to the documents. **I conclude that, in these circumstances, the privilege must prevail not only as to Regency, but also as to Metropolitan. Both Regency and Metropolitan seek the same documents to assert the same claims through the same counsel.** The purpose of the 'mutuality of interest' requirement is to allow the general partner to communicate with the partnership's counsel without fear of disclosure to the limited partners. The general partner, when it reasonably anticipates litigation with a limited partner, should not have to factor in the possibility that a limited partner with whom it is not yet at loggerheads may, in time, join the fray on the side of the already disaffected limited partner. **At issue here is the question of how [the general partner] perceived the circumstances surrounding any specific communication with counsel**

Id. at 12-13 (emphasis added). In the instant cases, it was undisputed that all of the Appellants/limited partners sought the same documents to assert the same claims through the same counsel. The only possible result is that the fiduciary exception is not available to any of the limited partners with respect to documents created after Weinberg threatened to sue the general partners.⁶⁰

3 No Evidence to Support Other Grounds Argued by Appellants

a Arguments Abandoned by Appellants in Lower Court

Appellants also made each of the following additional arguments for the production of Respondents' privileged documents, **but only** in the arguments preceding the 12/17/08 Order, which rejected each of Appellants' arguments. Appellants abandoned the following arguments in the lower court by not including them in their subsequent written and oral arguments to the court. (Pl Mot 6/11/09, 1-2, Pl Mem 7/2/09, 2-7 (R))

⁶⁰ Appellants also failed to show the requisite "good cause," which includes showing their particularized need for the production of each of Respondents' privileged documents (Def Mem 7/2/09, 15-17 (R)) Respondents are unaware of any evidence presented to the court, which would support a finding that Appellants had "good cause" to exercise the fiduciary exception to Respondents' attorney-client privilege under the Garner analysis.

b Appellants' Claims of Express or Implied Waiver

Prior to entry of the 12/17/08 Order, Appellants argued that Respondents expressly or impliedly waived their claim of privilege by informing them and their attorneys of the fact that Respondents retained counsel (Art Howson of GWB and the Bryan Cave law firm) for the purposes of pursuing collection on the notes, communicating with the defaulting purchasers, and otherwise determining the remedies available to the Limited Partnerships⁶¹ However, the fact that Respondents sought and obtained legal representation and the purpose of that representation are not privileged, and divulging such non-privileged information does not result in a waiver of privilege See supra at 17-18

Appellants also argued that Respondents waived the privilege by providing Appellants copies of letters between the general partners' attorneys and third parties The letters were **non-privileged** communications that did not divulge Respondents' confidential, attorney-client privileged communications (Pl Mem 11/19/07, Ex 11 at 1-24 (R))⁶²

Appellants also argued that Respondents waived their claim of privilege because some of their attorneys' documents, dated prior to the filing of these lawsuits, were not identified on the initial privilege logs (Tr 11/19/07, 21 25, 22 1-10, Def Br 11/19/07, 3 (explaining delay in obtaining/identifying GWB documents)(R)) However, **Appellants formally abandoned this argument, stipulating**

To the extent Plaintiffs and/or Defendants have previously pursued claims or arguments that the opposing party or parties have waived attorney-client

⁶¹ To be clear, Respondents have never asserted the defense of reliance upon advice of counsel in these lawsuits, and Respondents' counsel has so stated on the record (Tr 12/9/08, 54 2-6 (R))

⁶² In two of these letters, Bailey references Appellants' intent to sue the Respondents, more than four and a half years **before** four of these suits were filed In his 2/16/01 letter, Bailey states, "I feel **it is incumbent upon AIMCO and Mr Tuck to compensate the limited partners for their losses** My clients are willing to discuss a reasonable settlement, but **are firm in their commitment to litigate**, if necessary " (Pl Mem 11/19/07, Ex 11 at 20 (emphasis added)(R)) In his 3/29/01 letter, Bailey states, "I indicated to you that **we are considering litigation against our general partners** " (Pl Mem 11/19/07, Ex 11 at 24 (emphasis added)(R))

privilege or work product protection for documents identified on their respective privilege logs based on when such documents were first identified on the parties' privilege logs, such claims and arguments are hereby forever abandoned (Pendarvis Aff 4/22/10, Ex 60 (R))

c No Evidence for Crime, Fraud or Tort Exception

Prior to entry of the 12/17/08 Order, Appellants also claimed that the crime/fraud/tort exception required production of Respondents' privileged documents. The crime/fraud/tort exception applies only where communications are made between attorney and client *before* the fact of or *during* the commission of a crime, fraud or tort. See Duplan Corp v Deering Milliken, Inc., 397 F Supp 1146, 1172 (D S C 1974). Attorney-client communications made *after* the fact of the commission of a crime, fraud or tort are protected by the attorney-client privilege. See id. (requiring prima facie showing "that the lawyer's advice was designed to serve his client in the furtherance of its wrongful conduct.") Appellants offered no evidence in support of their claim that the crime/fraud/tort exception applied to *any* of Respondents' privileged documents. Rather, their arguments consisted entirely of speculation, conjecture and unsubstantiated conspiracy theories (Tr 11/19/07, 11 4-17, 26 14-25 (R)) See e.g. infra at 77-79

d Limited Partners Not Within the Attorney-Client Relationship

Appellants further argued that the attorney-client relationship between the general partners and their attorneys extended to them as limited partners of the Limited Partnerships. It does not appear that this precise issue has been addressed by the South Carolina appellate courts. However, a Virginia court's analysis of this issue is both compelling and consistent with South Carolina law. See Smathers v GBA Associates Limited Partnership, 55 Va Cir 73, 2001 Va Cir LEXIS 63 (Cir Ct of Fairfax County, VA 03/14/01) (Opinion Letter) (holding that "a limited partner is not a client of an attorney hired by the limited partnership.") A partnership is a "singular legal entity," separate and apart from its limited partners, and the attorney-client relationship is contractual in nature. Thus, when a

partnership retains an attorney, the partnership is the client and the “attorney for a partnership or general partner does not thereby undertake representation of limited partners ” Id at 55 Va Cir 75 (citations omitted) The Virginia court concluded

An attorney is hired to advocate on behalf of its client Thus, an attorney for a limited partnership advocates on behalf of that client There are times when the limited partnership has opposing interests to its limited partners The limited partnership must be able to rely on its attorney to advocate on its behalf and represent its interests alone Only if there has been an express or implied agreement to the contrary would the limited partnership’s expectation be different

Id at 76 This is consistent with South Carolina law governing partnerships and limited partnerships “[T]hrough a series of legislative enactments and judicial decisions, the partnership has become ‘a legal entity separate and distinct from the persons who compose it ’” Marvil Properties v Fripp Island Development Corp., 273 S C 619, 621, 258 S E 2d 106, 107 (1979) (dissent) (citing and quoting Chitwood v McMillan, 189 S C 262, 1 S E 2d 162 (1939)) ⁶³

C 6/2/09 Order Adopting Clary’s Findings and Conclusions

The *in camera* review of the parties’ respective documents and Clary’s reports to the court, the 6/2/09 Order adopting the findings/conclusions in Clary’s reports, and the parties’ respective motions to amend the 6/2/09 Order were all the direct result of unanimous collaboration and voluntary agreement between and among Judge Early, Appellants’ counsel, and Respondents’ counsel ⁶⁴ Appellants only complained of the process and the court’s

⁶³ The following evidence makes it clear that the attorneys considered the general partners and the Limited Partnerships to be their clients, but not the limited partners In letters to Bailey and the defaulting purchasers, the attorneys stated, “This firm [GWB] represents AmReal Corporation (an AIMCO company) as the general partner of the former selling limited partnerships ” or “As you know, this firm [Bryan Cave] represents AIMCO ” (Pl Mem 11/19/07, Ex 11 at 4, 6, 8, 13 (R)) Even Bailey acknowledged whom these attorneys represented, in his 2/16/01 letter to Tomilson of Bryan Cave, referring to “your recent letters to Lend Lease on behalf of AIMCO” and “Arthur Howson, Jr , attorney for AIMCO” (Pl Mem 11/19/07, Ex 11 at 19-20 (R))

⁶⁴ The court and the parties agreed to have Clary review the parties’ documents *in camera* and report his findings to the court (Tr 12/9/08, 49 17-20, 50 19-24, 53 22-24, 55 3-5, 56 8-

related orders *after* they learned that the court was going to rule in Respondents' favor on several key issues addressed in the 7/28/09 Privilege Order

Both of the parties timely filed motions to amend the 6/2/09 Order, pursuant to Rule 59(e), SCRCP (Pl Mot 6/11/09, 1-3, Def Mot 6/15/09, 1-8, Pl Mem 7/2/09, 1-8, Def Mem 7/2/09, 1-24 (R))⁶⁵ The court heard lengthy oral arguments from the parties' counsel concerning their respective motions to amend the 6/2/09 Order (Tr 7/6/09, 5-91 (R)) Not once did Appellants question whether the court had the authority to amend the 6/2/09 Order, to enter the 6/2/09 Order, to accept reports from Clary concerning his *in camera* review of the parties' documents, or to assign the *in camera* review to Clary in the first instance

Appellants did not contrive their jurisdictional argument under Rule 53, SCRCP, until *after* the court announced its ruling on the parties' Rule 59(e) motions and Respondents submitted the proposed order on such motions⁶⁶ Appellants' counsel responded with a letter

23, Order 12/30/08, 1-3, Order 1/31/09, 1 (Consent Order clarifying that Clary was *not* to issue an order of any type, but was merely “**to provide this Court with a Report** setting forth his findings and conclusions ” (emphasis added), Order 4/9/09, 2, Def Mem 8/21/09, Ex D at 1-18 and E at 1-3 (Clary's reports to the court, which were never filed with any Clerk of Court)(R)) After consulting with the parties' counsel as to how *they* wished to proceed (Vick Aff 6/7/10, Ex O at 2, 4 (R)), Judge Early entered the 6/2/09 Order, adopting the findings and conclusions contained in Clary's reports, and emphasizing

This action is taken **without prejudice to the parties' rights to make any arguments or objections concerning the findings and conclusions contained in the Reports, or the subject matter thereof**, via Motion(s) to Alter or Amend this Order, pursuant to Rule 59(e), SCRCP **As requested by the parties' counsel, the Court will grant a hearing on any Rule 59(e) Motion filed by the parties with respect to this Order and will afford the parties full consideration of any arguments or objections stated in such Motion(s), if any** (Order 6/2/09, 2 (emphasis added)(R))

⁶⁵ Although Appellants would later claim that the Clary reports constituted an “order or judgment” within the meaning of Rule 53(e), SCRCP, and that Judge Early had no authority to amend the Clary reports, Appellants clearly requested that Judge Early amend the 6/2/09 Order adopting Clary's findings and conclusions (Pl Mem 7/2/09, 2-8 (R)) They just did not like the results of Judge Early's review

⁶⁶ See (Vick Aff 6/7/10, Ex M at 1 (Judge Early 7/8/09 e-mail announcing his ruling to all counsel and instructing Respondents' counsel to prepare a proposed order), N at 1-15 (transmittal of proposed order to the court and counsel)(R))

to Judge Early, objecting to entry of the proposed order and questioning for the first time whether the court had the authority to amend **its own** 6/2/09 Order (Pendarvis Aff 4/22/10, Ex 81A at 1, see also Vick Aff 6/7/10, Ex O at 2 (R)) On 7/28/09, the court entered the Privilege Order, granting in part and denying in part **each** of the parties' motions to amend the 6/2/09 Order (Order 7/28/09, 1-11 (R))⁶⁷

An examination of Rule 53, SCRCP, shows Appellants' eleventh-hour claim to be specious Rule 53 applies only to Masters (defined in Rule 53(a), SCRCP, as "master-in-equity for the county," which Clary was not) and Special Referees, defined by Rule 53(a), SCRCP, as "a member of the South Carolina Bar to whom a matter has been referred under S C Code Ann §14-11-60 " S C Code Ann §14-11-60 (Supp 2010) provides

