

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

OCT 30 2014

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

ORIGINAL

Appellant Case No. 2014-000963

Allen Patterson, Steve Tilton, Richard Sendler,
Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis,
Michel Nieri, Allen Patterson Residential LLC, Tilton
Group, Sendler Construction Co., Inc., Privette Enterprises,
Ellis Construction Co., Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter, LLC, on behalf of
themselves and others similarly situated.....Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver,
Tom Markovich, Keith Smith, Jim Gregorie,
individually and as Trustees of the South Carolina
Home Builders Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund.....Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2012-CP-40-04211

RICHLAND COUNTY
FILED
2013 MAR -5 AM 10:19
JEANETTE W. McBRIDE
C.C.P. & G.S.

**ORDER DISMISSING MATTER
WITHOUT PREJUDICE**

This matter came before the Court on Tuesday, September 4, 2012 at 9:30 a.m.. S. Jahue Moore appeared on behalf of the Plaintiffs. Pope Johnson and Dwight Floyd appeared on behalf of the Defendants.

This matter is brought as a class action by members and beneficiaries of the Trust entitled the South Carolina Home Builders Self Insurers Fund.

The Defendants have set forth at least eight separately numbered reasons to dismiss this matter. The Court heard arguments from all parties regarding the motions to dismiss.

ROA-000001

SCANNED

In particular, the Defendants moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involves the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201. That section indicates that "[s]ubject to the provisions of Section 62-1-302(d), the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts." Based upon this section, the Court is concerned that this matter should be initially filed in Probate Court rather than Circuit Court. The South Carolina Code also indicates that a matter of this type may be removed from Probate Court to Circuit Court under South Carolina Code Section 62-1-302(d)(4).

The Court is concerned regarding the matters of alleged lack of subject matter jurisdiction. The Court is concerned that this matter could be litigated in full and the subject matter question raised later. This would lead to a waste of judicial resources.

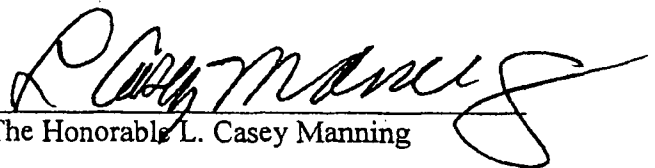
It is clear from the documents submitted to the Court that this dispute concerns a trust. It is also clear that the South Carolina Code at least implies that trust actions should originate in Probate Court.

With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

AND IT IS SO ORDERED.

Columbia, South Carolina

March 4, 2013


The Honorable L. Casey Manning

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE PROBATE COURT
CASE NO.: 2013-GC-40-00069

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis)
Company, Inc., Great Southern Homes,)
And J. Carter, LLC, on behalf of)
themselves and others similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as)
Trustees of the South Carolina Home)
Builders Self Insurers Fund, and as the)
South Carolina Home Builders Self)
Insurers Fund,)

Defendants.)

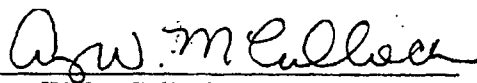
**ORDER GRANTING MOTION
FOR REMOVAL**

FILED
2013 APR 22 AM 11:17
AMY W. MCCULLOCH
PROBATE JUDGE
RICHLAND COUNTY, S.C.

THIS MATTER CAME BEFORE THE COURT by way of a Motion to Remove the Trust Action to Circuit Court filed with the Richland County Probate Court of April 9, 2013 by S. Jahue Moore and James Edward Bradley, attorneys for the Plaintiffs, pursuant to SC Code of Laws § 62-1-302 (d) (4).

THEREFORE, IT IS HEREBY ORDERED that Plaintiff's April 9, 2013 Motion to Remove shall be granted. The above captioned matter shall be removed from the Richland County Probate Court to the Richland County Court of Commons Pleas.

IT IS SO ORDERED.


Amy W. McCulloch
Richland County Probate Judge

April 22, 2013
Columbia, South Carolina

ROA-000003

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard
Sendler, Lincoln Privette, Marc Ellis,
Joey Carter, Barry Davis, Michel Nieri,
Allen Patterson Residential LLC, Tilton
Group, Sendler Construction Co., Inc.,
Privette Enterprises, Ellis Construction
Company, Inc., The Barry Davis Company,
Inc., Great Southern Homes, and J. Carter,
LLC, on behalf of themselves and others
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2013-CP-40-02655

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

JEANETTE M. McNEEL
Clerk of Court
2013 NOV 8 PM 12:50

2013 NOV 8 PM 12:50

FILED

INTRODUCTION

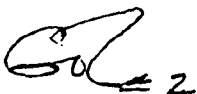
This matter came before the Court on October 9, 2013. The Defendants moved to dismiss the lawsuit on the basis that the lawsuit is a shareholder derivative action and does not comply with Rule 23(b)(1) of the Rules of Civil Procedure governing stockholder actions and moved to dismiss on a lack of standing by the Plaintiffs. Defendants also moved to dismiss the breach of contract and breach of contract accompanied by a fraudulent act claims. Based upon the arguments of the parties and the materials submitted to the Court, the Court denies the Defendants' motion.

GT

DISCUSSION

In September 1995, the South Carolina Home Builders Association created a trust, the South Carolina Home Builders Self Insurers Fund, to administer worker's compensation benefits for members of the South Carolina Home Builders Association. The Plaintiffs are beneficiaries of this trust and have sued the Defendants for breach of their duties as trustees. The matter was originally brought in February 2012 as case number 2012-CP-32-00757. In that case, the Trustees moved for dismissal on the basis that the Trustees must be sued in Probate Court. Judge Manning granted that motion. The Plaintiffs then sued in Probate Court on April 9, 2013, and the case was removed to Circuit Court. The Defendants have now moved to dismiss on the basis that the new lawsuit is a shareholder derivative action and does not comply with Rule 23(b)(1) of the Rules of Civil Procedure governing stockholder actions. The Defendants also move to dismiss on a lack of standing by the Plaintiffs and move to dismiss the breach of contract claims.

The Plaintiffs have alleged that the Trustees have made significant actions towards dissolving the trust and creating a new insurance company with the proceeds. The new insurance company would be a mutual insurance company of which the Trustees would all be board members. The insurance company would not have any benefit to the beneficiaries of the trust. The assets of the trust would be used to set up a company competing with the trust. The Trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit to the beneficiaries of the trust. The Trustees have not reimbursed the trust for these costs including the use of facilities, the software programs, and the employees.

A handwritten signature in black ink, appearing to be "GOL" followed by a stylized flourish.

Beneficiaries of the trust are subject to personal liability for shortfalls in trust assets. The Plaintiffs allege that if the trust continues to be managed in its current fashion, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk.

I. THE COMPLAINT IS NOT A DERIVATIVE ACTION, AND DOES NOT HAVE TO SATISFY THE PLEADING REQUIREMENTS OF RULE 23(b)(1).

Under South Carolina law, "derivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure." S.C. Code Ann. § 33-7-400 (2013). The applicable rule is South Carolina Rule of Civil Procedure 23(b)(1), Derivative Actions by Shareholders., which states:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law.

SCRCF Rule 23 (b)(1) (emphasis added). To bring a derivative action, a corporation must suffer an injury because of wrongs committed by the officers or directors. Either the corporation or its shareholders can bring the action. Any relief goes to the corporation, not the shareholders. *In re Greenwood Supply Co.*, 295 B.R. 787, 795 (Bankr. D.S.C. 2002).

The Plaintiffs are not shareholders of a corporation. Instead, they are beneficiaries of the trust. A shareholder is a "person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent rights granted by a nominee certificate are on file with a corporation." S.C. Code Ann. § 33-1-400. The Plaintiffs are beneficiaries of the Home Builders Trust. In addition, each beneficiary of the trust is jointly and severally liable for underfunded losses of the Self Insurers Fund. (Affidavit of David Gully, ¶ 13). Under South Carolina law, a shareholder cannot be liable for corporate losses. S.C. Code Ann. § 33-6-220(b).

 3

The Trustees must operate the trust for the beneficiaries' benefit, not for their own benefit or the benefit of a corporation or association.

In addition, the rule only applies to "derivative actions brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association." SCRCF Rule 23 (b)(1) (emphasis added). The trust is not a corporation, and it is not an unincorporated association. It is a trust. Under South Carolina law, trusts are treated separately from unincorporated associations. South Carolina Code Section 12-37-3160(c) defines a legal entity as a "corporation, partnership, limited liability company, unincorporated association, or trust." See also S.C. Code Ann. §§ 27-29-10(3), 37-25-10(2). This illustrates that a trust and an unincorporated association are separate legal entities.

Many South Carolina cases involve actions brought by beneficiaries against trustees in which a derivative action was *not* required: *E.g. Cartee v. Lesley*, 290 S.C. 333, 335, 350 S.E.2d 388, 389 (1986) ("Petitioners are the beneficiaries of a trust administered by [the trustees]. The beneficiaries brought suit against the trustees for negligence and breach of fiduciary duty alleging the estate had been mismanaged."); *Epworth Orphanage v. Long*, 199 S.C. 385, 19 S.E.2d 481 (1942) ("The complaint alleges a cause of action in equity against the executors and trustees of a testamentary trust, all the beneficiaries of said trust being made parties."); *Mayer v. M.S. Bailey & Son*, 347 S.C. 353, 359-60, 555 S.E.2d 406, 409 (Ct. App. 2001) ("we hold that as a minimum the [beneficiaries] had both standing and justiciable rights that a court of equity could protect."); *Rembert v. Gressette*, 318 S.C. 519, 520, 458 S.E.2d 552, 553 (Ct. App. 1995) ("Three beneficiaries . . . opposed the planned distribution of the trust assets and counterclaimed against the trustees...."); *Ramage v. Ramage*, 283 S.C. 239, 243, 322 S.E.2d 22, 25 (Ct. App. 1984) ("[The beneficiaries] brought this action to have the quitclaim deed set aside and to

enforce the terms of the trust.). South Carolina courts allow trust beneficiaries to bring actions against trustees.

The action brought by the Plaintiffs is not a derivative action. The Plaintiffs are not shareholders, and the trust is not a corporation or an unincorporated association. The Plaintiffs are beneficiaries of a trust. Therefore, the Plaintiffs are not bound by the additional pleading requirements of SCRPC 23(b)(1).

Even so, the Plaintiffs have complied with Rule 23(b)(1). This rule requires a verification of the complaint. Each plaintiff has verified the complaint under oath. These verifications were served on the Defendants.

Rule 23(b)(1) also requires that the Plaintiff set forth "the efforts, if any, made" to obtain the action desired. The complaint sets this out as follows:

8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:
 - a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.
 - b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

Plaintiffs' counsel also sent a letter to defense counsel setting forth the relief requested before bringing the suit. It sets out the relief sought in detail as follows:

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.



2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

As a result, the Plaintiffs have complied with Rule 23(b)(1) by stating in detail their request for relief and verifying their complaint.

II. THE PLAINTIFFS HAVE STANDING TO PURSUE THIS LAWSUIT.

To have standing, a plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. There must be a causal connection between the injury and the conduct. Third, it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotations omitted).

For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975). The requirement of standing "is not an inflexible one." *Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d



718, 719 (1976); *Gilstrap v. South Carolina Budget & Control Bd.*, 310 S.C. 210, 213, 423 S.E.2d 101, 103 (1992).

Current membership in an organization is not a requirement for standing. *Davis v. Richland Cnty. Council*, 372 S.C. 497, 499, 642 S.E.2d 740, 741 (2007). In *Davis*, the court found that the Plaintiffs had standing, even though they were no longer members of the Commission at the time they filed for an injunction. Therefore, current membership in the trust is not required for standing purposes. Under the terms of the trust, beneficiaries of the trust are subject to personal liability for any shortfall in trust assets. This liability extends after a membership expires. Therefore, even though some Plaintiffs may not be current members, they are still subject to personal liability and have a concrete, actual injury caused by the actions of the trustees in their management of the trust. Which entities are beneficiaries of the trust may be determined in the course of future discovery. At this time, accepting as true all material allegations of the complaint and construing the complaint in favor of the Plaintiffs, the Plaintiffs have standing to bring this lawsuit.

III. THE TRUST AGREEMENT IS A CONTRACT.

South Carolina courts refer to trust agreements as contracts. See *Klugh v. Seminole Sec. Co.*, 103 S.C. 120, 87 S.E. 644, 647 (1916) ("One of the expressed objects of the *trust contract* was to safeguard the subscribers to the capital stock.") (emphasis added); *Welling v. Crosland*, 129 S.C. 127, 123 S.E. 776, 777 (1924) ("a *contract, called a "Trust Agreement,"* was entered into by and between the subscribers to the syndicate" (emphasis added); *V.P. Randolph & Co. v. Walker*, 78 S.C. 157, 59 S.E. 856 (1907) ("A complaint alleging that money was deposited with defendant in *trust* for plaintiff, subject to his order, and that defendant refused to pay the same, *states a cause of action in contract.*") (emphasis added). The Fourth Circuit Court of Appeals

CSZ

was more direct when it simply stated "all express trusts [are] contractual relationship[s]." *In re Dameron*, 155 F.3d 718, 723 (4th Cir. 1998).

Other courts also agree that trusts fall under contract law principles, and are increasingly referring to trusts and contracts interchangeably. See *Williams v. Interpublic Severance Pay Plan*, 523 F.3d 819, 821 (7th Cir. 2008) ("Trust law honors rather than overrides express contractual language specifying a trustee's powers vis-à-vis a beneficiary."); *Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir. 2000) (calling an ERISA plan a "contract"); *Herdrich v. Pegram*, 170 F.3d 683, 686 (7th Cir. 1999) ("[E]ven a full-fledged trustee need not (indeed, must not) depart from the contractual provisions that the settlor established."), *rev'd*, 530 U.S. 211 (2000); *Gilbert v. Atl. Trust Co.*, No. 04-CV-327-PB, 2006 WL 1049707, at *4 n.6 (D.N.H., Apr. 19, 2006) ("I assume for the purpose of analysis that the revocable trust agreement is in fact a contract."); *In re Vebeliunas*, 252 B.R. 878, 887 (Bankr. S.D.N.Y. 2000) ("It follows that a trust, being a relationship, cannot have an alter ego, which would be akin to saying that someone is the 'alter ego' of a contract."); *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83, 86 (1938) ("In such instances the breach of the trust is in effect and, usually, in fact a breach of contract, express or implied. Actions thereon are necessarily based on the contract and the breach thereof."); *Wachovia Bank & Trust Co. v. Steele's Mills*, 225 N.C. 302, 309-10, 34 S.E.2d 425, 429 (1945) ("This agreement, [a trust], has the status of a contract.")

The Home Builders Trust was a contract between the settlor, the trustees and the beneficiaries. Because the Trustees have breached that trust, the breach of contract claims are valid. In addition, there was also an agreement between the trustees and beneficiaries that the trust would be managed only for the benefit of the beneficiaries. Under South Carolina law, a contract is an obligation which arises from actual agreement of the parties manifested by words,

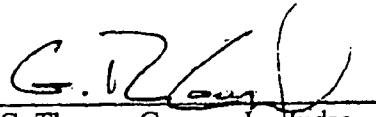
oral or written, or by conduct. *Gaskins v. Blue Cross-Blue Shield of South Carolina*, 271 S.C. 101, 245 S.E.2d 598 (1978). The necessary elements of a contract are an offer, acceptance, and consideration. *Carolina Amusement Co., Inc. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993). This trust agreement necessarily falls under this category. There was an agreement by the Trustees of the Home Builders Trust to operate the trust in a prescribed manner. The Trustees receive consideration for this operation. Therefore, a contract was made between the beneficiaries of the trust and the trustees, and the breach of contract and breach of contract accompanied by a fraudulent act claims are valid.

CONCLUSION

IT IS, THEREFORE, ORDERED that the Defendants' Motion to Dismiss on the basis that the new lawsuit is a shareholder derivative action and does not comply with Rule 23(b)(1) of the Rules of Civil Procedure governing stockholder action is **DENIED**. The Defendants' Motion to Dismiss on the basis of lack of standing by the Plaintiffs is **DENIED**. The Defendants' Motion to Dismiss the breach of contract and breach of contract accompanied by a fraudulent act claims is **DENIED**.

IT IS SO ORDERED.

Columbia, South Carolina
November 8, 2013


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Allen Patterson, Steve Tilton, Richard
Sendler, Lincoln Privette, Marc Ellis, Joey
Carter, Barry Davis, Michel Nieri, Allen
Patterson Residential LLC, Tilton Group,
Sendler Construction Co., Inc., Privette
Enterprises, Ellis Construction Company,
Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter,
LLC, on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Civil Action No. 2013-CP-40-02655

**ORDER (1) GRANTING DEFENDANTS'
MOTION TO RECONSIDER ORDER
DENYING DEFENDANTS' MOTION TO
DISMISS AND (2) DISMISSING
COMPLAINT**

RICHLAND COUNTY
FILED
2014 FEB 11 PM 12:39
JEANETTE W. HOSKINS
C.C.P. & G.S.

This matter came before the Court on January 14, 2014 for a hearing on the Defendants' Motion to Reconsider the Court's Order entered November 12, 2013, denying Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion was brought pursuant to Rule 59(e), SCRPC. For the reasons stated herein, the Court grants the Defendants' Motion to Reconsider, and, therefore, dismisses this action without prejudice pursuant to Rule 12(b)(6), SCRPC.

I.

"A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument

G.I.Z.,

ROA-000013

previously presented.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (citations omitted). The decision whether to grant a motion to reconsider is in the trial court’s discretion. *See, e.g., BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006) (so holding in context of motion under Rule 60(b), SCRCF); *Brown v. Pearson*, 326 S.C. 409, 416-17, 483 S.E.2d 477, 481 (Ct. App. 1997) (so holding in context of motion for summary judgment).

A motion to dismiss pursuant to Rule 12(b)(6) requires this Court to accept as true the well-pleaded facts in the complaint, but the Court need not give any weight to conclusions of law alleged therein. *Jones v. Gilstrap*, 288 S.C. 525, 343 S.E.2d 646 (Ct. App. 1986); *Charleston County School Dist. v. S.C. State Ports Authority*, 283 S.C. 48, 320 S.E.2d 727 (Ct. App. 1984). It is fundamental that a complaint must allege all facts necessary to satisfy each of the legal elements to support a cause of action or it should be dismissed. The motion to dismiss must be granted if the facts alleged in the complaint, and inferences reasonably deducible therefrom, do not entitle plaintiff to the relief sought. *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001) (citing *Jarrell v. Petoseed Co.*, 500 S.E.2d 793, 794 (Ct. App. 1998)).

II.

The Plaintiffs have brought a lawsuit alleging causes of action against the South Carolina Home Builders Self Insurers Fund (the “Fund”) and its Board of Trustees, claiming that misconduct by the Trustees has harmed the Fund. The Fund is supported by the members and pays workers' compensation and medical benefits for which its members become liable under the Workers' Compensation Act. Its members are home builders within this state that have applied for, and been granted, membership in the Fund. The Fund is governed by a Board of Trustees, and operated by a chief administrator and his staff. The Plaintiffs allege that the Fund is a trust

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#2

ROA-000014

and must be administered and regulated according to the laws of South Carolina governing trusts. The Defendants allege that the Fund is not a trust and, if so, a business trust subject to the pleading rules of the South Carolina Rules of Civil Procedure that apply to derivative lawsuits.

A trust is created where there is a declaration of trust, when there is property to which the trust pertains, and when there are named beneficiaries. *Johnson v. Thornton*, 264 S.C. 252, 214 S.E.2d 124 (1975). The Agreement and Declaration of Trust in this case is replete with references to trustees and trustee duties and obligations. There is no reference to, or provisions for, "beneficiary(ies)" in the document.

While the Fund was created by a document called "Agreement and Declaration of Trust," that document does not create a trust entity, but creates the Fund which is:

"... made and executed for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act: to form an overall self insurers fund pursuant to the Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits: to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage: and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building Industry."

Each member pays a predetermined rate for this protection. Moreover, each member is jointly and severally liable for the obligations of the Fund. This is a characteristic of an unincorporated association, as South Carolina Code Section 15-35-170 provides that all members of an unincorporated association are jointly and severally liable for the obligations of the association. *See also Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729 (1955) (same); *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 186 S.E.2d 651 (1936) (same). The funds held by the Trustees are for the protection of its members and the benefit of employees who may be workers' compensation claimants. However, the Plaintiffs and Defendants in this action are not claimants



to the Fund but members who established and maintain the Fund for their protection and the protection of their employees.

Thus, in reconsidering the document as a whole, its purpose, function, and operation, I cannot conclude that the document creates a trust in its commonly recognized form. Based on this, I decide to reconsider my decision of November 12, 2013.

III.

The Defendants' have moved to dismiss the Plaintiffs' Complaint. They argue that this is a derivative action and that it fails to meet the pleading requirement of Rule 23(b)(1), SCRPC. Plaintiffs maintain that their lawsuit is not a derivative action and that the pleading requirements of Rule 23(b)(1), SCRPC, do not apply, or if they do, these requirements were met in paragraph 8 of their complaint.

The allegations and the relief sought by the Plaintiffs confirm that the subject lawsuit is a derivative action. For example, at paragraph 13 of the Complaint, the Plaintiffs allege that their injuries are typical of the claims of the other members. In *Clearwater Trust v. Bunting*, the Supreme Court noted that claims of "identical harm to all shareholders . . . [gives] rise to a classic shareholders' derivative suit." 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006). At paragraph 21 of the Complaint, the Plaintiffs allege that the Fund has been harmed by the removal of \$5 million. At paragraphs 24-28 of the Complaint, the Plaintiffs allege that the Board has misappropriated monetary assets of the fund. In *Davis v. Hamm*, the Court of Appeals noted that "the liability of directors or officers of a corporation for loss to the corporation due to their mismanagement is an asset of the corporation and that any recovery on such a cause of action belongs solely to the corporation." 300 S.C. 284, 288, 387 S.E.2d 676, 678 (Ct. App. 1989). The gravamen of the Plaintiffs' Complaint alleges that the fund has been injured, not that the members have been injured. Accordingly, the Court finds this is a derivative action. *Brown v.*



Stewart, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) ("A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder.").

IV.

Having concluded that the Plaintiffs' lawsuit is derivative, the Court now turns to whether the Plaintiffs have complied with Rule 23(b)(1), SCRCF. This rule provides as follows:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

Rule 23(b)(1), SCRCF.

In *Carolina First Corp. v. Whittle*, the South Carolina Court of Appeals noted that the "protective principles underlying the pleading requirements of Rule 23(b)(1) have long been recognized as important gatekeepers in South Carolina corporate jurisprudence." 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000). To support that proposition, *Carolina First* cited to the 1893 South Carolina Supreme Court decision of *Latimer v. Richmond & D.R. Co.*, 39 S.C. 44, 51-52, 17 S.E. 258, 260-61 (1893). In *Latimer*, the Supreme Court noted that:

[B]efore the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court.

Id.



Turning to modern jurisprudence, *Carolina First* noted that “[d]emand is required in order to assure compliance with the most fundamental principle of corporate governance—directors are answerable to the shareholders and are charged with the duty and responsibility to manage all aspects of corporate affairs.” *Id.* at 188, 539 S.E.2d at 409. Accordingly, a lawsuit brought by shareholders (or, as in this case, members of an unincorporated association) is a “remedy of last resort.” *Id.* at 187, 539 S.E.2d at 408.

The “protective principles” of Rule 23 have been adopted because a proper pre-suit demand alerts the Board so that it may exercise its reasonable business judgment as to whether any corrective action should be taken without litigation. *Id.* at 188, 539 S.E.2d at 409. A plaintiff must allege the details of his pre-suit demand with particularity. “Rule 23 is a departure from the more liberal pleading requirements of Rule 8, SCRCP, in that it requires particularized allegations.” *Id.* at 188, 539 S.E.2d at 409. By pleading with particularity the actions sought by the plaintiff, the efforts he has made to convince the Board to take those actions, and the resulting decision by the Board, the Court is able to exercise its gatekeeping authority. If a demand is rejected by the Board, then the particularized allegations allow the Court to determine whether the Board’s decision deserves deference and, thus, whether a derivative suit should proceed. *E.g., Grimes v. Donald*, 673 A.2d 1207, 1219 (Del. 1996) (noting that if a demand is rejected, “the board rejecting that demand is entitled to the presumption of the business judgment rule unless the stockholder can allege facts with particularity creating a reasonable doubt that the board is entitled to the benefit of the presumption”) (overruled on unrelated grounds related to standard of review).

V.

As noted above, under Rule 23(b)(1) a plaintiff must meet certain pleading requirements in an effort to institute a derivative action. Again, compliance with this rule allows the trial court



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to act as a gatekeeper and determine whether the derivative action should proceed in court. In order for the trial court to make this determination, it may look only to the "four corners" of the Plaintiffs complaint. *Carolina First*, 343 S.C. at 190, 539 S.E.2d at 410. The particularized allegations surrounding the demand requirement must describe the efforts made to demand that the board take the action sought, and they must support an earnest effort to induce remedial action on the part of the board. *Id.* at 189-90, 539 S.E.2d at 410. At a minimum, the demand must identify the alleged wrongdoers, describe the factual basis of the alleged wrongful acts and the harm caused, and request remedial relief. *Id.* at 189, 539 S.E.2d at 409. A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCF must be dismissed pursuant to Rule 12(b)(6). *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339.

A review of the Complaint confirms that the Plaintiffs' have failed to comply with the requirements of this Rule. The Court need look no further than the facts alleged in the Complaint and compare them to the facts alleged in *Carolina First*, which are strikingly similar to those in the case at bar, to find that the pleadings of the Complaint fail to meet the heightened pleading requirements of Rule 23:

1. In *Whittle*, plaintiffs demanded "certain information"; in the instant matter, plaintiffs sent "correspondence to counsel for defendants."
2. In *Whittle*, plaintiffs demanded that "certain action be taken"; in the instant matter, "meetings with counsel for defendants" were held.
3. In *Whittle*, plaintiffs made "supplemental demands"; in the instant matter "Plaintiffs sent correspondence to the Trust."

This Court holds that the Complaint fails to allege with particularity the efforts the Plaintiffs' made to satisfy the pre-suit demand requirements of Rule 23(b)(1). As in *Carolina First*, which was dismissed, the Complaint "does not allege what the [members] demanded and what the Board rejected." Because the Complaint does not comply with Rule 23, the Court is



ROA-000019

unable to exercise its gatekeeping function to determine whether there are grounds for the derivative action to proceed.

During oral argument, the Plaintiffs asserted that on January 30, 2013 they sent a demand letter to the Board setting forth specific demands. The Plaintiffs did not, however, articulate those demands in their complaint, nor did they incorporate that letter into their complaint. Accordingly, the Court may not analyze that letter in ruling on this motion. *Carolina First*, 343 S.C. at 190, 539 S.E.2d at 410. With regard to the January 30, 2013 letter, the Defendants argued that they did not provide a substantive response to the letter because it was sent while awaiting a ruling on their motion to dismiss the previous lawsuit, and that the subject lawsuit was filed before they were able to properly respond.¹ Nevertheless, at oral argument, counsel for the Defendants stipulated that they would accept the January 30, 2013 letter as the Plaintiffs' demand letter and provide a substantive response within a reasonable amount of time.

VI.

The Plaintiffs' Complaint does not comply with the requirements of Rule 23(b)(1), SCRCF. Accordingly, the Court is constrained to grant the motion to reconsider and to dismiss the Complaint without prejudice.

As noted above, at the January 14 hearing, the Defendants stated on the record that the Defendants would accept Plaintiffs' January 30, 2013 letter as a demand under Rule 23, and would respond within a reasonable time. The Court finds that 60 days is a reasonable amount of time to respond to the Plaintiffs' letter. Once the Defendants provide a response to the Plaintiffs'

¹ The subject complaint is the second action brought by the Plaintiffs. The January 30, 2013 letter was sent to counsel for the Defendants while the first motion to dismiss was pending before the Circuit Court. The Circuit Court entered an Order dismissing the first complaint on March 5, 2013; the Plaintiffs filed the subject Complaint on April 9, 2013.



ROA-000020

demand, then, if necessary, the Plaintiffs may pursue whatever legal action they determine is appropriate.

The Complaint is hereby dismissed without prejudice.

IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Circuit Court Judge, 5th Judicial Circuit

February 11, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Allen Patterson, Steve Tilton, Richard Sendler)
Lincoln Privette, Marc Ellis, Joey Carter, Barry)
Davis, Michael Nieri, Allen Patterson Residential)
LLC, Tilton Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction Co., Inc.,)
The Barry Davis Company, Inc., Great Southern)
Homes, and J. Carter, LLC, on behalf of)
themselves and others similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie Weaver, Tom)
Markovich, Keith Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina Home)
Builders Self Insurers Fund, and the South Carolina)
Home Builder Self Insurers Fund,)

Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

Case No. 2013-CP-40-02655

**ORDER DENYING PLAINTIFFS'
MOTION TO RECONSIDER**

FILED
2014 MAR 28 PM 2:27
JAMETIE J. HOSKINS
C.C.P. & G.S.

This matter comes before the Court by way of Plaintiffs' Motion to Reconsider pursuant to Rule 59(e), SCRCF. Specifically, Plaintiffs ask this Court to reconsider its Order (1) Granting Defendant's Motion to Reconsider Order on Motion to Dismiss and (2) Dismissing Complaint filed February 11, 2014.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiffs' Motion under Rule 59(e), SCRCF to Reconsider this Court's Order filed February 11, 2014. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
March 28, 2014


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

ROA-000022

SCANNED

COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Allen Patterson, Steve Tilton, Richard
Sendler, Lincoln Privette, Marc Ellis,
Joey Carter, Barry Davis, and Michel Nieri,
on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

FILED

IN THE COURT OF COMMON PLEAS

2012 FEB 15 7 4:20

C/A No.

2012 CP 3200757

COMPLAINT

2012CP3200757

The Plaintiffs complain of the Defendants as follows:

FOR A FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty and Breach of Trust)

1. The Plaintiffs are citizens and residents of South Carolina.
2. The Plaintiffs are members of the Home Builders Association of South Carolina, Inc.
3. The Plaintiffs are beneficiaries of an Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.
4. The Defendants are the trustees of the South Carolina Home Builders Self Insurers Fund.
5. The Defendants are citizens and residents of South Carolina.

ROA-000023

6. This Court has personal jurisdiction over the parties involved and subject matter jurisdiction over this dispute.

7. The class is so numerous that joinder of all members is impracticable.

8. In particular, the Plaintiffs believe the class consists of between 700 and 900 Plaintiffs.

9. There are questions of law or fact common to the class.

10. In particular, the class of Plaintiffs consists of all beneficiaries under the same trust which is the South Carolina Home Builders Self Insurers Fund.