In case of a vacancy in the office of master-in-equity or in case of the disqualification or disability of the master-in-equity from interest or any other reason for which cause can be shown the presiding circuit court judge, upon agreement of the parties, may appoint a special referee in any case who as to the case has all the powers of a master-in-equity

Here, there was no vacancy in the office of Master-in-Equity, nor was the Master-in-Equity disqualified or disabled from interest or any other reason Clary was not appointed a "Special Referee" under S C Code Ann §14-11-60, nor could he have been within the meaning of Rule 53

Further, Rule 53, SCRCP, applies to the reference of **causes of actions** and **cases** to a Master-in-Equity or Special Referee, not, as here, to a review of documents within a discrete discovery dispute See Rule 53(b), SCRCP That the Rule is applicable only to the reference of **cases** and **causes of action** is further buttressed by S C Code Ann §14-11-85 (Supp 2010) (Appeals from final judgment of masters-in-equity) ("When some or all of the **causes**

⁶⁷ During a later hearing on Respondents' Motions for Sanctions, the court rejected Appellants' contrived Rule 53 argument challenging the court's authority to amend the 6/2/09 Order, and reminded Appellants' counsel that they specifically agreed to the process and procedures that ultimately resulted in the 7/28/09 Order (Tr 8/24/09, 21 19-25, 22 1-10, 25, 23 1-5, 34 22-25, 35 1-7 (R))

of action in a case are referred to a master-in-equity or special referee, the master or referee shall enter final judgment as to those causes of action ” (emphasis added)) No “cause of action” or “case,” as contemplated by Rule 53, SCRCP and S C Code Ann §14-11-60, 85, was referred to Clary He was merely asked to review documents *in camera* and provide a report of his findings to the court Also, Clary never issued an “order or judgment,” and his reports were never filed with the Clerk of Court See Rule 53(e), SCRCP (“When a matter has been referred, any appeal from any **order or judgment** issued by the master or special referee shall be to the Supreme Court or the Court of Appeals ” (emphasis added))⁶⁸

In sum, this Court specifically assigned Judge Early to preside over all aspects of this litigation, and he did not relinquish his authority or jurisdiction to Clary or anyone else Judge Early had the authority and jurisdiction to enter the 6/2/09 and 7/28/09 Orders

D 8/18/08 Order Denying Appellants’ Motion to Compel #6

Appellants’ sought to compel production of certain financial information and documents from Respondent AIMCO, which Appellants claimed their punitive damages expert needed, including (for each of AIMCO’s five highest paid executives) life, health or other insurance premiums, club, social, political, professional or other membership dues, the make, model, and cost of each automobile, airplane or helicopter provided to the executives, entertainment expenses paid for each executive, allowances or reimbursement expenses provided for automobile, travel, educational, and clothing expenses (Pl Mot (#6) 6/12/08, Ex 2-3, Def Br (#6) 6/30/08, 4 (R))

Respondents objected to the discovery on the grounds that it was not relevant to the issues considered in determining punitive damages (Def Br (#6) 6/30/08, 12-15 (R)) Consistent with this Court’s holding in Branham v Ford Motor Co, 390 S C 203, 240-41,

⁶⁸ Appellants’ claim that Judge Early was without authority to enter the 7/28/09 Order because one trial judge can not overrule an order from another trial judge (see Buckley v Shealey, 370 S C 317, 635 S E 2d 76 (2006)) ignores the fact that Clary was not a trial judge when he issued his *reports* to the court

701 S E 2d 5, 25 (2010), that such discovery requests “went far beyond the pale,” the court ruled that such information need not be produced and denied Appellants’ motion ⁶⁹

E 3/3/09 Order Granting/Denying Appellants’ 2005 Motion to Compel

Appellants filed their first Motion to Compel, pertaining to discovery requests in the Parkview action alone, on 7/29/05, but the matter was not pursued further until a motion hearing on 7/1/08 (Tr 7/1/08, 4-40, 47-62 (R)) The only complaints not resolved prior to entry of the 3/3/09 Order (App Mot) were the scope of Appellants’ interrogatories 12 and 24 and request for production 6 (Order 3/3/09 (App Mot), 2-3 (R)) ⁷⁰

Respondents objected to Interrogatories 12 and 24 and Document Request 6 on the grounds that they were vague, ambiguous, overly broad, overly burdensome, and sought information that was not relevant and was not reasonably calculated to lead to the discovery of admissible evidence (Order 3/3/09 (App Mot), 2-3 (setting forth the subject discovery requests, objections and answers to the same, verbatim)(R)) The discovery requests generally pertained to all lawsuits against Respondents, as well as all investigations,

⁶⁹ In addition, the 8/18/08 Order was supported by the following AIMCO is a publicly traded company and the U S Securities and Exchange Commission’s website provides the complete compilation of AIMCO’s quarterly and yearly reports for the requested years (Def Br (#6) 6/30/08, 3-4 (R)), Respondents produced AIMCO’s SEC Schedule 14A, Definitive Proxy Statement, for its 4/28/08 Shareholder Meeting (Vick Aff 6/7/10, Ex C at 1-54 (R)) and one of AIMCO’s 10-K reports (without objection by Appellants) (Tr 7/1/08, 42 (R)) to further illustrate the information available in the public domain, Judge Early observed that the information available on the SEC website “ought to be enough” for the expert (Tr 7/1/08, 45 4-5 (R)), and though the court afforded Appellants an additional, post-hearing opportunity to produce evidence supporting their claim of need, their expert’s affidavit merely stated that he needed the information sought, *without any explanation*, and claimed that a “substantial portion of the information I requested is not publically [sic] available,” *again without elaborating further* (Wood Aff , 7/28/08, ¶¶3-4 (R)) Appellants’ expert’s opinion that he needs the information sought, without more, did not require a different ruling

⁷⁰ All other matters raised in Appellants’ 7/29/05 motion were resolved by Respondents’ compliance with the court’s verbal instructions (Order 3/3/09 (App Mot), 2, 4, Tr 7/1/08, 9 4-8, 24-25, 21 9-25, 22 1-12, 25 4-24, 58 12-22, 59 3-16 (R)), the court’s verbal rulings that Respondents’ answers were sufficient (Tr 7/1/08, 18 8-10, 24-25, 19 1, 20 1-18, 23 11-25, 30 19-25, 31 1-18, 35 11-25, 36 9-16, 39 17-22, 56 2-7 (R)), or the court’s verbal rulings as to matters that would be addressed prior to trial in a scheduling order (Tr 7/1/08, 11 1-3, 10-11, 12 1-7, 13 17-21, 16 4-8, 14-16, 57 3-5, 12 (R)) (See also Tr 7/1/08, 62 14-16 (Appellants’ counsel’s affirmation that all concerns were addressed)(R))

criticism, reprimands, and sanctions of or against Respondents by any governmental agency (Order 3/3/09 (App Mot), 2-3, Tr 7/1/08, 26 6-9 (R))

The discovery requests were obviously too broad as written, covering lawsuits, investigations and inquiries arising out of any circumstances, from slip and falls to slander to tenant complaints (Tr 7/1/08, 26 20-22, 27 2-11, 15-25, 28 1-8, 52 1-12, see also Vick Aff 6/7/10, Ex H at 2-3, 6-8, 14-15 (proposed revisions of more reasonable scope)(R))⁷¹ The requests were also too broad in that they were directed to all of the Respondents (not only those that were involved in the 1999-2000 decision not to take the properties back) and they were not limited to a particular timeframe (though Appellants later advised that they were intended to be limited to 1975 to the present, *i e* , 33 years) (Vick Aff 6/7/10, Ex H at 2, 3, 6, 5, 15 (R)) The court instructed the parties' counsel to try to work with one another to revise the discovery requests to a more reasonable scope (Tr 7/1/08, 28 12-17, 52 13-21 (R)), but they were unable to reach a final agreement

The court required Respondents to answer a more reasonably tailored version of the requests set forth in the Order (Order 3/3/09 (App Mot), 3-4 (R))

F 10/22/10 Order Denying Motion for Protective Order

On 2/22/10, almost seven months after Appellants were ordered to produce 96 documents they claimed were privileged and/or work product, they "offered" to submit them to the court under seal, conditioned upon the court redacting mental impressions, conclusions, opinions or legal theories, and making specific findings as to why each document was not privileged or work product, before the court could provide redacted versions to Respondents (See e g Pl Mot 2/22/10 (Protective Order) (Orleans), 2 (R)) But

⁷¹ Respondents also pointed out the inherent, practical ambiguities in the language proposed by Appellants, "investigated, reprimanded, criticized, cited or sanctioned " (Vick Aff 6/7/10, Ex H at 8 ("What constitutes an investigation by HUD? A phone call, e-mail or letter from any HUD employee that inquires as to what is occurring at a property or when repairs will be made? What constitutes a reprimand by HUD?"), 3 (R))

Appellants did not provide any of the 96 documents compelled in the 7/28/09 Order to the court. The court correctly construed the motion as one conditioned upon the court accepting Appellants' terms.⁷²

The court held that the motion, though purportedly filed under Rule 26(c), SCRCp, was in effect an untimely motion under Rule 59(e), SCRCp, in that it sought to amend the 7/28/09 Privilege Order (Order 10/22/10, 2-3 (R)). It also held that the issue of redaction was not timely presented to it, *i.e.*, no such issue was raised prior to entry of the 7/28/09 Order (Order 10/22/10, 3 (R)). Finally, the court reaffirmed its earlier holding that Appellants waived all claims of privilege, including work product, thus making further review of the documents a meaningless exercise (Order 10/22/10, 3-4, see supra at 35)(R)).

On 11/8/10, Appellants filed a Rule 59(e) motion seeking to amend the 10/22/10 Order denying their motion for protective order. They did not contend the court misconstrued their motion. Instead, they claimed they were denied due process, alleging that the court signed an order prepared by Respondents' counsel without Appellants having had an opportunity to provide their input, correct errors, etc. Appellants' argument ignored Respondents' earlier memoranda (Def. Mem. 3/1/10 (Protective Order), 1-3, Def. Mem. 6/7/10, 1-39 (R)), the earlier hearing (Tr. 3/29/10, 32 16-37 6 (R)), the court's 6/5/10 request that both sides submit proposed orders (Def. Mem. 11/17/10, 2-3 & Ex. 2A (court's 6/15/10 e-mail)(R)), and Respondents' proposed order submitted to the court and Appellants' counsel on 6/15/10, four months before the court entered the 10/22/10 Order (Def. Mem. 11/17/10, Ex. 2A & 2B (Respondents' 6/15/10 e-mail with attached proposed order)(R)). Appellants never forwarded a proposed order to the court, never provided any briefing, input, or comments with respect to Respondents' proposed order, and have never identified a single error in the 10/22/10 Order. Appellants' argument was frivolous and

⁷² Appellants did not contend in their subsequent Rule 59(e) motion that the court misconstrued the conditional nature of their motion.

insincere (Order 12/11/10 (denying motion to amend 10/22/10 Order) (R))

V NO ABUSE OF DISCRETION IN 10/7/10 ORDER DENYING MOTION FOR RECUSAL (Re Issue 3 and Appealed Orders dated 3/7/06, 10/7/10, 12/11/10)

A Facts Relevant to Appellants' Motion for Recusal

During the 3/29/10 afternoon motion hearing, after the court, once again, advised counsel that it intended to enter an order dismissing the cases due to Appellants' disobedience of the Discovery Orders, Appellants' counsel made an oral motion for recusal, which Judge Early denied (Tr 3/29/10, 24 6-16, 26 9-25, 27 1-4 (R))⁷³ As the record clearly shows, Appellants were not bothered by Judge Early's "relationships," which they knew about for years, until he informed them of the impending dismissal of their claims due to their persistent failure to comply with the Discovery Orders

Stripped of their conspiracy theories, hearsay, innuendo, opinions and unfounded conclusions, Appellants' recusal argument is based upon the following

- Ellis Johnston's wife's ex-husband was a fraternity brother of Judge Early **40 years ago** (Tr 3/29/10, 10 21-25 (R))
- About **30 years ago**, following a wedding, Marvin Infinger⁷⁴ spent the night at then attorney (now Judge) Early's lake house (Tr 3/29/10, 6 12-22 (R)) **This was disclosed to Appellants' counsel at a 4/23/08 status conference, which Appellants' attorney has admitted** (Bailey Aff 3/30/10 (Parkview),⁷⁵ ¶ 10 (R)), **and Appellants raised no concerns -- until two years later** when Judge Early announced the impending sanctions against Appellants
- Assisting Infinger during his nine-month involvement in these cases, was his principal associate, Anne Ross Rosen Judge Early officiated at the wedding of Mrs

⁷³ Though Appellants' counsel informed the court that he would need to consult with the Appellants before he decided whether to file a written motion for recusal, on the very next day he filed a 4-page Motion for Recusal (*signed the day of the hearing*) and an accompanying 19-page affidavit (Pl Mot 3/29/10, Bailey Aff 3/30/10 (R))

⁷⁴ The Haynsworth Sinkler Boyd law firm and Ellis Johnston, as lead counsel, have represented Respondents in these cases since their inception Marvin Infinger and Anne Ross Rosen, both formerly of HSB's Charleston office, assisted with the representation between April 2008 and January 2009

⁷⁵ Identical affidavits of Joel Bailey were filed on 3/30/10 in each of the five cases Respondents cite to the specific paragraphs of the Parkview affidavit only so as to avoid unnecessary duplication (See Bailey Aff 3/30/10 (Parkview, Palmetto, Roosevelt, Orleans, Pinewood) (R))

Rosen in 2007⁷⁶ As often happens at weddings, the bride's parents provided accommodations to the entire wedding party, which included Judge Early (Tr 3/29/10, 7 19-8 3(R))⁷⁷ **Judge Early informed Appellants' counsel of his role as officiant at Mrs Rosen's wedding at the 4/23/08 status conference**, when it appeared that she would be involved in the case, and asked if that presented a problem (Tr 3/29/10, 18 15-17, 21 17-22 2, Bailey Aff 3/30/10 (Parkview), ¶¶ 10-11 (**Bailey acknowledged 4/23/08 disclosure**)(R)) **Again, Appellants raised no concerns -- until 2 years later** when Judge Early announced the impending sanctions against Appellants

- Mrs Rosen's father performed a colonoscopy on Judge Early (Tr 3/29/10, 7 1-7 (R))
- Though Mrs Rosen's parents once lived in Bamberg, South Carolina, Judge Early did not see them socially then, nor does he see them now (Tr 3/29/10, 7 10-13 (R))
- Infinger appeared only once in court, and that was at the 4/23/08 status conference Rosen never appeared in court Neither signed any pleadings, letters, discovery, or documents filed with the court or Clerk
- Neither Infinger, nor Rosen, have been involved in these cases since January 2009, two months **before** the 3/3/09 Discovery Order was issued, six months **before** the 7/28/09 Privilege Order was issued, and 15 months **before** the 4/6/10 Sanctions Order was issued (Vick Aff 6/7/10, Ex D (R))
- Mr Johnston's son, Caldwell, and Judge Early's son, Ross, were fraternity brothers in college **14 years ago** and went to Europe together **13 years ago** They have remained

⁷⁶ Because Miss Ross was Protestant and Mr Rosen was Jewish, a non-sectarian officiant was sought (Tr 3/29/10, 7 19-25 (R))

⁷⁷ In connection with the "wedding" allegation of misconduct, Appellants point to a partial quote from the 3/29/10 hearing transcript, which expressed Judge Early's initial reaction after being notified by Respondents that Appellants issued a subpoena potentially requiring disclosure of Judge Early's credit card numbers, Social Security number, etc , without notice to him (see Vick Aff 6/7/10, Ex II at 1-8 (Johnston e-mail and ltr 3/15/10, with encls)(R)) The portion quoted by Appellants is presented *in context* below

COURT Well, quite frankly, Mr Bailey, I got the thing [3/15/10 e-mail with enclosed subpoena] I looked at it Of course, you know, when you first read something like that your blood boils a little bit

MR BAILEY Sure I understand

COURT I said, Jack, you better just sit back and reflect on it a little bit and not do anything, which I did, and, quite frankly, when I got Ellis' – Mr Johnston's letter or e-mail I realized it had been sitting over there on my desk and I needed to give you a hearing (Tr 3/29/10, 25 17-26 2)(R)

friends over the years⁷⁸ (Tr 3/29/10, 10 13-16, 11 2-4 (R)) **Judge Early disclosed this to Appellants' counsel, at the latest, on 2/13/08 during a conference call** (Tr 3/29/10, 11 10-15, Bailey Aff 3/30/10 (Parkview), ¶ 7 (**Bailey acknowledged disclosure of Ross' and Caldwell's friendship in "the spring of 2008"**)(R))

- **During that same conference call in early 2008, Judge Early informed counsel that his son, Ross, invited him to go fishing, along with Caldwell and Caldwell's fiancée, on Caldwell's uncle's (Mr Johnston's brother's) boat Judge Early specifically inquired if counsel had any objection to his going Appellants' counsel said they had none** (Tr 3/29/10, 11 10-13, 18 15-17, 19 17-20 3, Bailey Aff 3/30/10 (Parkview), ¶ 7 (**Bailey acknowledged disclosure of the fishing trip invitation in the spring of 2008 and that he said he had no objection to the Judge attending the trip**)(R)) Caldwell's uncle paid for the fuel and Judge Early paid for the meals (Tr 3/29/10, 12 15-18 (R)) **Two years later, they complained about it**
- Johnston has been a member of the Caroliniana since 2008, and Judge Early since 2000 The Caroliniana holds an annual white tie dinner dance It is composed of some 300 to 400 members (Tr 3/29/10, 11 19-12 6, 15 9-18 (R))
- Ross Early's Facebook page lists Annie Johnston, Mr Johnston's daughter, as one of 285 "friends"⁷⁹ (Bailey Aff 4/7/10, Ex 1 at 2 (R))
- Annie Johnston's Facebook page lists Ross Early as one of 607 "friends" (Bailey Aff 4/7/10, Ex 4 at 1 (R)) Contrary to Bailey's representation in his affidavit, Annie Johnston has never posted a photograph of Judge Early on her Facebook page (Bailey Aff 4/7/10, Ex 3-4 (R))⁸⁰
- Despite Appellants' "shitty job" comment and associated conspiracy theory (see App Br (Parkview, Palmetto, Orleans, Roosevelt), 38, App Br (Pinewood), 37-38), Johnston has served as lead counsel in these cases from their inception in April 2003 until the present He has never been asked to step down or otherwise modify his role (Johnston Aff 4/20/10, ¶ 3, Hilty Aff 4/16/10, ¶ 5)(R))
- Other than as set forth above, **none** of Respondents' counsel have ever interacted or socialized with Judge Early They have never hunted, fished, golfed, had dinner with, been to the house of, hosted in their homes, had any financial interest or mutual interest with, had lawsuits with or against, or, with the exception of the five cases on appeal, had a matter before Judge Early (Tr 3/29/10, 8 4-18 1 (R))

The above should be compared to Judge Early's disclosures with respect to his

⁷⁸ Appellants also contend that Judge Early has a picture of Caldwell Johnston in his office (see e.g. Orleans App Br, 37) This is indicative of the length which Appellants will go The picture is one of Judge Early's son, Ross, jumping off a bungee jump with Caldwell in the *background* clapping (Tr 3/29/10, 10 17-20 (R))

⁷⁹ It is unknown how many of his other "friends" might have a parent who is an attorney

⁸⁰ The only photo of Judge Early appearing there is part of Ross Early's photo identification (Bailey Aff 4/7/10, Ex 3 at 2 (7/31/09 Facebook page)(R)) And, even this does not appear on Annie Johnston's 2/23/10 Facebook page (Bailey Aff 4/7/10, Ex 3 at 2 (2/23/10 Facebook page)(R))

relationships with Appellants' attorneys, Pendarvis and Bailey (Tr 3/29/10, 8 15-9 18, 15 19-20 (Pendarvis) (including Judge Early describing Pendarvis as a friend, former co-worker, and unofficial mentor to the Judge's sons), 9 19-10 12, 15 20-24 (Bailey)(R))

The "relationships" complained of by Appellants are just not the type of matters that give rise to an inference of partiality, bias or prejudice. If they were, it is hard to imagine a judge, especially in the small and close-knit Bar of the State of South Carolina, who would not be subject to recusal at the whim of one party or another and at any time during the litigation (in these cases, two years after Appellants became aware of most of the things they now claim is evidence of partiality, bias or prejudice) ⁸¹

B South Carolina's Standard for Recusal

The well-settled recusal standard in South Carolina is that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he has a personal bias or prejudice against a party." Koon v Fares, 379 S C 150, 156, 666 S E 2d 230, 234 (2008) (citing Patel v Patel, 359 S C 515, 524, 599 S E 2d 114, 118 (2004)). **In addition**, the party seeking recusal "must show some evidence of bias or prejudice" Id (emphasis added). He cannot simply allege the existence of bias without evidence thereof. Id. "If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Id (emphasis added).

⁸¹ Appellants also raise as evidence of partiality an *ex parte* telephone communication initiated from Judge Early to Vick on 02/17/10, in which Judge Early gave Vick instructions with respect to changes to a proposed order previously forwarded by Respondents to Judge Early and Appellants' counsel. He was without his law clerk that day, and therefore asked Vick to perform the ministerial task, and to immediately notify Appellants' counsel of the call and his instructions, which Vick did. (See e.g. Pl Mot 2/22/10 (Disclosure) (Parkview), Attachment (Vick e-mail, 2/17/10)(R)) This was no different than the procedure followed by Appellants' counsel, Bailey, when he received an *ex parte* telephone communication from Judge Early on 1/5/07 instructing him to prepare an order denying Respondents' motions to dismiss and to transfer venue. (Def Mem 6/7/10, Ex J at 1 (Bailey e-mail, 1/5/07)(R)) Though such communications are certainly frowned upon, this Court has **refused to "adopt, per se, the view that all orders consequently emanating therefrom in part or in whole are rendered invalid"** Burgess v Stern, 311 S C 326, 331, 428 S E 2d 880, 884 (1993) (emphasis added).

“To compel recusal, the alleged bias of the judge must be personal, as distinguished from judicial, in nature ” Christensen v Mikell, 324 S C 70, 74, 476 S E 2d 692, 694 (1996) “A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record ” Patel, 359 S C at 524, 599 S E 2d at 118 (citing Ellis v Procter & Gamble Distrib Co., 315 S C 283, 285, 433 S E 2d 856, 857 (1993)) “*“The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge even if it is later held the judge committed error in his rulings ”*” Mortgage Elec Sys , Inc v White, 384 S C 606, 616, 682 S E 2d 498, 503 (Ct App 2009) (quoting Mallett v Mallett, 323 S C 141, 147, 473 S E 2d 804, 808 (Ct App 1996) (emphasis added))

Here, there is no evidence of bias or prejudice,⁸² all of the court’s orders are amply supported by the record, and the record clearly reveals that Appellants sought recusal as a last ditch effort to avoid sanctions for their persistent disobedience of the Discovery Orders **two years after** they learned of the “relationships” they now claim are evidence of bias See Duplan Corp v Deering Milliken, 400 F Supp 497, 510 (D S C 1975) (“Timeliness is essential to any recusal motion To be timely, a recusal motion must be made at counsel’s *first opportunity after discovery* of the disqualifying facts ”) (emphasis in original)

Appellants argue that Canon 3(E)(1) of the Code of Judicial Conduct (“CJC”) requires an entirely objective standard whereby a judge, without any evidence of bias or prejudice, should be automatically disqualified if his impartiality might reasonably be

⁸² Appellants argue that Judge Early improperly rejected the allegations upon which they based their recusal motion, citing 46 Am Jur 2d Judges §§ 95 and 214 (1994) While the cited materials support the proposition that a judge should not pass on the truth of the facts alleged in a motion for recusal or supporting affidavit, Appellants’ opinions, conjecture and speculation are not facts Judge Early’s observation that Appellants “continue to harass and prod me to recuse myself” is a far cry from passing on the truth of the sparse facts alleged in support of the motion for recusal The following statement of law is more pertinent to the materials relied upon by Appellants “Allegations of facts that are merely frivolous or fanciful will not support a motion to disqualify on the ground of prejudice, nor will conclusory statements, conjecture, or innuendo be sufficient to support a motion for disqualification ” 46 Am Jur 2d Judges § 208 (1994)

questioned. They rely heavily on the 1996 amendment of Canon 3(E)(1), which on its face changed the language from advisory (“should”) to mandatory (“shall”).⁸³ However, both before and after the 1996 amendment of Canon 3(E)(1), this Court has consistently and repeatedly held that there must be evidence of bias or prejudice to require recusal. If there is no such evidence, the ruling on a recusal motion is entirely within the judge’s discretion and will not be disturbed on appeal. See Koon, 666 S E 2d at 234 (2008), Patel, 599 S E 2d at 118 (2004), Christensen, 476 S E 2d at 694 (1996), Roche v. Young Bros., 332 S C 75, 84-85, 504 S E 2d 311, 316 (1998), see also White, 682 S E 2d at 503 (Ct App 2009), State v. Jackson, 353 S C 625, 627, 578 S E 2d 744, 745 (Ct App 2003).