11. The claims or defenses of the representative parties are typical of the claims or defenses of the class.

12. In particular, the Plaintiffs are members of the South Carolina Home Builders Association and beneficiaries of the South Carolina Home Builders Self Insurers Fund as are all members of the class.

13. The representative parties will fairly and adequately protect the interests of the class.

14. In particular, the representative parties are all home builders who are members of the class and who adequately represent the interests of class members.

15. The relief sought in this matter is injunctive and monetary. The amount in controversy exceeds \$100 for each member of the class.

16. The Plaintiff Class are beneficiaries of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

17. A copy of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund is attached as Exhibit A to this complaint and incorporated into this complaint.

18. The Defendants are trustees under the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

19. The Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust.

20. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.

21. The Trustees did not advise the beneficiaries that the funds could have been returned to them.

22. The Trustees have failed to advise the members of the potential tax consequences of their action.

23. The Trustees have purchased a building as well as expensive software programs for the purpose of creating a member owned insurance company which will convey no benefit on the beneficiaries of the Trust.

24. The Trustees have used trust funds to purchase the building and the insurance software program.

25. The Trustees have used trust funds and assets to hire attorneys, consultants, and other employees for the purpose of setting up a member owned insurance company which will convey no benefit on the members of the Trust.

26. The Trustees have used and intend to use trust assets to pay employees and other costs for setting up the member owned insurance company which will convey no benefit on the beneficiaries of the Trust.

27. The Trustees have taken significant amounts of money out of the Trust for their own benefit by virtue of payments to themselves for unnecessary meetings and other unnecessary payments.

28. The Trustees' acts as alleged above are *ultra vires*.

29. The Trustees have acted in violation of their fiduciary duties to the beneficiaries and of their powers as enumerated in the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

30. As such, the Trustees are personally liable for their actions.

31. In addition, the trustees should not be allowed to use trust assets to fund their defense in this matter as their actions in this matter are *ultra vires* and outside of the powers afforded to them by South Carolina trust law and the trust agreement.

32. As Trustees of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund, the Defendants are charged with a fiduciary duty toward the beneficiaries of the Trust.

33. In line with these fiduciary duties, the Trustees are required to put the interests of the beneficiaries of the Trust above the Trustees' own interest.

34. In addition, the Trustees are required to take all actions involved in the management of the Trust for the best interests of the beneficiaries.

35. In fact, the Trustees have not acted in the best interests of the beneficiaries of the Trust and have breached their fiduciary duties and the Trust itself by virtue of their actions as alleged above.

36. In addition, the Trustees have distributed trust assets for the purpose of setting up a member owned insurance company which will convey no benefits on the members of the Trust.

37. The Trustees have also disseminated untrue information and failed to disseminate necessary information to beneficiaries of the Trust regarding their activities, the benefit of the activities to the Trust beneficiaries, and the amounts of money to which the Trust beneficiaries are entitled.

38. The Trustees' actions as alleged above amount to breach of their fiduciary duties and breach of the trust which was their charge.

39. As a direct and proximate result of the Defendants' breach of their fiduciary duties and breach of the trust agreement, the Plaintiffs have been injured including, but not limited to, loss of funds, attorney fees, harassment and aggravation, loss of trust assets, higher payments into the Trust, and other damages all to their actual damage.

40. The Plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded, enjoining further violations of the fiduciary duties and trust agreement, and awarding the Plaintiffs and the class actual and punitive damages.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract and Trust Agreement)

41. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

42. The Trustees' actions alleged above amount to a breach of the contract and trust agreement as alleged above.

43. As a direct and proximate result of the Trustees' breach of contract and trust agreement, the Plaintiff beneficiaries are entitled to the relief requested above.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)

44. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

45. The Defendants' actions as alleged above amount to a breach of contract accompanied by a fraudulent act.

46. The Defendants' actions that were fraudulent include, but are not limited to:

- a. Disseminating false information to the beneficiaries regarding their actions and the effect of their actions,
- b. Failing to disseminate accurate and complete information to the trust beneficiaries regarding the Trustees' actions and the consequences of their actions; and
- c. Attempting to mislead the trust beneficiaries and hid their actions which are not taken in the best interests of the trust beneficiaries.

47. As a direct and proximate result of the Defendants' breach of contract accompanied by a fraudulent act, the Plaintiffs have been damaged as alleged above.

48. The Plaintiffs are entitled to an order of this Court awarding them their actual damages as requested above as well as punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

49. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

50. The Plaintiffs are entitled to a declaratory judgment in this matter setting forth the rights of the parties.

51. There is a controversy regarding the rights of the parties in this matter over which the Court has jurisdiction to rule.

52. The Plaintiffs request an order of this Court ordering that the Defendants must comply with the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund and their fiduciary duties.

53. In particular, the Plaintiffs are entitled to an order of this Court ordering that the Defendants may not take funds or assets from the trust for the purpose of setting up a member owned insurance company.

FOR A FIFTH CAUSE OF ACTION
(Accounting)

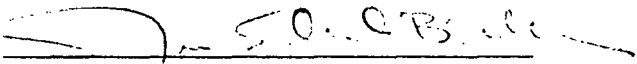
54. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

55. As beneficiaries, the Plaintiffs are entitled to an accounting of all expenditures made by the trust.

56. The Plaintiffs hereby demand an accounting pursuant to South Carolina trust law and common law for all expenditures made by the trust.

WHEREFORE, the Plaintiffs having complained of the Defendants ask that the Court award the relief requested above as well as such other relief as the Court deems fair and equitable.

MOORE, TAYLOR & THOMAS, P.A.

By: 

S. Jahue Moore
James Edward Bradley
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
803-796-9160
Attorney for Plaintiffs

West Columbia, South Carolina

February 16, 2012

FILED
2012 FEB 16 2 42 20
CLERK OF COURT
JULIA CAMPBELL

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson Residential LLC, Tilton)
Group, Sandler Construction Co., Inc..)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter.)
LLC, on behalf of themselves and others)
similarly situated.)

C/A No. 2012-CP-32-00757

Plaintiffs.)

vs.)

AMENDED COMPLAINT

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund.)

Defendants.)

The Plaintiffs complain of the Defendants as follows:

FOR A FIRST CAUSE OF ACTION

(Breach of Fiduciary Duty and Breach of Trust)

1. The Plaintiffs are business entities located in South Carolina.
2. The Plaintiffs are members of the Home Builders Association of South Carolina, Inc.
3. The Plaintiffs are beneficiaries of an Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.
4. The Defendants are the trustees of the South Carolina Home Builders Self Insurers Fund.
5. The Defendants are citizens and residents of South Carolina.

ROA-000031

6. This Court has personal jurisdiction over the parties involved and subject matter jurisdiction over this dispute.

7. The class is so numerous that joinder of all members is impracticable.

8. In particular, the Plaintiffs believe the class consists of between 700 and 900 Plaintiffs.

9. There are questions of law or fact common to the class.

10. In particular, the class of Plaintiffs consists of all beneficiaries under the same trust which is the South Carolina Home Builders Self Insurers Fund.

11. The claims or defenses of the representative parties are typical of the claims or defenses of the class.

12. In particular, the Plaintiffs are members of the South Carolina Home Builders Association and beneficiaries of the South Carolina Home Builders Self Insurers Fund as are all members of the class.

13. The representative parties will fairly and adequately protect the interests of the class.

14. In particular, the representative parties are all home builders who are members of the class and who adequately represent the interests of class members.

15. The relief sought in this matter is injunctive and monetary. The amount in controversy exceeds \$100 for each member of the class.

16. The Plaintiff Class are beneficiaries of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

17. A copy of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund is attached as Exhibit A to this complaint and incorporated into this complaint.

18. The Defendants are trustees under the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

19. The Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust.

20. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.

21. The Trustees did not advise the beneficiaries that the funds could have been returned to them.

22. The Trustees have failed to advise the members of the potential tax consequences of their action.

23. The Trustees have purchased a building as well as expensive software programs for the purpose of creating a member owned insurance company which will convey no benefit on the beneficiaries of the Trust.

24. The Trustees have used trust funds to purchase the building and the insurance software program.

25. The Trustees have used trust funds and assets to hire attorneys, consultants, and other employees for the purpose of setting up a member owned insurance company which will convey no benefit on the members of the Trust.

26. The Trustees have used and intend to use trust assets to pay employees and other costs for setting up the member owned insurance company which will convey no benefit on the beneficiaries of the Trust.

27. The Trustees have taken significant amounts of money out of the Trust for their own benefit by virtue of payments to themselves for unnecessary meetings and other unnecessary payments.

28. The Trustees' acts as alleged above are *ultra vires*.

29. The Trustees have acted in violation of their fiduciary duties to the beneficiaries and of their powers as enumerated in the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

30. As such, the Trustees are personally liable for their actions.

31. In addition, the trustees should not be allowed to use trust assets to fund their defense in this matter as their actions in this matter are *ultra vires* and outside of the powers afforded to them by South Carolina trust law and the trust agreement.

32. As Trustees of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund, the Defendants are charged with a fiduciary duty toward the beneficiaries of the Trust.

33. In line with these fiduciary duties, the Trustees are required to put the interests of the beneficiaries of the Trust above the Trustees' own interest.

34. In addition, the Trustees are required to take all actions involved in the management of the Trust for the best interests of the beneficiaries.

35. In fact, the Trustees have not acted in the best interests of the beneficiaries of the Trust and have breached their fiduciary duties and the Trust itself by virtue of their actions as alleged above.

36. In addition, the Trustees have distributed trust assets for the purpose of setting up a member owned insurance company which will convey no benefits on the members of the Trust.

37. The Trustees have also disseminated untrue information and failed to disseminate necessary information to beneficiaries of the Trust regarding their activities, the benefit of the activities to the Trust beneficiaries, and the amounts of money to which the Trust beneficiaries are entitled.

38. The Trustees' actions as alleged above amount to breach of their fiduciary duties and breach of the trust which was their charge.

39. As a direct and proximate result of the Defendants' breach of their fiduciary duties and breach of the trust agreement, the Plaintiffs have been injured including, but not limited to, loss of funds, attorney fees, harassment and aggravation, loss of trust assets, higher payments into the Trust, and other damages all to their actual damage.

40. The Plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded, enjoining further violations of the fiduciary duties and trust agreement, and awarding the Plaintiffs and the class actual and punitive damages.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract and Trust Agreement)

41. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

42. The Trustees' actions alleged above amount to a breach of the contract and trust agreement as alleged above.

43. As a direct and proximate result of the Trustees' breach of contract and trust agreement, the Plaintiff beneficiaries are entitled to the relief requested above.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)

44. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

45. The Defendants' actions as alleged above amount to a breach of contract accompanied by a fraudulent act.

46. The Defendants' actions that were fraudulent include, but are not limited to:

- a. Disseminating false information to the beneficiaries regarding their actions and the effect of their actions,
- b. Failing to disseminate accurate and complete information to the trust beneficiaries regarding the Trustees' actions and the consequences of their actions; and
- c. Attempting to mislead the trust beneficiaries and hid their actions which are not taken in the best interests of the trust beneficiaries.

47. As a direct and proximate result of the Defendants' breach of contract accompanied by a fraudulent act, the Plaintiffs have been damaged as alleged above.

48. The Plaintiffs are entitled to an order of this Court awarding them their actual damages as requested above as well as punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

49. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

50. The Plaintiffs are entitled to a declaratory judgment in this matter setting forth the rights of the parties.

51. There is a controversy regarding the rights of the parties in this matter over which the Court has jurisdiction to rule.

52. The Plaintiffs request an order of this Court ordering that the Defendants must comply with the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund and their fiduciary duties.

53. In particular, the Plaintiffs are entitled to an order of this Court ordering that the Defendants may not take funds or assets from the trust for the purpose of setting up a member owned insurance company.

FOR A FIFTH CAUSE OF ACTION
(Accounting)

54. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

55. As beneficiaries, the Plaintiffs are entitled to an accounting of all expenditures made by the trust.

56. The Plaintiffs hereby demand an accounting pursuant to South Carolina trust law and common law for all expenditures made by the trust.

WHEREFORE, the Plaintiffs having complained of the Defendants ask that the Court award the relief requested above as well as such other relief as the Court deems fair and equitable.

MOORE, TAYLOR & THOMAS, P.A.

By: 

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James Edward Bradley
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West Columbia, SC 29171
803-796-9160
Attorney for Plaintiffs

West Columbia, South Carolina

April 16, 2012

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sandler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sandler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2012-CP-32-00757

SECOND AMENDED COMPLAINT

The Plaintiffs complain of the Defendants as follows:

FOR A FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty and Breach of Trust)

1. The Plaintiffs are business entities and individuals located in South Carolina.
2. The individual Plaintiffs are members of the Home Builders Association of South Carolina, Inc.
3. The corporate Plaintiffs are beneficiaries of an Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

4. The Defendants are the trustees of the South Carolina Home Builders Self Insurers Fund.

5. The Defendants are citizens and residents of South Carolina.

6. This Court has personal jurisdiction over the parties involved and subject matter jurisdiction over this dispute.

7. The class is so numerous that joinder of all members is impracticable.

8. In particular, the Plaintiffs believe the class consists of between 700 and 900 Plaintiffs.

9. There are questions of law or fact common to the class.

10. In particular, the class of Plaintiffs consists of all beneficiaries under the same trust which is the South Carolina Home Builders Self Insurers Fund.

11. The claims or defenses of the representative parties are typical of the claims or defenses of the class.

12. In particular, the Plaintiffs are members of the South Carolina Home Builders Association and beneficiaries of the South Carolina Home Builders Self Insurers Fund as are all members of the class.

13. The representative parties will fairly and adequately protect the interests of the class.

14. In particular, the representative parties are all home builders who are members of the class and who adequately represent the interests of class members.

15. The relief sought in this matter is injunctive and monetary. The amount in controversy exceeds \$100 for each member of the class.

16. The Plaintiff Class are beneficiaries of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

17. A copy of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund is attached as Exhibit A to this complaint and incorporated into this complaint.

18. The Defendants are trustees under the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

19. The Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust.

20. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.

21. The Trustees did not advise the beneficiaries that the funds could have been returned to them.

22. The Trustees have failed to advise the members of the potential tax consequences of their action.

23. The Trustees have purchased a building as well as expensive software programs for the purpose of creating a member owned insurance company which will convey no benefit on the beneficiaries of the Trust.

24. The Trustees have used trust funds to purchase the building and the insurance software program.

25. The Trustees have used trust funds and assets to hire attorneys, consultants, and other employees for the purpose of setting up a member owned insurance company which will convey no benefit on the members of the Trust.

26. The Trustees have used and intend to use trust assets to pay employees and other costs for setting up the member owned insurance company which will convey no benefit on the beneficiaries of the Trust.

27. The Trustees have taken significant amounts of money out of the Trust for their own benefit by virtue of payments to themselves for unnecessary meetings and other unnecessary payments.

28. The Trustees' acts as alleged above are *ultra vires*.

29. The Trustees have acted in violation of their fiduciary duties to the beneficiaries and of their powers as enumerated in the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

30. As such, the Trustees are personally liable for their actions.

31. In addition, the trustees should not be allowed to use trust assets to fund their defense in this matter as their actions in this matter are *ultra vires* and outside of the powers afforded to them by South Carolina trust law and the trust agreement.

32. As Trustees of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund, the Defendants are charged with a fiduciary duty toward the beneficiaries of the Trust.

33. In line with these fiduciary duties, the Trustees are required to put the interests of the beneficiaries of the Trust above the Trustees' own interest.

34. In addition, the Trustees are required to take all actions involved in the management of the Trust for the best interests of the beneficiaries.

35. In fact, the Trustees have not acted in the best interests of the beneficiaries of the Trust and have breached their fiduciary duties and the Trust itself by virtue of their actions as alleged above.

36. In addition, the Trustees have distributed trust assets for the purpose of setting up a member owned insurance company which will convey no benefits on the members of the Trust.

37. The Trustees have also disseminated untrue information and failed to disseminate necessary information to beneficiaries of the Trust regarding their activities, the benefit of the activities to the Trust beneficiaries, and the amounts of money to which the Trust beneficiaries are entitled.

38. The Trustees' actions as alleged above amount to breach of their fiduciary duties and breach of the trust which was their charge.

39. As a direct and proximate result of the Defendants' breach of their fiduciary duties and breach of the trust agreement, the Plaintiffs have been injured including, but not limited to, loss of funds, attorney fees, harassment and aggravation, loss of trust assets, higher payments into the Trust, and other damages all to their actual damage.

40. The Plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded, enjoining further violations of the fiduciary duties and trust agreement, and awarding the Plaintiffs and the class actual and punitive damages.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract and Trust Agreement)

41. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

42. The Trustees' actions alleged above amount to a breach of the contract and trust agreement as alleged above.

43. As a direct and proximate result of the Trustees' breach of contract and trust agreement, the Plaintiff beneficiaries are entitled to the relief requested above.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)

44. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

45. The Defendants' actions as alleged above amount to a breach of contract accompanied by a fraudulent act.

46. The Defendants' actions that were fraudulent include, but are not limited to:

- a. Disseminating false information to the beneficiaries regarding their actions and the effect of their actions,
- b. Failing to disseminate accurate and complete information to the trust beneficiaries regarding the Trustees' actions and the consequences of their actions; and
- c. Attempting to mislead the trust beneficiaries and hid their actions which are not taken in the best interests of the trust beneficiaries.

47. As a direct and proximate result of the Defendants' breach of contract accompanied by a fraudulent act, the Plaintiffs have been damaged as alleged above.

48. The Plaintiffs are entitled to an order of this Court awarding them their actual damages as requested above as well as punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

49. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

50. The Plaintiffs are entitled to a declaratory judgment in this matter setting forth the rights of the parties.

51. There is a controversy regarding the rights of the parties in this matter over which the Court has jurisdiction to rule.

52. The Plaintiffs request an order of this Court ordering that the Defendants must comply with the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund and their fiduciary duties.

53. In particular, the Plaintiffs are entitled to an order of this Court ordering that the Defendants may not take funds or assets from the trust for the purpose of setting up a member owned insurance company.

FOR A FIFTH CAUSE OF ACTION
(Accounting)

54. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

55. As beneficiaries, the Plaintiffs are entitled to an accounting of all expenditures made by the trust.

56. The Plaintiffs hereby demand an accounting pursuant to South Carolina trust law and common law for all expenditures made by the trust.

WHEREFORE, the Plaintiffs having complained of the Defendants ask that the Court award the relief requested above as well as such other relief as the Court deems fair and equitable.

MOORE, TAYLOR & THOMAS, P.A.

By: 

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Attorney for Plaintiffs

West Columbia, South Carolina

June 1, 2012

FILED

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE PROBATE COURT

ACTION No. _____

Allen Patterson, Steve Tilton, Richard
Sendler, Lincoln Privette, Marc Ellis,
Joey Carter, Barry Davis, Michel Nieri,
Allen Patterson Residential LLC, Tilton
Group, Sendler Construction Co., Inc.,
Privette Enterprises, Ellis Construction
Company, Inc., The Barry Davis Company,
Inc., Great Southern Homes, and J. Carter,
LLC, on behalf of themselves and others
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,)

Defendants.)

COMPLAINT

The Plaintiffs complain of the Defendants as follows:

FOR A FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty and Breach of Trust)

1. The Plaintiffs are business entities and individuals located in South Carolina.
2. The individual Plaintiffs are members of the Home Builders Association of South Carolina, Inc.
3. The corporate Plaintiffs are beneficiaries of an Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

FILED
2013 APR -9 PM 1
AMY N. MCCULLOCH
PROBATE JUDGE
RICHLAND COUNTY, S.C.

4. The Defendants are the trustees of the South Carolina Home Builders Self Insurers Fund.

5. The Defendants are citizens and residents of South Carolina.

6. This Court has personal jurisdiction over the parties involved and subject matter jurisdiction over this dispute.

7. This matter concerns the operation and construction of a trust.

8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:

a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.

b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

9. The class is so numerous that joinder of all members is impracticable.

10. In particular, the Plaintiffs believe the class consists of between 700 and 900 Plaintiffs.

11. There are questions of law or fact common to the class.

12. In particular, the class of Plaintiffs consists of all beneficiaries under the same trust which is the South Carolina Home Builders Self Insurers Fund.

13. The claims or defenses of the representative parties are typical of the claims or defenses of the class.

14. In particular, the Plaintiffs are members of the South Carolina Home Builders Association and beneficiaries of the South Carolina Home Builders Self Insurers Fund Trust as are all members of the class.

15. The representative parties will fairly and adequately protect the interests of the class.

16. In particular, the representative parties are all home builders who are members of the class and who adequately represent the interests of class members.

17. The relief sought in this matter is injunctive and monetary. The amount in controversy exceeds \$100 for each member of the class.

18. The Plaintiff Class Members are beneficiaries of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

19. The Defendants are trustees under the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

20. The Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust.

21. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.

22. The Trustees did not advise the beneficiaries that the funds could have been returned to them.

23. The Trustees have failed to advise the members of the potential tax consequences of their action.

24. The Trustees have purchased a building as well as expensive software programs for the purpose of creating a member owned insurance company which will convey no benefit on the beneficiaries of the Trust.

25. The Trustees have used trust funds to purchase the building and the insurance software program.

26. The Trustees have used trust funds and assets to hire attorneys, consultants, and other employees for the purpose of setting up a member owned insurance company which will convey no benefit on the members of the Trust.

27. The Trustees have used and intend to use trust assets to pay employees and other costs for setting up the member owned insurance company which will convey no benefit on the beneficiaries of the Trust.

28. The Trustees have taken significant amounts of money out of the Trust for their own benefit by virtue of payments to themselves for unnecessary meetings and other unnecessary payments.

29. The Trustees' acts as alleged above are *ultra vires*.

30. The Trustees have acted in violation of their fiduciary duties to the beneficiaries and of their powers as enumerated in the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

31. As such, the Trustees are personally liable for their actions.

32. In addition, the trustees should not be allowed to use trust assets to fund their defense in this matter as their actions in this matter are *ultra vires* and outside of the powers afforded to them by South Carolina trust law and the trust agreement.

33. As Trustees of the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund, the Defendants are charged with a fiduciary duty toward the beneficiaries of the Trust.

34. In line with these fiduciary duties, the Trustees are required to put the interests of the beneficiaries of the Trust above the Trustees' own interest.

35. In addition, the Trustees are required to take all actions involved in the management of the Trust for the best interests of the beneficiaries.

36. In fact, the Trustees have not acted in the best interests of the beneficiaries of the Trust and have breached their fiduciary duties and the Trust itself by virtue of their actions as alleged above.

37. In addition, the Trustees have distributed trust assets for the purpose of setting up a member owned insurance company which will convey no benefits on the members of the Trust.

38. The Trustees have also disseminated untrue information and failed to disseminate necessary information to beneficiaries of the Trust regarding their activities, the benefit of the activities to the Trust beneficiaries, and the amounts of money to which the Trust beneficiaries are entitled.

39. The Trustees' actions as alleged above amount to breach of their fiduciary duties and breach of the trust which was their charge.

40. As a direct and proximate result of the Defendants' breach of their fiduciary duties and breach of the trust agreement, the Plaintiffs have been injured including, but not limited to, loss of funds, attorney fees, harassment and aggravation, loss of trust assets, higher payments into the Trust, and other damages all to their actual damage.

41. The Plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded, enjoining further violations of the fiduciary duties and trust agreement, and awarding the Plaintiffs and the class actual and punitive damages.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract and Trust Agreement)

42. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

43. The Trustees' actions alleged above amount to a breach of the contract and trust agreement as alleged above.

44. As a direct and proximate result of the Trustees' breach of contract and trust agreement, the Plaintiff beneficiaries are entitled to the relief requested above.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)

45. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

46. The Defendants' actions as alleged above amount to a breach of contract accompanied by a fraudulent act.

47. The Defendants' actions that were fraudulent include, but are not limited to:

- a. Disseminating false information to the beneficiaries regarding their actions and the effect of their actions,

b. Failing to disseminate accurate and complete information to the trust beneficiaries regarding the Trustees' actions and the consequences of their actions; and

c. Attempting to mislead the trust beneficiaries and hid their actions which are not taken in the best interests of the trust beneficiaries.

48. As a direct and proximate result of the Defendants' breach of contract accompanied by a fraudulent act, the Plaintiffs have been damaged as alleged above.

49. The Plaintiffs are entitled to an order of this Court awarding them their actual damages as requested above as well as punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

50. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

51. The Plaintiffs are entitled to a declaratory judgment in this matter setting forth the rights of the parties.

52. There is a controversy regarding the rights of the parties in this matter over which the Court has jurisdiction to rule.

53. The Plaintiffs request an order of this Court ordering that the Defendants must comply with the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund and their fiduciary duties.

54. In particular, the Plaintiffs are entitled to an order of this Court ordering that the Defendants may not take funds or assets from the trust for the purpose of setting up a member owned insurance company.

FOR A FIFTH CAUSE OF ACTION

(Accounting)

55. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

56. As beneficiaries, the Plaintiffs are entitled to an accounting of all expenditures made by the trust.

57. The Plaintiffs hereby demand an accounting pursuant to South Carolina trust law and common law for all expenditures made by the trust.

FOR A SIXTH CAUSE OF ACTION

58. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

59. The Trust is not being operated for the benefit of its beneficiaries.

60. The beneficiaries' best interests would be served by a termination of the Trust and distribution of its assets to the beneficiaries.

61. Termination of the Trust would best serve its purposes.

62. The Plaintiffs ask that a receiver be appointed and that the Trust be terminated with the assets distributed to the beneficiaries after costs and fees.

FOR A SEVENTH CAUSE OF ACTION

63. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

64. The Plaintiffs ask that their attorney fees be paid by the Defendants or the Trust as the Court deems appropriate pursuant to the South Carolina Declaratory Judgment Act and South Carolina Code Section 62-7-1004.

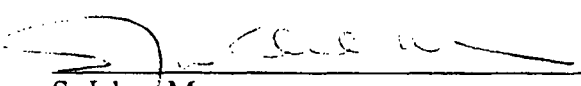
FOR AN EIGHTH CAUSE OF ACTION

65. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

66. Pursuant to the Trust's actions in transferring out Five Million Dollars for the establishment of a competing mutual fund, there is at least Five Million Dollars available to distribute to beneficiaries of the Trust.

67. The Court should award a distribution of excess funds to the beneficiaries of the Trust of at least Five Million Dollars.

WHEREFORE, the Plaintiffs having complained of the Defendants ask that the Court award the relief requested above as well as such other relief as the Court deems fair and equitable.



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Attorneys for Plaintiffs

West Columbia, South Carolina

April 5, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE PROBATE COURT

Allen Patterson, Steve Tilton, Richard)
Sandler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sandler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

ACTION No. 2013-GC-40-69

2013 APR -9 PM 1
AMY W. McCULLOCH
PROBATE JUDGE
RICHLAND COUNTY, S.C.

REMOVAL TO CIRCUIT COURT

YOU WILL PLEASE TAKE NOTICE THAT the Plaintiffs hereby move to remove this
matter to Circuit Court pursuant to South Carolina Code Section 62-1-302(d)(4).

Respectfully submitted,

By: 

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James Edward Bradley
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803-796-9160
Attorney for Plaintiffs

West Columbia, South Carolina

April 5, 2013

ROA-000056

State of South Carolina

Court of Common Pleas

County of Richland

2013-CP-40-02655

Allen Patterson, et al.

:

:

-VS-

:

TRANSCRIPT OF RECORD

:

Herb Witter, et al.

:

October 9, 2013

Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Jr., Judge.

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

Ward Bradley, Esquire

Attorney for the Plaintiffs

Pope D. Johnson, III, Esquire

William W. Wilkins, Esquire

Lawrence M. Hershon, Esquire

Attorneys for the Defendant

Daphne D. Helms

Circuit Court Reporter

1 **The Court:** Well, let me start off by saying, Judge
2 Wilkins, welcome to our court. Happy to have you here today.
3 I see you brought your lawyer.

4 **Mr. Wilkins:** I sure did, Judge. Thank you.

5 **Mr. Johnson:** I brought my lawyer.

6 **The Court:** All right. Mr. Bradley, are you prepared?
7 Are you ready to go?

8 **Mr. Bradley:** Yes, sir, Judge. Thank you.

9 **The Court:** All right.

10 **Mr. Johnson:** Your Honor?

11 **The Court:** Mr. Johnson?

12 **Mr. Johnson:** May it please the Court? I'm Pope Johnson
13 and I, along with Mr. Wilkins and Mr. Williams, represent the
14 defendants. I'm going to make the argument for all the
15 defendants to start with, and then the judge will reply if
16 reply is necessary.

17 Two things that I do want to tell you that's come to my
18 attention: Mr. Sandler, who is the plaintiff, has died and I
19 don't know that that has anything to do with going forward
20 today, but I just point it out. The other thing, Judge---

21 **The Court:** Wait a minute. Oh, I see. Sandler and
22 Sandler Construction.

23 **Mr. Johnson:** Richardson.

24 **The Court:** I see that.

25 **Mr. Johnson:** The other thing, Your Honor: We just got

1 a memo yesterday with some attachments from Mr. Bradley.
2 We'd like to have an opportunity to respond to them.

3 **The Court:** I have your memo also.

4 **Mr. Johnson:** Right.

5 **The Court:** But no---

6 **Mr. Johnson:** We were told to file them last Wednesday
7 and which we did, and all we want to do is have the
8 opportunity to address them.

9 **The Court:** That's fine. I have no problem with that.

10 **Mr. Johnson:** But proceeding, Your Honor, we're here
11 today arguing the defendant's motion to dismiss. This is an
12 action by the plaintiffs against the South Carolina
13 self-insured -- home builders self-insurer's fund for an
14 alleged misuse of money owed the fund. You may or may not be
15 familiar with what the fund - the S-I-F it's referred to -
16 is, but it is a self-insured fund that exists to provide
17 workers' compensation protection to members who pay to become
18 a member of the fund and have it self-insured.

19 It's not an insurance company. It doesn't issue an
20 insurance policy. It doesn't charge insurance premiums. It
21 is not regulated by the Insurance Commission. It's regulated
22 by the Workers' Compensation Commission.

23 Now, even though it's set up under a document that's
24 referred to as a trust agreement, it is not a trust in any
25 way, shape, or form in the traditional sense of the word.

1 There are no beneficiaries named who participate. They don't
2 get a benefit from the fund other than the right to get my
3 protection under the comp act.

4 It is a totally voluntary participation. People can
5 either apply and become a member or they can buy their
6 coverage on the open market. It is run by the membership in
7 the sense that they elect a board of trustees who manages the
8 day-to-day operations and sees the -- oversees the operation
9 of the fund.