The Code of Judicial Conduct is entirely consistent with the case law. Canon 3(E)(1)(a) contemplates recusal where “the judge has a personal bias or prejudice,” implying proof of bias or prejudice. Canon 3(E)(1)(a), CJC, Rule 501, SCACR (emphasis added). More importantly, the Preamble of the Code of Judicial Conduct expressly provides, “The Canons and Sections are rules of reason. *They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances*.” Preamble, CJC, Rule 501, SCACR (emphasis added).

If this Court was to ever reverse its prior opinions and adopt a purely objective standard (i.e., no evidence of bias or prejudice necessary), as urged by Appellants, the present appeals would not be the appropriate cases to make such a change. In Patel, this Court found no error in the family court judge’s denial of husband’s motion to recuse where wife had three senators write letters to the judge on the wife’s behalf (two were copied to Chief Justice Toal) seeking a trial date. The Court declined to adopt the federal standard in that case because the husband failed to demonstrate that he would prevail under such a standard in any event. Patel, 599 S E 2d at 119. Likewise, Appellants’ contrived “facts”

⁸³ The language was changed from “should” to “shall” effective 10/1/96. S C Sup Ct Order dated 4/18/96.

would not require recusal under the federal standard, so there is no need for the Court to reconsider its prior opinions requiring proof of bias or prejudice

Appellants' reliance upon this Court's opinion in Ellis is misplaced. In Ellis, this Court found evidence of judicial prejudice because the record did not support the trial judge's factual findings, not due to the fact of an *ex parte* communication. Ellis, 433 S E 2d at 857 (involving *ex parte* memorandum to trial court addressing the merits of the case). Cf. Burgess v. Stern, 311 S C 326, 331, 428 S E 2d 880, 884 (1993) (Because the judge's order was supported by the evidence, this Court found that there was no prejudice resulting from several *ex parte* communications and affirmed the judge's refusal to recuse himself.)

Appellants' reliance upon Caperton v. A T Massey Coal Co., 129 S Ct 2252 (2009), is also *grossly* misplaced. The Supreme Court of the United States emphasized that its decision in Caperton addressed "an extraordinary situation where the Constitution requires recusal." Id. at 2265. Caperton involved a party who contributed \$3 *million* to get a judge elected to the highest court in West Virginia, such that the judge would sit on that very court when the party appealed a \$50 million verdict against it, and said judge denied multiple **timely** motions for recusal before casting the swing vote to reverse the verdict against his largest campaign contributor. Id. at 2257-58. In such extreme cases, the constitutional inquiry is "whether the **average judge** in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" Id. at 2262 (emphasis added).⁸⁴

In stark contrast, the facts and circumstances presented in the current appeals would not cause any jurist familiar with the South Carolina Bar (or likely any Bar) to raise even an eyebrow when considering the likely impact on the "average judge." There are **no** extraordinary circumstances relating to Appellants' recusal motions. This Court is the

⁸⁴ Appellants' recusal efforts relied upon the opinions and beliefs expressed in the affidavits of the Appellants and their attorneys. Clearly, the opinions/beliefs of a disgruntled party or his attorney cannot be the measure of whether a judge should be forced to recuse himself.

highest court in the State, not Judge Early, and this Court's review of the various orders appealed ensures Appellants due process. Even if this Court were to apply the United States Supreme Court's objective "average judge" standard, it can not be said that the circumstances presented in these cases were such that an "average judge" would have been concerned that he could not conduct himself in a fair, balanced and unbiased manner. As a matter of law, the "average judge" is presumed to exhibit honesty and integrity, and he is presumed to be sincere in his oath to uphold the Constitution and apply the law impartially. See Caperton, 129 S. Ct. at 2267-68 (dissenting opinion of Justice Scalia). Appellants have shown no evidence that Judge Early was, in fact, biased, or that an average judge would be affected by bias under the circumstances.⁸⁵ The court did not err in denying Appellants' recusal motion (Order 10/7/10, 1-6 (R.)).

Appellants filed a motion to amend the court's 10/7/10 Order (denying recusal motion) in the Orleans case *only*. In light of the evidence and law discussed above, the grounds for amendment set forth in the Orleans Appellants' motion were completely without merit. Accordingly, the court denied the motion (Order 12/11/10 (R.)).

VI APPELLANTS' MISREPRESENTATIONS OF THE RECORD

Throughout this Brief, Respondents corrected many of the misrepresentations made by Appellants in their briefs to this Court. A careful comparison of the factual claims *alleged* in their briefs with the materials they cite reveals that most of their allegations are only supported by the opinions, speculation, and conjecture of Appellants themselves or their attorneys. The fact that Appellants and their attorneys presented their opinions, speculation and conjecture in the form of affidavits does not transform them into *evidence*. There is virtually no supporting evidence for their opinions, speculation, conjecture, and conclusory

⁸⁵ While Appellants appealed this Court's 3/7/06 Order, which assigned the five cases to Judge Early, they do not attribute any error to this Court in the issuance of that order. Rather, their arguments all contend that Judge Early should have disqualified or recused himself, which relates to Judge Early's 10/7/10 Order only.

allegations. Unfortunately, it is impossible for Respondents to specifically identify each such instance in this Brief due to space limitations.

One of Appellants' principal concoctions (having little, if anything, to do with the appealed orders) is that Respondents elected not to accept the return of the properties due to an alleged investigation of AIMCO's practices with these and other properties by HUD and the DOJ. Appellants allege that Respondents declined to take the properties back

- (1) Not because BFG, Respondents and an independent broker determined the properties had no value above the existing mortgage,
- (2) Not because of adverse tax consequences that would inure to the detriment of the limited partners,
- (3) Not because additional capital contributions would be required, and
- (4) Not because HUD's "Mark-to-Market" program would reduce the subsidies on these properties (Def. Mem. in Supp. 2/9/09, Ex. C (R.)),

but, because (according to Appellants)

- (1) HUD and DOJ were investigating AIMCO over a management fee kickback scheme,
- (2) "These" properties were also subject to management fee kickbacks, and
- (3) If AIMCO took them back, it would have had to pay a much higher fine (See e.g. Orleans App. Br., 8, Davis Aff. 4/7/10, ¶36 (R.))

Appellants presented **no legitimate evidence** to support these conclusions and allegations.⁸⁶

What the evidence does show is that, during the period 1997 through 2002, HUD approved every Transfer of Physical Asset application ("TPA") and 2530 Previous Participation Certification submitted by AIMCO, for a total of 1,629 properties (Pendarvis Aff. 4/22/10, Ex. 66 at 5-10 & Ex. A-B (R.)). These included 2530 applications for

⁸⁶ The unsubstantiated conspiracy theories and conjecture contained in Appellants' briefs to this Court not only distort the materials cited, but those materials were either filed or presented to the lower court **after** the 4/6/10 Sanctions Order (see *supra* at 49-50) **or** they were **never** filed or presented in the lower court (see the following motion/briefs filed in these appeals: Resp. Mot. to Stay, Dismiss and/or Strike 7/13/11, 5-8, App. Return 7/25/11, 13-16, Resp. Reply Br. 8/1/11, 4-12 & Ex. 2-7). As a matter of law, this Court should not consider such materials or issues in these appeals (see *supra* at 49-50).

Parkview, Palmetto, Roosevelt and Orleans, which were granted on 4/16/99 after AIMCO took over management of the properties (Pendarvis Aff 4/22/10, Ex 66 at Ex B (R))⁸⁷

HUD instituted an inquiry and claim against National Housing Partnership (“NHP”) in 1997, an entity that was acquired by AIMCO in December of that year, for supervisory management fee agreements NHP entered into during the period 1977 to 1984. None of the properties here were involved, nor were any Respondents, except as a result of the subsequent acquisition of NHP. A preliminary settlement was reached in September 1998 for those claims against NHP, and was completed in July 2001 (Pendarvis Aff 4/22/10, Ex 66 at 5-10, 12 (R))⁸⁸

Appellants’ conspiracy theories have no basis in fact. How Appellants draw their conclusions is an enigma⁸⁹

VII CONCLUSION

For the reasons set forth above, and on any other grounds appearing in the record, Respondents respectfully request that the Court affirm all orders appealed, and remit these

⁸⁷ AIMCO did not have any ownership interest in, nor did it manage, the Pinewood property, so it was not, and had no reason to be, included in the 2530 applications. The Pinewood Appellant’s assertion that it was part of the alleged “kickback scheme” (Pinewood App Br , 7) is as curious as it is false.

⁸⁸ A more detailed debunking of Appellants’ conspiracy theories (which are allegedly supported by materials that they **never** filed or presented in the lower court, or that were only filed after the 4/6/10 Sanctions Order, see supra at 78 (note 86)) is contained in Respondents’ Reply Brief (at 15-21 & Ex 8-20), which was filed in these appeals on 8/1/11.

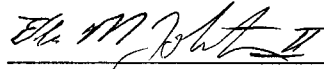
⁸⁹ Appellants’ many mischaracterizations, misrepresentations and contrived arguments in this Court and the lower court (eleventh hour recusal motions and all) bring to mind the advice given by the lawyer to Chichikov in Gogol’s Dead Souls.