10 Now, what we've -- we moved to dismiss the plaintiffs'
11 complaint, and I'll tell Your Honor that this is the second
12 action that's been brought. There was a prior action that
13 was dismissed, but we've moved to dismiss the plaintiffs'
14 action, first of all, for failure to comply with the
15 requirements of Rule 23 regarding derivative actions. And if
16 we fail on that, we have moved to dismiss the causes of
17 action for breach of contract, breach of contract accompanied
18 by a fraudulent act, and we've also moved to dismiss certain
19 of the individual plaintiffs.

20 Now, as to the Rule 23 to dismiss the entire action,
21 Rule 23(b), as Your Honor knows, governs the procedure for
22 derivative lawsuits, and it has certain requirements that
23 have to be met for an action to go forward. Under the rule
24 there are heightened pleading requirements that the -- the
25 plaintiff has to plead with particularity the facts of an

1 effort to go to the board prior to the suit and resolve the
2 matter there. He has to plead facts to show the reasons why
3 his efforts to resolve it were unsuccessful, and if he fails
4 to allege those in sufficient detail, there's Court of
5 Appeals' decisions and Supreme Court decisions that say the
6 action should be dismissed.

7 The heightened pleading requirements is in part a
8 recognition that the board of directors or the board of
9 trustees manage the day-to-day operations of organizations,
10 not the courts. And the rule has its effect by -- by
11 limiting access to the courts by minorities who want to
12 simply drag the board into court when they agree or disagree
13 with some decision made by the board. That is exactly what
14 this suit is about.

15 These plaintiffs - we say four; they say 8 or 16 - are a
16 small minority of the fund which is some 8 or 900 members and
17 they have drug us into court and they're challenging the
18 decisions that the board made going back to 2008, Judge,
19 2009, 2010, and so we're having to spend the fund's money and
20 time defending an action brought by a very small percentage
21 of the fund challenging those decisions.

22 The other thing that Rule 23 requires is it requires
23 that the complaint be properly verified, and it's our
24 position that in this case if you look at the complaint,
25 they've failed to comply with the requirements with a

1 particularized pleading and they've failed to comply with the
2 requirement to properly verify their complaint, and as a
3 result the Court should dismiss this action.

4 Now, if you look at Paragraph 8 on Page 2 of their
5 complaint, their effort in a particularized---

6 **The Court:** Let me find it. (Pause.) All right.

7 **Mr. Johnson:** ---pleadings is to simply say---

8 **The Court:** Which...

9 **Mr. Johnson:** Paragraph 8, Your Honor, A. and B.

10 **The Court:** Oh, I thought you said Page 8.

11 **Mr. Johnson:** Page 2, Paragraph 8. I'm sorry.

12 **The Court:** I'll get it. All right. I've got it.

13 **Mr. Johnson:** If you look at Paragraph 8(b), that is all
14 they have to say in terms of particularized pleadings, and
15 that is insufficient under Carolina First versus Whittle, an
16 excellent decision written by Judge Howard that discusses the
17 purpose of the rule and the policy behind the rule and says
18 specifically that they've got to come forward and plead the
19 facts of what they did and why their -- what the rule says
20 they've got to do, why their effort at relief was not
21 successful.

22 As to the verification, Your Honor, if you turn to the
23 verifications to the complaint, you'll readily see that the
24 -- that all the verification states is: I hereby verify the
25 allegations in the complaint are true and accurate to the

1 best of my knowledge. Rule 11 says what has to go into any
2 verification, and it has to be that the matters contained
3 herein are true except for those upon information and belief
4 and, as to those, I believe them to be true. They have pled
5 nothing on information and belief.

6 There's -- looking at that verification, there's no
7 evidence that they have firsthand knowledge -- any of them
8 have firsthand knowledge about the first allegation of the
9 complaint. And for those reasons, Your Honor, we say that
10 the Court should dismiss the action in its entirety.

11 Now, Your Honor, the plaintiffs' response that we got
12 yesterday was: Well, this action doesn't really involve Rule
13 23. It's not a derivative action under Rule 23 because it's
14 a trust. Well, I would say their position is belied by the
15 fact that they plead in an effort to comply with Rule 23 and
16 refer to Rule 23 in Paragraph 8 on Page 2. They verify or
17 attempt improperly to verify but submit something they call a
18 verification which shows that they were -- that Rule 23 --
19 they view it as being applicable when they filed their
20 pleading.

21 But, Your Honor, the -- we say Rule 23 applies because
22 it applies to corporations or unincorporated associations.
23 What we have here is, in essence, an unincorporated
24 association managed by a board of trustees who are elected by
25 the members, not a trust in the traditional sense of the word

1 trust.

2 If this was a corporation and the board was being sued
3 for the very things that are being sued for here, the board
4 would be entitled to the protection of Rule 23. Our board of
5 trustees ought to have the same protection as an
6 unincorporated association.

7 Now, Your Honor, the -- we have also moved to dismiss
8 the causes of action for breach of contract and breach of
9 contract accompanied by a fraudulent act. There's no
10 allegation in the complaint that the plaintiffs entered into
11 a contract with the board or with the fund. In fact, Your
12 Honor, the trust agreement or on the document that
13 established the fund that's been produced by Mr. Bradley --
14 and it's dated back in the nineties, and there's nothing
15 where any of these plaintiffs have signed or obligated
16 themselves on the contract on that trust agreement.

17 We've cited the restatement rule that says that a trust
18 is not a contract. You don't sue a trustee for breach of
19 contract; the beneficiary does. You have other causes of
20 action. No offer, no acceptance, no mutuality of obligation,
21 none of the requirements to form a contract... So we say
22 that those causes of action have to be dismissed.

23 **The Court:** That's two and three?

24 **Mr. Johnson:** Two and three. Finally, Your Honor, we
25 move to dismiss the plaintiffs' -- the individual plaintiffs

1 as party plaintiffs and we move to dismiss them upon the
2 grounds that they are not members of the fund. In fact, what
3 is alleged are that the individual plaintiffs are members of
4 the Home Builders Association of South Carolina and then
5 paragraph -- it's in Paragraph 2 on Page 1. Then in
6 Paragraph 3, the corporate defendants are the beneficiaries
7 of the agreement and declaration of trust.

8 There's no allegation to support it, and we've provided
9 the affidavit of Jeff Renew (phonetic) in support of this
10 part of our motion which says that none of these individual
11 plaintiffs have any relationship with the fund. Their
12 businesses do, some of them, but none of the individuals.
13 Then, Your Honor, we---

14 **The Court:** Hold on. Affidavit of who?

15 **Mr. Johnson:** Jeff Renew.

16 **The Court:** I don't see that.

17 **Mr. Johnson:** Let me see if I...

18 **The Court:** Did that come with your memorandum?

19 **Mr. Johnson:** It came with the motion, Your Honor.

20 **The Court:** Oh, with the motion. I'm sorry.

21 **Mr. Johnson:** Yes, sir.

22 **The Court:** I was looking at the memorandum.

23 **Mr. Johnson:** It should be attached to the motion.

24 **The Court:** Well, let me look. Jeff Renew. I got it.

25 **Mr. Johnson:** All right, sir. And then---

1 **The Court:** Now---

2 **Mr. Johnson:** ---in his affidavit you will see that
3 we've also moved to dismiss I think four of the corporate
4 plaintiffs on the grounds that they're no longer members of
5 the fund.

6 **The Court:** All right. You're moving to dismiss the
7 individual members?

8 **Mr. Johnson:** The individual---

9 **The Court:** Plaintiffs.

10 **Mr. Johnson:** ---plaintiffs who are not members and have
11 no---

12 **The Court:** None of them.

13 **Mr. Johnson:** None of them.

14 **The Court:** Okay. So that's all the individual
15 plaintiffs and these four corporate defendants who are no
16 longer members.

17 **Mr. Johnson:** No longer members and---

18 **The Court:** So they have no...

19 **Mr. Johnson:** No standing---

20 **The Court:** No standing.

21 **Mr. Johnson:** ---to bring the suit. And furthermore,
22 Your Honor, the suit asks for -- I mean, the suit actually is
23 a derivative lawsuit that seeks to recover money not from the
24 plaintiffs but would go back to the fund. In other words, if
25 the trustees, in fact, misuse the fund's money, then you

1 don't pay it out to the plaintiffs or any of those. It comes
2 back to the fund. And since they're no longer members, they
3 get no benefit from it anyway.

4 So we would say, Your Honor, you should dismiss the
5 entire action; that is our principal position. Failing
6 there, we think you ought to dismiss the second and third
7 causes of action with those party plaintiffs.

8 **The Court:** All right.

9 **Mr. Johnson:** If you have any questions, I'll be happy
10 to answer them.

11 **The Court:** Well, let's see what Mr. Bradley has to say.

12 **Mr. Bradley:** Thank you, Judge. I represent the
13 plaintiffs. I think a little background on the question of
14 what the pleadings require would be helpful here, Judge.
15 This case was actually filed last year in circuit court. In
16 response, we received a motion to dismiss from the same
17 defendants and the same lawyers, and in that motion to
18 dismiss, one of the bases for their motion to dismiss was
19 that this arrangement was a trust and that, therefore, the
20 case had to be filed in probate court because probate court
21 has exclusive jurisdictions over trusts.

22 That was argued to Judge Manning, at which point the
23 defendants took the position that this arrangement is a trust
24 agreement. Judge Manning agreed with them and dismissed the
25 case on the basis that there was no subject matter

1 jurisdiction in circuit court because it was a trust and it
2 had to be filed in probate court. So our case was dismissed
3 on that basis.

4 Therefore, we re-filed the case in probate court and
5 removed it to circuit court to cure the jurisdictional defect
6 that they argue and Judge Manning agreed with them on. And
7 so now the argument is that it is not a trust. Instead, it
8 is a corporation subject to Rule 23(b)(1) of the South
9 Carolina Rules of Civil Procedure. And one thing that you
10 haven't heard is what the rule actually says, and I believe
11 the reason you haven't heard that is because the rule doesn't
12 say what Mr. Johnson says it says.

13 What it says is this: "Derivative actions by
14 shareholders. In a derivative action brought by one or more
15 shareholders or members to enforce a right of a corporation
16 or other unincorporated association" -- that's how it starts
17 and that's what the rule applies to.

18 A trust is not a corporation and a trust is not an
19 unincorporated association. In fact, in our memorandum,
20 pursuant to lots and lots of law, a trust is a particular
21 kind of a legal entity that is controlled by the probate code
22 regarding how trusts are administered. That's why you have
23 to file it in probate court originally and you can remove it
24 to circuit court. It has a particular definition. It's a
25 particular thing, and it's separate from a corporation or an

1 unincorporated entity like a labor union would be, for
2 instance.

3 In addition to the fact that they took the position in
4 this courthouse that this is a trust and already won a motion
5 based on that -- and so I believe they're locked into the
6 fact that it's a trust and not whatever they call it, an
7 unincorporated association. The actual agreement creating
8 this thing says: Agreement and declaration of trust. Those
9 are the very first words on the page.

10 Judge, to make it a little easier, I have a copy of our
11 memo with the attachments if that would help.

12 **The Court:** I've got it.

13 **Mr. Bradley:** Do you have it? I have a copy for your
14 law clerk if she'd like one.

15 **The Court:** Well, I don't need that much paper.

16 **Mr. Bradley:** Okay. I understand that. That's a
17 problem I have, too. So the agreement itself says it's an
18 agreement of trust. It sets up a settler of the trust which
19 was the Home Builders Association, just like a trust does.
20 It sets up a board of trustees, and it charges them with
21 administering the fund for the benefit of the beneficiaries
22 of this trust who are the people who join or the corporations
23 who join for the purpose of purchasing workers' compensation
24 coverage. It's a mutual obligation.

25 The way this works, Judge, is when you go into this

1 trust, you sign a personal guarantee of the trust obligations
2 and, therefore, if the trust loses money, you are personally
3 on the hook. You could be assessed back for the losses of
4 the trust. So that goes to one of the arguments which is:
5 Well, these corporations that have not continued to purchase
6 workers' compensation coverage this way are not properly in
7 front of this case. They are because they're still on the
8 hook.

9 If the trust comes up short of funds, the trust can go
10 out and seek those funds back from them because they've
11 signed personal guarantees, and it's my understanding that
12 the individuals have signed something as well. That goes to
13 the arguments about whether the individuals of the
14 corporations are the right plaintiffs.

15 To me, I'm okay with one or the other, but the problem
16 was I couldn't get clarification on who really was the member
17 and who was the right person because they all signed
18 personally and in their corporate capacities. That's why we
19 brought them all to try and avoid the situation where we
20 brought just one and we would have to get the other, which
21 may have come up.

22 To resolve that question, I believe we should be allowed
23 to get discovery to see how these documents are signed and
24 how things are set up, and then we can agree on who the
25 proper plaintiffs are. I certainly don't want to spend a lot

1 of time arguing about who the proper plaintiffs are. I can
2 bring either one, but I just want to make sure I've got the
3 right ones so that I don't wind up down the road with the
4 wrong guys involved in the case.

5 So that goes to that, and that's the way the trust is
6 set up by this trust agreement. And, in fact, the argument
7 was made that this was a trust and it should have been
8 brought in probate court in front of Judge Manning which he
9 granted and said it was a trust and should be made in probate
10 court. Therefore -- and I think we're in a position---

11 **The Court:** There's an order to that effect.

12 **Mr. Bradley:** Sir?

13 **The Court:** Is there an order to that effect?

14 **Mr. Bradley:** Yes, sir. It should be in the file. I've
15 probably got a copy here. I was looking for it but I... My
16 file is not the greatest, Judge, but there is an order to
17 that effect. I'm not sure how quickly I can set my hands on
18 it.

19 **The Court:** I see the order removing...

20 **Mr. Bradley:** Yes, sir. Well, the order was in the
21 previous case. It dismissed our previous case on the basis
22 that it was a trust and should have been brought in probate
23 court.

24 **The Court:** Okay. There's a previous file.

25 **Mr. Bradley:** Yes, sir.

1 **The Court:** In the clerk's office.

2 **Mr. Bradley:** We have previously filed this lawsuit
3 under a different action number and it was dismissed. Here
4 is the order, Judge.

5 **The Court:** All right. Or you can give it---

6 **Mr. Bradley:** I have a copy right here.

7 **The Court:** Have you seen it?

8 **Mr. Johnson:** Yes, we've seen it.

9 **Mr. Bradley:** He's seen it. Yes, sir.

10 **The Court:** Okay. Thank you.

11 **Mr. Bradley:** So now that we're here, in order to do
12 what these people have asked me to do, you'll have to rule
13 that an action by a beneficiary against the trust is subject
14 to the Rule 23(b)(1) requirements for derivative actions.
15 That's not the law, Judge.

16 There are reams of cases where -- reported cases in
17 South Carolina where beneficiaries have sued trustees for
18 mismanagement, some of them probably where the beneficiaries
19 won and some of them where the trustees won. But as far as I
20 can tell, there is no authority whatsoever in this state for
21 the argument that an action by a beneficiary against a
22 trustee for a trust administration is subject to Rule
23 23(b)(1). There's no cases on that.

24 There are some cases that say things like: This action
25 is a derivative-type action or you're bringing an action on

1 behalf of a personal representative or perhaps a personal
2 representative of an estate didn't bring an action that a
3 beneficiary wanted brought, those kinds of cases, but there's
4 not anything that says Rule 23(b)(1) pertains to an action by
5 a beneficiary against trustees of a trust because those kinds
6 of actions are controlled by the probate code, and you have
7 to comply with those requirements which we've done. So for
8 that reason, the whole argument that 23(b)(1) controls and we
9 have to comply with it is wrong.

10 Now, going to the next step on this, assuming you
11 disagree with me which I hope you don't, but if you do, we've
12 complied with it anyway which is why that's in the pleadings
13 because in the last case they made that argument, too. They
14 said, hey, you've got to comply with Rule 23 and it's a
15 trust, and the judge ruled it was a trust.

16 So we went back. We filed it like a trust and we did
17 our best to comply with Rule 23 to try and shut off these
18 kind of arguments that we get our pleadings right so we can
19 actually get some discovery and get to the merits of the
20 case.

21 And what we heard back was: This is Rule 23. So we
22 said, "Fine. We'll comply with Rule 23." So I wrote a
23 letter to Mr. Johnson, and I said, "Mr. Johnson, these are
24 the things that we're aggrieved by," and that's attached to
25 our memorandum, "and this is the action we want you to take."

1 And then I put in my pleadings -- I sent them a letter asking
2 to take action. They've refused to take action which is what
3 Rule 23(b) requires. And I got the pleadings verified by all
4 the individuals with businesses to say that they verified
5 that what's in the complaint is true and accurate to the best
6 of their knowledge.

7 Now, the argument that you've got to go through and say
8 it's all true, what it says is true, and unless it says on
9 information and belief, that's a new one on me and it's very
10 clever, but I don't think it gets to the merits of what's
11 going on. I've got a verification from each person. I've
12 made the allegations right out of the rule for 23(b). I've
13 sent the letter saying: Please take this action which has
14 been rebuffed.

15 I've tried to comply with the rule which I don't even
16 think I have to comply with because they said it was a trust
17 to start with and got my case dismissed on that basis the
18 first time through. So those are our arguments as to the
19 Rule 23(b) (1) that this is a stockholder a class action case.
20 It's a trustee beneficiary case. That's why we don't think
21 we have to comply with that.

22 Now, the next argument kind of gets back into this
23 "heads I win/tails you lose." So we sued on a breach of
24 contract. If you say it's not a trust, it's a breach of
25 contract. I tell you what: There's some agreement my

1 clients are paying money to these people under. I don't know
2 what they want to call it. They want to say it's a
3 stockholder agreement. It's an unincorporated association.
4 It's not a contract; it's not trust. I've never heard of it,
5 but one thing is for sure: They're getting the money.

6 I don't know what the agreement is or what they want to
7 call it because they're getting money from my clients to
8 provide workers' compensation and my clients are guaranteeing
9 their debt. It sounds like an agreement to me. It sounds
10 like some kind of contract. I'm trying to cover all the
11 bases because this is a very unusual beast that they didn't
12 teach me about in law school. Maybe other people learned
13 about these kinds of trusts.

14 But there's not -- there's an agreement. We're paying
15 money. They're providing the compensation coverage. We're
16 providing guarantees of their shortfalls, and there's excess
17 money in that fund. That's what we're going at; that's the
18 problem.

19 So there's no stock issued. The agreement creating it
20 says it's a trust. They said it was a trust the last time we
21 stood up in the courtroom and argued about it, and we are
22 giving them money. So if it's not those things, it's got to
23 be a contract. There's some kind of contractual agreement.
24 That's why the contract is in there, trying to cover our
25 bases to say, look, let's get past this arguing about the

1 pleadings and get to the merits of whether we have a claim
2 upon which we're entitled to relief.

3 Instead, what we get is: You've got the wrong people.
4 You should have brought these people. It's a trust. It's an
5 unincorporated association. You've got to go in probate
6 court. You've got to file -- you've got to file it under
7 23(b). You have to have it verified. It can't be a
8 contract; it's not a trust.

9 Well, the question is: What is it then? Obviously they
10 don't have to say at this point, but we're trying to cover
11 all our bases to make sure our pleadings set forth the
12 grounds that we believe we're entitled to relief upon.

13 So I think I've covered the argument about Rule 23, why
14 we don't believe it applies. If it does apply, that we've
15 complied with it, that's set out in our memorandum as well.
16 As far as the standard of people to sue, we believe we need
17 to go through discovery to make sure we figure out who
18 actually has standing. That's why we've put them all in
19 there.

20 **The Court:** Did your clients tell you they have executed
21 guarantees?

22 **Mr. Bradley:** Yes, Judge.

23 **The Court:** All of them?

24 **Mr. Bradley:** I can't say all of them to a letter, but I
25 know that's the procedure for how these things are written.

1 And I don't think Mr. Johnson will disagree with me that part
2 of the way this is done is the members or the beneficiaries
3 guarantee the debts of the trust. In case the trust comes up
4 short, they can be assessed.

5 In fact, there's a similar trust for the commercial
6 contractors in South Carolina. They just got assessed on it.
7 So that's -- that's our position on that, Judge.

8 So we believe -- we want to find out who are the proper
9 plaintiffs. We don't need to have plaintiffs we don't need.
10 We want to make sure we've got right ones, but it's too early
11 to make that decision.

12 And then finally the fact that they are no longer paying
13 in with their compensation coverage as beneficiaries of this
14 trust does not mean they don't have standing here because
15 they still have liability. And our argument is this: That
16 we believe that these trust assets have been basically
17 misappropriated or funneled away from the trust itself in
18 order to create other insurance companies and that if there
19 are excess assets in the trust, the people who are entitled
20 to receive those excess assets are the beneficiaries of the
21 trust, not the trustees and not some other company. Thank
22 you, Judge.

23 **The Court:** All right. Judge Wilkins?

24 **Mr. Wilkins:** Judge, this is a classic derivative
25 lawsuit. We only learned yesterday that the plaintiffs have

1 now taken the position that Rule 23 does not apply to this
2 lawsuit although they pled that they had complied with Rule
3 23 in their complaint. It really makes no logical sense to
4 think about an entity that has a board of directors and
5 manages assets and calls itself an association and, thus,
6 Rule 23 applies or, in this case, an entity that has a board
7 of directors that manages an asset and calls itself a trust
8 fund and, thus, Rule 23 does not apply.

9 Last evening, in preparation for today, Mr. Williams and
10 I were doing some more research, and there are very few cases
11 dealing trusts and Rule 23, and in South Carolina there are
12 none because every time a trust is sued, it's by a direct
13 beneficiary pursuant to a will testamentary trust or a trust
14 set up for estate planning purposes.

15 But there are cases throughout the country where a trust
16 is sued, and these are not beneficiaries. They call
17 themselves beneficiaries, but nowhere in any document will
18 you find the word beneficiary other than the ones they wrote.
19 They are members of this association, and that's how these
20 home builders are referred to and consider themselves.
21 They're members. It's a voluntary membership.

22 But, anyway, the Court of Appeals in Massachusetts --
23 and I want to hand this case up. We did not cite it in our
24 memorandum - and we've also got one from New Mexico - where
25 in Massachusetts there was a condominium that was placed into

1 a trust, and there was a board of directors that managed the
2 condominium.

3 **Mr. Bradley:** Can I have a copy of the case?

4 **Mr. Wilkins:** I'll get you a copy. And the -- and,
5 anyway, the members of the trust were the owners of the
6 individual condominium units, and one of the members didn't
7 like what the board of trustees were doing, so they brought a
8 suit. And the Massachusetts highest court said: You've got
9 to comply with Rule 23. Indeed, Massachusetts has the same
10 rule identical that South Carolina has.

11 And then the other case from New Mexico, there was a
12 pension fund that was set up to pay pensions to retired
13 public school teachers and it was a trust, and one of the
14 pensioners sued the financial advisor. Anyway, the court
15 said: You didn't comply with Rule 23 and, therefore, the
16 case is dismissed. There is no case that the defendants --
17 the plaintiffs can cite that will support the position that
18 Rule 23 does not apply to this situation.

19 Now, there are two principles and three rules of law
20 that govern a Court's decision when addressing a Rule 23
21 issue. First of all, South Carolina jurisprudence recognizes
22 that Rule 23 is an important gatekeeper because of the
23 policies underlying corporate governors by a board of
24 directors as opposed to a minority shareholder or a minority
25 member trying to sue the board of directors.

1 Rule 23 is an exception to the liberal pleading
2 requirements of Rule 8 because it requires that the
3 allegations made must be made particularizing how the
4 complainant made efforts to gain compliance with what he
5 seeks in this lawsuit. He must make a proper demand and then
6 cite that it was wrongly refused or that the demand was
7 futile, and in this case the plaintiffs have done neither.
8 And I might add, Judge, that the case law is very clear and
9 it's cited in the Court of Appeals and the Supreme Court that
10 a Court should rigorously enforce the requirements of Rule
11 23.

12 There are a lot of cases dealing with it, but I really
13 think the Court need go no further than Carolina First versus
14 Whittle that we've cited in our memorandum to you. I think
15 it is particularly instructive to compare the complaint in
16 Carolina versus Whittle and the language of the complaint in
17 this case that Mr. Johnson referred to. It's only one
18 sentence, one sentence, that sets forth their particularized
19 demand, and as the Court knows in Paragraph 8, "The
20 plaintiffs, the agents, and others on their behalf have made
21 efforts to obtain the actions they desire in this matter
22 including correspondence to counsel for defendants, meeting
23 with counsel for the defendants, correspondence to the trust
24 in previous lawsuit to no avail."

25 Now, I'd like to compare the demand requirement in

1 Carolina versus Whittle with the demand requirement here. In
2 Carolina versus Whittle, the demand said: We have demanded
3 certain information, but it did not particularize what the
4 information was.

5 In this case, the plaintiff says: We've sent
6 correspondence to counsel for defendants, but they do not
7 tell us in their complaint, as they must, if they're going to
8 meet the requirements -- they do not tell us what that
9 correspondence says. In Carolina First versus Whittle it
10 said: We demanded certain action be taken, but they did not
11 particularize what that action was.

12 In this case we had a meeting with counsel for the
13 defendants, they say, but they do not tell us what was
14 discussed in their complaint with -- at those meetings. In
15 Carolina First versus Whittle, the plaintiff said: We
16 demanded supplemental information. We made a supplemental
17 demand, but they don't say what that supplemental demand was.
18 Here they say the plaintiffs sent correspondence to the
19 trust, but there's not even a hint, a hint, in their
20 complaint as to what was contained in that correspondence.

21 And lastly to maintain that the demand requirements of
22 Rule 23 are met or have been partially met by reference to
23 some previous lawsuit, quite frankly, Judge, borders on the
24 absurd. As Carolina First versus Whittle said: The
25 complaint does not allege what the shareholders demanded and

1 what the board rejected. The complaint in this case falls
2 squarely within that same category and can be described by
3 using the exact words that the Court of Appeals used. I'll
4 be happy to answer any questions the court has.

5 **The Court:** Not at this time. Thank you.

6 **Mr. Wilkins:** By the way, let me make one other thing,
7 Judge.

8 **The Court:** Sure.

9 **Mr. Wilkins:** As Carolina First versus Whittle said very
10 clearly: In that case the plaintiffs did exactly what
11 happened in this case. After the fact, after the complaint
12 has been filed, they allege -- they submit another letter.
13 That's what they tried to do in Carolina First, and the
14 circuit judge properly rejected the letter and the Court of
15 Appeals said that was proper because Rule 23 issues must be
16 decided solely from the four corners of the complaint.

17 **The Court:** All right.

18 **Mr. Wilkins:** Thank you, Judge.

19 **The Court:** Mr. Bradley?

20 **Mr. Bradley:** Briefly, Judge. I want to correct a
21 misstatement of fact that's been made to the Court. The
22 letter was sent before the complaint.

23 **The Court:** Wait a minute. Say it again.

24 **Mr. Bradley:** The letter we sent them asking them to do
25 certain things, that's attached, was sent before the

1 complaint. And I want to ask one other ques -- I want to get
2 to one other clarification and that is---

3 **The Court:** The letter, you say it's attached to the
4 complaint?

5 **Mr. Bradley:** It's attached to our memorandum. It is
6 not attached to the complaint, Judge, but it was sent to them
7 and I assume their lawyer got it because he responded to it
8 and said basically, no, we're not going to do it, in a nice
9 way, not in an unpleasant way and---

10 **Mr. Wilkins:** I'm sorry.

11 **The Court:** Don't interrupt him.

12 **Mr. Bradley:** Thank you. Finally, I do not understand
13 how they can take a position with the Court that this is a
14 trust when that motion by Judge Manning's order requiring us
15 to have our lawsuit dismissed and go forward in probate court
16 and now take the position that it is not a trust...

17 **The Court:** Mr. Wilkins?

18 **Mr. Wilkins:** First of all, Judge, in that first lawsuit
19 we always maintained that Rule 23 applied, and since they
20 alleged that it was a trust in the first lawsuit, out of
21 abundance of caution we said, well, this jurisdiction has to
22 be complied with and Judge Manning agreed with that, but he
23 did not address our position that Rule 23 applied, period. I
24 mean, that's always been our position.

25 And I might add: The letter that we're referring to was

1 sent after the first lawsuit was filed, but while it was
2 pending, in an attempt to comply with Rule 23 in the first
3 lawsuit. But that aside, it doesn't matter. What happens is
4 that under -- Carolina versus Whittle says you've got to --
5 you've got to make a pre-suit demand, number one, and, two,
6 you've got to allege it with particularity in your complaint
7 what you demanded and what action you want the board to take.
8 And failing to do that in the four corners of their
9 complaint, then the case must be, not should be -- I mean,
10 not may be but must be dismissed. That's what Carolina First
11 said very, very clearly.

12 So whether the letter was sent or not, when it was sent
13 actually with the first lawsuit doesn't make any difference
14 because there's not -- the complaint does not particularize
15 in Paragraph 8 what was demanded and what action they wanted.

16 **The Court:** All right. Anything further?

17 **Mr. Bradley:** No.

18 **Mr. Johnson:** No, Your Honor.

19 **Mr. Bradley:** I don't want to beat this horse to death,
20 but I do want to make sure the facts are properly in front of
21 the Court. What happened when we filed the original lawsuit
22 believing this case was a trust, we thought it was a trust
23 and we thought we could file it in circuit court. They made
24 the argument that because it was a trust and they did say it
25 was 23 -- Rule 23, but they also made the argument to

1 dismiss. It was a trust. There was no subject matter
2 jurisdiction because it had to be filed in probate court.

3 Judge Manning indicated at that hearing that he was
4 inclined to dismiss it and, in fact, he did dismiss it on
5 that basis. While -- I don't know if it was while it was
6 still pending but it was certainly after we knew it was going
7 to be dismissed because they had made this argument that we
8 had to comply with Rule 23. I sent the letter to Mr. Johnson
9 to make sure he knew what we wanted. In fact, I went and sat
10 down and met with Mr. Johnson and his clients to go over it.

11 So they had it before these pleadings were served. I
12 guess we've spent an hour arguing -- what I should have done
13 was just block and copy what was my letter and put it in my
14 pleadings because that's what it boils down to because they
15 have all the information, and if you grant their motion,
16 that's what I'm going to do and we'll just go back and serve
17 everybody again.

18 But it's just -- what we're doing is just getting a lot
19 of procedural roadblocks to actually getting to the merits of
20 the case, and that's where we are anyway. Thank you for your
21 time, Judge.

22 **The Court:** Thank you. Mr. Johnson?

23 **Mr. Johnson:** Your Honor, I want to emphasize: They
24 pled in the original action that it was a trust. We say if
25 it is a trust, then it's got to start in probate court and

1 come up. We pled -- we also moved to dismiss that it was
2 subject to the jurisdiction of the Workers' Compensation
3 Commission. We raised Rule 23.

4 What Judge Manning said is there's a question of whether
5 it's proper in this court or not, and to be on the safe side,
6 start over in probate court to cure any possible jurisdiction
7 problem which is how we got here. And these aren't just
8 procedural roadblocks. These are requirements of the rule
9 for a purpose. And we ask that you dismiss it, Your Honor.

10 And, finally, on the individual plaintiffs, we submitted
11 an affidavit that they aren't members. He submitted no
12 counter-affidavits from anybody that they are members.

13 **The Court:** He doesn't -- I don't think he disputes that
14 they are members. He says they've signed guarantees
15 that would make them ultimately liable which would give them
16 standing.

17 **Mr. Johnson:** But they haven't pled that, Your Honor.

18 **The Court:** I understand.

19 **Mr. Johnson:** If he wants to amend and plead something
20 like that, we'll deal with it.

21 **The Court:** Or---

22 **Mr. Johnson:** I don't -- I don't think the -- I don't
23 know whether the individuals have signed guarantees of the
24 corporations, but it's not in the pleadings.

25 **The Court:** I understand. Well, my first thought is

1 that I will refer this back to the probate court. The second
2 thing: Let me have proposed orders from you within ten days,
3 and I'll consider it and let you know.

4 **Mr. Wilkins:** Thank you, Judge.

5 **The Court:** Thank you very much.

6 **Mr. Bradley:** Thank you for your time, Judge. I
7 appreciate it.

8 **The Court:** Anything else?

9 **Mr. Johnson:** No.

10 **Mr. Bradley:** Thank you for your time.

11 (Whereupon, the proceedings were concluded. There were
12 no exhibits introduced.)
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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

COURT OF COMMON PLEAS
2013-CP-40-0265

Allen Patterson, et. al.

vs.

Herb Witter, et. al.

DEFENDANT

TRANSCRIPT OF RECORD

January 14, 2014
Florence, SC

B E F O R E:

THE HONORABLE G. THOMAS COOPER, JUDGE.

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

MR. BRADLEY, ESQ.
Attorney for the Plaintiff

POPE JOHNSON, ESQ.
WILLIAM WILKINS, ESQ.
Attorney for the Defendants

KESHIA REED
Official Court Reporter

I N D E X

(WHEREUPON, there were no witnesses called.)

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1 THE COURT: Okay. Mr. Wilkins, your motion be
2 glad to hear from you.

3 MR. WILKINS: Thank you, Your Honor. We
4 appreciate the opportunity the Court has given us to
5 appear before you this morning. I want to add to a
6 document that the Court has a copy of entitled agreement
7 of declaration trust of South Carolina Home Builders Self
8 Insurers' Fund. This one was created to assist home
9 builders in obtaining workers' compensation coverage for
10 its employees. This document provides a board of trustees
11 shall govern this fund and trustees are elected by the
12 members. And a member becomes a member by being a home
13 builder who applies with the fund and with the Workers'
14 Compensation Commission for approval to obtain workers'
15 compensation insurance with the assistance of this fund.
16 If approved, the member makes a monthly contribution to
17 the fund. And in return, the fund does certain things to
18 assist the home builder obtain workers' compensation
19 insurance and it also administers any claims and processes
20 any claims its employees may bring against them.

21 This is an organization where its members
22 voluntarily participate. They come together voluntarily
23 and pay money for a service. It is a classic
24 unincorporated association just like a church or perhaps a
25 labor union comes together to accomplish a desired goal.

1 The Court's order that was issued earlier seems
2 to indicate that because the members of this fund are
3 jointly and severally liable that they cannot be
4 shareholders. Therefore, they must be beneficiaries.
5 Well, beneficiaries of the trust are not jointly and
6 severally liable and all of the beneficiaries, in every
7 case cited by the plaintiffs in every case those
8 beneficiaries or those trust were not jointly and
9 severally liable. The reason was, of course, because all
10 the cases they cited dealt with testamentary trust and
11 things establish by wills or codicils or estate planning
12 purposes. Of course, those are not -- and everybody I
13 think should agree, that those are not unincorporated
14 associations.

15 A lot was said in the recent filing by the
16 plaintiffs said the fund trustees took five million
17 dollars out of the fund and put it somewhere else.
18 Plaintiffs don't know exactly what happened and I just
19 want to make sure the Court knows as well. After a vote
20 of the membership over 700 members voting 96.5 percent of
21 the membership of this fund voted to authorize the board
22 of trustees to make applications to the South Carolina
23 Insurance Commission to establish a mutual insurance
24 company. This was done with the blessing of the Workers'
25 Compensation Commission.

1 Now, the reason this was so desirable by
2 overwhelming majority of the members is two reasons. One
3 the workers' comp insurance coverage was being extended by
4 the mutual company, so they would get the same thing they
5 got under the fund. The big difference was a mutual
6 insurance company participant is not jointly and severally
7 liable as all of the members pursuant to statute are
8 liable under the fund. The fund was going to be phased
9 out over a period of two years. The mutual insurance
10 company will take over the same function of the fund and
11 provide even greater services to the members.

12 The plaintiffs rely heavily on a case called
13 Borrower Savings and Loan. This was a United States
14 Supreme Court decision. It dealt with a entity called
15 Fidelity Mortgage the Supreme Court said was a business
16 trust. The trustees of this business trust sued a third
17 party, the Borrower Savings and Loan Association. And the
18 single issue in the case was whether or not how you
19 determine the varsity of citizenship for - in federal
20 court purposes. It was not a derivative lawsuit, had
21 nothing to do with Rule 23 Did not even mention Rule 23,
22 but interestingly enough, Judge, if you take the parties
23 involved in this case, you take the Fidelity Mortgage,
24 which the Court said was a business trust. If you take
25 those who invested in that rust, which the Supreme Court

1 said are the trust beneficiary shareholders and assume
2 that one of those shareholders claims that the trustees
3 mismanaged something dealing with the Fidelity Mortgage,
4 they would have to bring a lawsuit and comply with
5 derivative ruling. It would have to comply with Rule 23.
6 And how do I know that because a Massachusetts court which
7 governs the Borrower case, Massachusetts law said so. And
8 guess what the Massachusetts court said in a case where
9 the defendant was a city fund trust, which was an
10 investment company and shareholders brought an action
11 against the board of trustees because they did a
12 mismanagement claim. Guess what the Massachusetts court
13 said, because a business trust in practical affect is in
14 many respect similar to a corporation. The statute
15 regulated derivative actions applies to a shareholder
16 bringing such a claim against a corporation or a business
17 trust.

18 In analyzing the Devoro case, with regard to
19 derivative Lawsuits Rule 23 and some things like that, I
20 came across a case that I like to briefly bring to the
21 Court's attention, very important case. And Massachusetts
22 seems to be probably the leading jurisdiction in the
23 nation dealing with derivative type actions and rule
24 governing Rule 23. By the way, Massachusetts Ru e 23 is
25 identical to South Carolina Rule 23.

1 In this case, three individuals came together,
2 they were business people and they organized an entity
3 known as the Adam Street Realty Trust. The Adam Street --
4 and that trust agreement appointed them as the three
5 members of the board of trustees. They owned a
6 condominium complex and they sold 28 units. One of the
7 units was purchased by a fellow named Kote (sp). Kote
8 became dissatisfied with the way the trustees were
9 managing the condominium association and so he brought a
10 lawsuit. He claims a personal harm himself, but he also
11 claimed harm for all the condominium unit holders and the
12 association itself. Here's what the Massachusetts Court
13 of Appeals said, a condominium once created is run by a
14 corporation, maybe run by a trust or it may be run by an
15 incorporated association, whether plaintiff was seeking
16 redress for wrongs allegedly done to the condominium
17 association, he has to proceed derivatively since the
18 plaintiff has failed to follow the procedure set forth in
19 Massachusetts Rules of Civil Procedure 23 summary judgment
20 in favor of the defendants was mandated. And what the
21 Court was saying in this case, Judge, is you can call it a
22 trust, corporation, unincorporated association. You can
23 call them beneficiaries, investors, members, shareholders.
24 It doesn't matter the labels that somebody may put on a
25 pleading or a document. You look behind to see what's

1 going on. In this case, it was a business being run by
2 the association dealing with condominiums. In our case,
3 what we have is individuals who obtain assistance from the
4 fund in obtaining workers' compensation coverage for its
5 employees. The question is why does it undo it? Why does
6 the fund assist homebuilders in getting workers
7 compensation? They do it for one reason for the money
8 because the homebuilders all pay every month what's called
9 a member's contribution, also referred to sometimes as a
10 premium, but they pay something for the service that the
11 fund gives to them. The fund in addition to that
12 processes any claim that an employee would make against
13 the members claiming a workers' compensation claim. This
14 is a classic case of an unincorporated association coming
15 together, people coming together to accomplish a desired
16 building.

17 South Carolina recognizes that we have an entity
18 called a business trust. It's set forth in Title 33
19 Section 53-10 and other subsections of the South Carolina
20 code. It does not define exactly what a business trust
21 is, but it does one thing is very important. It says an
22 instrument creating a South Carolina business trust may
23 provide that no personal liability will attach to the
24 individual shareholders or the trustees of that trust as
25 oppose to an unincorporated association we know by law by

1 statute, that members are jointly and severally liable.
2 If you call yourself a South Carolina business trust and
3 you opt out so to speak of that law, you can avoid
4 liability, which leads me to think that a South Carolina
5 business trust in effect is just a hybrid of an
6 unincorporated association, but given the opportunity, you
7 can remove the joint and several liability for those who
8 participate in it, other states also recognize a business
9 trust and they go a little bit further than South Carolina
10 has done.

11 For example, Ohio says a business trust means an
12 unincorporated business association. Indiana says a
13 business trust is an unincorporated business association.
14 The state of Washington says a Massachusetts trust, which
15 is another name for a business trust is an unincorporated
16 business association whether you call it again a fund or a
17 trust or whatever, what we have here is an unincorporated
18 association doing business and because of that the rules
19 of derivative lawsuits apply.

20 As the Court, well knows Rule 23 applies to
21 corporations and unincorporated associations. There's
22 zero significance between the rule that apply to that
23 apply to corporations and unincorporated associations as
24 far as derivative rules of concern. If I say corporation,
25 I can just as easy say unincorporated association when

1 dealing with derivative requirements.

2 There a good many cases out there, Judge, I just
3 want to refer to just a couple of them very briefly.
4 First is the Clear Water Trust vs. Bunson case. Before
5 that, let me highlight the allegations made in the
6 complaint. In this complaint, the plaintiff allege and I
7 quote, The claims of the representative parties are
8 typical of the claims -- of the class the plaintiff
9 purport to represent. South Carolina Supreme Court said
10 and I quote, Corporate malfeasance -- and that's all
11 that's alleged in this complaint is corporate malfeasance,
12 that resulted in identical harm of all shareholders gives
13 rise to the classic shareholders derivative suit. A
14 derivative action that does not meet the pleading
15 requirements of Rule 23 must be dismissed pursuant to
16 Rule(b)(6).

17 Now, there only two exceptions that are rule two
18 recognized in South Carolina and two recognized in every
19 jurisdiction throughout this country but only two. And
20 those two exceptions are these: If the board and its
21 members owed a special duty to a shareholder that was
22 personal to that shareholder and not to the shareholders
23 in general, that shareholder may sue the board and its
24 members without bringing a derivative action.

25 Number two, if the injury to the shareholder is

1 separate and distinct from the injury sustained by the
2 association of the corporation whatever it maybe itself if
3 it's separate and distinct injury to that shareholder,
4 that shareholder may sue without bringing a derivative
5 action. But those were the only two exceptions. Nowhere
6 in this complaint, did the plaintiff allege in any way
7 that the trustees owed them a special duty that was
8 personal to them or that they suffered an injury that was
9 separate and distinct from the injury suffered by all of
10 the members and the association itself. The bankruptcy
11 court here in South Carolina directly and succinctly put
12 it like this: Where there's an action permissible creates
13 a corporate property, the action is derivative. If any
14 relief is granted, it goes to the corporation and not to
15 the shareholders. Because this complaint contains no
16 allegation, none whatsoever, that the demand would have
17 been futile. Then the question before the Court is
18 whether or not a proper demand was made pursuant to Rule
19 23 and the case law govern interpreting that statute, that
20 requires that the demand and the efforts made to obtain
21 the relief sought was made with particularity.

22 THE COURT: You take the position that paragraph
23 eight does not meet that standard?

24 MR. WILKINS: And I'll be happy to tell you why,
25 Judge, exactly. But first of all, let me just quickly say

1 that the reason for the particularity requirement and the
2 demand requirement is based on sound policy. First of
3 all, the demand he made on the association ahead of time
4 before a lawsuit could be filed gives the board, the
5 governing body, who has a fiduciary duty to manage the
6 entity, the opportunity to look at the demand, make such
7 investigations maybe necessary and take remedial action if
8 it is appropriate.

9 The reason the demand and the efforts made must
10 be set forth with particularity in the complaint is
11 because the Court is the gate keeper of whether or not
12 lawsuits like this and others as well like this should go
13 forward. For example, if the demand is set forth in the
14 complaint and the efforts made to achieve desired results
15 plaintiff want is set forth in the complaint. The Court
16 can look at it and say wait a minute on proper motion by
17 the defendants. If the board did what you want them to
18 do, they would have to violate some regulation. You can't
19 do that, so I'm going to dismiss the lawsuit. If the
20 Court listen to demands set forth in the complaint with
21 particularity and says, well, proper motion by the
22 defendants, this demand is frivolous, dismiss the lawsuit.
23 On the other hand the Court looks at it and says wait a
24 minute, this decision by the board not to meet this
25 demand, it's covered by the sound business, judgment rule

1 cases say it all across the country the Court can dismiss
2 the action. But the Court cannot do that unless the
3 (8)(b) one sentence states the particularity what the
4 demand was and what effort was made.

5 Now, the Court well knows that this analysis by
6 the Court must be done as Carolina First clearly says
7 within the four corners of the complaint don't look beyond
8 that, you look to the complaint. Well, the Court need go
9 no further than Carolina first to make this decision I
10 suggest. In this case, the South Carolina Court of
11 Appeals declined the principles that I just articulated to
12 the Court affirm the circuit court, which dismissed the
13 complaint because Rule 23 was not complied with. The
14 Court mentioned paragraph (8)(b) and I just want to -- I
15 won't read but just one sentence, what I would like to do,
16 Judge, is take care of ours first go ahead and put our
17 complaint, the plaintiff's complaint right here let's look
18 at the two together very briefly.

19 The Carolina First case the plaintiffs demanded
20 quote certain information. In this case, the plaintiff
21 said in paragraph (8)(b) that one sentence that they sent
22 quote correspondence to the counsel for the defendants.
23 They don't say when correspondence was sent, but more
24 importantly they do not say what was set forth in the
25 correspondence. They do not say what demand, if any, was

1 set forth in the correspondence. Carolina First complaint
2 said the plaintiff's demanded quote certain action be
3 taken. In this case, the plaintiff said we had quote
4 meetings with counsel for defendants, don't want say when
5 the meetings were held but more importantly what was said
6 at the meetings, what demands, if any, were made at the
7 meetings.

8 Carolina First complaint says the plaintiffs
9 made and I quote supplemental demands. In this case, what
10 did the plaintiffs allege, the plaintiff's say we sent
11 correspondence to the trust. Don't say when the
12 correspondence was sent, but more importantly what was in
13 the correspondence, what was said and what demand, if any,
14 was made. In a nut shell, affirming the circuit court the
15 Court of Appeals said that Carolina First, the complaint
16 does not allege what the shareholder demanded and what the
17 board rejected. The complaint in this case before the
18 Court falls squarely within the same category and can be
19 described by using the identical words. Thank you, Judge.

20 THE COURT: Thank you, Mr. Wilkins.

21 Mr. Bradley.

22 MR. BRADLEY: Thank you, Judge. There were a
23 lot of facts recited in that argument that are not in the
24 record. Gravamen of the problem is this: These people
25 want to take these trust funds and create a new company

1 that will be a mutual company on which they were all equal
2 board members. The mutual companies assets will not
3 belong to the people who are in this trust. Trust itself
4 says if the trust is dissolved, the money is suppose to go
5 to the beneficiaries of the trust, that's the gravamen of
6 this complaint. That's the basic problem. There are a
7 lot of other problems, but that's the most central problem
8 because it is a trust and the trust itself specifies that
9 upon its dissolution, the funds are suppose to be
10 distributed to the members of the trust, that's exactly
11 what they're trying to not do. That's where we're going
12 with it. Now, I want to back up a minute because really
13 the only question before the Court today is should you
14 dismiss this complaint for failure to comply with Rule 23.
15 So the first question is does Rule 23 even apply.

16 To look at that, you look at Rule 23, which says
17 corporations, shareholders, unincorporated associations
18 which as the Court knows unincorporated associations are
19 commonly thought of as churches, partnerships, unions. We
20 all learn that in law school, that's why we have a class
21 called corporations and partnerships. Partnerships can be
22 incorporated or not incorporated now, but when I was in
23 law school, they didn't even them incorporated. And then
24 the other class you take is trust and estates because
25 they're separate things and they're commonly referred to

1 as separate things. They're separate filings with the
2 IRS. The South Carolina statutes were referenced
3 indicated they were different things and the Court with
4 the cases that you've set up say that they're different
5 things. They are different things.

6 Now, how do we know this is a trust. First,
7 they already made a motion to dismiss our first lawsuit on
8 the basis that it was a trust. They said you don't have
9 jurisdiction in circuit court because this is a trust, you
10 have to bring it in probate. They made that motion and
11 Judge Manning granted it. He said I agree, it's a trust.
12 You said it was a trust, I agree it's a trust. I'm
13 dismissing this case without prejudice. Bradley, if you
14 want to bring this case, you got to bring it in probate
15 court. So we went back and filed a lawsuit in probate
16 court and then we're moving to circuit court pursuant to
17 that procedure. So they've already taken the position
18 once that it was a trust in that courtroom. One, how to
19 remand it and have an official finding on the record that
20 it's a trust. But even if that's not enough, Judge, the
21 agreement that they talked about that was the first thing
22 Mr. Wilkins talked about, it refers to a trust. It calls
23 it the agreement of declaration of a trust. It refers to
24 the entity created as the settler just like a trust, has a
25 board of trustees and the settler of the trustees on the

1 very first page sets out what they're going to do.

2 On the next page, it sets forth what you have to
3 do to be a member and it calls people members rather than
4 beneficiaries. I would suppose if you look on page --
5 what I have is page -- it looks like it's page one, but I
6 really think it's page two. It's hard to read my copy.
7 It says the members accompanied for incorporation
8 individual partnership or other legal entity and who is a
9 participating member in good standing the Home Builders
10 Association of South Carolina. So they're creating a
11 membership class by who's in the Home Builders
12 Association, which is the settler.

13 On the next page, it talks about the trustees.
14 It defines who the trustees are. And it says how do you
15 have trustees, that's page three. Article two says
16 creation of the trust. It creates a trust fund. The
17 trustees may hold property in the name of the trust fund
18 and it shall be used for the purposes as set forth here.
19 And it says the purpose, this trust agreement, that's on
20 page three.

21 Page four talks about the designation of
22 trustees who's eligible and how you reside as a trustee.
23 Page five talks about how properties held and trustees
24 title just like a trust. If you flip over, there's some
25 other language that consistently calls it a trust. But if

1 you flip over to page 11, it defines the trustees powers
2 at the bottom of page 11 at J. It says the board of
3 trustees shall have all authorities and powers granted to
4 trustees generally by the laws of South Carolina. And
5 then on the next page you'll see it incorporates the
6 probate code to set out what the trustees powers are.
7 That's 62-7-703, that's the probate code, Judge. And that
8 section of the probate code says the power of the trustees
9 what they can do. So clearly the document itself is a
10 contemplated trust because it defines the trustees powers
11 under the probate code.

12 If you look at page 13 under the miscellaneous
13 section and this is what we're talking about, the
14 agreement under the amendment section may not be amended
15 so there was to change its purposes, which is what Mr.
16 Wilkins told you in the beginning they were trying to do.
17 They wanted to dissolve the trust and create a new company
18 with the money that's in the trust. And or to permit the
19 diversion or application of any of the funds in the trust
20 for any purposes other than specified herein. And then it
21 talks about the termination of the trust, that's section
22 two. It has to be done by concurrence of all the parties
23 to the agreement which has not happened because the Home
24 Builders Association has to agree, that's what they're
25 trying to do is terminate it. And then it talks about

1 terminating on people's death just like a trust. But in
2 the filing it says in the event of termination, the
3 remaining available funds after provided for all
4 outstanding obligation shall be distributed through a
5 formula determine by the trustees to the participating
6 members. So just in their opening argument shows what
7 they're doing that violates the trust agreement and going
8 through it why it's a trust and how it was set up.

9 I want to talk about a couple of legal positions
10 we put up in front of you. It was a discussion about
11 South Carolina Code Section 33-53-10, which is the
12 business trust code section. That code section requires
13 that if you have a business trust it be filed with the
14 clerk of court and secretary of state just like for a
15 corporation. This document is not filed that way. The
16 sections of the code that they cited to support their
17 argument don't even apply to this trust because it wasn't
18 filed in a way that would make it a business trust under
19 that act. The act requires that it be filed with the
20 secretary of state and the county, that's 33-53-10. But
21 this document wasn't done that way, so it doesn't even
22 qualify as a business trust under the statutes that
23 they're urging that you follow in this case.

24 Now, assuming despite the language and despite
25 Judge Manning's finding that the Court's finds it's not a

1 trust, it's something else that doesn't count as a trust,
2 but it's subject to the shareholder provisions like the
3 corporation under Rule 23, which is the argument the
4 defendant's are articulating. We complied with Rule 23.
5 Rule 23 has two basic requirements. First, it's verified
6 that we done that, it's verified. Second that we have
7 made notice on them and recited the notice for our
8 complaint. Our complaint in paragraph eight sets forth
9 our notice and it actually incorporates a letter that we
10 already sent to Mr. Johnson saying exactly what we wanted
11 and why and that's been sent to the Court. The letter --
12 the complaint incorporates the letter because it said that
13 we sent a letter demanding a relief and we did send a
14 letter demanding relief. And they didn't do anything.
15 They didn't take a vote on it as far as I know, tell us
16 why they wouldn't do it, take any further steps. Mr.
17 Johnson wrote me a nice letter back stating we're not
18 going to do it. But the letters in the file -- the
19 complaint incorporates the letter certainly can
20 incorporate other documents and complaints done all he
21 time in the contract complaints. It's an - little
22 unusual case, but all the time if you say somebody
23 breached a contract, you incorporate the terms of the
24 contract in the complaint. We just incorporated a let er
25 into our complaint. I guess, what needs to happen is if

1 they convinced you that they are right, we'll file this
2 lawsuit a third time and just copy the paragraphs that are
3 in my letter into the complaint to satisfy the requirement
4 doesn't make very much sense to me, but it appears to be
5 what they're demanding in this case. They certainly had
6 notice of the relief we wanted.

7 In addition, there was a lot of arguments about
8 whether this is derivative relief and how it's sought.
9 Our clients are beneficiaries of the trust. In a trust,
10 any beneficiary can bring an action against a trustee for
11 many different things for an accounting that's set forth
12 in the probate code to receive a copy of the complete
13 trust as amended to show what's been done with the trust
14 assets. We asked for that too and it's in the complaint.
15 Even if this wasn't a class action, any member of a trust
16 can bring an action for an accounting and for ways to
17 trust assets. There's no requirement that you have to
18 have every member of the trust to do it. And we brought
19 those actions as well as our complaint. So first of all,
20 we don't think Rule 23 applies to the trust. It's not a
21 partnership. It's not a church. It's not trading, it's a
22 trust. It says everywhere everything about it complies
23 with a trust. You got a settler. You got to find
24 beneficiaries and you got trust corpus created by the
25 beneficiaries contributions. So it is a trust. It's not

1 subject to the rule. Even if it is subject to the rule,
2 we've complied with the Rule. Even if it's not subject to
3 the rule, if you find it is subject to the rule and that
4 we haven't complied with the rule, there are claims in
5 here that can go forward without being a class action.
6 The trust claim certainly -- any member of the trust can
7 bring an action against the trust for waste and for
8 dissolution of the trust, it doesn't mean it's purpose and
9 for breach of the trust duties for any trust. So even if
10 everything they say is right, the case still should be
11 dismissed, but we disagree with their findings on the law.
12 Thank you, Judge.

13 THE COURT: Mr. Johnson.

14 MR. JOHNSON: If you have questions, if not,
15 I'll respond.

16 THE COURT: Mr. Wilkins is doing such a good
17 job.

18 MR. JOHNSON: I'll sit down then.

19 THE COURT: You may proceed.

20 MR. JOHNSON: Thank you, Your Honor. Judge,
21 we've all heard the old song that if it looks like a duck,
22 swims, flies, quack like a duck, it's a duck. In this
23 trust is called a trust the fund doesn't look, swim, fly
24 or quack like a trust, because it is not a trust. Under
25 the document and what counsel fail to tell you when he was

1 reciting the terms of the document is the language about
2 members. The document doesn't refer to anyone as being a
3 beneficiary of the trust.

4 On page 8 under section six, it talks about
5 approval of new members. To become a member of the fund,
6 you have to pay a fee and what you get is your
7 compensation benefits provided according to what the act
8 requires. Who has ever heard of a beneficiary of a trust
9 having to pay a fee to become a beneficiary? The document
10 does not designate beneficiaries. Who are the
11 beneficiaries or the specific beneficiaries? Is whoever
12 wants to apply to become a member. And members have
13 joined in several liability.

14 Your Honor, have you ever seen a trust document
15 in all your years of your practice where a beneficiary had
16 to pay to be a beneficiary and then he is jointly and
17 severally liable for the acts of the trustee for any and
18 all acts joint and several liability that means one member
19 can be held liable for everything that the trustees do.

20 The only way you can call it a trust is promote
21 form over substance. It is referred to as a trust, but if
22 you look at how it's handled and administered and who can
23 become members and not beneficiaries, the substance is
24 it's not a trust. It's not a corporation. It's not an
25 LLC. It's not a limited liability partnership. It is a

1 classic as Judge Wilkins said unincorporated association.
2 Now, just one or two other parts, Your Honor, counsel
3 argued that we asserted that it was subject to the
4 jurisdiction of the probate court when it was dismissed
5 originally.

6 THE COURT: How do you deal with that?

7 MR. JOHNSON: Sir.

8 THE COURT: How do you deal with that?

9 MR. JOHNSON: We did what all lawyers do we pled
10 an alternative. I'll show you what your pleadings says.
11 We allege four grounds for dismissing the case in the
12 first place. And then we allege -- we say in the
13 alternative the case should be dismissed for lack of
14 subject matter jurisdiction, it's in the probate court.
15 In the alternative, it should be dismissed for the lack of
16 subject matter jurisdiction because these type entities
17 are in the inclusive jurisdiction of the Workers'
18 Compensation Commission.

19 Your Honor, probably knew Gene Lewis who
20 practiced with Turner Padgett. He was called no-liability-
21 no-coverage Lewis because in every case his client was not
22 involved. If they were involved, they weren't negligent.
23 If they were negligent, the other side was more negligent.
24 If they were liable at all, there was no coverage. All we
25 did is do what lawyers do and plead in the alternative.

1 The other thing counsel didn't tell you in his
2 presentation when he talked about Judge Manning's order
3 originally and I think he mentioned it here today. Judge,
4 we obtained the order from Judge Manning on this point.
5 We have submitted as part of our response, we submitted an
6 order to Judge Manning that dismissed it on the grounds of
7 -- it was derivative lawsuit had not been properly pled.
8 They submitted an order that Judge Manning signed and it
9 was within the jurisdiction of the probate court. And if
10 you look at what Judge Manning's order actually says it
11 says this has been raised. I am concerned that the
12 parties can litigate all the way through. They could
13 start over filing in probate court and moved it up and
14 that's what I think they ought to do and that's why I'm
15 dismissing it. That was their order not our order.

16 The only way, Your Honor, we believe you can
17 make a finding that it should not be dismissed, is to find
18 that it's a trust by promoting form over substance. We do
19 not think you should do that. We encourage you not to do
20 that, but, Judge, whatever you do please please change the
21 format of your order because what is in that order are
22 findings about it being a trust that are inconsistent with
23 the law subject to the probate code.

24 I want to hand up a copy -- not a copy but the
25 court's statute code book 42-520. If you look down

1 towards the bottom of this section here, you'll see that
2 the self-insured trust, which is what this is are subject
3 to the exclusive jurisdiction of the workers' compensation
4 commission. And for goodness sakes don't leave an order
5 in place that it would be inconsistent with that without
6 that being before the Court to make a determination on.
7 And we ask you that you set aside your order dismissing
8 the case. If they want to replead it and come back again,
9 fine, but it ought to be dismissed at this stage. We ask
10 that you do so.

11 MR. WILKINS: Judge, if I may.

12 THE COURT: Absolutely, go ahead, Judge Wilkins.

13 MR. WILKINS: In response to what plaintiff
14 said, 96.5 percent of the members of this fund voted to
15 authorize the trustees to apply ---

16 THE COURT: He just said that's not in the
17 record.

18 MR. WILKINS: Well, in any event, what happened
19 is this mutual insurance commission that was applied for,
20 a mutual insurance company was applied for with the
21 blessing of the workers' comp commission would have
22 created a mutual insurance company that would be owned by
23 policy holders, that is all these members who are members
24 of the fund would now become if they wanted to become
25 members and policy holders of this insurance, mutual

1 insurance company. And I do agree that the real issue
2 here before the Court is whether or not Rule 23 has to be
3 complied with and then was it complied with. And I bring
4 up the business trust in South Carolina code these other
5 say just to indicate to the Court doesn't matter what you
6 call it. You can call it a trust. You can call it a
7 fund. Question is what's going on and that determines
8 whether Rule 23 has to be complied with and I suggest to
9 the Court that Carolina First says absolutely no. This
10 complaint does not comply with Rule 23, but let me offer
11 this to the Court. The plaintiff brought up the fact that
12 they sent a letter making a demand. The letter was dated
13 January the 30th 2013. The first lawsuit was ongoing at
14 that time and so what this was was an attempt to comply
15 with Rule 23 after the fact by sending a letter after the
16 complaint had been filed. Judge Manning's order was
17 issued on March the 4th and this lawsuit was filed on
18 April the 13th.

19 Let me offer this suggestion to the Court. And
20 I agree we don't need to do things just having to redo
21 what we already done. I will represent to the Court that
22 the fund will accept this letter dated January the 30th
23 2013. By the way, it's not incorporated into the
24 complaint, was not attached, was not reference to just
25 said correspondence was sent. Well, what correspondence?

1 But nevertheless, we represent to the Court that we will
2 accept this January 30th 2013, letter that the plaintiff
3 styled their demand letter will accept it as being
4 received. We will respond to it in a timely fashion. And
5 if our response is not satisfactory to the plaintiffs,
6 then they can take whatever action they think is
7 appropriate.