Remain calm, let nothing embarrass you, however bad things may get. Never despair of anything, there is no case that can’t be saved. If you see that the matter is approaching decision, don’t try to justify and defend yourself no, just mix things up by bringing in new elements. Mix things up, and mix them up again, that’s all. Introduce extraneous factors, so that the first thing to do is to complicate them. Why, you can complicate things, if you want to, so that no one will ever be able to make head or tail out of them. After all, you can only catch crayfish in muddy waters.

cases to the trial court for a determination of the amount of the award of expenses to Respondents pursuant to the 4/6/10 Sanctions Order

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, PA



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ATTORNEYS FOR RESPONDENTS

This 10th day of November, 2011
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

RECEIVED

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S C Supreme Court

Laurance H Davis, Jr , Mary Jane R Pike, Eva Marie
Reynolds and Rhoda G Rentz, individually and in their
capacities as the Limited Partners of Parkview Apartments,
a South Carolina Limited Partnership

Case No 2003-CP-07-726

Appellants,

vs

Parkview Apartments, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc , AmReal Corporation
a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr , and John
Doe, a generic designation for a party or parties whose true
identity is unknown

Respondents

Laurance H Davis, Jr , Marvin D McCarthy, James W Ivey
and Erin E Ivey, individually and in their capacities as the
Limited Partners of Palmetto Apartments, a South Carolina
Limited Partnership

Case No 2005-CP-07-1989

Appellants,

vs

Palmetto Apartments, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc , AmReal Corporation
a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr , and John
Doe, a generic designation for a party or parties whose true
identity is unknown

Respondents

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

Case No 2005-CP-07-1990

Appellants,

vs

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Rhoda G Rentz, Mary Jane Pike, Eva Marie Reynolds, and Joanne O Mercy, individually and in their capacities as the Limited Partners of Orleans Gardens, a South Carolina Limited Partnership

Case No 2005-CP-10-4229

Appellants,

vs

Orleans Gardens, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Laurance H Davis, Jr , Rhoda G Rentz, Mortimer M
Weinberg, Jr , Hodge Land Co , Inc , and Anna Trotter,
individually and in their capacities as the Limited Partners
of Roosevelt Gardens, a South Carolina Limited Partnership

Case No 2005-CP-38-1131

Appellants,

vs

Roosevelt Gardens, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc , AmReal Corporation
a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, N Barton Tuck, Jr , and
John Doe, a generic designation for a party or parties whose
true identity is unknown

Respondents

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In accordance with this Court's Order of 10-5-11, Appellants hereby file a consolidated reply brief in the five above-captioned cases. Respondents have filed two motions to dismiss the appeals in these cases, asserting in their last motion that Appellants used paragraph numbers, as opposed to page numbers. This Court ordered Appellants to file amended briefs, to include page numbers, which they did. In their brief, however, Respondents have done exactly the same thing. For example, on pages 1, 6, 7, and 8, Respondents refer this Court to paragraph numbers, not page numbers. As in the lower court, Respondents continue to operate under a double standard whereby they adhere to a different interpretation of the rules than they seek to impose upon Appellants. Nevertheless, contrary to the positions taken by Respondents, Appellants are able to ascertain what documents the Respondents reference and have responded herein accordingly.

STATEMENT OF THE CASE

Appellants reaffirm the Statement of the Case contained in their briefs in each of the five cases. Respondents' Statement of the Case contains certain erroneous and misleading assertions. Accordingly, Appellants do not adopt the Statement of the Case set forth by the Respondents.

The first distortion in Respondents' Statement of the Case appears in their assertion that "Appellants falsely state that Respondents did not affirmatively plead statute of limitations as to all claims in the Pinewood case." Respondents provide no citation to any portion of Appellants' brief in support of this accusation, perhaps this is due to the fact that Appellants' brief contains no such statement. On page 1 of Appellants' brief, the following language appears: "Respondents answered on January 17, 2006, setting forth a general denial and twenty-two affirmative defenses including, *inter alia*, the statute of limitations, this defense specifically did not include any of Appellants' claims subsequent to 1999 (Answer, p. 2-35)." Appellants' statement is not false, it is taken directly from the Respondents' Answer in the Pinewood case.

It is clear from Appellants' Complaints, including Pinewood, that the basis of their claims for damages resulted from Respondents' failure to take any action with respect to collection of

the outstanding note due to the Limited Partnership or retrieval of partnership properties between the time the note matured in 1999 and the expiration of the three-year statute of limitations period thereafter in 2002 Paragraph 149 of Respondents' Answer in Pinewood states, in pertinent part "To the extent Plaintiffs claim damages resulting from (c) the failure of the general partners to take action on behalf of the partnership *prior to the 1999 promissory note becoming due*, such claims are barred by the applicable statute of limitations " (Answer, p 29) (Emphasis added) Thus, Respondents clearly limited their reliance on the statute of limitations under their own language in this paragraph to claims relating to their failure to act *prior to the maturity date of the note in 1999* This is exactly what Appellants set forth in their original Statement of the Case

Paragraph 148 of Respondents' Answer states that "*one or more* of Plaintiffs' claims are barred by the applicable statutes of limitation " (Answer, p 29, Emphasis added) This paragraph clearly does not, as represented by Respondents, specifically apply to *all* claims of Appellants, it applies only to "one or more " Had Respondents intended for the statute of limitations defense to apply to all claims in the Pinewood case, they could have so stated in their Answer, but chose not to do so Appellants' brief accurately - not "falsely" - sets forth Respondents' statute of limitations defense

In discussing Respondents' motion for summary judgment, from which the Pinewood case was specifically excluded, Appellants' brief stated at page 10 "These motions were based on the defense of the statute of limitations and were limited by Respondents to Palmetto, Roosevelt and Orleans *As shown above the statute of limitations defense in Pinewood is limited to Respondents' conduct prior to November 1999* " (Emphasis added) This statement is accurate, and contradicts Respondents' assertion that Appellants falsely represented their position

Respondents' Statement of the Case, in Footnote #2, contains an additional accusation against Appellants which has no basis in fact "Appellants *falsely* claim that Respondents' counsel *insisted* that Appellants postpone the filing of the Palmetto, Orleans, Roosevelt and

Pinewood case ” (Emphasis added) Again, Respondents provide no citation to any portion of Appellants’ brief in support of this accusation, again, Appellants’ brief contains no such statement Instead, it states on page 2 “Following the filing of the Parkview case in 2003, counsel for the parties *agreed* to postpone any discovery in the case, as well as the filing of additional related cases, in order to pursue a universal resolution for all cases involved ” (Emphasis added) This is consistent with the position maintained by the Appellants throughout this litigation In Appellants’ submissions in connection with the hearings held on the statute of limitations issue, correspondence between counsel for the parties was presented These included

- (1) letter of 8-5-03 from Respondents’ counsel, confirming the “status quo” meeting “to discuss settlement of (Parkview), as well as potential causes of action for Orleans Apartment, Palmetto, Roosevelt I and Pinewood This meeting will be for the purposes of attempting to settle all such claims ”,
- (2) letter of 1-19-04 from Appellants’ counsel “Insofar as your *suggestion* of a stay of discovery is concerned, we earlier had *agreed* to stay all matters and keep the *status quo* pending receipt of the appraisals and mediation ” (Emphasis added),
- (3) letter of 6-9-04 from Appellants’ counsel “We had *earlier agreed* to hold all motions, discovery, etc , in abeyance until after the mediation in August (Emphasis added),
- (4) letter of 6-10-04 from Respondents’ counsel to Beaufort County Clerk of Court re pending motion in the Parkview case, stating “*Attorneys for the parties have agreed* to postpone all motions, discovery, etc , pending mediation, Accordingly, if this case, *along with several others that have not been filed*, are not resolved through mediation, we will notify you and have the motion restored for hearing ” (Emphasis added) (See Plaintiffs’ Combined Submissions re Statute of Limitations, Tab 5)

This correspondence corroborates Appellants’ position concerning equitable estoppel and a *de facto* tolling agreement as stated in their briefs, and refutes Respondents’ claim that delay of the filing of the cases in Palmetto, Roosevelt, Orleans and Pinewood was done at the *insistence* of the Respondents Appellants have always maintained that it was by agreement

Respondents’ Statement of the Case also asserts, “The parties attempted to negotiate a compromise of Appellants’ disputed claims and agreed to a mediation, *but nothing more* ” As shown from the above correspondence, this statement is erroneous Furthermore, it is directly

contradicted by the sworn testimony of Respondents' former Vice-President, Mr Patrick Foye

Q Do you recall an agreement that we would hire someone to appraise the properties, and then we would see if we couldn't get a mediation set, that we could kind of negotiate on it at that point?

A I generally remember that, yeah

Q Was it your understanding that when we left the meeting, that basically we were not going to proceed with any discovery in the Parkview case, and *we were going to hold the status quo and filing of anything else* until we could get Mr Denatto (sic) or some appraiser hired and the cases mediated? (Emphasis added)

A I generally remember that *That s my recollection of what happened* (Emphasis added) (See Exhibit 90, Pendarvis Affidavit of 4-22-10)

Mr Foye's testimony shows that Respondents clearly agreed to do more than negotiate and mediate -they agreed " to hold the *status quo* and filing of anything else" until the mediation had taken place In light of these obvious misstatements by Respondents, Appellants decline to adopt their Statement of the Case and rely upon the Statement of the Case in Appellants brief

ARGUMENT

1 Non-Preservation of Appellate Issues Respondents assert objections to certain affidavits submitted to the lower court by or on behalf of Appellants Respondents argue that affidavits submitted after the lower court's sanctions order of 4-6-10 should not have been considered by the lower court, and cannot be considered by this Court (Respondents' brief, p 49) They also now challenge the content and evidentiary viability of the affidavits (*Ibid* p 77-79) A review of the record in this case demonstrates the fallacy of these positions

Affidavits of Davis, Bailey, Rentz, Pike, Hodge, Reynolds, and Hinnant were submitted primarily in support of Appellants' Motion for Recusal and Vacation of Prior Orders, this is acknowledged by Respondents (*Ibid*, p 49, Footnote 48) The recusal/vacation motion was filed March 30, 2010, *prior* to the issuance of the sanctions order An affidavit from Appellants' counsel accompanied that motion, the other affidavits referenced above were submitted in support of the motion thereafter, in accordance with SCRCP 6(d) All were submitted and were before

the lower court *prior* to the issuance of the order denying the recusal/vacation motion

On April 20, 2010, Respondents moved to strike the aforesaid affidavits for the reasons which they now argue in this appeal (Respondents' Motion to Strike 4-20-10, pp 8-10). The lower court never ruled on Respondents' motion with respect to the affidavits. Respondents never filed a motion under SCRCP 59 requesting such a ruling. Furthermore, Respondents have not appealed any portion of the recusal/vacation order. Accordingly, Respondents have not preserved the issue of admissibility and/or viability of these affidavits for appellate review, and they are precluded as a matter of law from asserting this position in these appeals. Cf., *Wilder Corp v Wilke*, 330 S C 71, 76, 497 S E 2d 731, 733 (1998) (an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review), *Atlantic Coast Builders and Contractors LLC v Lewis*, (SC Supreme Court, Opinion # 27044, decided 9-26-11) ("error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure, as noted by the Chief Justice, that we do not reach issues which were not ruled upon by the trial court ")

While Respondents complain that affidavits were submitted by Appellants subsequent to the issuance of the sanctions order on 4-6-10, Respondents nevertheless reference and designate for inclusion in the record on appeal affidavits and exhibits which their counsel submitted after that date. Accordingly, Respondents committed the very acts which they assert were improper on the part of the Appellants. This, of course, is consistent with their "double standard" approach taken in the lower court and addressed in Appellants' briefs.¹

2 Statute of Limitations Issue As stated in the briefs of the parties, the statute of limitations was an issue in the proceedings before the lower court. While Appellants contended

1

Respondents' unique approach that the applicable court rules should be interpreted and applied differently to them than to their opponents continued in these appeals. By gaming the system through a non-meritorious motion to dismiss, Respondents were able to gain a significant advantage of several additional months to prepare their brief, while Appellants have abided by the rules and timely filed their briefs in accordance with such rules.

that it was only one of several issues, Respondents focused on it as being virtually the only issue and persuaded Judge Early to do the same. Notwithstanding that the issue was raised as an affirmative defense by Respondents, they later claimed that the issue was raised by Appellants merely by filing their complaints, this argument was not made until Judge Early issued an order denying their motion for summary judgment based upon the statute of limitations defense (Order of 6-5-08). Appellants' position concerning this argument is generally set forth in their brief and is adopted and incorporated by reference herein (Appellants' brief, pp 9-10).

Respondents made specific assertions in their brief relating to the statute of limitations. They sought dismissal of Appellants' claims in these cases on two (2) separate occasions before Judge Early (*Cf.*, Tr , 10-4-06, pp 35-59 and Tr , 11-19-07, pp 49-86). The arguments presented were essentially the same in both instances, and resulted in denials of Respondents' motions. In the first instance, Judge Early's denial granted Respondents' additional time to complete discovery (Order of 2-13-07, p 1-5), but no similar provision was included in the subsequent denial of summary judgment (Order of 6-5-08, p 1-2). Respondents now assert that these orders resulted from "the murkiness Appellants successfully created as to the facts" (Respondents' brief, p 10). As hereinafter discussed, any "murkiness" was inserted by Respondents' attempts to obtain confidential privileged information from Appellants.