8 THE COURT: What are you suggesting?

9 MR. WILKINS: Well, I suggest that this lawsuit
10 be dismissed without prejudice. We take this demand
11 letter, we respond to it in 60 to 90 days or whatever
12 reasonable period of time and then they can take whatever
13 action they think is appropriate pending on our response.

14 THE COURT: I understand.

15 MR. WILKINS: Thank you, Judge.

16 THE COURT: The -- Mr. Bradley, I hate to -- I
17 don't see that letter in the file.

18 MR. BRADLEY: Judge, it's attached to the
19 previous motion, but I have a copy of it.

20 THE COURT: The previous what?

21 MR. BRADLEY: The previous -- the last time we
22 argued this we ended up --

23 THE COURT: Okay, I was looking as an attachment
24 to the complaint.

25 MR. BRADLEY: I can give you a copy of it. I

1 didn't attach it formally to the complaint.

2 THE COURT: You did?

3 MR. BRADLEY: It's not -- it was not attached to
4 the complaint.

5 THE COURT: Well, I thought that's what you
6 represented.

7 MR. BRADLEY: But it's referenced in the
8 complaint. It's referenced in the complaint, it's not
9 attached.

10 THE COURT: All right. I thought you said in
11 your argument that it was attached and that it was normal
12 practice.

13 MR. BRADLEY: I certainly didn't mean to. What
14 I was trying to say is it was referenced in the complaint?

15 THE COURT: You said something like it was a
16 normal practice to attach documents like a contract or a
17 letter to the complaint.

18 MR. BRADLEY: I thought I said incorporate by
19 reference, but I misspoke. I'm not arguing with the
20 Court.

21 THE COURT: All right, that's fine.

22 MR. BRADLEY: What I meant to say was
3 incorporate by reference.

24 THE COURT: All right. Of course, the Court has
25 no way of knowing what that letter -- if evaluating that

1 letter in light of Rule 23 -- in other words, the language
2 of the complaint is not very specific and ---

3 MR. BRADLEY: It doesn't say the date of the
4 letter, that's true, Judge. It does say correspondence
5 sent to the defendant with the demand, which is that
6 letter.

7 THE COURT: Well, you think that complies with
8 -- I mean assuming if you get pass the trust issue if you
9 can defendant's can get past the trust issue that letter
10 or that language in the complaint complies with Carolina
11 First?

12 MR. BRADLEY: I do think it does because it
13 incorporates the specific language of the letter. It says
14 the correspondence to be sent and they know we did because
15 they have it. I mean, they received it a year ago and I
16 don't understand why they can't reply to it for a whole
17 year.

18 THE COURT: Did they not reply to it?

19 MR. BRADLEY: They replied and said no.

20 THE COURT: Okay.

21 MR. BRADLEY: I mean, they did reply to it, but
22 they just said no. I don't know why they want to reply to
23 it again a year later. I mean, that's what been doing it
24 for 18 months.

25 THE COURT: All right. Mr. Wilkins.

1 MR. WILKINS: Judge, we didn't say no. We did
2 not say no. What we said was this letter was sent to us
3 after the lawsuit was brought and therefore it's not
4 improper to demand letter. And therefore, we're not going
5 to respond to it. But again, I represent we will respond
6 to it if this case is dismissed. We don't respond and
7 they can take whatever action they think is appropriate.

8 THE COURT: All right. Thank you, counsel.
9 Once again, I need some proposed orders from which to
10 craft a response to the motion. What's a satisfactory
11 time period, ten days again?

12 MR. BRADLEY: That's fine.

13 MR. WILKINS: That's fine.

14 THE COURT: Thank you very much. Thank you
15 counsel.

16 MR. WILKINS: Thank you, Judge.

17 END OF REQUESTED TRANSCRIPT
18
19
20
21
22
2
24
5

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2012-CP-32-00757

AFFIDAVIT OF DAVID GULLY

The affiant being duly sworn testifies as follows:

1. I am over the age of 18 and otherwise qualified to give sworn testimony in court.
2. I am a residential home builder and owner of Central Contracting. I have a residential homebuilder's license.

3. I am the current president of the Home Builders Association of South Carolina for the year 2012. In 2011, I served as vice president of that organization, and in 2010, I served as treasurer. I have been involved with the Home Builders Association of South Carolina for a significant amount of time.

4. I am also a member of the South Carolina Home Builders Self Insurers Fund through my company Central Contracting.

5. My company has been involved with the South Carolina Home Builders Self Insurers Fund for a significant amount of time. The South Carolina Home Builders Self Insurers Fund provides workers compensation coverage for my company.

6. I have been an ex-officio of the South Carolina Home Builders Self Insurers Fund when I was vice president of the Home Builders Association of South Carolina in 2011. I was a voting ex-officio member.

7. The South Carolina Home Builders Self Insurers Fund Trustees voted to remove the ex-officio members or I would still be an ex-officio member of the Self Insurers Fund.

8. The Home Builders Association of South Carolina has approximately 3400 members. The South Carolina Home Builders Self Insurers Fund has approximately 600 members.

9. As recently as several years ago, there were approximately 1700 members of the South Carolina Home Builders Self Insurers Fund. Since that time, membership has been reduced to approximately 600 members.

10. The South Carolina Home Builders Self Insurers Fund is a trust which was created by the Home Builders Association of South Carolina as settlor. A copy of the trust agreement is attached as Exhibit A to my affidavit.

11. As originally set up, the trust was created to serve the members of the Home Builders Association. Originally, in order to be a beneficiary of the Self Insurers Fund trust, the insured had to be owned or controlled by a member of the Home Builders Association of South Carolina.

12. The trustees have recently voted to remove that requirement for beneficiaries.
13. Under this arrangement, each beneficiary of the trust is jointly and severally liable for underfunded losses of the Self Insurers Fund.
14. As such, the trust is to be administered in the best interest of the beneficiaries, and the trustees have a fiduciary duty to the beneficiaries of the trust.
15. The trustees have not fulfilled this fiduciary duty including, but not limited to, the following ways:
 - a. The trustees have voted to remove assets from the trust in order to incorporate a new member owned insurance company which will confer no benefit upon the beneficiaries of the trust.
 - b. The trustees have removed approximately \$5,000,000 from the trust corpus for the purpose of establishing a separate insurance company which will not provide any benefits to the beneficiaries of the trust and will increase the personal risk to the beneficiaries of the trust.
 - c. There is approximately \$20,000,000 remaining in the trust to fund its liabilities which upon information and belief the trustees intend to use to set up a separate insurance company which will convey no benefit to the beneficiaries of the trust.
 - ~~d. The trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit on the beneficiaries of the trust.~~
 - e. The trustees have used these assets to begin setting up a separate insurance company which will convey no benefit to the beneficiaries of the trust and

have not reimbursed the trust for these costs including the use of facilities, the software computer programs, and the employees of the trust.

f. Under the trustees' management, the beneficiary membership has decreased such that the risk undertaken by the trust and its beneficiaries is not sufficiently spread.

g. In order to increase membership in the trust, the trustees have written new policies with high risk that expand past their experience in new construction which will further deplete the assets of the trust and convey no benefit on the beneficiaries of the trust.

h. The trustees have used trust funds to hire attorneys, consultants, and other employees for the purpose of setting up a competing insurance company which will convey no benefit on the members of the trust.

16. The representative parties in this matter will fairly and adequately protect the interests of the class which consists of the beneficiaries of the trust as they are beneficiaries of the trust and members of the Home Builders Association of South Carolina.

17. The amounts of money sought in this matter are more than \$100 for each beneficiary of the trust as this matter concerns millions of dollars in significant workers compensation insurance payments. The trust beneficiaries will have typical claims with the same

claims and defenses for all members of the class.

18. The class consists of all current and former beneficiaries of the trust.

19. It would be in the best interests of the beneficiaries to dissolve the trust holding sufficient funds to cover all losses and distribute the remaining assets to the beneficiaries.

20. If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk. I attach a letter sent by the trustees to beneficiaries of the trust indicating that excess funds held by the trust are not the property of the beneficiaries or intended to be used for the benefit of the beneficiaries. This letter along with other conduct as indicated above in this affidavit forms the basis for this lawsuit.

FURTHER AFFIANT SAYETH NAUGHT.

D-B-G
David Gully

SWORN to before me this
9 day of August, 2012
Robert S. Hawley
Notary Public for South Carolina
My Commission Expires: 7/18/2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
Allen Patterson, Steve Tilton,	)	Civil Action No. 2012-CP-32-00757
Richard Sendler, Lincoln Privette,	)	
Marc Ellis, Joey Carter, Betty Davis,	)	
And Michael Nier on behalf of	)	
Themselves and others similarly	)	
situated,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Affidavit of Jeffrey M. Ranew
	)	
Herb Witter, Colin Campbell, Eddie	)	
Weaver, Tom Markovich, Keith	)	
Smith, Jim Gregorie, individually	)	
and as Trustees of the South Carolina)	)	
Home Builders Self Insurers Fund,	)	
and the South Carolina Home	)	
Builders Self Insurers Fund,	)	
	)	
Defendants.	)	
	)	

PERSONALLY APPEARED BEFORE ME, Jeffrey M. Ranew, who being duly sworn, deposes and says:

1. I am Jeffrey M. Ranew. I am the Administrator of the South Carolina Home Builders Self Insurers Fund ("SIF") and I have served in this capacity since March 24, 2003. I make this affidavit based upon personal knowledge.

2. The administration of the SIF is regulated and controlled by the South Carolina Workers' Compensation Commission. The SIF is not an insurance company and the South Carolina Department of Insurance has no control over the administration of the SIF. The SIF does not issue policies of insurance. If a home builder wants to become a member of the SIF in order to satisfy his employer's obligation under the South

Carolina Workers' Compensation Act, he completes a workers' compensation application, completes a WCC Form 6a, and pays a \$25.00 non-refundable fee to the South Carolina Workers' Compensation Commission. Attached as Exhibit A is a copy of the workers' compensation application. Attached as Exhibit B is the WCC Form 6a. The WCC Form 6a and the check is then submitted to the Commission for approval. Upon approval, the home builder receives a certificate confirming that he is a member of the SIF. The SIF then provides the new member with a new member package with information about the SIF and the management of the SIF. Attached as Exhibit C is a new member package. After five weeks and a report on his operation, the new member is billed for the premium relating to his business. Attached as Exhibit D is a copy of the certificate that is issued. The certificate sets forth the responsibilities of the employer and the SIF. There are no written contracts signed by the member and the SIF. There are no written contracts signed by the member and the trustees.

3. The Complaint alleges that the defendants have used trust funds to purchase a building. Use of SIF funds for this purpose was approved by the South Carolina Workers' Compensation Commission. See Exhibit E. The building is owned by Center point V, LLC which is owned by the SIF. The SIF occupies part of the building, with the remainder being leased out or available for lease.

4. The Complaint alleges that the defendants removed approximately \$5,000,000.00 from the trust corpus for the purpose of establishing a separate mutual insurance company which would not provide any benefit to the beneficiaries of the trust. The funds were only transferred and held in an account after 96.5% of the SIF

membership voted to approve the transfer of the funds. The SIF mailed out 933 ballots and the vote was as follows:

533 marked "yes"
33 marked "no"
188 designated by recipient as "proxy"
179 abstentions subsequently recorded as "proxy"

After Board approval and acceptance of proxy votes, pursuant to the balloting letter, the vote tally was recorded as follows:

Yes: 900 votes (96.5%)
No: 33 votes (3.5%)

The plaintiffs voted as follows, as shown by their ballots marked Exhibit F:

Lincoln Privette voted "yes" with conditions and his vote was counted as a "no" vote
Joey Carter approved it
Marc Ellis approved it
Barry Davis approved and disapproved it
Allen Patterson authorized the Board to vote on his behalf
Richard Sandler approved it
Michel Nieri approved it through his Authorized Agent Maureen Smirdall
Ron Boshan approved it on behalf of Steve Tilton

Prior to the transfer of the funds, an agreement was reached that the \$5,000,000.00 would be returned to the SIF if an agreement could not be reached with the Home Builders Association of South Carolina ("HBASC") regarding the establishment and operation of the proposed mutual insurance company. The South Carolina Workers' Compensation Commission approved the transfer of the funds. See Exhibit G. When an agreement could not be reached with the HBASC regarding the establishment and operation of the proposed mutual insurance company, the application for a mutual insurance company was withdrawn, and the \$5,000,000.00 was returned to the SIF.

5. The establishment of a separate mutual insurance company has been studied and under consideration by the SIF since 2003 when the SIF Board Chairman and Administrator introduced the concept of a mutual insurance company to a meeting of the Home Builders Association of South Carolina senior leadership and received a provisional endorsement. Attached as Exhibit H are copies of Board Minutes beginning in 2003 wherein the establishment of a mutual insurance company has been addressed. There are real and substantial benefits in transitioning from a self insured fund to a mutual insurance company. Members of a mutual insurance company are not jointly and severally liable for claims as members of a self insured fund such as the SIF are. While SIF members would continue to remain jointly and severally liable for claims until the SIF is terminated, formation of a mutual company would start the process leading to termination of the SIF and the eventual end of exposure for joint and several liability. A mutual company could offer other types of insurance to a broader customer base which would help insure the viability and availability of the insurance coverage. The number of members of the SIF has been reduced because of the negative impact of the recession on the home building industry. The SIF's effort to move from a self insured fund to a mutual insurance company using \$5,000,000.00 in non-pledged assets of the SIF was approved last year by the South Carolina Workers' Compensation Commission. See Exhibit I.

6. The Complaint alleges that the trustees did not advise the beneficiaries that the funds that were being transferred to establish the mutual company could have been returned to the membership. Attached as Exhibit J is a letter from the South Carolina Workers' Compensation Commission which outlines all of the requirements for

seeking to distribute dividends to the membership. A return of member contributions in the amount of \$750,000.00 was made in 2009. Member contributions in the amount of \$750,000.00 were returned in 2010. However, there is no pending request to the Commission for additional return of member contributions or the payment of dividends.

7. The Complaint alleges that the trustees have taken significant amounts of money out of the trust for their own benefit by virtue of payments to themselves for unnecessary means and for other unnecessary payments. However, for the period from 1995 to 2008, the trustees received no compensation for time/travel to regularly scheduled board meetings. Beginning in 2008, the trustees began to receive \$250.00 for time/travel expense for each board meeting attended. There are 12 board meetings per year. If the trustee attends all meetings, he receives a maximum of \$3,000.00 per year. Board meetings frequently take as much as a full day. Some trustees travel from Seneca, Greenville and Charleston to attend these meetings. In addition thereto, approximately every six months, the trustees attend a meeting with similar SIF's from other states. The expense incurred for travel and meals for trustees and their spouses or guests are reimbursed by the SIF. According to the SIF records, trustees have attended such meetings since the mid-1990's.

8. In December 2007, the SIF hired a consulting firm to assist in selecting a new software computer program. The recommendation of the consulting firm was accepted and on December 19, 2008, the Board of Trustees voted to purchase the new software program.

9. To my knowledge, plaintiffs have filed no petitions with the South Carolina Workers' Compensation Commission seeking relief regarding the actions of the

defendants. Plaintiff Ellis did participate on behalf of the HBASC in a mediation between the SIF and the HBASC regarding establishment of the mutual insurance company. However, the plaintiffs have never contacted the SIF or sought to appear before the SIF Board to address and/or resolve their claims which are set forth in their complaint.

10. Attached hereto as Exhibit K is a true and genuine copy of the Agreement and Declaration of Trust dated September 27, 1995, with amendments, all of which have been approved by the South Carolina Workers' Compensation Commission as shown by the initials. Attached as Exhibit L are letters from the Commission regarding their approval.

11. The SIF's business office is located in Richland County and has always been located in Richland County. The offices are located at 1370 Browning Road, Suite 130, Columbia, South Carolina 29210, which is the principal place of administration of the Trust.

12. None of the alleged acts or omissions referred to in the Complaint have taken place in Lexington County. All SIF actions have taken place in Richland County.

SWORN TO AND SUBSCRIBED BEFORE ME

this 15 day of March, 2012

[Signature]
Notary Public for South Carolina

My Commission Expires: 7/5/15

[Signature]
Jeffrey M. Ranew

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sendler, Lincoln Privette,)
Marc Ellis, Joey Carter, Barry Davis,)
Michael Nieri, Allen Patterson)
Residential, LLC, Tilton Group,)
Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis)
Construction Company, Inc., The)
Barry Davis Company, Inc., Great)
Southern Homes, and J. Carter,)
LLC, on behalf of themselves and)
others similarly situated,)

Civil Action No. 2013-CP-40-02655

Plaintiffs,)

vs.)

Affidavit of Jeffrey M. Ranew

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

PERSONALLY APPEARED BEFORE ME, Jeffrey M. Ranew, who being duly sworn, deposes and says:

1. I am Jeffrey M. Ranew. I am the Administrator of the South Carolina Home Builders Self Insurers Fund ("SIF") and I have served in this capacity since March 24, 2003. I make this affidavit based upon personal knowledge.

2. The individual plaintiffs are not and have never been members of the SIF and have no contractual or other relationship with the SIF.

3. Contrary to the allegations of paragraph 3 of the Complaint, the following corporate plaintiffs are not beneficiaries of an Agreement and Declaration of Trust creating the South Carolina Home Builders Self Insurers Fund but are former members of the SIF who have terminated their memberships on the date shown below:

Ellis Construction Company, Inc.	1/30/13
Barry Davis Company, Inc.	1/1/13
Sendler Construction, Inc.	2/25/13
Tilton Group, Inc.	8/12/12

4. The only corporate plaintiffs who are current members of the SIF are as follows:

Patterson Residential, Inc.
Privette Enterprises, Inc.
Great Southern Homes, Inc.
J. Carter, LLC

SWORN TO AND SUBSCRIBED BEFORE ME

this 9th day of July, 2013

Susan J. Mondillo
Notary Public for South Carolina

My Commission Expires: 6/15/2016

Jeffrey M. Ranew
Jeffrey M. Ranew

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sendler, Lincoln Privette,)
Marc Ellis, Joey Carter, Betty Davis,)
And Michael Nier on behalf of)
Themselves and others similarly)
situated,)

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

vs.)

**Notice of Motion and Motion to Dismiss
by Defendant South Carolina Home
Builders Self Insurers Fund**

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

TO: THE PLAINTIFFS and their attorneys

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Home Builders Self Insurers Fund ("SIF") will move to dismiss the Complaint in this action upon the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCP, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the plaintiffs to obtain the action they desire from the trustees or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.
2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the defendant from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew which is attached to the companion Motion of

#1 WWR

ROA-000132

Defendants Herb Witter and the other Trustees and is incorporated by reference herein.

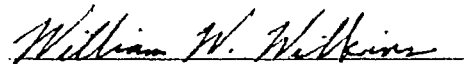
3. The cause of action for breach of contract should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached.
4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRCP, regarding allegations of fraud.
5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.
6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. The Affidavit of Jeffrey M. Ranew is submitted in support of this motion.
7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.
8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the trustees have been studied and considered in good faith and the defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.

#2 WNW

9. This action should be transferred for improper venue. S.C. Code Ann. Section 62-7-204 provides that the venue for a judicial proceeding involving a trust is the county in which the trust's principal place of administration is located, and the principal place of administration of the trust in this case is Richland County. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Home Builders Self Insurers Fund moves for a protective order pursuant to Rule 26(c)(1) and (2), SCRCP, upon the grounds that it should be protected from having to respond to the plaintiffs' Request for Production and the plaintiffs' Interrogatories until such time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment.



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**Attorneys for Defendant South Carolina
Home Builders Self Insurers Fund**

Columbia, South Carolina
March 15, 2012

#3

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sandler, Lincoln Privette,)
Marc Ellis, Joey Carter, Betty Davis,)
And Michael Nier on behalf of)
Themselves and others similarly)
situated,)

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

**Notice of Motion and Motion to Dismiss
by Defendants Herb Witter, Colin
Campbell, Eddie Weaver, Tom
Markovich, Keith Smith, and Jim
Gregorie, Individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund**

TO: THE PLAINTIFFS and their attorneys

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as trustees of the South Carolina Home Builders Self Insurers Fund, move to dismiss the Complaint in this action upon the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCF, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the plaintiffs to obtain the action they desire from the trustees or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.
2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the defendant from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew.

3. The cause of action for breach of contract should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached.
4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRPC, regarding allegations of fraud.
5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.
6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. The Affidavit of Jeffrey M. Ranew is submitted in support of this motion.
7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.
8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the trustees have been studied and considered in good faith and the defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.
9. This action should be transferred for improper venue. S.C. Code Ann. Section 62-7-204 provides that the venue for a judicial proceeding involving a trust is the county in which the trust's principal place of

administration is located, and the principal place of administration of the trust in this case is Richland County. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurance Fund, will move for a protective order pursuant to Rule 26(c)(1) and (2), SCRCF, upon the grounds that they should be protected from having to respond to the plaintiffs' Request for Production and the plaintiffs' Interrogatories until such time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCF, to consider matters outside of the Complaint and treat the motion as one for summary judgment.



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**Attorney for Defendants Herb Witter,
Colin Campbell, Eddie Weaver, Tom
Markovich, Keith Smith and Jim
Gregorie, individually and as trustees of
the South Carolina Home Builders Self
Insurers Fund**

Columbia, South Carolina
March 15, 2012

FILED

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS II: 52

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

BETH A. CARRIGG
C/A No. 2012-CP-32-00757K OF COURT
LEXINGTON SC

MOTION FOR CLASS CERTIFICATION

YOU WILL PLEASE TAKE NOTICE THAT ten days after service of this motion or at such time as the Court designates, the Plaintiffs in this matter will move for class certification. This motion relied upon the Complaint in this matter as well as the Affidavit of David Gully and attachments. The Plaintiffs move for class certification on the following grounds:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law and fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. The representative parties will fairly and adequately protect the interests of the class;
5. The relief sought in this matter is injunctive and monetary. The amount in controversy exceeds \$100 for each member of the class; and
6. The class consists of all beneficiaries past and present under the South Carolina Home Builders Self Insurers Fund.

MOORE, TAYLOR & THOMAS, P.A.

By: 

S. Jahue Moore
James Edward Bradley
1700 Sunset Boulevard
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West Columbia, SC 29171
803-796-9160
Attorney for Plaintiffs

West Columbia, South Carolina

June 1, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sandler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sandler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2012-CP-40-04311

JEANE L. M. BRIDE
C.C.P. & G.S.

2012 JUL 19 AM 11:31

FILED

MOTION FOR CLASS CERTIFICATION

YOU WILL PLEASE TAKE NOTICE THAT ten days after service of this motion or at such time as the Court designates, the Plaintiffs in this matter will move for class certification. This motion relied upon the Complaint in this matter as well as the Affidavit of David Gully and attachments. The Plaintiffs move for class certification on the following grounds:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law and fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class;

ROA-000140

4. The representative parties will fairly and adequately protect the interests of the class;
5. The relief sought in this matter is injunctive and monetary. The amount in controversy exceeds \$100 for each member of the class; and
6. The class consists of all beneficiaries past and present under the South Carolina Home Builders Self Insurers Fund.

MOORE, TAYLOR & THOMAS, P.A.

By: 

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Attorney for Plaintiffs

West Columbia, South Carolina

July 9, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

C/A No. 2012-CP-40-4311

Allen Patterson, Steve Tilton, Richard
Sandler, Lincoln Privette, Marc Ellis, Joey
Carter, Betty Davis, and Michael Nier,
on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

**MOTION TO DISMISS AMENDED
COMPLAINT BY DEFENDANT SOUTH
CAROLINA HOME BUILDERS SELF
INSURERS FUND**

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Home Builders Self Insurers Fund ("SIF") moves for an Order dismissing Plaintiffs' Complaint on the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the Plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCP, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the Plaintiffs to obtain the action they desire from the SIF or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.

2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the Trustees from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew, which is incorporated herein by reference and was previously attached to the Motion of Defendant Trustees filed on March 20, 2012.

3. The cause of action for breach of contract should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the Plaintiffs and the

ROA-000142

Defendants and there are no allegations as to how a contract was created, nor how that contract was breached.

4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the Plaintiffs and the Defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRCF, regarding allegations of fraud.

5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.

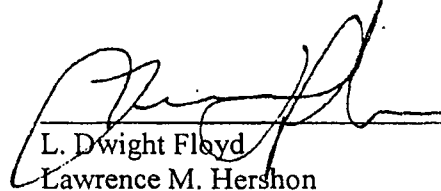
6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. This motion is supported by the Affidavit of Jeffrey M. Ranew.

7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.

8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the Trustees have been studied and considered in good faith and the Defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendant the South Carolina Home Builders Self Insurers Fund, will move for a protective order pursuant to Rule 26(c)(1) and (2), SCRCF, upon the grounds that they should be protected from having to respond to the Plaintiffs' Request for Production and the Plaintiffs' Interrogatories until such time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCF, to consider matters outside of the Complaint and treat the motion as one for summary judgment.



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Attorneys for Defendant the South Carolina Home
Builders Self Insurers Fund.

July 3, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

C/A No. 2012-CP-40-4311

Allen Patterson, Steve Tilton, Richard)
Sandler, Lincoln Privette, Marc Ellis, Joey)
Carter, Betty Davis, and Michael Nier,)
on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

**MOTION TO DISMISS AMENDED
COMPLAINT BY DEFENDANTS HERB
WITTER, COLIN CAMPBELL, EDDIE
WEAVER, TOM MARKOVICH, KEITH
SMITH, JIM GREGORIE, INDIVIDUALLY
AND AS TRUSTEES OF THE SOUTH
CAROLINA HOME BUILDERS SELF
INSURERS FUND**

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund (the "Trustees") move for an Order dismissing Plaintiffs' Complaint on the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the Plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRPC, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the Plaintiffs to obtain the action they desire from the Trustees or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.

2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the Trustees from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew, which is incorporated herein by reference and was previously attached to the Motion of the Defendant Trustees filed on March 20, 2012.

3. The cause of action for breach of contract should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of

action in that the trust agreement is not a contract between the Plaintiffs and the Defendants and there are no allegations as to how a contract was created, nor how that contract was breached.

4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the Plaintiffs and the Defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRPC, regarding allegations of fraud.

5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.

6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. This motion is supported by the Affidavit of Jeffrey M. Ranew.

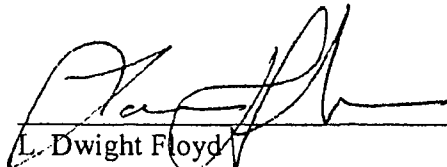
7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.

8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the Trustees have been studied and considered in good faith and the Defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, will move for a protective order pursuant to Rule 26(c)(1) and (2), SCRPC, upon the grounds that they should be protected from having to respond to the Plaintiffs' Request for Production and the Plaintiffs' Interrogatories until such

time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment.



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Attorneys for Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund

July 3, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sandler, Lincoln Privette,)
Marc Ellis, Joey Carter, Barry Davis,)
Michael Nieri, Allen Patterson)
Residential, LLC, Tilton Group,)
Sandler Construction Co., Inc.,)
Privette Enterprises, Ellis)
Construction Company, Inc., The)
Barry Davis Company, Inc., Great)
Southern Homes, and J. Carter,)
LLC, on behalf of themselves and)
others similarly situated,)

Civil Action No. 2013-CP-40-02655

Plaintiffs,)

vs.)

Notice of Motions and Motions

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

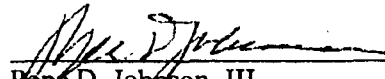
TO: THE PLAINTIFFS and their attorneys

YOU WILL PLEASE TAKE NOTICE that the Defendants move to dismiss the Complaint in this action upon the following grounds:

1. The claims by the individual plaintiffs should be dismissed upon the grounds that they are not members of the South Carolina Home Builders Self Insurers Fund ("SIF") and have no valid claims against the defendants.
2. The claims of the former corporate members, Ellis Construction Company, Inc., Barry Davis Company, Inc., Sandler Construction, Inc., Total Care of the Low Country, LLC, and Tilton Group, Inc. should be

dismissed since they are no longer members and have no valid claim against the defendants.

3. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCP, including the requirement that the complaint be properly verified, and fails to allege with particularity the efforts, if any, made by the plaintiffs to obtain the action they desire from the trustees or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.
4. The cause of action for breach of contract should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there is no contract between Allen Patterson Residential, LLC, Privette Enterprises, Great Southern Homes, and J. Carter, LLC and the SIF other than the contract to provide services and pay benefits under the South Carolina Workers' Compensation Act which are not involved in this action and furthermore there are no allegations as to how a contract was created, nor how that contract was breached.
5. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRCP, regarding allegations of fraud.


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**Attorney for Defendants Herb Witter,
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Smith, Jim Gregorie, individually and as
Trustees of the South Carolina Home
Builders Self Insurers Fund**

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**Attorneys for Defendant South Carolina
Home Builders Self Insurers Fund**

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Attorneys for the Defendants

Columbia, South Carolina
July 8, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No. 2013-CP-40-02655
Allen Patterson, Steve Tilton, Richard	)	
Sendler, Lincoln Privette, Marc Ellis, Joey	)	
Carter, Barry Davis, Michel Nieri, Allen	)	
Patterson Residential LLC, Tilton Group,	)	
Sendler Construction Co., Inc., Privette	)	
Enterprises, Ellis Construction Company,	)	
Inc., The Barry Davis Company, Inc.,	)	MOTION TO RECONSIDER ORDER
Great Southern Homes, and J. Carter,	)	DENYING MOTION TO DISMISS
LLC, on behalf of themselves and others	)	
similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Herb Witter, Colin Campbell, Eddie	)	
Weaver, Tom Markovich, Keith Smith,	)	
Jim Gregorie, individually and as Trustees	)	
of the South Carolina Home Builders	)	
Self Insurers Fund, and the South Carolina	)	
Home Builders Self Insurers Fund,	)	
	)	
Defendants.	)	

PLEASE TAKE NOTICE that the Defendants hereby move the Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an Order altering, amending, or vacating the Court's Order Denying Defendants' Motion to Dismiss entered on November 12, 2013 and received by the attorneys for the Defendants on November 19, 2013.

Respectfully, the grounds for this motion to reconsider, in addition to the reasons supplied in the memorandum of law and proposed order previously submitted to the Court, are as follows:

1. Joint and Several Liability is a Hallmark of an Unincorporated Association.

- a. S.C. Code Ann. § 15-35-170, entitled "Judgments against unincorporated associations," provides that members of an unincorporated association are

individually and jointly and severally liable for its actions: “On judgment being obtained against an unincorporated association . . . , the individual property of any copartner or **member** thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment.” *See also Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729 (1955); *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 186 S.E.2d 651 (1936).