Appellants essentially presented three arguments to the lower court in opposition to Respondents' motions. First, they contended that their claims, if subject to a three-year statute of limitations, were filed within that time period, *i.e.*, within three years of the 2002 date that Respondents had in which to initiate litigation to collect the outstanding notes and/or retrieve partnership properties. Although Respondents claimed that Appellants were on notice of Respondents' misconduct in 2001, Appellants argued that this was not the criteria for accrual of their claims. In essence, Appellants contend that their claims would not accrue until they suffered a legally cognizable injury at the hands of the Respondents, and this did not occur until the time

expired for Respondents to exercise their right to initiate litigation on behalf of the partnership, *Id.*, in 2002. Cf., *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005). Furthermore, contrary to Respondents' assertions, Appellants' retention of counsel in 2000 was not for the purpose of initiating litigation against Respondents based on the claims in the cases *sub judice*, but for the purpose of determining Respondents' intentions concerning recovery of partnership assets.

Second, Appellants contended that the respective partnership documents were executed under seal and thus subject to a 20-year statute of limitations, which clearly had not expired at the time of the filing of these cases. In support of this position, an Affidavit of Laurance Davis dated 9-30-06 was submitted (Tab 6 to Plaintiffs' Combined Submissions re Statute of Limitations). This affidavit contained all pertinent partnership documents in each of these cases as exhibits, together with a detailed explanation and history of each. This evidence clearly established that the documents were executed under seal in accordance with the laws of South Carolina, accordingly, there was ample evidence before the lower court to support Appellants' position in this regard, contrary to Respondents' assertions in their brief.

Third, Appellants contended that Respondents were estopped from asserting the statute of limitations as a defense to Palmetto, Pinewood, Orleans and Roosevelt. Although Respondents, both before Judge Early and in their brief in this Court, continue to deny the essence of the agreement between counsel for the parties, the evidence presented refutes their position. As previously shown herein, Mr. Johnston's correspondence to Appellants' counsel and to the Beaufort County Clerk of Court are at odds with his position that there was no "status quo" agreement. The nail in the coffin, however, came with the deposition testimony of Respondents' own vice-president, Patrick Foye, which completely supports the position of Appellants. Clearly the agreement between counsel called for the withholding of the filing of Palmetto, Orleans, Pinewood and Roosevelt suits until appraisals could be done and the claims in all the cases mediated. When it became apparent that Respondents were not going to proceed with the

appraisals and mediation in good faith, suits were filed in the four cases. The lower court recognized that there were genuine issues of material fact for determination by a jury.

3 Discovery & Privilege Issues The lower court's dismissal of Appellants' claims as part of its Sanctions Order involved consideration of its prior Discovery and Privilege Orders. The record reflects that the underlying litigation was proceeding toward a trial of the Parkview case, with a projected trial date of May 2009. As noted in Appellants' brief, Judge Early had issued conflicting rulings on discovery issues which established a "double standard" for the parties. Appellants' counsel then elected to attempt to obtain evidence *via* depositions. Respondents' counsel tried a different tact. Faced with the denial of their summary judgment motion and an impending trial date only months away, Respondents' counsel elected in August of 2008 to up the ante with new discovery requests which (1) were aimed at securing confidential communications between Appellants and their counsel, as well as materials protected by the work-product doctrine and (2) expanded the discovery emphasis from the Parkview case to include detailed information as to all cases. The second goal succeeded in creating enormous problems for Appellants' counsel, who are both sole practitioners with limited support staff. The first goal created problems for the Appellants themselves, as it invaded their right to privileged communications with their counsel and their right to protection under the work-product doctrine.

Respondents' contentions as to the adequacy of Appellants' discovery responses as to non-privileged issues are refuted by the evidence and record in this case. *Cf.*, Appellants' briefs, pp 22-28, 47-48, Pendarvis Affidavit 4-22-10 with Exhibits. As noted in Appellants' brief, the 2008 discovery requests by Respondents went far beyond the limits of discovery provided by the South Carolina Rules of Civil Procedure. Not only did they seek privileged information not subject to discovery under SCRCP 26, they were incredibly vague and broad, and required Appellants to produce documents over a period of time encompassing several decades. The requests included information relating to changes in tax laws during the 1980s, information relating to subsequent

purchasers of the respective properties with whom Appellants had absolutely no involvement, criminal activities or suspected criminal activity at the properties or in the immediate vicinity of the properties, tax and estate planning information and financial information for the properties during the time they were being managed by Respondents, with no involvement by Appellants (Ex 45, Pendarvis Aff 4-22-10) Respondents' discovery requests exceeded the bounds of discovery permitted under the rules of civil procedure and should not have been sanctioned *Oncology and Hematology Associates of SC v SC D H E C* 387 SC 380, 692 SE2d 920 (2010)

Given the age and health of Appellants, their lack of involvement with the properties once Respondents became general partners, the fact that many of the original partners from whom Appellants received their interests were deceased, the breadth and vagueness of the requests, and the passage of so much time, they were presented with a virtually impossible task (Davis Aff , 4-7-10, pp 2, 18, Hinnant Aff , pp 2, 7-8, Hodge Aff , pp 8-9, Bailey Aff 3-30-10, pp 6, 8) Nevertheless, Appellants produced thousands of pages of documents in response to the discovery requests and informed Judge Early that they had produced everything in their possession or control (Tr 12-9-08, p 37, l 18-24, p 40, l 24- p 41, l 9, p 41, ll 11-22, Tr 8-24-09, p 6, ll 5-7, 17-19, 23-24, p 7-8) Notwithstanding such compliance, Judge Early dismissed their cases based upon their failure to properly respond to Respondents' discovery requests As noted in Appellants' brief, this was clearly an abuse of discretion and was not supported by the evidence

The lower court's dismissal of Appellants' claims for failure to disclose and/or produce information or documents privileged as work-product or confidential communications, as previously discussed in Appellants' brief, also constituted an abuse of discretion As noted in Appellants' brief, both sides sought information relating to communications and documents exchanged between their opponents and their counsel, the difference is that Appellants sought information and documents from counsel retained to represent their limited partnerships in other matters, while Respondents sought information and documents from counsel retained to represent

Appellants in the cases *sub judice* Judge Early stated that he did not “have the time and resources to go through all of the attorney-client documents,” and referred the privilege issue to the Honorable Gary E. Clary, as “Special Master ” (Appellants’ brief, p. 18). The order appointing Judge Clary is entitled, “Order Appointing the Honorable Gary E. Clary as Special Master for Resolution of Specified Discovery Disputes ” (Order, 12-30-08). The “specified discovery disputes” set forth in the order were the parties’ requests concerning communications with the aforesaid lawyers. The order provided that Judge Clary was to “make his ruling as to whether each such document is subject to discovery and production should be compelled ”. The scope of Judge Clary’s authority was later expanded to include examination of documents from the Bryan Cave law firm, which had not been disclosed by Respondents prior to the entry of the initial order appointing Judge Clary as “Special Master ” (Order, 1-31-09). The latter order also required that Judge Clary “provide this Court with a Report setting forth his findings and conclusions ”.

Judge Clary reviewed each and every document submitted by the parties with respect to the privilege issue, and issued his findings and conclusions on 2-9-09 and 4-15-09. Based on objections of counsel, Judge Clary further amended his findings and conclusions on 4-22-09. The findings and conclusions of Judge Clary specified the documents each party was required to produce. Although Judge Early initially adopted the findings and conclusions of Judge Clary, he later issued, at Respondents’ urging and without reviewing a single document on Appellants’ privilege log, an order which significantly reduced the number of documents Respondents had to produce and greatly increased the number of documents Appellants had to produce. (Order, 7-28-09). Prior to the entry of this order, Appellants informed Judge Early of their belief that the lower court lacked authority to alter the rulings of the Special Master, citing SCRCP 53.

SCRCP 53 relates to “Masters” and “Special Referees ”. Respondents’ brief asserts that this rule does not apply to the findings and conclusions of Judge Clary because the order appointing him referred to him as “Special Master ”. Their position is obviously based upon their

recognition that SCRPC 53 would prohibit the alteration of Judge Clary's findings and conclusions by Judge Early. Appellants believe that, notwithstanding the designation given to Judge Clary by Judge Early, it is obvious that Judge Clary was to make the determination as to the production of the documents claimed to be subject to privilege. Under SCRPC 53, Judge Clary's findings could only be altered by an appellate court, and such rule specifically prohibits referring matters "for the purpose of making a report to the circuit court." Judge Early's alterations of Judge Clary's findings and conclusions were inconsistent with SCRPC 53 and represent an abuse of discretion, accordingly, Judge Early's order of 7-28-09 should be vacated.

The key arguments advanced with respect to production of documents claimed to be privileged were the "at-issue waiver," "common interest" and "divergence" arguments. Judge Early determined that Appellants had waived their claim of privilege by (1) merely filing their complaints and (2) including language in two of the complaints concerning Appellants' claim for damages as a result of delays encountered by conduct of the Respondents. These are discussed in Appellants' brief and the arguments contained therein are incorporated in this reply. Respondents cite various cases to support Judge Early's ruling, but the fact remains that the cases cited do not emanate from the appellate courts of this State, South Carolina has never adopted the theory that the mere filing of a complaint places the statute of limitations at issue so as to impliedly waive the attorney-client privilege as to any information or documents related to that issue. Respondents cite and quote from a decision by a United States Magistrate Judge in *City of Myrtle Beach v. United National Insurance Company*, 2010 US Dist LEXIS 89725 (8-27-10, DSC). Notwithstanding the fact that this is not precedent with respect to this Court, the case is clearly distinguishable from the cases *sub judice*. It involves a claim by a municipality against its insurer for recovery of out-of-pocket costs in an underlying lawsuit, under a theory of bad faith. The Magistrate Judge determined that the insurer had asserted a number of affirmative defenses in its answer which "injected" issues of law and fact contained in the documents for which it

seeks protection” under a privilege argument. The court made it clear that the “bad faith” nature of the underlying claim made the decision unique, because “an insurer’s thoughts and knowledge are at the center of a claim for bad faith.” The court also noted that the insurer’s attorneys had communicated and corresponded with the City in connection with the nature and merits of the underlying suit. Under these facts, the Magistrate Judge concluded that the insurer had waived the attorney-client privilege.

Ironically, *City of Myrtle Beach* actually undermines Respondents’ positions in several key areas. First, the decision states, “The only exception to the attorney-client privilege recognized by the South Carolina Supreme Court includes communication in furtherance of tortious or fraudulent conduct.” (Citing *State v. Doster*, 284 SE2d 218 (1981)). This is exactly the exception Appellants asked the lower court to adopt as part of their requests to get communications between Respondents and counsel hired for the partnerships. Second, the decision focused upon the “special relationship between an insurer and its insured,” comparing it to a “fiduciary relationship.” Again, this mirrors the position of Appellants in the lower court when they sought the aforesaid communications. It undermines the “divergence of interest” theory adopted by the lower court as a basis for rejecting Appellants’ request for the aforesaid communications. Third, the decision rejected the “mere filing” waiver theory adopted by the lower court, stating, “There is no per se waiver of the attorney-client privilege simply by a plaintiff making allegations of bad faith.” In short, *City of Myrtle Beach* supports Appellants’ position in the lower court with respect to communications between Respondents and partnership counsel.