- b. The Court’s apparent reliance upon the fact that shareholders of a corporation cannot be liable for the losses or actions of a corporation, Order p. 3, as a basis to conclude that this is not a derivative action is inconsistent with Rule 23’s application to both corporations and unincorporated associations.
- c. The affidavit submitted by the Plaintiffs confirms that the South Carolina Home Builders Self Insurance Fund (“SIF”) is an unincorporated association, as the affidavit asserts the existence of individual joint and several liability for the members of the SIF.
- d. Joint and several liability on the part of the members is inconsistent with their being beneficiaries. Beneficiaries receive benefits from trusts and are not jointly and severally liable for actions of the trustees.

2. The SIF is an unincorporated association.

- a. Because it is not incorporated or otherwise organized as a corporate entity under the laws of this state, the SIF is an unincorporated association. The cited South Carolina Code sections (§§12-37-3160(c), 27-29-10(3), and 37-25-10(2)), Order p. 4, are not relevant to the determination that the SIF is an unincorporated association and the applicability of Rule 23. Moreover, the definitions of those statutes apply only to the respective statutes cited.

3. Members of the SIF are not “beneficiaries.”

- a. The homebuilders/members of the SIF are described as “beneficiaries” in the Order. The Court erred in labeling these individuals as beneficiaries; the SIF document refers to the homebuilders as members and never as a beneficiary.

4. The Court erred by concluding this is not a derivative action.

- a. Each case cited by the Defendants regarding shareholder derivative litigation applies to this case as binding precedent. Rule 23 applies to corporations and **unincorporated** associations. That the body of South Carolina case law addresses corporations, as opposed to unincorporated associations, has zero significance. The case law is binding precedent for unincorporated associations.
- b. The Complaint alleges improper conduct by the Trustees that caused harm to the SIF. The Complaint does not allege any harm flowing solely to the named plaintiffs. These allegations present classic derivative claims. Allegations of “corporate malfeasance that resulted in identical harm to all shareholders . . . gives rise to a classic shareholder’s derivative suit.” *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006).
- c. Since as early as 1928, in *Gary v. Matthews*, 148 S.C. 125, 145 S.E. 702 (1928), the South Carolina Supreme Court has described derivative actions in the following regards:
 - i. Discussing the allegations of the complaint the Court stated that:
 - 1. “The basis of the demurrers is that the losses alleged to have been sustained by the mismanagement and negligence of the defendant directors, and by the willful appropriation of assets of the bank by certain officers, constitute assets which belong to the corporation, or to its representative, the receiver, for the benefit of general creditors, depositors, and stockholders, and that damages on account thereof cannot be recovered in an action by the stockholders solely for their benefit.”

ii. Describing the applicable law, the Court stated:

1. "The law is thoroughly settled that such damages, if recoverable, constitute assets which belong to the corporation, or to its representative, the receiver, and that any action therefor must be brought in the right of the corporation, for the benefit of all persons entitled to participate in the distribution of its assets."

- d. In 1928, the South Carolina Supreme Court described the law regarding what a derivative action is as, "thoroughly settled."
- e. This Court has erred by failing to follow binding precedent that has been thoroughly settled for over 80 years.

5. The Trust cases cited by the Court are not controlling.

- a. Each case regarding litigation between a trust beneficiary and a trustee cited in the Order at p.4 (*e.g.*, *Cartee v. Lesley, etc.*) pertains to a trust in the traditional sense, *i.e.*, a trust set up with named beneficiaries relating to issues concerning the disbursement of assets. These cases are irrelevant to the case at bar. The subject case addresses a workers compensation insurance fund that has been set up as an unincorporated association. A lawsuit of this nature necessitates that the requirements of Rule 23(b)(1) be followed.

6. The Court misapplied the standard for determining whether Rule 23 has been met.

- a. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2001) sets forth an exacting standard for compliance with Rule 23.
- b. By concluding that the general language of Paragraph 8 of the Plaintiffs' complaint met the Rule 23 heightened pleading requirement, the Court failed to apply binding precedent. The Complaint must set forth **in detail** the pre-filing actions of the named plaintiffs. "At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm

caused to the corporation, and request remedial relief.” *Whittle*, 346 S.C. at 189, 539 S.E.2d at 409. “Such a pre-suit demand must be alleged not in a conclusory fashion, but through particularized allegations.” *Id.* at 189, 539 S.E.2d at 409-10.

- c. The “[d]emand is required in order to assure compliance with the most fundamental principles of corporate governance—directors are answerable to the shareholders and are charged with the duty and responsibility to manage all aspects of corporate affairs.” *Id.* at 188, 539 S.E.2d at 409. The Court erred in determining that the Complaint complied with Rule 23.
- d. The Court’s conclusion that a letter sent to defense counsel during the pendency of the first lawsuit and before the filing of the second lawsuit, complied with Rule 23 was in error.

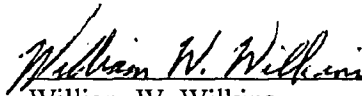
- i. Page 5 of the Order sets forth the language of the subject letter; the language of that letter is not found anywhere in the Plaintiffs’ complaint; accordingly, the Court disregarded binding precedent and thus erred by relying upon the letter. “[E]vidence of a demand outside the well pleaded facts contained in the Third Amended Complaint should not have been considered by the trial court and is not properly before us on appeal.” *Id.* at 191, 539 S.E.2d at 410 (rejecting the plaintiff’s submissions of “letters purporting to meet the pre-suit demand requirement . . . , in response to the motion to dismiss”).

7. The Court erred by concluding that a case involving a Trust can never be subject to Rule 23.

- a. Assuming in the alternative that the SIF is a Trust, the Court erred by determining that a lawsuit involving a Trust can never be subject to the Rule 23 pleading requirements, as that finding is contrary to the case law cited by the Defendants.

The Order submitted by the plaintiffs, and signed by the Court, is seriously flawed. It considers matters outside of the record, disregards binding precedent, and cites cases that are not applicable to this matter. The purpose of this motion is to bring these flaws to the Court's attention so the Court can consider whether and how to correct them. If an issue is presented to the trial Court but not ruled upon, the omission must be brought to the Court's attention by a Rule 59(e) motion for the issue to be addressed and preserved for review. *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000). Accordingly, the Defendants move and request that the Court rule specifically on each of these issues set forth above and determine, based upon each and all grounds and issues raised thereby, whether the Court should alter and amend its Order and grant the Defendants' motion to dismiss. Furthermore, the Defendants request that the Court allow oral argument on the issues raised by this motion.

Respectfully submitted,



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November 27, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sandler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sandler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2013-CP-40-02655

PLAINTIFFS' MOTION TO RECONSIDER

This motion concerns the Court's Order of February 11, 2014, which was served upon the Plaintiffs on February 20, 2014. The Plaintiffs move for the Court to reconsider that Order on the following grounds:

A. The Defendants acknowledge they received the Plaintiffs' letters of January 2013 making the required demands in this matter. There is no question this letter was served upon the Defendants before this lawsuit was brought and that the Defendants already have responded to it. It is not in the interest of justice to require a second response to a letter which was sent over a year ago. Requiring that this action be dismissed so that the

Defendants can respond to the letter again elevates form over substance and impedes the judicial systems' mandate of providing speedy resolutions to disagreements among citizens.

B. The better remedy in this case, if the Court believes a second response is necessary to the Plaintiffs' January 2013 letter, is to allow the Defendants to respond while leaving the lawsuit in place. Then, in the event the Defendants require more detailed pleadings, the Plaintiffs can supplement or amend the pleadings such that the action remains pending. This eliminates additional procedural delays and expenses which do not advance the ends of justice or speedy resolutions of disputes.

C. In the event that the Court still believes the matter should be dismissed without prejudice, the Plaintiffs believe the finding of fact in the Court's Order regarding whether or not the document in issue is a trust should be removed so as not to create problems upon refilling. In the Court's Order, the Court indicates that this matter is not to be treated as a trust under the Probate Code, but rather as a business trust or an unincorporated association.

In fact, the trust cannot be a business trust because it is not incorporated and filed as a business trust is required to be. By definition, a business trust requires the assets of the trust to be held on behalf of holders of transferable certificates which show the interest in the trust estate. See S.C. Code § 33-53-10. No such certificates exist in this case. In addition, a business trust must be registered with the Register of Deeds and the Secretary of State. *Id.* This trust has not been registered. Finally, the trust does have beneficiaries which are its members. The trust indicates that when the trust terminates, its proceeds shall be distributed to its members. (See page 13 of Trust, attached). Indeed,

this case is about to whom those proceeds belong because the trustees intend to use the proceeds to set up a competing insurance company. The Court's Order appears to rely upon the belief that the trust does not have beneficiaries and, therefore, is an unincorporated association. In fact, the trust provides that upon its dissolution, its proceeds will be distributed to the members. (See page 13 of Trust Agreement attached).

Furthermore, as defined in the Probate Code, a trust is:

[I]ncludes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article 6 (Sections 62-6-101 et seq.), custodial arrangements pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63, business trusts providing for certificates to be issued to beneficiaries, common trust funds¹, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

S.C. Code Ann. §33-21-210(49).

The Probate Code includes "any express trust," and does not make an exclusion for trusts created to maintain worker's compensation insurance for member/beneficiaries. In fact, the code section does remove some sorts of trust type agreements from its definition. But, it does not contain the exception that the Court has created in this case.

D. The Court did not address the issue raised by the Plaintiffs of judicial estoppel. In fact, Judge Manning found that the operative document was a trust in a previous order which required the lawsuit to be filed in Probate Court. The Defendants moved to dismiss on the basis that the matter was a trust and had to be filed in Probate Court.

¹ A common trust fund is a fund held by a bank. See S.C. Code §34-21-210(3).

Judge Manning granted their motion. As a result, the Plaintiffs filed the matter in Probate Court and removed it to Circuit Court.

When the matter was removed to Circuit Court, the Defendants alleged that the matter had to be pursued under South Carolina Rule of Civil Procedure 23. The Court's ruling now is in direct opposition to Judge Manning's ruling earlier that the document at issue is a trust.

As a result of the Court's Order now, there is an order holding the document is a trust, and there is an order holding the document is not a trust. As a result, the Plaintiffs do not know which court this matter should be filed in. It has been filed now in Probate Court and in Circuit Court. There is a finding that it should be filed in Probate Court by Judge Manning. Now there is a finding by this Court that it is not a trust subject to be filed in Probate Court. As a result, this Court should reconsider its ruling and follow the previous ruling from Judge Manning that the document is in fact a trust.

Respectfully submitted,



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March 3, 2014

Trustees shall not be liable therefor.

ARTICLE VI

MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Settlor. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by a concurrence of all of the parties to this Agreement, including the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities: in which case, the Trust may continue in perpetuity unless otherwise terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Allen Patterson, Steve Tilton, Richard
Sendler, Lincoln Privette, Marc Ellis, Joey
Carter, Barry Davis, Michel Nieri, Allen
Patterson Residential LLC, Tilton Group,
Sendler Construction Co., Inc., Privette
Enterprises, Ellis Construction Company,
Inc., The Barry Davis Company, Inc.,
Great Southern Himes, and J. Carter,
LLC, on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Civil Action No. 2012-CP-40-04311

**CONSOLIDATED MEMORANDUM OF
LAW IN SUPPORT OF MOTIONS TO
DISMISS AMENDED COMPLAINT BY
DEFENDANTS**

This matter is before the Court on separate Motions to Dismiss the Second Amended Complaint (the "Amended Complaint") pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure filed by (1) the South Carolina Home Builders Self Insurers Fund ("SIF") and (2) Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund (the "Trustees," and collectively with SIF, the "Defendants"). The Defendants have moved to dismiss the Amended Complaint in its entirety against all Defendants, as a matter of law, for the reasons stated in the respective Motions and for the reasons set forth below:

BACKGROUND

The Plaintiffs, in their Amended Complaint, allege that they are beneficiaries of an Agreement and Declaration of Trust created in the SIF. Established in 1995, SIF is an organization of South Carolina homebuilders who have joined together to provide a secure source for workers' compensation coverage. SIF is operated by a Board of Trustees. The Plaintiffs are all homebuilders who purport to represent themselves and others similarly situated. The Plaintiffs allege that the Trustees have engaged in the following misconduct:

1. The Trustees voted to remove approximately \$5,000,000.00 from the trust in order to incorporate a new member-owned insurance company.
2. The Trustees did not advise the beneficiaries that the funds could be returned to them and failed to advise them of the potential tax consequences.
3. The Trustees, using trust funds, purchased a building as well as expensive software for the purpose of creating the member-owned insurance company.
4. The Trustees have used trust funds and assets to hire attorneys, consultants and other employees for the purpose of setting up a member-owned insurance company.
5. The Trustees have taken significant amounts of money out of the trust for their own benefit by virtue of payments to them for unnecessary meetings and other unnecessary payments.

The Plaintiffs have alleged that they are entitled to the following relief:

"40. The plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, **that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded**, enjoining further violations of the fiduciary duties and trust agreement, and awarding the plaintiffs and the class actual and punitive damages." (emphasis added).

The Amended Complaint alleges causes of action for: (1) breach of fiduciary duty; (2) breach of contract and trust agreement; (3) breach of contract accompanied by a fraudulent act; (4) declaratory judgment; and (5) accounting.

DEFENDANTS' MOTION

The Amended Complaint is deficient and fails on several grounds: (1) the Amended Complaint is a derivative action and fails to meet the pleading requirements of Rule 23(b)(1), (2) Plaintiffs fail to plead a cause of action for breach of contract, (3) Plaintiffs fail to plead a cause of action for breach of contract accompanied by a fraudulent act, (4) alternatively, this Court lacks subject matter jurisdiction over the internal affairs of SIF, (5) alternatively, the South Carolina Workers' Compensation Commission has exclusive jurisdiction over the affairs of a self insurance fund such as SIF, (6) the business judgment rule protects the Trustees and bars all claims, and (7) Plaintiffs fail to allege a lack of good faith on the part of the Trustees,

The Defendants filed the Affidavit of Jeffrey M. Ranew, the SIF Administrator, in support of their motion. His affidavit contains a description of SIF and the relationship between SIF and the Plaintiff members, stating as follows:

2. The administration of the SIF is regulated and controlled by the South Carolina Workers' Compensation Commission. The SIF is not an insurance company and the South Carolina Department of Insurance has no control over the administration of the SIF. The SIF does not issue policies of insurance. If a home builder wants to become a member of the SIF in order to satisfy his employer's obligation under the South Carolina Workers' Compensation Act, he completes a workers' compensation application, completes a WCC Form 6a, and pays a \$25.00 non-refundable fee to the South Carolina Workers' Compensation Commission. Attached as Exhibit A is a copy of the workers' compensation application. Attached as Exhibit B is the WCC Form 6a. The WCC Form 6a and the check is then submitted to the Commission for approval. Upon approval, the home builder receives a certificate confirming that he is a member of the SIF. The SIF then provides the new member with a new member package with information about the SIF and the management of the SIF. Attached as Exhibit C is a new member package. After five weeks and a report

on his operation, the new member is billed for the premium relating to his business.

His affidavit also addresses specifically the allegations of misconduct and confirms that:

1. The establishment of a separate mutual insurance company had been studied and under consideration by SIF since 2003;
2. Approximately \$5,000,000.00 was removed from the trust corpus for the purpose of establishing a separate insurance company after a 96.5% vote of the members of SIF, including favorable votes from plaintiffs Carter, Ellis, Davis, Patterson, Sendler, Nier, and Tilton, but the funds were returned to the SIF when an agreement could not be reached with the HBASC on the formation of a mutual insurance company;
3. The Trustees did not advise the beneficiaries that the funds could be returned to the membership because there was no right to do so;
4. Trust funds were used to purchase a building, which purchase was approved by the South Carolina Workers' Compensation Commission;
5. The Trustees received no compensation for time/travel to regularly scheduled meetings from 1995 to 2008 and only then began to receive \$250.00 per meeting for time/travel expense for each board meeting attended; and
6. The SIF had hired a consulting firm to select the new software computer program and based thereon voted to purchase a new software computer program on December 19, 2008.

Mr. Ranew's affidavit also states that the Plaintiffs have: (1) filed no petitions with the South Carolina Workers' Compensation Commission seeking relief, (2) never participated in any mediation regarding the establishment of a mutual company, and (3) never contacted SIF or sought to appear before the board to address and/or resolve the claims set forth in the Amended Complaint.

The Defendants' motions seek the dismissal of the Amended Complaint as a matter of law, pursuant to Rule 12(b)(6), SCRCF. For the arguments that are supported by the Ranew affidavit, the Defendants also request that the motion be converted to a motion for summary judgment and determined pursuant to Rule 56, SCRCF.

STANDARD FOR RULE 12(b)(6)

Under South Carolina law, in connection with a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept as true the well-pleaded facts in the complaint, but the Court need not give any weight to conclusions of law alleged therein. *Jones v. Gilstrap*, 288 S.C. 525, 343 S.E.2d 646 (Ct. App. 1986); *Charleston County School Dist. v. South Carolina State Ports Authority*, 283 S.C. 48, 320 S.E.2d 727 (Ct. App. 1984). It is fundamental that a complaint must allege all facts necessary to satisfy each of the legal elements to support a cause of action or it should be dismissed. The motion to dismiss must be granted if the facts alleged in the complaint, and inferences reasonably deducible therefrom, do not entitle plaintiff to the relief sought. *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001) (citing *Jarrell v. Petoseed Co.*, 500 S.E.2d 793, 794 (Ct. App. 1998)).

STANDARD FOR RULE 56

Defendants have supported portions of their motion with the Affidavit of Jeffrey M. Ranew. Pursuant to Rule 12(b), SCRCPP, Defendants ask that their motion be treated as a motion for summary judgment for select arguments made herein. Summary judgment is appropriate where there is no genuine issue of material facts and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCPP; See *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by 'showing' – that is, pointing out to the trial court – that there is an absence of evidence to support

the nonmoving party's case." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party makes this demonstration, the opposing party "must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*." *Id.* (emphasis in original); *Midland Mutual Life Ins. Co. v. Harrell*, 331 S.C. 394, 397, 503 S.E.2d 189, 190 (Ct. App. 1998) (emphasis in original).

ARGUMENT

As outlined in each of the Motions to Dismiss, Plaintiffs' Amended Complaint must be dismissed as a matter of law for several reasons, pursuant to Rule 12(b)(6), SCRPC, for the reasons discussed in Sections 1 - 5:

1. Plaintiffs Bring a Derivative Action That Fails to Meet the Pleading Requirements of Rule 23(b)(1), SCRPC.

Summary of Argument

As a general rule, trust beneficiaries may not bring an action at law for conduct damaging the assets of a trust. However, trust beneficiaries can generally bring a *derivative* action. Because Plaintiffs, as SIF beneficiaries, do not allege that their loss is separate and distinct from that of the trust, they cannot bring this action individually at law, their claims are of a derivative nature and their lawsuit constitutes a derivative action.

Because derivative actions intrude upon the governance of an entity, they are subject to special pleading standards set forth at Rule 23(b)(1), SCRPC. The Plaintiffs in this case have not even attempted to comply with the proper pleading standards. Plaintiffs' Amended Complaint is not verified, and Plaintiffs fail to allege that they made or attempted to make a demand on the Trustees. Plaintiffs also fail to allege the reasons for not making such a demand on the Trustees. In sum, Plaintiffs bring a derivative action that fails to comply with the requirements of Rule

23(b)(1). Thus, the Amended Complaint must be dismissed. In the alternative, if the Amended Complaint is not dismissed on the above grounds, in a derivative action any damages or other benefits derived from the action belong to the trust. As a result, Plaintiffs, contrary to their claim, cannot individually recover any damages from the Trustees.

A. Plaintiffs as SIF Beneficiaries Can Only Bring a Derivative Action.

As a general common law rule, a trust beneficiary may not bring an action at law for conduct damaging the assets of a trust, and the right to bring such an action belongs to the trustee. See, e.g., *Int'l Ass'n of Fire Fighters, Local 2665 v. City of Clayton*, 320 F.3d 849, 851 (8th Cir. 2003) (holding that fire fighters, as beneficiaries of pension plan, could not bring suit on behalf of trust); *Ex parte Callan Assocs., Inc.*, No. 1081683, 2011 WL 3963007, at *3 (Ala. Sept. 9, 2011) (“any cause of action initiated on behalf of a trust for conduct damaging the assets of the trust belongs to the trustee of that trust”); Restatement (Second) of Trusts §§ 281(1), 282(1) (1959).

Trust beneficiaries must bring such an action as a derivative action. See *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 184, 64 S.E.2d 524, 528 (1951) (holding that hospital corporation's trustees were analogous to directors and shareholders of corporation and were entitled to bring a derivative action). A derivative action is one in equity. *Straight v. Goss*, 380 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009). While there do not appear to be any South Carolina reported cases recognizing the right of alleged trust beneficiaries similar to Plaintiffs to bring a derivative action, many jurisdictions permit trust beneficiaries to sue through a derivative action, as long as the beneficiaries show that the trustee failed to bring suit. See, e.g., *Ex parte Callan Assocs., Inc.*, 2011 WL 3963007, at *5 (“a beneficiary may initiate a derivative action on behalf of the trust if the beneficiary shows the trustee failed to bring suit, the trustee colluded

with the third party, or the trustee occupied an antagonistic position to the beneficiary”); *Saunders v. Muratori*, 251 P.3d 550, 553 (Colo. Ct. App. 2010) (“In equity, trust beneficiaries may bring a suit for the benefit of a trust when the trustees refuse to do so. . . . Such a suit is analogous to a shareholder derivative suit on behalf of a corporation.”). Similarly, in a wrongful death action, the South Carolina Supreme Court stated that the “rule, which is frequently cited in . . . instances of trusteeship,” is that the beneficiary may himself bring an action “[i]f a trustee refuse[s], after demand, to bring an action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust.” *Bailes v. S. Ry. Co.*, 227 S.C. 176, 182-83, 87 S.E.2d 481, 484 (1955) (“[T]he beneficiary is *not enforcing his own cause of action*, but is acting as a *temporary representative of the trust*.” (emphasis added)).

In the case at bar, Plaintiffs are the alleged beneficiaries of SIF bringing suit against SIF and its Trustees. Much like a shareholder lawsuit against a corporation and its directors, a trust beneficiary can only bring a derivative action on behalf of a trust and cannot sue individually.

B. Plaintiffs’ Claims Are of a Derivative Nature.

Plaintiffs bring claims that are of a derivative nature, which makes their lawsuit a derivative action. Their allegations regarding the damages prove that:

40. The plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, **that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded**, enjoining further violations of the fiduciary duties and trust agreement, and awarding the plaintiffs and the class actual and punitive damages. (emphasis added).

Plaintiffs cannot maintain an individual action because they did not allege or show that any trust beneficiary’s loss is separate and distinct from that of the trust itself. The Amended Complaint identifies no personal damage to any plaintiff.

In the corporate setting, a shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. *See Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 362, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995); *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012). “A shareholder’s suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder.” *Id.* Allegations of corporate malfeasance that result in identical harm to all shareholders are a “breach of fiduciary duty claim that [give] rise to a classic shareholders’ derivative suit.” *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006). Where the alleged injury falls directly on a corporation or a trust and only secondarily on shareholders or trust beneficiaries, the plaintiff’s claim is necessarily derivative. *See Ex parte Morgan Asset Mgmt., Inc.*, 86 So. 3d 309 (Ala. 2011) (holding that plaintiffs, who were beneficiaries of trusts that held shares of investment funds, and who claimed they were injured by diminution in value of funds, were alleging injury that fell directly on funds and only secondarily on plaintiffs, making their claim derivative).

Plaintiffs fail to allege an injury that is separate and distinct from the injury to the other SIF beneficiaries or the injury to SIF itself. The Amended Complaint makes it clear that it was the SIF that was allegedly directly injured, and only through that harm to the SIF were the beneficiaries allegedly (and derivatively) injured. As a result, Plaintiffs’ claims are of a derivative nature, Plaintiffs’ lawsuit constitutes a derivative action, and the Plaintiffs must adhere to the requirements necessary to file a derivative action.

C. *Plaintiffs Fail to Meet the Pleading Requirements of Rule 23(b)(1).*

Under Rule 23(b)(1), SCRCF, a plaintiff must meet certain pleading requirements in order to maintain a derivative action against a corporation or an unincorporated association. This Rule seeks to prevent the unrestrained use of derivative actions. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2001).

Plaintiffs fail to meet the pleading requirements of Rule 23(b)(1) that are required in order to maintain their derivative action. Plaintiffs' Complaint is not verified, and Plaintiffs fail to allege that they made or attempted to make a demand on the Trustees prior to filing suit. Plaintiffs also fail to allege the reasons for not making such a demand on the Trustees.

First, a complaint must be "verified." Rule 23(b)(1), SCRCF. Without any doubt, Plaintiffs' Amended Complaint is clearly not verified.

Secondly, a complaint must allege with particularity the pre-suit efforts taken by the plaintiff to obtain the action he desires from the board (i.e., the "pre-suit demand"), as well as the reasons for his failure to obtain the action or for not making the effort. Rule 23(b)(1), SCRCF. Such a pre-suit demand is required so that the board is notified and can use its business judgment to pursue the litigation or waive such right and allow the beneficiaries to pursue the action. *Whittle*, 343 S.C. at 188, 539 S.E.2d at 409. If the plaintiff's pre-suit demand fails to correct the alleged improper conduct, then in a later filed lawsuit, the plaintiff must affirmatively plead the factual basis of its pre-suit demand (i.e., its complaint must contain the facts constituting the substance of the pre-suit demand), and the pleading must provide evidence of an earnest effort to induce remedial action on the part of the board. *Id.* at 189-90, 539 S.E.2d at 410. At a minimum, the pleading surrounding the pre-suit demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused, and the requested remedial

relief. *Id.* at 189, 539 S.E.2d at 409. Such a pre-suit demand must be alleged, not in conclusory fashion, but through particularized allegations. *Id.* at 189, 539 S.E.2d at 409-410. A derivative action that does not meet the pleading requirements of Rule 23(b)(1) is properly dismissed pursuant to Rule 12(b)(6). *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339 (citing *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)).

The same demand requirements apply to derivative actions in the context of a trust. *See, e.g., Ex parte Callan*, 2011 WL 3963007, at *6 (action by mother of designated beneficiary of Prepaid Affordable College Tuition Trust Fund on behalf of beneficiary and Fund was premature, where mother failed to make a demand on trustees prior to bringing suit); *Ex parte Morgan*, 86 So. 3d 309 (holding that circuit court did not have subject matter jurisdiction over trust beneficiaries' derivative claims where beneficiaries had not complied with requirements of Rule 23.1 of Alabama Rules of Civil Procedure).

Plaintiffs fail to meet any of these requirements, and, therefore, the Amended Complaint is deficient and must be dismissed as a matter of law. Plaintiffs fail to make any allegations that they made or attempted to make any pre-suit demand on the Trustees, let alone do so with particularity. Plaintiffs also fail to allege the reasons for not making such efforts. As a result, Plaintiffs fail to meet the requirements for what must be contained in the pre-suit demand.¹ In sum, Plaintiffs bring a derivative action that fails to comply with the requirements of Rule 23(b)(1) and, thus, must be dismissed. *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339 (citing *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)).

¹ Moreover, if the Court is inclined to review any facts in its determination of this motion, as stated in Mr. Ranew's affidavit filed with the original motions to dismiss, Plaintiffs never sought to appear before the Trustees or contact SIF to address or resolve the claims set forth in their Amended Complaint. Ranew Aff. ¶ 9.

D. In the Alternative, Damages Belong to SIF and Not the SIF Beneficiaries.

In the alternative, to the extent that the Amended Complaint is not dismissed on the above grounds, Plaintiffs have not suffered any damages and the claims must be dismissed. In a derivative action, any damages or other benefits derived from the action belong to SIF. Plaintiffs cannot individually recover actual or punitive damages from the Trustees.

A shareholder may not collect any money directly from the wrongdoer because it belongs to the corporation. See, e.g., *Rivers v. Wachovia Corp.*, 665 F.3d 610, 615-16 (4th Cir. 2011) (holding that “any recovery in a derivative suit rebounds to the benefit of the corporation” because “any recovered damages constitute assets which belong to the corporation”); *Molever v. Levenson*, 539 F.2d 996 (4th Cir. 1976) (holding that award of damages to stockholders, instead of bank, was erroneous because real party in interest in a derivative action was the bank).

Plaintiffs’ claim that Plaintiffs themselves are entitled to a direct award of actual and punitive damages. Am. Compl. ¶ 40. However, as shown above, Plaintiffs’ lawsuit constitutes a derivative action. Therefore, in this derivative action, any alleged damages belong to SIF. Plaintiffs can neither seek nor individually recover any actual or punitive damages directly from the Trustees. As a result, Plaintiffs’ claims to an award of such damages directly to them is improper and must be dismissed.²

2. Plaintiffs Fail to Plead a Cause of Action for Breach of Contract.

In their Amended Complaint, Plaintiffs fail to state facts sufficient to support the cause of action for breach of contract. Plaintiffs face a glaring deficiency in their pleadings: they fail to even allege the existence of a contract between Plaintiffs and SIF or between Plaintiffs and the Trustees. This simple allegation cannot be made because there is no such contract. Plaintiffs

² To the extent, if any, that the case at bar is not dismissed, the Defendants request that the claim for punitive damages be stricken from the Amended Complaint because punitive damages cannot be sought in an equity suit. *Dibble v. Sumter Ice and Fuel Co.*, 283 S.C. 278, 286, 322 S.E.2d 674, 679 (Ct. App. 1984).

further fail to allege how such a contract was created, and they fail to allege how the contract was breached.

The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). While the pleading standards under Rule 8, SCRPC are relaxed, there still must be some allegation of the existence of the contract, of how the contract was created, and of how the contract was breached. The failure to meet any of these elements constitutes a deficiency in the pleadings and cause for dismissal; Plaintiffs fail to meet each of these elements.

The Restatement (Second) of Trusts³ confirms that a trustee who fails to perform his duties is not liable to the beneficiary for breach of contract. Restatement (Second) of Trusts § 197 cmt. b (1959). "The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract." *Id.* Moreover, all parties must be obligated under a contract for it to be enforceable; that is, a contract must involve mutuality of obligation. *See Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 167, 355 S.E.2d 286, 290 (Ct. App. 1987) ("all parties must be obligated under a contract in order for it to be enforceable").