As discussed in Appellants’ brief, there is no basis under South Carolina law for the “divergence” theory adopted by the lower court in order to avoid production of the communications between Respondents and partnership counsel. Respondents owed a continuing fiduciary duty to Appellants which would not be obviated simply because they chose to engage in conduct which placed their interests above those of Appellants, indeed, the very act of doing

so was a breach of their fiduciary duty For the lower court to hold, as did Judge Early, that a generalized threat of litigation by a single limited partner (Mr Weinberg) in a single limited partnership (Roosevelt) at a time when the present claims could not possibly have accrued because the underlying properties had not even been sold (1998) constitutes such a divergence of interest as to insulate Respondents from their fiduciary duty is mind-boggling It is clearly an abuse of discretion and is unsupported by the law of this State (Appellants' brief, p 19)

4 Disqualification/Recusal Issue Confronted with the overwhelming evidence of lack of full disclosure of the extrajudicial relationships existing between Judge Early, Respondents' counsel of record, and members of their families, Respondents' brief seeks to minimize the role of Respondents' counsel Rosen and Infinger in the lower court (Respondents' brief, p 71) They note that Mr Infinger "appeared only once in court" and that neither Ms Rosen nor Mr Infinger signed any pleadings, letters, discovery, or documents filed with the court or Clerk " (*Ibid*) What Respondents fail to state to this Court is that Mr Infinger and Ms Rosen were consistently listed as counsel for Respondents in documents presented to the lower court, and made no attempt to move before the lower court to be relieved as counsel, indeed, they did not seek to be removed as counsel of record until these appeals were filed and pending in the Appellate Courts (*Cf* , Respondents' Response to Discovery dated 5-27-08, Respondents' brief dated 6-30-08, Consent Order dated 1-31-09) They remained counsel of record until relieved by this Court on 5-5-11

The listing of Mr Infinger and Ms Rosen as counsel of record for Respondents, coupled with Respondents' new claim that Mr Infinger and Ms Rosen had very little involvement in the case, presents a perplexing dilemma for Respondents If, as now contended by Respondents, Rosen and Infinger had no involvement in these cases since January, 2009, why did they remain counsel of record until the matters were no longer before Judge Early? Perhaps more importantly, if their involvement was as minimal as now contended by Respondents, why were they ever listed

as counsel of record at all? Were Mr Johnston, Mr Vick and Mr Belcher not able to represent Respondents without the assistance of Mr Infinger and Ms Rosen? If so, why was their involvement at the minimal level now claimed by Respondents? What, *other than their association with Judge Early*, did these attorneys bring to the table? Why was it important for them to remain counsel of record as long as the cases were pending before Judge Early? Unfortunately, the answers to these questions remain unknown, as Judge Early specifically denied Appellants' motion to have these attorneys make a full disclosure on the record and for limited discovery concerning this aspect of the case. A reasonable person, presented with these facts and resulting unanswered questions, would certainly have reason to question the judge's impartiality.

Respondents' brief attempts to belittle the nature and number of relationships between Judge Early, Respondents' counsel and members of their families. In so doing, the brief erroneously seeks to convey the impression that Judge Early made an adequate disclosure of these relationships throughout the litigation, this is simply not true and is not corroborated by the record. For example, Respondents assert, with respect to the Ross/Rosen wedding officiated by Judge Early, that "the bride's parents provided accommodations *to the entire wedding party*, which included Judge Early" (Respondents' Brief, p. 71, emphasis added). Respondents cite a reference in the transcript of the 3-29-10 hearing as support for their statement. A review of the transcript cited, however, shows that Judge Early's comments only related to accommodations provided to himself and members of his family, and make no reference to accommodations provided for "the entire wedding party." The attempt to lessen the financial benefit provided to Judge Early or his family by or on behalf of Respondents' counsel is not supported by the record.

The relationships between Judge Early, Respondents' counsel and members of their families are specifically detailed in Appellants' brief. Any reasonable person would view these relationships as creating an appearance of impropriety or a serious risk of actual bias, particularly when coupled with the facts that (1) Judge Early never disclosed them on the record until

Appellants moved that he do so, (2) the disclosure which he did make on the record, as noted in Appellants' brief, was either incomplete or inaccurate, (3) Judge Early declined to require Respondents' counsel to make a disclosure of the relationships under oath, and (4) Judge Early refused Appellants' request to conduct limited discovery with respect to these relationships

Respondents' brief relies extensively upon the requirement of establishing actual bias or prejudice in order for a party to prevail on a motion for disqualification or recusal (Respondents' brief, p 73-77) In denying the motion for recusal, Judge Early adopted Respondents' position that a showing of actual bias or prejudice was required (Order, 10-7-10, pp 1-5) Appellants' brief cited the Code of Judicial Conduct and the United States Supreme Court case of *Caperton v Massey*, 129 S Ct 2252 (2009) as authority for the proposition that the judge's ruling was based upon an error of law, Respondents understandably seek to minimize or distinguish these authorities (Respondents' brief, p 77-77) The fact remains, however, that the imposition of the requirement of demonstrating actual bias or prejudice deprives most litigants of any realistic ability to effect the recusal or disqualification of a judge As such, this requirement is directly at odds with the language of both the Code of Judicial Conduct and *Caperton*

While Respondents seek to limit the holding in *Caperton* to its specific facts, and rely almost exclusively upon language in the case referencing an "average judge," this Court should reject this position and should follow the requirements of *Caperton* In this regard, a more detailed analysis of the *Caperton* decision and the Code of Judicial Conduct is warranted Justice Kennedy's opinion in *Caperton* held that an appellate judge in West Virginia was disqualified on constitutional due process grounds from sitting on a case involving a financial contributor to his election campaign Respondents rely upon the fact that the campaign contribution was significant, i e , \$3,000,000 00 (Respondents' brief, p 76) However, the amount involved was not *per se* determinative of the court's decision Indeed, the court specifically adopted language from one of its earlier decisions, requiring judges "to hold the balance nice, clear and true" and

to disqualify themselves when presented with “a possible temptation” to deviate from this standard *Caperton supra*, at 2264, quoting *Tumey v Ohio*, 273 US 510, 532 (1927) *Tumey* involved only \$12 00 in financial benefit, yet found that lack of disqualification by the affected judge resulted in a denial of constitutional due process. Noting that the small amount involved would probably not affect the judgment of “men of the highest honor,” *Tumey* nevertheless required disqualification for “every procedure which would offer a possible temptation to the average man as a judge which might lead him not to hold the balance nice, clear and true.” *Tumey*, at 532. Whether or not Judge Early’s acceptance of financially beneficial favors by or on behalf of Respondents’ counsel or members of their families actually influenced his decisions in these cases is immaterial in light of the decision in *Caperton*, all that need be shown is a likelihood that he would “feel a debt of gratitude” to that party. *Caperton supra*, at 2262. As noted in Appellants’ brief, Judge Early felt enough of “a debt of gratitude” to Mr. Johnston’s brother for inviting him on the fishing trip that he took him and his wife to dinner.

Caperton and *Tumey* both represent disqualifications required under the due process clause of the United States Constitution. *Caperton* specifically adopts the Code of Judicial Conduct language providing for judicial disqualification where there is “an appearance of impropriety,” proof of actual bias, prejudice or misconduct is not required. As noted in Appellants’ brief, an objective “reasonableness” test supplants the subjective requirement of actual bias or prejudice heretofore required by the appellate courts of this State. Appellants’ position in this regard is supported by legal scholars and the American Bar Association.

As previously discussed in Appellants’ brief, Judge Early’s order denying Appellants’ motion for recusal likened his situation to that involving another judge, an obvious reference to the highly publicized case involving former Family Court Judge Segars-Andrews. As pointed out in Appellants’ brief, such reference demonstrates an abuse of discretion for consideration of matters outside the record, it also provides insight into the present disqualification/recusal issue.

South Carolina Law Professor Nathan M. Crystal suggested in 2010 that, in light of the Segars-Andrews case, the South Carolina Supreme Court should “reconsider the prejudice standard for review of disqualification decisions.” Crystal, *The Segars-Andrews Case - Looking to the Future*, S C LAW, May, 2010 at 8. Professor Crystal specifically noted, as detailed in Appellants’ brief, that “prejudice is almost impossible to prove.” *Ibid*

Professor Crystal’s suggestion is amplified by the American Bar Association’s (ABA) Standing Committee on Judicial Independence’s report to the House of Delegates in May, 2011. In that report, “the American Bar Association urges states to establish clearly articulated procedures for judicial disqualification determinations, and prompt review by another judge or tribunal of denials of requests to disqualify a judge.” The ABA specifically references the *Caperton* decision, as well as its own “Judicial Disqualification Project,” which began in 2007, and is consistent with Appellants’ position. The report specifically approves the objective test for recusal set forth in the Code of Judicial Conduct which was adopted in *Caperton*, and notes, “Approximately 10 states have proposed new judicial disqualification rules since *Caperton* was handed down.” *Ibid*, p. 2, Fn. 6. Commenting on the need to enhance the public’s perception of a fair and impartial court system, the report states

Appearances matter because the public’s perception of how the court’s are performing affects the extent of its confidence in the judicial system. And public confidence in the judicial system matters a great deal. Public confidence in our judicial system is an end in itself. *Ibid*, p. 2, Fn. 7, quoting from ABA, *Justice in Jeopardy: Report of the Commission on the 21st Century Judiciary*, 10 (2003).

The ABA report specifically discusses *Caperton* and its rejection of the actual bias or prejudice requirement adopted by Judge Early, finding that an “objective risk of actual bias” represents a “constitutionally intolerable” situation, requiring disqualification. *Ibid*, p. 3. The ABA report provides recommended changes for states which have imposed the “actual bias or prejudice” requirement for recusal or disqualification. The report also references *Caperton*’s holding that “the due process clause demarks only the outer boundaries of judicial

disqualifications,” its favorable references to the Code of Judicial Conduct as “maintaining the integrity of the judiciary and the rule of law,” and its distinguishment of the “constitutional floor” established by the due process clause versus the “ceiling set by common law, statute or the professional standards of the bench and bar ” *Ibid*, quoting *Caperton* at 2266 and 2267 and *Bracy v Gramley*, 520 U S 899, 904 (1997) Thus, the report recognizes, as does *Caperton*, that the Code of Judicial Conduct requires less of a showing and, *a fortiori* provides greater protection to litigants than the higher standard required to establish a due process violation

The ABA report makes certain suggestions to states, such as South Carolina, which will need to modify their recusal/disqualification requirements in light of the *Caperton* decision The report recognizes as a worst case scenario the situation existing in the cases *sub judice* whereby “a variety of substantive or procedural matter (e g motions to dismiss, discovery disputes) may be decided by a judge who, it later turns out, should not be presiding over the case ” *Ibid* , p 6 In order to avoid such a situation, the report notes that “disqualification can be effected in 36% of the States by so-called ‘peremptory challenges ’ Such challenges permit disqualification without the requirement of any showing of cause Once the challenge is filed, substitution of another judge follows automatically with no further proceedings required ” *Ibid* The report does not reject disqualification for cause in non-peremptory challenge states but suggests as part of such procedure that a movant submit an affidavit together with a motion, if the affidavit is in proper form and meets the procedural requirements in effect, “the judge must grant the motion ” *Ibid*, p 8 Under this arrangement, the motion for disqualification “must be predicated on the default standard [as set forth in the Code of Judicial Conduct] (i e , that the judge’s impartiality may reasonably be questioned) or on specific factual basis for disqualification ” *Ibid* These include those set forth in the Code of Judicial Conduct, including “disqualification where the judge has a bias concerning a party’s lawyer ” *Ibid*

Directly on point to this discussion is a recent article by South Carolina School of Law Professor John P. Freeman. Freeman, *Appearance of Impropriety Recusal and the Segars-Andrews Case*, 62 S.C.L. Rev. 485. Professor Freeman specifically details the decision in *Caperton*, its effect upon the disqualification requirements in South Carolina in general, and the Segars-Andrews case in particular. As Professor Freeman notes, *Caperton* illustrates “that a judge’s failure to recuse can have due process ramifications (and) also calls into question the legal test used by South Carolina’s appellate courts.” *Ibid*, p. 487.