First, Plaintiffs fail to allege the existence of a contract between Plaintiffs and SIF. The Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund (the "Trust Agreement") is not a *contract* between Plaintiffs and SIF. In fact, as established by the exhibits to the Amended Complaint, there have been no written contracts signed by the members and SIF or by the members and the Trustees. As a result, Plaintiffs are

³ The South Carolina Supreme Court has cited the Restatement (Second) of Trusts positively. *See, e.g., Ex parte Guar. Bank & Trust Co.*, 255 S.C. 106, 113-14, 177 S.E.2d 358, 361-62 (1970) (citing and referring to the Restatement (Second) of Trusts as "convincing text authority" that has been "cited with approval" by the court in previous decisions); *S.C. Dep't of Mental Health v. McMaster*, 372 S.C. 175, 180-81, 642 S.E.2d 552, 555 (2007). Other South Carolina courts have also cited the Restatement (Second) of Trusts positively or with approval. *See, e.g., Doe v. Roe*, 323 S.C. 445, 453, 475 S.E.2d 783, 787 (Ct. App. 1996).

not parties to the Trust Agreement. The Trust Agreement, in essence, creates SIF, and there are no parties to the Trust Agreement in the traditional sense of how a contract is formed. The Trust Agreement creates no mutuality of obligation and no reciprocal rights between Plaintiffs and SIF or the Trustees. As a result, the Trust Agreement is not a contract that can be enforced. Hence, Plaintiffs fail to allege the existence of a contract between Plaintiffs and the Defendants.

Second, Plaintiffs' Amended Complaint is void of any allegation of how a contract was created.

Third, while Plaintiffs make allegations as to wrongdoing by the Trustees, they fail to make allegation as to which, if any, of these actions constituted a breach of contract.

Finally, Plaintiffs fail to allege what kind of damages the breach of contract specifically caused.

As a result, Plaintiffs fail to state facts sufficient to support their cause of action for breach of contract, and this cause of action must be dismissed.

3. Plaintiffs Fail to Plead a Cause of Action for Breach of Contract Accompanied by a Fraudulent Act.

A. The Elements of the Breach of Contract Accompanied by a Fraudulent Act Cause of Action.

To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). Mere speculation by a party as to fraudulent intent is not sufficient to produce a question of fact. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 471, 597 S.E.2d 881, 883 (Ct. App. 2004).

Plaintiffs fail to establish all three elements of the breach of contract accompanied by a fraudulent act cause of action.

B. Plaintiffs Fail to Establish the Breach of Contract Element.

Under South Carolina law, a claim for breach of contract accompanied by a fraudulent act requires that Plaintiffs first establish a breach of contract. *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 495 (4th Cir. 2007) (citing *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606, 612 (2002)). Having a contract is a prerequisite to proving breach of contract accompanied by a fraudulent act. *Armstrong v. Collins*, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005).

As established in Section 2, *supra*, Plaintiffs fail to allege or show the existence of a contract between Plaintiffs and the Defendants or a breach of contract by the Defendants. As a result, Plaintiffs fail to establish the breach of contract element necessary for establishing a claim for breach of contract accompanied by a fraudulent act.

C. Plaintiffs Fail to Establish the Fraudulent Intent Element.

Fraudulent intent is the second necessary element of the breach of contract accompanied by a fraudulent act cause of action. The fraudulent intent must relate to the breaching of the contract and not merely to its making. *Conner v. City of Forest Acres*, 348 S.C. at 465-66, 560 S.E.2d at 612.

Plaintiffs fail to allege any particularized fraudulent intent relating to the alleged breaching of the contract by the Trustees. As a result, Plaintiffs fail to establish the fraudulent intent element of this claim.

D. Plaintiffs Fail to Establish the Fraudulent Act Element.⁴

Plaintiffs fail to show dishonesty in fact on the part of the Trustees, and they fail to allege any unfair dealing by the Trustees.

A “fraudulent act” is broadly defined as “any act characterized by dishonesty in fact or unfair dealing.” *Conner v. City of Forest Acres*, 348 S.C. at 466, 560 S.E.2d at 612. A showing of acts characterized by dishonesty or unfair dealing is required to meet the fraudulent act element of the breach of contract accompanied by a fraudulent act cause of action. *Maro v. Lewis*, 389 S.C. 216, 223-24, 697 S.E.2d 684, 688 (Ct. App. 2010).

As established in Section 6B(ii), *infra*, contrary to Plaintiffs’ allegations, Plaintiffs fail to show that the Trustees engaged in any acts characterized by dishonesty. Moreover, Plaintiffs make no allegations that the Trustees engaged in unfair dealing. As a result, Plaintiffs fail to establish the fraudulent act element of the breach of contract accompanied by a fraudulent act cause of action.

E. Conclusion – Plaintiffs’ Breach of Contract Accompanied by a Fraudulent Act Cause of Action Fails.

Plaintiffs fail to establish the breach of contract element, the fraudulent intent element, and the fraudulent act element of the breach of contract accompanied by a fraudulent act cause of action. Because the failure to establish any single element of a cause of action creates a deficiency in the allegations, Plaintiffs fail to state facts sufficient to support their cause of action for breach of contract accompanied by a fraudulent act, and, thus, the cause of action must be dismissed.

⁴ The argument for dismissal under this element require analysis under the summary judgment standard explained below. However, this claim should be dismissed under Rule 12(b)(6) for the reasons stated in subsection B and C, *supra*, as the failure of any single elements makes the claim defective.

4. The Probate Court Has Exclusive Jurisdiction Over the Internal Affairs of SIF.

In the alternative to the arguments made above, the Amended Complaint must be dismissed in its entirety because this Court lacks subject matter jurisdiction over this action as it involves the internal affairs of a trust. Proceedings initiated by interested parties concerning the internal affairs of trusts are subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. § 62-7-201 (1976).

The Probate Court has exclusive jurisdiction over matters concerning the internal affairs of trust administration. *All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S. C.*, 358 S.C. 209, 239, 595 S.E.2d 253, 269 (Ct. App. 2004); *Mayer v. M.S. Bailey & Son*, 347 S.C. 353, 359, 555 S.E.2d 406, 409 (Ct. App. 2001). Plaintiffs' Amended Complaint only involves matters concerning the internal affairs of the SIF. In the Amended Complaint, Plaintiffs challenge the Trustees' administration and distribution of the SIF and the propriety of the Trustees hiring and paying attorneys, consultants, and other employees for the purpose of setting up a member owned insurance company. Am. Compl. ¶¶ 19, 20, 21, 22, 23, 24, 25, 26, 27. As a result, this Court lacks subject matter jurisdiction over this action. The Probate Court has exclusive jurisdiction over all of the matters raised by Plaintiffs' in the Amended Complaint because they concern the internal affairs of the SIF. Thus, the Amended Complaint must be dismissed.

5. The South Carolina Workers' Compensation Commission Has Exclusive Jurisdiction Over the Affairs of a Self Insurance Fund.

In the alternative to the arguments made above, the Complaint must be dismissed in its entirety because this Court lacks subject matter jurisdiction over this action. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over the affairs of a self insurance fund such as SIF.

SIF was established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto. *See* S.C. Code Ann. § 42-5-20 (1976) ("The commission may, under such rules and regulations as it may prescribe, permit . . . employers in businesses of a similar nature to enter into agreements to pool their liabilities . . . for the purpose of qualifying as self-insurers.") Pursuant to S.C. Code Ann. § 42-5-20, the South Carolina Workers' Compensation Commission has "exclusive jurisdiction of group self-insurers under this section." Therefore, the South Carolina Workers' Compensation Commission has exclusive jurisdiction over the affairs of SIF.

Plaintiffs' Amended Complaint only involves matters concerning the affairs of SIF and the actions of SIF as carried out by its Trustees. Plaintiffs have filed no petitions with the South Carolina Workers' Compensation Commission seeking relief regarding the actions of the Trustees. *Ranew Aff.* ¶ 9. As a result, this Court lacks subject matter jurisdiction over this action and the Amended Complaint must be dismissed.

ARGUMENT ON ISSUES ADDRESSED UNDER RULE 56

As outlined in each of the Motions to Dismiss, Plaintiffs' Amended Complaint must be dismissed pursuant to Rule 56, SCRPC, for the reasons discussed in Sections 6 and 7:

6. The Business Judgment Rule Protects the Trustees and Bars All Claims.

Summary of Argument

South Carolina courts have described and interpreted the standards that apply to directors and trustees in identical terms. Therefore, in South Carolina, the business judgment rule is the standard that applies to the Trustees in the case at bar. As a result, the Trustees' decisions and actions cannot be judicially reviewed unless Plaintiffs overcome the business judgment rule. However, Plaintiffs fail to overcome the business judgment rule: Plaintiffs fail to sufficiently

allege or show a lack of good faith, dishonesty, self-dealing, fraud, or unconscionable conduct on the part of the Trustees. Each Trustee acted with the care of an ordinarily prudent person in similar circumstances and reasonably believed to serve the best interests of the SIF and its beneficiaries. The Trustees exercised their good faith business judgment in their decisions to pursue the above actions. Therefore, the Trustees' business judgment cannot be judicially reviewed and the Amended Complaint must be dismissed.

A. The Business Judgment Rule Applies to Trustees.

The business judgment rule applies to trustees in the same manner that it applies to directors of a corporation. The business judgment rule is a key factor in the operation of a corporation or an unincorporated association. Under the rule, "a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." *Dockside Ass'n, Inc. v. Detyens*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987), *aff'd*, 294 S.C. 86, 362 S.E.2d 874 (1987).

The business judgment rule precludes judicial review of actions taken by a corporation's directors absent a showing of a lack of good faith, fraud, self-dealing, or unconscionable conduct. *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987). The judgment of the directors will not be set aside by judicial action absent a showing of bad faith, dishonesty, or incompetence. *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). The same standard applies to trustees. *Hargrave v. Canadian Valley Elec. Coop., Inc.*, 792 P.2d 50, 57 (Okla. 1990).

As a fiduciary, much like a director, a trustee is under a duty of loyalty to act solely in the best interests of the beneficiary. *Compare Yates v. Yates*, 292 S.C. 49, 51, 354 S.E. 2d 800, 801 (Ct. App. 1987) *with Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 603, 538 S.E.2d 15, 27 (Ct.

App. 2000) (a director must show he acted in good faith, with the care of an ordinarily prudent person in similar circumstances, and in a manner he reasonably believes to be in the best interests of the corporation.). A trustee must exercise reasonable care, prudence, and diligence in the management of trust assets as a reasonably prudent person would do in his own affairs. *Cartee v. Lesley*, 290 S.C. 333, 336, 350 S.E.2d 388, 390 (1986).

Furthermore, a number of jurisdictions have applied the business judgment rule to trustees as well as directors. For example, the Oklahoma Supreme Court recognizes that liability cannot be imposed on a trustee if he acted with “the care and diligence of an ordinarily prudent man under similar circumstances.” *Hargrave v. Canadian Valley Elec. Coop., Inc.*, 792 P.2d at 57 (Okla. 1990) (The “business judgment rule shields a director or trustee from liability in the case of an honest error in judgment.”). *See also Wood Prince v. Lynch*, 2005 WL 373805, at *5 (R.I. Super. 2005) (The fiduciary duties of trustees and directors are substantially similar, and that, therefore, the business judgment rule applied to trustees unless the objecting beneficiaries showed that the trustees abused their discretion or contravened the provisions of the trust); *Pederzani v. Guerriere*, 1995 WL 1146832, at *1 (Mass. Super. 1995) (Finding the business judgment rule as the appropriate standard to be applied to claims against trustees, the court held that trustees were “not liable for actions taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of the interests of the unit owners.”).

As a result, the business judgment rule is the standard that applies to the Trustees. Therefore, there must be no judicial review of the Trustees’ decisions and actions unless Plaintiffs can overcome the business judgment rule.

B. *Plaintiffs Fail to Overcome the Business Judgment Rule That Applies to the Trustees.*

Plaintiffs fail to overcome the business judgment rule that applies to the Trustees. Plaintiffs have failed to allege that the Trustees acted in bad faith. Furthermore, all of the alleged actions by the Trustees were permissible and within their authority under the Trust Agreement and do not create any breach of the Trustees' obligations to SIF and its beneficiaries. The burden is on Plaintiffs to show a lack of good faith on the part of the Trustees. However, Plaintiffs cannot show that the Trustees engaged in self-dealing or dishonesty. Plaintiffs also cannot show that the Trustees did not act in the best interests of SIF and its beneficiaries. The Trustees collectively acted with the care of an ordinarily prudent person and, therefore, their good faith business judgment must not be judicially reviewed.

The business judgment rule eliminates judicial review of business decisions of a corporation or a trust if they are made in good faith and with the care of an ordinarily prudent person. *Kuznik*, 342 S.C. at 603, 538 S.E.2d at 28. When a plaintiff challenges the actions and decisions of directors or trustees, the burden is on the plaintiff to show a lack of good faith on the part of the trustees. *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. at 87, 362 S.E.2d at 874 ("the burden of proving a lack of good faith is borne . . . by those challenging the board's actions").

i. *The Trustees Did Not Engage in Self-Dealing.*

Plaintiffs fail to show that the Trustees engaged in any self-dealing. The Trustees did not remove SIF funds and assets in order to use them for their own purposes. On the contrary, the Trustees only transferred the money from the SIF and held it in an account for the purpose of establishing a separate mutual insurance company. *Ranew Aff.* ¶ 4. In fact, Plaintiffs do not even allege that the transferred SIF money was used by the Trustees to their own benefit and admit that the money was to be used for the purpose of establishing a member owned insurance

company. Am. Compl. ¶ 20. Moreover, when an agreement could not be reached with the Home Builders Association of South Carolina regarding the establishment and operation of the proposed mutual insurance company, the application for a mutual insurance company was withdrawn, and the transferred SIF money was returned to SIF. Ranew Aff. ¶ 4.

While Plaintiffs allege that the Trustees have taken “significant amounts of money” out of the SIF for their own benefit as payments to themselves for allegedly “unnecessary” meetings (Am. Compl. ¶ 27), contrary to these allegations, from 1995 to 2008, the Trustees received no compensation for time and travel to regularly scheduled board meetings. Ranew Aff. ¶ 7. It was only beginning in 2008 that the Trustees began to receive a mere sum of \$250.00 for time and travel expense for each board meeting attended. Ranew Aff. ¶ 7. If a Trustee attended all twelve board meetings per year, he would receive a maximum of only \$3,000.00 per year. Ranew Aff. ¶ 7. As a result, contrary to Plaintiffs’ allegations, the Trustees did not take out *significant* amounts of money from the SIF for *unnecessary* meetings. Instead, the Trustees only began to be minimally reimbursed for time and travel expense since 2008 to attend board meetings, with some Trustees having to travel rather long distances, and with board meetings frequently taking as long as a full day. Ranew Aff. ¶ 7.

ii. The Trustees Did Not Engage in Dishonesty.

Plaintiffs fail to show that there was any dishonesty on the part of the Trustees. On the contrary, the Trustees only transferred the SIF’s funds after 96.5% of the SIF membership voted to approve this transfer, with most Plaintiffs approving it at the time. Ranew Aff. ¶ 4. Plaintiffs also allege that the Trustees did not advise the beneficiaries that the funds being transferred to establish the mutual insurance company could have been returned to the membership. Am. Compl. ¶ 21. However, it is clear that the beneficiaries were aware of this before they voted to

approve the transfer of the funds because returns of member contributions were made to them in 2009 and 2010. Ranew Aff. ¶ 5.

iii. The Trustees Acted in the Best Interests of SIF and Its Beneficiaries.

Plaintiffs fail to show that the Trustees did not act in the best interests of SIF and its beneficiaries. Plaintiffs allege that certain acts of the Trustees conferred no benefit upon the beneficiaries of the SIF. These alleged acts include the removal of assets from SIF in order to incorporate a new member owned insurance company, and the use of SIF funds and assets to purchase a building and a software program, as well as to hire attorneys, consultants, and other employees, for the purpose of creating and setting up the member owned insurance company. All of the acts that Plaintiffs allege were contrary to the best interests of the beneficiaries are related to the creation and setup of the new member owned insurance company.

Plaintiffs fail to allege or show a lack of good faith on the part of the Trustees in taking the above actions. In fact, the Trustees exercised their business judgment with the care of an ordinarily prudent person in similar circumstances, reasonably believing that the above decisions and actions were in the best interests of SIF and its beneficiaries. The establishment of a separate mutual insurance company has been studied and under consideration by SIF and the Trustees since 2003, when it began to be regularly addressed at board meetings. Ranew Aff. ¶ 5, Ex. H. The decision to transition from a self insured fund to a mutual insurance company was made in good faith as the Trustees were pursuing the best interests of SIF and its beneficiaries. Contrary to Plaintiffs' allegations, there are real and substantial benefits to this transition. Ranew Aff. ¶ 5. Members of a mutual insurance company are not jointly and severally liable for claims as members of a self insured fund such as the SIF are, and the formation of a mutual insurance company would start the process leading to the eventual end of exposure for joint and

several liability. Ranew Aff. ¶ 5. Due to the negative impact of the recession on the home building industry, the number of members of the SIF has been reduced. Ranew Aff. ¶ 5. However, a mutual insurance company could offer other types of insurance to a broader customer base, which would help insure the viability and availability of insurance coverage for the homebuilder members. Ranew Aff. ¶ 5.

Moreover, all of the Trustees actions were approved by the South Carolina Workers' Compensation Commission. Ranew Aff. ¶¶ 3, 4, 5. Regardless, these benefits are inconsequential to the legal argument at issue, as these decisions are protected by the business judgment rule.

iv. Conclusion – the Business Judgment Rule Protects the Trustees.

Plaintiffs do not sufficiently allege or show a lack of good faith, dishonesty, self-dealing, fraud, or unconscionable conduct on the part of the Trustees. Plaintiffs also fail to allege that the Trustees violated the Agreement and Declaration of Trust, and the Trustees in fact acted with authority for all the action they took. The Trustees acted with the care of an ordinarily prudent person in similar circumstances. The Trustees reasonably believed their actions served the best interests of SIF and its beneficiaries. The Trustees exercised their good faith business judgment in their decisions to pursue the above actions, accompanied by no corrupt motives, self-dealing, dishonest, fraud, or unconscionable conduct. As a result, Plaintiffs fail to overcome the business judgment rule that applies to the Trustees. Therefore, the Trustees' business judgment cannot be judicially reviewed, and all of Plaintiffs' claims are barred. Thus, the Amended Complaint must be dismissed.

7. Plaintiffs Fail to Allege a Lack of Good Faith on the Part of the Trustees.

Under the Trust Agreement, the Trustees are not liable for any action taken in good faith. Ranew Aff., Ex. K § 12.

The section above details how Plaintiffs fail to allege or show a lack of good faith on the part of the Trustees with regard to their decisions and actions. In fact, as set forth above, the Trustees were acting in good faith and in the best interests of SIF and its beneficiaries with regard to the decision to transition to a mutual insurance company, as well as with regard to the actions taken by them toward the creation and setup of such a mutual insurance company. The failure to make such an allegation of lack of good faith is a pleading deficiency, and, as such, the Amended Complaint must be dismissed.

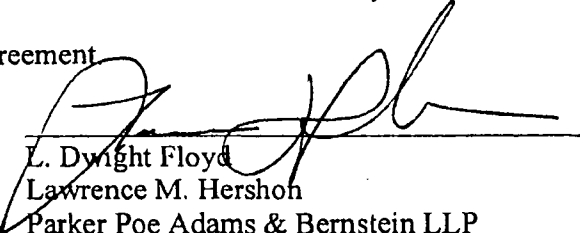
Moreover, because 96.5% of the SIF membership voted to approve the transfer of the SIF money for the purpose of establishing a mutual insurance company, the Trustees acted with the reasonable belief that their actions complied with the desires of the SIF's beneficiaries. Such belief relieves the Trustees from personal liability for these actions. *Rembert v. Gressette*, 318 S.C. 519, 525, 458 S.E.2d 552, 555-56 (Ct. App. 1995) (holding that the finding that trustee was not personally liable for alleged mismanagement of trust assets was supported by evidence that trustee believed stock transfer complied with desires of beneficiaries).

Thus, the Amended Complaint must be dismissed.

CONCLUSION

As detailed in each section above, Plaintiffs' Amended Complaint must be dismissed as a matter of law for several reasons: (1) the Complaint is a derivative action and fails to meet the pleading requirements of Rule 23(b)(1) because the Amended Complaint is not verified, Plaintiffs fail to allege that they made or attempted to make a pre-suit demand on the Trustees,

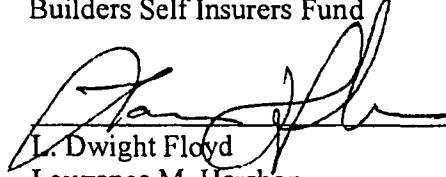
and Plaintiffs fail to allege the reasons for not making such a pre-suit demand on the Trustees; (2) Plaintiffs fail to plead a cause of action for breach of contract because a trustee who fails to perform any duties cannot be liable for breach of contract; (3) Plaintiffs fail to plead a cause of action for breach of contract accompanied by a fraudulent act, as Plaintiffs fail to meet each element of the cause of action; (4) alternatively, this Court lacks subject matter jurisdiction over the internal affairs of the SIF; (5) alternatively, the South Carolina Workers' Compensation Commission has exclusive jurisdiction over the affairs of a self insurance fund such as SIF; (6) the business judgment rule protects the Trustees and bars all claims because Plaintiffs fail to sufficiently allege or show a lack of good faith, dishonesty, self-dealing, fraud, or unconscionable conduct on the part of the Trustees; and (7) Plaintiffs fail to allege a lack of good faith on the part of the Trustees, and the Trustees are not liable for any actions taken in good faith, pursuant to the terms of the Trust Agreement



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August 28, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Allen Patterson, Steve Tilton, Richard
Sandler, Lincoln Privette, Marc Ellis, Joey
Carter, Barry Davis, Michel Nieri, Allen
Patterson Residential LLC, Tilton Group,
Sandler Construction Co., Inc., Privette
Enterprises, Ellis Construction Company,
Inc., The Barry Davis Company, Inc.,
Great Southern Himes, and J. Carter,
LLC, on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Civil Action No. 2013-CP-40-02655

**CONSOLIDATED MEMORANDUM OF
LAW IN SUPPORT OF MOTIONS TO
DISMISS COMPLAINT BY DEFENDANTS**

This matter is before the Court on Defendants' Motions to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The Complaint, in its entirety, should be dismissed against all Defendants, as a matter of law.¹

BACKGROUND

This is a derivative action against the South Carolina Home Builders Self Insurers Fund (the "Fund") and its Board of Trustees. The Fund was created by an Agreement and Declaration of Trust dated September 27, 1995. Its purpose, according to the trust agreement, is to provide a fund to meet and fulfill the homebuilder/member's obligations and liabilities under the South

¹ The subject complaint is the second action brought by the Plaintiffs. The first action, C/A No. 2012-CP-40-4311, was not initially filed in the probate court and was therefore dismissed for lack of subject matter jurisdiction. The instant action was initially filed in the probate court and later removed to this Court.

Carolina Workers' Compensation Act. The Fund is not an insurance company and is not regulated by the South Carolina Department of Insurance. Instead, the Fund is regulated by the South Carolina Workers' Compensation Commission.

If a homebuilder wants to become a member of the Fund, the homebuilder must complete a WCC Form 6A and pay a \$25.00 non-refundable fee to the South Carolina Workers' Compensation Commission. Upon Commission approval, the homebuilder receives a certificate confirming membership in the Fund, the Fund provides the new member with a new member packet and bills the new member the amount due for providing workers compensation benefits to the homebuilder/member's business. The Fund issues a certificate that sets forth the responsibilities of the Fund and the member. There are no written contracts signed by the member and the Fund or by the member and the trustees. The Fund is managed by a Board of Trustees.

Plaintiffs have brought this lawsuit with myriad allegations, claiming that alleged misconduct by the Trustees has harmed SIF. Some Plaintiffs are corporate homebuilders, and other are individuals who are merely members/owners of the corporate homebuilders. The Plaintiffs purport to represent themselves and others similarly situated. The Plaintiffs allege, among other things, that the Trustees removed assets without any benefit to the beneficiaries and misused assets of SIF.

ARGUMENT

1. Plaintiffs Bring a Derivative Action That Fails to Meet the Pleading Requirements of Rule 23(b)(1), SCRPC.

A. The Complaint is a derivative action

Plaintiffs improperly seek to prosecute this lawsuit as a class action. The pertinent case law dictates that Plaintiffs can only proceed in the form of a derivative action under Rule 23(b). See Rule 23(b)(1), SCRPC; *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 184, 64 S.E.2d 524, 528

(1951) (holding that hospital corporation's trustees were analogous to directors and shareholders of corporation and were entitled to bring a derivative action); *Bailes v. S. Ry. Co.*, 227 S.C. 176, 182-83, 87 S.E.2d 481, 484 (1955) ("[T]he beneficiary is *not enforcing his own cause of action*, but is acting as a *temporary representative of the trust*." (emphasis added)). Where the alleged injury falls directly on a trust and only secondarily on trust beneficiaries, the plaintiff's claim is necessarily derivative. See *Ex parte Morgan Asset Mgmt., Inc.*, 86 So. 3d 309, 321 (Ala. 2011) (holding that beneficiaries were alleging injury that fell directly on funds held by the trust and only secondarily on plaintiffs, making their claim derivative).

Plaintiffs cannot maintain an individual action because they did not allege that any trust beneficiary's loss is separate and distinct from that of the trust itself. The Complaint identifies no personal or distinct damage to any plaintiff. See *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012) ("A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder."); *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (Allegations of corporate malfeasance that result in identical harm to all shareholders are a "breach of fiduciary duty claim that [gives] rise to a classic shareholders' derivative suit."); *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991) ("It is firmly established by our decisions that individual shareholders may not sue corporate directors or officers directly for losses suffered by the corporation.").

Therefore, Plaintiffs' claims are of a derivative nature. As alleged beneficiaries of SIF, they can only bring a derivative action on behalf of a trust and cannot sue individually.

B. Plaintiffs Fail to Satisfy the Pleading Requirements of Rule 23(b)(1)

Under Rule 23(b)(1), SCRCP, a plaintiff must meet certain pleading requirements in order to maintain a derivative action.² “A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCP, is properly dismissed pursuant to Rule 12(b)(6).” *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339. This Rule seeks to prevent the unrestrained use of derivative actions. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2001). The subject Complaint challenges the decisions of the SIF Board of Trustees; therefore, it is analogous to a complaint challenging the decisions of a Board of Directors of a corporation.³

The pleading requirements of Rule 23 require particularized, heightened allegations, and are a departure from the liberal pleading requirements of Rule 8. *Id.* at 188, 539 S.E.2d at 409. “The protective principles underlying the pleading requirements of Rule 23(b)(1) have long been recognized as important gatekeepers in South Carolina corporate jurisprudence.” *Id.* at 185, 539 S.E.2d at 407.

Plaintiffs fail to satisfy the following requirements:

- Plaintiffs fail to allege “with particularity” the efforts they made to satisfy the proper pre-suit demand requirements of Rule 23(b)(1).

² Rule 23(b)(1) requires that “the complaint shall also allege with particularity the efforts made by the plaintiff to obtain the action he desires from the directors...and the reason for his failure to obtain the action or for not making the effort.”

³ While the undersigned have been unable to locate a South Carolina case addressing a derivative action on behalf of a trust, other jurisdictions have made clear that trust beneficiaries may only pursue a derivative action after a showing that the trustee failed to act properly and to pursue the necessary action. *See, e.g., Ex parte Callan Assocs., Inc.*, 87 So.3d 1161, 1167 (Ala. 2011) (“a beneficiary may initiate a derivative action on behalf of the trust if the beneficiary shows the trustee failed to bring suit, the trustee colluded with the third party, or the trustee occupied an antagonistic position to the beneficiary”); *Saunders v. Muratori*, 251 P.3d 550, 553 (Colo. Ct. App. 2010) (“In equity, trust beneficiaries may bring a suit for the benefit of a trust when the trustees refuse to do so. . . . Such a suit is analogous to a shareholder derivative suit on behalf of a corporation.”).

- At a minimum, the pleading surrounding the pre-suit demand must specifically identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused, and the requested remedial relief. *Whittle*, 343 S.C. at 189, 539 S.E.2d at 409.
- Plaintiffs make a general allegation in Paragraph 8 of the Complaint that they “made efforts to obtain the action they desire” by way of correspondence, meetings, and a previous lawsuit. Our courts have deemed such general allegations insufficient. *Whittle*, 343 S.C. at 189, 539 S.E.2d at 402 (plaintiffs alleged they demanded “certain information” and “certain actions” in their derivative action; court deemed these allegations conclusory and insufficient).
- Plaintiffs also fail to allege any reasons for not making an appropriate pre-suit demand on the Trustees.
- Plaintiffs’ Complaint is not properly verified.
 - Under Rule 11(c), SCRPC, in a verification, an affiant must have personal knowledge of the information being verified and attest to its truth, unless an allegation is made upon information and belief. No allegation in the Complaint is made upon information and belief. The verification of each plaintiff states that “the allegations in the Complaint are true and accurate to the best of my knowledge.” This form of verification is insufficient under the Rules, as it fails to establish personal knowledge as to any allegation. Thus it appears that none of the verifiers have first hand knowledge of any allegation. There are no allegations alleged upon information and belief. The qualification of “best of my knowledge” essentially renders the verification meaningless and is counter to the purpose of the verification.

Plaintiffs bring a derivative action that fails to comply with the requirements of Rule 23(b)(1) and, thus, must be dismissed. *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339 (citing *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)). *See also Ex parte Morgan*, 86 So.3d at 321 (holding that circuit court did not have subject matter jurisdiction over trust beneficiaries’ derivative claims where beneficiaries had not complied with requirements of Rule 23.1 of the Alabama Rules of Civil Procedure).

2. Certain Plaintiffs Lack Standing and Cannot Pursue this Lawsuit.

A. Individual Plaintiffs

While the individual plaintiffs may have an interest in SIF through their ownership of the corporate plaintiffs, none of the individuals are actual members or beneficiaries of SIF. *See*

attached Affidavit of Jeffrey Ranew, the Administrator of SIF (also submitted with the Motion). Therefore, each of the individual plaintiffs lack standing to pursue the alleged causes of action against the Defendants, and they must be dismissed from this action.

B. Certain Corporate Plaintiffs

Certain corporate plaintiffs -- Ellis Construction Company, Inc., Barry Davis Company, Inc., Sandler Construction, Inc., and Tilton Group, Inc. -- are former members of, but no longer belong to SIF, nor were they members when this lawsuit was brought. *See* attached Affidavit of Jeffrey Ranew. Therefore, each of these parties lack standing to assert the alleged causes of action against the Defendants, and they must be dismissed from this action.

3. The Trust Agreement is not a Contract; Breach of Contract Claim Fails.

A trust agreement is not a contract, and a trustee who fails to perform his duties is not liable to a beneficiary for breach of contract. *Restatement (Second) of Trusts* § 197 cmt. b (1959) ("The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract.").