Professor Freeman states, “Under the appearance of impropriety test, it is well established and understood that proof of actual misconduct is not required. The rationale for keeping the admittedly vague appearance standard for judicial conduct is that ‘judges represent the system as a whole and must be both right-acting and right-appearing.’” Recognizing *Caperton*’s adoption of this test, Professor Freeman discusses Justice Kennedy’s recitation of “objective standards that require recusal when the probability of actual bias on the part of the judge is too high to be constitutionally tolerable.” *Ibid*, p. 490. Under *Caperton*, proof of a high probability or serious risk of actual bias, rather than actual bias itself, “not only justifies recusal, but also provides grounds to recuse under the Due Process Clause.” *Ibid*, p. 491. Freeman points out that *Caperton* holds that the showing needed to establish a due process violation, while less than the “actual bias or prejudice” requirement currently imposed by South Carolina, is still greater than the showing required under the reasonableness standard of the Code of Judicial Conduct. Justice Kennedy points out that states adhering to the reasonableness standard will normally resolve recusal disputes under that approach as opposed to a due process argument. “Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.” *Caperton*, *supra*, at 2267.

In terms of the effect of *Caperton* upon the disqualification procedures used in South Carolina, Professor Freeman analyzed the Segars-Andrews case to illustrate the fact that South

Carolina's "actual bias or prejudice" requirement runs contrary to the holding in *Caperton*

"*Caperton* will have a direct impact on appellate standards that require proof of actual bias in order to overturn a lower court judge's refusal to recuse. It directly calls into question the validity of *Simpson v Simpson*² which held that a complainant must make a showing of actual prejudice in order to overturn a trial court judge's refusal to recuse. *Caperton* rejects any requirement that a party present on appeal some proof of actual bias or prejudice in order to win a reversal premised on a lower court judge's failure to recuse. This result, tied to due process requirements, plainly amounts to lowering the bar for proof of unethical conduct. Unquestionably, proving that a judge is subject to a serious risk of bias is far easier than proving that the judge's ruling actually was affected by bias.

Since proof of a serious *risk* of judicial bias establishes a due process violation under *Caperton*, the need for a showing of *actual* prejudice in order to win a recusal case in South Carolina is a requirement that has in effect been overruled. This result is only fair. After all, why should a litigant whose trial has been tainted by the judge's violation of the appearance of impropriety standard have to prove something more than that in order to prevail on appeal? *Ibid*, pp. 494-495.

The Freeman article discusses the Segars-Andrews situation in great detail. The Judicial Merit Selection Commission, notwithstanding that the South Carolina Court of Appeals upheld Judge Segars-Andrews' decision not to recuse herself, nevertheless determined that she should have done so in order to avoid an appearance of impropriety. Specifically, the Commission determined that, as contended by Appellants in these cases, there should have been a "full and prompt disclosure to the parties who then would have had a right to agree or disagree on remittal of disqualification." *Ibid*, p. 506. It was noted that, when a disclosure was finally made, it was done much later than it should have been, thus aggravating the perception of impropriety. The Commission's decision was appealed to this Court, which denied the judge's request for relief. *Segars-Andrews v. Judicial Merit Selection Commission*, 387 SC 109, 691 S.E.2d 453 (2010).

The Commission adopted the objective reasonableness test stated in the Code of Judicial Conduct and mandated in *Caperton*. Importantly, "all members of the Commission concluded that there was an appearance of impropriety in Judge Segars-Andrews's handling of Mr. Simpson's divorce case." *Ibid*, p. 510. The comments of Commission Chairman Senator Glenn

² 377 SC 519, 660 S.E.2d 274 (Ct. App. 2008).

F McConnell are particularly informative

We cannot discount what Mr Simpson reasonably believes, especially when the circumstantial evidence could readily justify that belief Any reasonable person in the public in similar circumstances could also believe that justice in this case was not administered fairly This is the test enunciated in the commentary to Canon 2A This appearance of impropriety leads to lack of faith in the system, and the Commission must endeavor to ensure that the public believes that justice will be administered in an even manner without regard to who appears in the court or who represents them *Ibid* , p 509-510

The “appearance of impropriety” test employed by the Commission, embraced by the Code of Judicial Conduct and mandated by the United States Supreme Court is the proper test for determining disqualification or recusal issues Contrary to the assertions of Respondents, which were adopted by Judge Early, proof of actual bias or prejudice should not be required As demonstrated in Appellants’ brief, there is ample evidence of such actual bias or prejudice

5 Misrepresentations On numerous instances, Respondents have asserted in their brief that Appellants have mis-characterized and/or misrepresented evidence to this Court and to the lower court Appellants vigorously dispute these assertions On pages 6 and 7 of their brief, Respondents assert, “Appellants’ attorney was well aware of the tolling agreements *and suits*” filed by Respondents’ counsel Johnston with respect to the Pinewood case (Emphasis added) In support of this assertion, they reference Exhibit G of Johnston Affidavit dated 6-7-10 An examination of that document, as well as the other documents submitted to the lower court by Respondents concerning this issue, demonstrates that Mr Johnston did not inform counsel for Appellants of the existence of the two suits which he had filed until 11-14-07, during the deposition of the 30(b)(6) witness in that case (Respondents’ Memorandum dated 6-15-10 (Footnote #15), Affidavit of Johnston 6-7-10, Exhibit G) While Mr Johnston informed Appellants’ counsel of his intent “to obtain an additional extension of the Tolling Agreement” in prior correspondence, he never mentioned the filing of the suits until 11-14-07, *two years after the last of the suits had been dismissed*

Respondents go to great lengths in their brief attempting to justify the conduct of their

counsel with respect to the ultimate sale of the Pinewood property (Respondents' Brief, pp 5-8) While they reference certain negotiations entered into on behalf of the partnership by Mr Johnston, they fail to mention the numerous continuing requests for information concerning those negotiations made to Mr Johnston by Appellants' counsel, as well as the lack of information provided with respect to those requests (Ex O to Johnston Affidavit 6-7-10) They also fail to note that the ultimate sale of the property was for less than the appraised value (Letter of 6-8-04, Tab 5, Plaintiffs' Combined Submissions Re Statute of Limitations 11-19-07, Ex N, Johnston Affidavit 6-7-10) Irrespective of these omissions, however, Appellants maintain that the filing of the lawsuits by Mr Johnston represents knowledge on the part of Respondents as to exactly what should have been done in each of these cases - counsel retained to represent the various partnerships for the purpose of retrieving partnership assets should have timely instituted litigation in order to accomplish that purpose The problem with the Pinewood lawsuits instituted by Mr Johnston is that Respondents obviously never intended to pursue the claims set forth in the lawsuits As shown in Appellants' brief, neither of the lawsuits were ever served after having been filed and were ultimately voluntarily dismissed by Respondents' counsel Most importantly, the lawsuits were dismissed nearly two years before the property was ultimately sold or before Respondents' counsel informed Appellants of their existence During this period of time, the partnership lost the negotiating advantage which would have been available under the two lawsuits, and the evidence indicates that the appraised value of the property, which was obtained by Respondents, had declined from \$900,000 00 to \$525,000 00 *Ibid*

One of the more egregious misrepresentations made by Respondents in their brief to this Court deals with their attempt to discredit Appellants' assertions relating to the management fee kickback scheme employed by Respondents with respect to various properties, including those involved in these appeals (Respondents' brief, p 78-79) Specifically, Respondents make the following assertion "None of the properties here were involved, nor were any Respondents,

except as a result of the subsequent acquisition of NHP ” *Ibid* , p 79 This statement is incomplete and misleading, as shown by the evidence submitted in the lower court, prior submissions to this Court, and Respondents’ own documents (Davis Affidavit 4-7-10, p 19-20, Appellants’ Return to Respondents’ Motion to Stay Time Limits, etc ,7-25-11, Ex 4, AmReal #015538) This documentation clearly reveals that (1) AIMCO’s subsidiary NHP was receiving management fee kickbacks labeled as “supervisory management fees,” (2) these included partnerships in which NHP affiliates were acting as general partner, and (3) the Parkview, Palmetto, Roosevelt and Orleans partnerships were included in those properties which involved the “supervisory management fees ” (Appellants’ Return to Respondents’ Motion to Stay Time Limits, etc ,7-25-11, Ex 4, AmReal #015538, Ex 2) These documents also clearly support Appellants’ position that Respondents were more concerned with the government’s investigation concerning these illegal fees, and the resulting devastating economic effect which it was having on Respondents’ pending 2530 applications relating to all of their properties, than they were with their fiduciary duties to the Appellants (Von Weise Memo, 8-31-99)

The validity of Appellants’ position was specifically acknowledged in a memo from the Bryan Cave law firm, the same firm hired by Respondents under the guise of recovering assets for these partnerships Appellants’ Return to Respondents’ Motion to Stay Time Limits, etc ,7-25-11, Ex 2) Contrary to Respondents’ assertions in their brief, Appellants have made no misrepresentations concerning the conflict of interest created by Respondents Their statement that Appellants’ position regarding this conflict has “no basis in fact” and “is an enigma” are totally disingenuous Respondents’ inherent conflict between getting themselves out of the criminal and potentially economically devastating situation with HUD over the kickback scheme, on the one hand, and satisfying their fiduciary obligations to Appellants under these limited partnerships on the other, was clearly known to and appreciated by Respondents As Appellants have maintained throughout this litigation, this was the true reason why Respondents declined to

fulfill their fiduciary obligations to Appellants by recovering the subject properties, and why they violated their fiduciary duties of full disclosure concerning their conflict of interest. Indeed, the evidence adduced during discovery in the lower court shows that AIMCO's own employees admitted as much to Boston Financial Group employee Ford Von Weise (Von Weise Memo 8-31-99)

Respondents also have misrepresented Appellants' knowledge and position with respect to the issue of disqualification and/or recusal of Judge Early. On page 70 of their brief, they state, "As the record clearly shows, Appellants were not bothered by Judge Early's 'relationships,' *which they knew about for years*, until he informed them of the impending dismissal of their claims." (Emphasis added.) Contrary to this assertion, the record "clearly shows" exactly the opposite. As shown in Appellants' briefs, as well as the transcript of the March 29, 2010 hearing and Appellants' submissions to the lower court, Judge Early had made no disclosures on the record of any of his relationships with Respondents' counsel, and had only made brief comments off the record concerning his fishing trip with Mr. Johnston's brother, his officiating at the wedding of Ms. Rosen, and his prior relationship with Mr. Infinger. (See Appellants' brief, p. 31-50.) These were clearly not full and complete disclosures, and certainly did not include the close relationship between members of the judge's family and the family of Respondents' counsel (*Ibid*). To claim that Appellants had known about these relationships "for years" is a complete distortion of the record. If Appellants possessed the knowledge represented by Respondents in their brief, and if they "were not bothered" by the implications of such relationships, they would have had no need to request a full disclosure on the record by Judge Early, or to request that Respondents' counsel make a similar disclosure under oath, or to request permission to conduct limited discovery in order to determine the true nature of such relationships. They certainly would not have felt the need to issue a subpoena to the Fripp Island Resort in order to obtain information which they would have already had.

CONCLUSION

For the reasons set forth in Appellants' briefs and this Reply, the sanctions of dismissal of Appellants' cases and imposition of attorneys' fees should be reversed. Furthermore, the other orders of Judge Early which are subject to these appeals should be reversed and/or vacated, as they are clearly the result of abuses of discretion, or are tainted by the bias and prejudice demonstrated with respect to the relationships between Judge Early, Respondents' counsel and members of their families. Finally, in light of the *Caperton* decision, this Court should immediately vacate the "actual bias or prejudice" requirement with respect to disqualification or recusal issues involving judges in this State. As Professor Freeman noted, "*Caperton* performed a great service, making it easier for litigants and reviewing courts to protect against contamination of the judicial process. After *Caperton* it would be incongruous for appellate courts to require litigants attacking a judge's failure to recuse on ethical grounds to provide a greater quantum of proof than what they would need to establish a due process violation. *Caperton* will assist the recusal process by permitting a judge deciding a recusal motion to do the right thing and step aside on appearance grounds without conceding that there are grounds for proving actual bias. This is because *Caperton* instructs that conduct sufficient to cause a judge to 'feel a debt of gratitude' to one side can tip the scale and thereby create an appearance of impropriety." Freeman, *supra*, at 512

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