Furthermore, a glaring deficiency in the Complaint is Plaintiffs' failure to even allege the existence of a contract between Plaintiffs and SIF, or between Plaintiffs and the Trustees. This simple allegation cannot be made because there is no such contract, nor has there ever been one. Plaintiffs further fail to allege how such a non-existent contract was created, and they fail to allege how it was breached. The Trust Agreement, in essence, creates SIF, and there are no parties to the Trust Agreement in the traditional sense of how a contract is formed. The Trust Agreement creates no mutuality of obligation and no reciprocal rights between Plaintiffs and SIF or the Trustees. As a result, the Trust Agreement is not a contract.

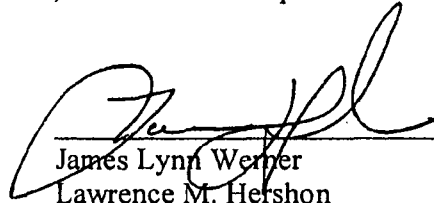
4. Breach of Contract Accompanied by a Fraudulent Act Fails.

Because the Trust Agreement is not a contract, the cause of action for breach of contract accompanied by a fraudulent act cannot survive. *Armstrong v. Collins*, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005) (having a contract is a prerequisite to proving breach of contract accompanied by a fraudulent act).

In addition, Plaintiffs fail to allege any particularized fraudulent intent relating to the alleged breaching of the contract by the Trustees.

CONCLUSION

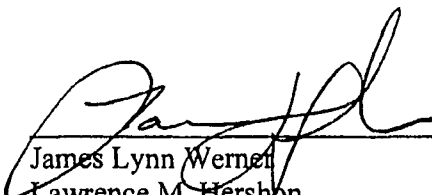
As detailed in each section above, Plaintiffs' Complaint is deficient and must be dismissed as a matter of law.



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Trustees of the South Carolina Home Builders Self
Insurers Fund

October 2, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2013-CP-40-02655

**MEMORANDUM IN OPPOSITION
TO DEFENDANTS'
MOTION TO DISMISS**

INTRODUCTION

The Plaintiffs are beneficiaries of a trust and sued the Defendants for breach of their duties as trustees. The matter was originally brought in February 2012 as case number 2012-CP-32-00757. In that case, the Trustees moved for dismissal on the basis that the Trustees must be sued in Probate Court. Judge Manning granted that motion. The Plaintiffs then sued in Probate Court on April 9, 2013, and the case was removed to Circuit Court. The Defendants have now moved to dismiss on the basis that the new lawsuit is a shareholder derivative action and does not comply with Rule 23(b)(1) of the Rules of Civil Procedure governing stockholder actions.

STATEMENT OF FACTS

In September 1995, the South Carolina Home Builders Association created a trust to administer worker's compensation benefits for members of the South Carolina Home Builders Association. That trust is referred to as the South Carolina Home Builders Self Insurers Fund. (Attached as Exhibit A). The fund had several members of the South Carolina Home Builders Association on its board and worked in conjunction with the South Carolina Home Builders Association to sell worker's compensation insurance policies and administer the policies.

The Trustees have made significant actions towards dissolving the trust and creating a new insurance company with the proceeds. The new insurance company would be a mutual insurance company of which the Trustees would all be board members. The insurance company would not have any particular benefit to the beneficiaries of the trust. The assets of the trust would be used to set up a company competing with the trust. The Trustees transferred approximately five million dollars out of the trust to do this. At some point, they transferred the money back into the trust. There is approximately \$20,000,000 remaining in the trust to fund its liabilities. However, the Trustees intend to use these funds to set up a separate insurance company which will convey no benefit to the beneficiaries of the trust.

The Trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit to the beneficiaries of the trust. The Trustees have used these assets to begin setting up a separate insurance company which will convey no benefit to the beneficiaries of the trust and have not reimbursed the trust for these costs including the use of facilities, the software programs, and the employees of the trust. If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk. (Affidavit of

David Gully, attached as Exhibit B). All beneficiaries of the trust are subject to personal liability for any shortfall in trust assets.

ARGUMENT

I. THIS TRUST ACTION IS NOT A DERIVATIVE ACTION, THEREFORE ALL PLEADING REQUIREMENTS HAVE BEEN MET.

A. THE PLEADING REQUIREMENTS OF SCRCP 23(B) DO NOT APPLY BECAUSE PLAINTIFFS ARE NOT SHAREHOLDERS AND THE TRUST IS NOT A CORPORATION OR AN UNINCORPORATED ASSOCIATION.

The Defendants are incorrect in their assertion that Plaintiffs' claims are a derivative action. Under South Carolina law, "derivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure." S.C. Code Ann. § 33-7-400 (2013). The applicable rule is South Carolina Rule of Civil Procedure 23(b)(1), Derivative Actions by Shareholders., which states:

In a derivative action brought by one or more *shareholders or members to enforce a right of a corporation or of an unincorporated association*, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law.

SCRCP Rule 23 (b)(1) (emphasis added). To bring a derivative action, a corporation must suffer an injury because of wrongs committed by the officers or directors. Either the corporation or its shareholders can bring the action. Any relief goes to the corporation, not the shareholders. *In re Greenwood Supply Co.*, 295 B.R. 787, 795 (Bankr. D.S.C. 2002).

The Defendants have attempted to re-classify this breach of trust suit as a shareholder derivative action by labeling the Plaintiffs as shareholders. The case law cited by the Defendants

regarding shareholder suits does not apply because the Plaintiffs are not shareholders.¹ Instead, they are beneficiaries of the trust. A shareholder is a “person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent rights granted by a nominee certificate are on file with a corporation.” S.C. Code Ann. § 33-1-400. The Plaintiffs are beneficiaries of the Home Builders Trust. In addition, each beneficiary of the trust is jointly and severally liable for underfunded losses of the Self Insurers Fund. (Affidavit of David Gully, ¶ 13, attached as Exhibit B). Under South Carolina law, a shareholder cannot be liable for corporate losses. S.C. Code Ann. § 33-6-220(b). The Trustees must operate the trust for the beneficiaries’ benefit, not for their own benefit or the benefit of a corporation or association.

In addition, the rule only applies to “derivative actions brought by one or more shareholders or members to enforce a right *of a corporation or of an unincorporated association*.” SCRCP Rule 23 (b)(1) (emphasis added). The trust is not a corporation, and it is not an unincorporated association. It is a trust. Under South Carolina law, trusts are treated separately from unincorporated associations. South Carolina Code Section 12-37-3160(c) defines a legal entity as a “corporation, partnership, limited liability company, unincorporated association, or trust.” *See also* S.C. Code Ann. §§ 27-29-10(3), 37-25-10(2). This illustrates that a trust and an unincorporated association are separate legal entities.

The Defendants cite *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 184, 64 S.E.2d 524, 528 (1951), to support their claim that the trust beneficiaries may only bring stockholder derivative actions to address trustee misconduct. In that case, the Plaintiffs sued an eleemosynary

¹ Defendants cite *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012), *Clearwater Trust v. Bunting*, 367 S.C. 340, 626 S.E.2d 334 (2006), *Babb v. Rothrock*, 303 S.C. 462, 401 S.E.2d 418 (1991), and *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), all of which involve shareholders, not beneficiaries, bringing actions against directors of corporations.

corporation, not the trustees of a trust. The court held that the “ability to sue for vindication of a right in the *corporation* is universally recognized when the *corporation*, through its executives, fails and refuses to so proceed.” *Id.* at 191, 64 S.E.2d at 531 (emphasis added). In fact, the court allowed the lawsuit without a presuit request for action. And, the defendant was a corporation, not a trust.

The second case cited by Defendants involves the administration of an estate, not a trust. *Bailes v. S. Ry. Co.*, 227 S.C. 176, 87 S.E.2d 481 (1955). In that case, the administrator, acting as the representative of the statutory beneficiaries, refused to bring an action for wrongful death as requested by the beneficiaries. *Id.* at 178, 87 S.E.2d at 482. The court held that since the action could only be brought by the administrator, and he refused to do so, the beneficiaries had a cause of action against the administrator. *Id.* Under those circumstances, the beneficiaries were acting on behalf of the trust, since a wrongful death action can only be brought by the estate administrator. *Id.* at 183, 87 S.E.2d at 184.

Ex parte Morgan Asset Mgmt., Inc., 86 So. 3d 309 (Ala. 2011), reh'g denied (Dec. 16, 2011), involved an action brought by shareholders of investment funds against their investment management corporation based on the lowering of share values. This was an action against a corporation by shareholders. It was not an action by beneficiaries against a trustee.

The action brought by the Plaintiffs is not a derivative action. The Plaintiffs are not shareholders, and the trust is not a corporation or an unincorporated association. The Plaintiffs are beneficiaries of a trust. Therefore, the Plaintiffs are not bound by the additional pleading requirements of SCRPC 23(b)(1).

II. BENEFICIARIES OF A TRUST MAY SUE TRUSTEES FOR WRONGDOING IN ADMINISTERING THE TRUST.

Many South Carolina cases involve actions brought by beneficiaries against trustees in which a derivative action was *not* required: *E.g. Cartee v. Lesley*, 290 S.C. 333, 335, 350 S.E.2d 388, 389 (1986) ("Petitioners are the beneficiaries of a trust administered by [the trustees]. The beneficiaries brought suit against the trustees for negligence and breach of fiduciary duty alleging the estate had been mismanaged."); *Epworth Orphanage v. Long*, 199 S.C. 385, 19 S.E.2d 481 (1942) ("The complaint alleges a cause of action in equity against the executors and trustees of a testamentary trust, all the beneficiaries of said trust being made parties."); *Mayer v. M.S. Bailey & Son*, 347 S.C. 353, 359-60, 555 S.E.2d 406, 409 (Ct. App. 2001) ("we hold that as a minimum the [beneficiaries] had both standing and justiciable rights that a court of equity could protect."); *Rembert v. Gressette*, 318 S.C. 519, 520, 458 S.E.2d 552, 553 (Ct. App. 1995) ("Three beneficiaries . . . opposed the planned distribution of the trust assets and counterclaimed against the trustees...."); *Ramage v. Ramage*, 283 S.C. 239, 243, 322 S.E.2d 22, 25 (Ct. App. 1984) ("[The beneficiaries] brought this action to have the quitclaim deed set aside and to enforce the terms of the trust.). South Carolina courts allow trust beneficiaries to bring actions against trustees. There is no South Carolina rule, statute or case which treats an action by trust beneficiaries as a derivative stockholder action.

III. EVEN THOUGH THE TRUST BENEFICIARIES ARE NOT SUBJECT TO RULE 23(b)(1), THEY HAVE COMPLIED WITH IT.

The beneficiaries have complied with the requirements of Rule 23(b)(1). This rule requires a verification of the complaint. Each plaintiff has verified the complaint under oath. These verifications were served on the Defendants.

Rule 23(b)(1) also requires that the Plaintiff set forth "the efforts, if any, made" to obtain the action desired. The complaint sets this out as follows:

8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:
 - a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.
 - b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

Plaintiffs' counsel also sent a letter to defense counsel setting forth the relief requested before bringing the suit. A copy of this letter is attached as Exhibit C. It sets out the relief sought in detail as follows:

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.
2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

As a result, the Plaintiffs have complied with Rule 23(b)(1) by stating in detail their request for relief and verifying their complaint.

IV. THE BREACH OF CONTRACT CLAIMS ARE VALID.

A. TRUSTS MAY BE TREATED AS CONTRACTS.

South Carolina courts have referred to trust agreements as contracts. *See Klugh v. Seminole Sec. Co.*, 103 S.C. 120, 87 S.E. 644, 647 (1916) (“One of the expressed objects of the *trust contract* was to safeguard the subscribers to the capital stock.”) (emphasis added); *Welling v. Crosland*, 129 S.C. 127, 123 S.E. 776, 777 (1924) (“a *contract, called a “Trust Agreement,”* was entered into by and between the subscribers to the syndicate” (emphasis added); *V.P. Randolph & Co. v. Walker*, 78 S.C. 157, 59 S.E. 856 (1907) (“A complaint alleging that money was deposited with defendant in *trust* for plaintiff, subject to his order, and that defendant refused to pay the same, *states a cause of action in contract.*”) (emphasis added). The Fourth Circuit Court of Appeals was more direct when it simply stated “all express trusts [are] contractual relationship[s].” *In re Dameron*, 155 F.3d 718, 723 (4th Cir. 1998).

Other courts also agree that trusts fall under contract law principles, and are increasingly referring to trusts and contracts interchangeably. *See Williams v. Interpublic Severance Pay Plan*, 523 F.3d 819, 821 (7th Cir. 2008) (“Trust law honors rather than overrides express contractual language specifying a trustee's powers vis-à-vis a beneficiary.”); *Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir. 2000) (calling an ERISA plan a “contract”); *Herdrich v. Pegram*, 170 F.3d 683, 686 (7th Cir. 1999) (“[E]ven a full-fledged trustee need not (indeed, must not) depart from the contractual provisions that the settlor established.”), *rev'd*, 530 U.S. 211 (2000); *Gilbert v. Atl. Trust Co.*, No. 04-CV-327-PB, 2006 WL 1049707, at *4 n.6 (D.N.H., Apr. 19, 2006) (“I assume for the purpose of analysis that

the revocable trust agreement is in fact a contract.”); *In re Vebeliunas*, 252 B.R. 878, 887 (Bankr. S.D.N.Y. 2000) (“It follows that a trust, being a relationship, cannot have an alter ego, which would be akin to saying that someone is the ‘alter ego’ of a contract.”); *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83, 86 (1938) (“In such instances the breach of the trust is in effect and, usually, in fact a breach of contract, express or implied. Actions thereon are necessarily based on the contract and the breach thereof.”); *Wachovia Bank & Trust Co. v. Steele's Mills*, 225 N.C. 302, 309-10, 34 S.E.2d 425, 429 (1945) (“This agreement, [a trust], has the status of a contract.”)

The Home Builders Trust was a contract between the settler, the trustees and the beneficiaries. Because the Trustees have breached that trust, the breach of contract claims are valid.

B. EVEN IF THE TRUST IS NOT A CONTRACT, THERE WAS AN AGREEMENT BETWEEN THE TRUSTEES AND BENEFICIARIES THAT THE TRUST WOULD BE MANAGED ONLY FOR THE BENEFIT OF THE BENEFICIARIES.

An agreement, or contract, “is nothing more than a manifestation of mutual assent by two or more legally competent persons to one another.” 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 1:3, at 13–14 (4th ed. 1990). A trust is a “prevalingly contractarian institution.” John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 628, 637-43 (1995). “The settlor-trustee relationship is indeed contractual, as settlors and trustees are free to dicker over the terms of the trust ... even if in fact they do not.” Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 643-44 (2004); see also Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434, 469-72 (1998) (“trusts are contracts”).

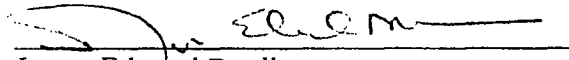
Under South Carolina law, a contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. *Gaskins v. Blue Cross-Blue*

Shield of South Carolina, 271 S.C. 101, 245 S.E.2d 598 (1978). The necessary elements of a contract are an offer, acceptance, and consideration. *Carolina Amusement Co., Inc. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993). This trust agreement necessarily falls under this category. There was an agreement by the Trustees of the Home Builders Trust to operate the trust in a prescribed manner. The Trustees receive consideration for this operation. Therefore, a contract was made between the beneficiaries of the trust and the trustees, and the breach of contract claims are valid.

CONCLUSION

For the reasons stated above, the court should deny the Defendants' Motion to Dismiss.

Respectfully submitted,



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October 8, 2013

AGREEMENT AND DECLARATION OF TRUST
CREATING THE
SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

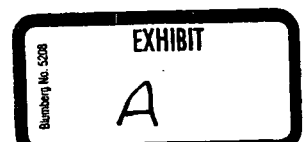
THIS AGREEMENT, made and entered into this 27 day of September, 1995 by and between the Home Builders Association of South Carolina, Inc., a corporation not for profit, organized and existing under and by virtue of the laws of the State of South Carolina, hereinafter referred to as the "Settlor", and a Board of Trustees, hereinafter referred to as the "Trustees", has been designated for the purposes, among others, of directing the affairs of the Fund.

WITNESSETH:

WHEREAS, the Settlor and the Trustees intend to apply to the South Carolina Workers' Compensation Commission for the establishment of a group self insurers fund pursuant to South Carolina statutes for the benefit of the members of the Home Builders Association of South Carolina, Inc.; and

WHEREAS, the establishment of a group self insurers fund for the purpose of satisfying an employers' obligation under the South Carolina Workers' Compensation Act would be in the best interest of the members of the Home Builders Association of South Carolina, Inc.; and

WHEREAS, it is considered to be in the best interest of the members of the Home Builders Association of South Carolina, Inc. that an Agreement and Declaration of Trust fully setting forth the duties and responsibilities of the Trustees be entered into;



NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND is hereby established as follows:

ARTICLE I

DEFINITIONS

Fund - The group self insurers fund or funds which are hereby created for the purposes set forth herein.

Indemnity Agreement - The Indemnity Agreement which shall be filed by the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND pursuant to the Rules for Self Insurers as issued by the South Carolina Workers' Compensation Commission.

Member - A company, firm, corporation, individual, partnership or other legal entity involved in on-site home construction which is a participating member in good standing of the Home Builders Association of South Carolina, Inc.

Rules for Self-Insurers - The Rules for Self Insurers under the South Carolina Workers' Compensation Act as amended from time to time and administered by the South Carolina Workers' Compensation Commission.

Service Agent - Any individual, co-partnership, corporation, firm or other legal entity engaged in the business of servicing approved workers' compensation self-insurance programs which has made application to, and been approved by, the South Carolina Workers' Compensation Commission.

Trustees - The Trustees appointed to serve on the Board of Trustees of this Fund as provided herein.

ARTICLE II

CREATION OF THE TRUST

There is hereby established and created a Trust Fund which shall be known as the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND and the Trustees thereof may hold property, enter into contracts and in all matters as hereinafter set forth act in behalf of the Trust Fund in that name. This Trust Fund shall be used for the purposes as hereinafter set forth.

ARTICLE III

PURPOSE

This Trust Agreement is made and executed for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; to form an overall self insurers fund pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building industry.

ARTICLE IV

DESIGNATION OF TRUSTEES

SECTION 1 NUMBER AND ELIGIBILITY OF TRUSTEES

The operation and administration of the Trust Fund shall be the joint responsibility of a Board of Trustees consisting of a number of Trustees of not less than five (5) nor more than nine (9). The Board of Trustees shall consist of at least one representative from each of the five Home Builders Association of South Carolina, Inc. districts. The President and Vice President of the Home Builders Association of South Carolina, Inc. shall serve as Ex-Officio Trustees: they shall have voting privileges if and only if they are Members of the Fund. Except for the two Ex-Officio Trustees, Trustees shall be elected by the participating Members by a mail ballot.

*Trustee elections shall be held by mail ballot to all members of the Fund. Trustees receiving a vote of 51% of returned ballots shall be declared duly elected. The Trustees shall elect from one of their number, one Trustee to serve as Chairman. Except for the two Ex-Officio Trustees, only members of the Home Builders Association of South Carolina, Inc. whose businesses participate in the Trust, or their employees, may serve as Trustees. If the Trust wants to change the makeup of the Board of Trustees or requirements for being a Trustee, it must first be approved by the Home Builders Association of South Carolina Board of Directors.

SECTION 2 RESIGNATION OR REMOVAL OF TRUSTEES

Any Trustee herein named, or any successor Trustee, may resign at any time, with or without cause, by giving not less than sixty (60) days written notice of the intention to so resign to the Board of Trustees and to the Board of Directors of the Home Builders Association of South Carolina, Inc. The Board of Directors of the Home Builders

*By-Law change approved by The SCHBSIF Board of Trustees on November 13, 1997.

Association of South Carolina, Inc. may remove a Trustee now serving or any successor Trustee with or without cause, by giving not less than ten (10) days written notice to the Trustee being removed and to the Board of Trustees. Prior to the effective date of such resignation or removal, the Board of Trustees shall nominate a successor Trustee to complete the term of the removed Trustee, subject to the approval of the Executive Committee of the Board of Directors of the Home Builders Association of South Carolina, Inc. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee or subsequent to his resignation or removal as Trustee. A successor Trustee shall not be required to inquire into or take any notice of the prior administration of the Trust Fund. Any successor Trustee, immediately upon his acceptance in writing to the Trust, shall become vested with all the estate, rights, powers, discretion and duties of his predecessor Trustee with like effect as if originally named as Trustee herein.

No Trustee may be appointed who is, or continues to serve as a Trustee after becoming an owner, officer or employee of a service agent.

SECTION 3. TRUSTEES' TITLE.

In case of death, resignation, refusal or inability to act by any one or more of the Trustees, the remaining Trustees shall have all of the powers, rights, estates and interest of this Trust and shall be charged with its duties, provided that in such cases, no action may be taken unless it is concurred in by not less than a majority of the remaining Trustees, which shall be not less than two (2) in number.

SECTION 4. TRUSTEE OFFICERS.

The Trustees shall meet as promptly as possible after execution of this Trust Agreement and elect from among the Trustees a Chairman and a Secretary of the Board of Trustees. The term of such offices shall commence on the date of their election and continue to the end of the fiscal year. Thereafter, such officers shall be elected annually.

ARTICLE V

ADMINISTRATION OF FUND

SECTION 1. MEETINGS.

The Trustees shall meet at least quarterly, and more often if required, at the principal office of the Fund or at such other location as may be acceptable to a majority of the Trustees. The Chairman of the Trustees shall set the date, time and location of each meeting, and notice thereof shall be furnished to each Trustee by the Secretary or Administrator not less than ten (10) days prior to the date of such meeting. Such notice shall specify the date, time and location of such meeting and may specify the purpose thereof and any action proposed to be taken thereat. Whenever any notice is required to be given to any Trustee hereunder, such notice shall be directed to the said Trustee by certified mail, return receipt requested, to the address of such Trustee as recorded in the office of the Fund.

Special meetings of the Trustees may be held at any time and place without notice provided all Trustees execute a waiver of notice and consent to the said meeting.

For the purposes of a duly called and noticed meeting of the Board of Trustees a quorum shall consist of four (4) members of the Board of Trustees, unless the Board of

Trustees consists of less than four (4) Trustees in which case all Trustees shall be required to constitute a quorum. Meetings, including votes, may be conducted by telephone conference. The Secretary, acting Secretary, or his designee shall keep minutes of all meetings, proceedings and acts of the Board of Trustees, but such minutes need not be verbatim. Copies of all minutes of the meetings of the Board of Trustees shall be sent by the Secretary, acting Secretary or a designee to all Trustees.

SECTION 2. VOTING.

All actions by, and decisions of, the Board of Trustees shall be by the vote of a majority of the number of Trustees attending a duly called meeting of the Trustees at which a quorum is present; provided, however, that actions by, and decisions of, the Board of Trustees may be taken by a vote of a majority of the number of Trustees attending a special meeting without notice when a proper waiver and consent has been obtained as provided in Section I above.

SECTION 3. OFFICE OF THE FUND.

The Trustees shall establish and maintain an office of the Fund, the exact location of which is to be made known to the parties interested in or participating in the said Fund and to the appropriate governmental agencies and departments of state. The books and records pertaining to the Fund and its administration shall be kept and maintained at the office of the Trust.

SECTION 4. EXECUTION OF DOCUMENTS.

A certificate signed by the chairman and secretary of the Fund shall be evidence of the action of the Board of Trustees and any such certificate or other instrument so signed shall

conclusively be presumed to be authentic, and all facts and matters stated therein shall conclusively be presumed to be true.

SECTION 5. APPOINTMENT OF ADMINISTRATOR.

The Trustees shall designate a fiscal agent and/or an Administrator to administer the financial affairs of the Fund; provided, however, such fiscal agent or Administrator shall not be an owner, officer, or employee of a service agent.

Any fiscal agent and/or Administrator so appointed shall furnish a fidelity bond with the Trust as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities held by or in the name of the Fund. The amount of the bond shall be determined by the Trustees and evidence of such bond shall be filed with the appropriate governmental agencies and departments.

SECTION 6. APPROVAL OF NEW MEMBERS.

The Trustees, after the inception date of the Fund, shall receive applications for membership from prospective new members to the Fund and shall approve such application for membership in accordance with the Rules for Self-Insurers, the terms of the Indemnity Agreement, and the rules and regulations established and promulgated by the Trustees for the admission of new members to the Fund. The Board of Trustees may delegate the ministerial authority for membership approval to the Administrator or such other person as they select; provided that such Administrator or person designated is not an owner, officer, or employee of a service agent. Membership in the Fund is also contingent on the regulations of the state of South Carolina and approval by the South Carolina Workers' Compensation Commission.

SECTION 7. ESTABLISHMENT OF FUNDS.

The Trustees shall be responsible for establishing such Trustee funds, loss funds, or other funds which may be required from time to time by South Carolina Statutes, or the Rules for Self-Insurers or the Rules of Conduct and Administration of this Fund as may be established by the Trustees from time to time.

SECTION 8. POSTING OF SECURITY.

The Trustees shall be responsible for and shall undertake the posting of such security deposit and/or security bonds as may be required to be posted with the South Carolina Workers Compensation Commission pursuant to South Carolina Statutes, or the Rules for Self-Insurers or such other legislative enactments or administrative regulations which may be established from time to time.

SECTION 9. REPORTS BY TRUSTEES.

The Trustees shall be responsible for and shall cause to be filed such annual or other periodic audits, reports, and disclosures as may be required from time to time pursuant to applicable federal or state statutes or governmental regulations.

SECTION 10. FISCAL MANAGEMENT AND AUTHORITY.

The Trustees shall have said authority and take all necessary precautions to safeguard the assets of the Fund including, but not limited, to the following:

- a. The designation of a fiscal agent and/or Administrator to administer the financial affairs of the Fund, who shall furnish a fidelity bond with the Trustees as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Trustees, and

evidence of such bond shall be filed with the Commission, said bond being one of the conditions required for approval of the establishment and continued operation of a self insurers fund. Such fiscal agent or Administrator shall be an owner, officer, or employee of the service organization.

b. Retaining control of all monies collected or disbursed for the Fund. All loss funds or funds of any type shall remain in the custody of the Trustees or the authorized Administrator. Provided, however, that a revolving fund for payment of compensation benefits due and other related expenses may be established for the use of the authorized service company. The service company shall furnish a fidelity bond covering its employees, with the Trustees as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Provided, however, that should the bond required of the fiscal agent and/or Administrator also cover the monies in the revolving fund, separate bond shall not be required.

c. Having the accounts and records of the Fund audited annually or at any other time as may be necessary to determine the financial stability of the Fund or the adequacy of the monetary reserves, such audits to be made by Certified Public Accountants.

d. The Trustees shall make active efforts to collect delinquent accounts resulting from any unpaid premiums by members.

e. The Trustees or fiscal agent or Administrator shall not utilize any of the monies collected as premium for any purpose unrelated to workers' compensation insurance.

f. The Trustees shall be authorized to invest Trustees' funds, claims funds and unappropriated surplus in the following types of investments only:

1. Savings accounts or certificates of deposit in a duly chartered commercial bank located within the State of South Carolina and insured through the Federal Deposit Insurance Corporation.

2. Share accounts or savings certificates in a duly chartered savings and loan association located within the State of South Carolina and insured through the Federal Savings and Loan Insurance Corporation.

3. Direct obligations of the United States Treasury, such as notes, bonds or bills which are backed by the full faith and credit of the United States Government.

g. The safety of any investment of surplus monies or claims reserves shall be the responsibility of the Trustees.

h. The Trustees shall be prohibited from making any type of investment as authorized by these rules with the intent to trade, dispose or sell the security in any manner other than redeeming it at maturity. Therefore, it shall be the responsibility of the Trustee to purchase securities in such denominations and with dates of maturity to insure that these securities shall be redeemable at the same time and in the same amounts as the Fund's current and long-term liabilities.

i. The Trustees shall report annually, as part of the financial statement of the Fund, a schedule showing the disposition of all investment income earned during the Fund year just ended.

j. The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act which is incorporated herein by

reference as permitted by statute 62-7-703 (b) as if fully set out herein.

SECTION 11. RULES AND REGULATIONS.

The Trustees may prescribe such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided the rules and regulations shall not be inconsistent with the provisions of this Declaration of Trust, the Indemnity Agreement, the Rules for Self Insurers, applicable federal and/or state statutes and applicable governmental regulations.

SECTION 12. TRUSTEES' LIABILITIES.

No Trustees shall be liable for any action taken pursuant to this Trust Agreement in good faith or for an omission, by any other Trustee or by any employee of Trustee.

The Trustees are hereby authorized and empowered to obtain, at the expense of the Fund, liability insurance fully protecting the Trustees and the Fund from any loss or expense incurred, including reasonable attorney's fees, for all acts of the Trustees except bad faith and gross negligence on the part of the Trustees. The Fund hereby agrees to save, hold harmless and indemnify the Trustees while acting in the capacity of Trustees excepting bad faith and gross negligence.

SECTION 13. RELIANCE ON COUNSEL'S OPINION.

The Trustees may consult with legal counsel concerning any questions which may arise with reference to the duties and powers or with reference to any other matter pertaining to this Agreement or the Trust created hereby; and the opinion of such counsel shall be full and complete authorization and protection in respect to any action taken or suffered by the Trustees hereunder in good faith in accordance with the opinion of such counsel, and the

Trustees shall not be liable therefor.

ARTICLE VI

MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Settlor. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by a concurrence of all of the parties to this Agreement, including the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities; in which case, the Trust may continue in perpetuity unless otherwise terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

SECTION 3. SITUS OF THE TRUST.

This Trust Agreement is executed by the parties hereto and accepted by the Trustees in the State of South Carolina, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of South Carolina.

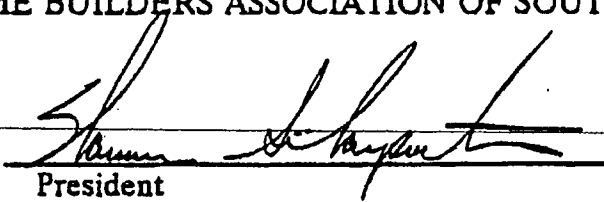
SECTION 4. CONSTRUCTION.

Whenever any words are used in this Agreement in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and whenever any words are used in this Agreement in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and whenever any words were used in the Agreement in the plural form, they shall be construed as though they were also in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, this Agreement and Declaration of Trust has been executed the day and year first above written.

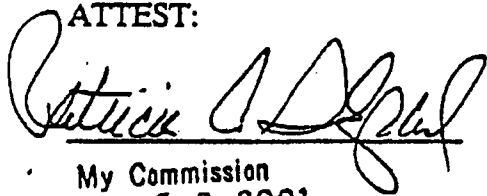
SETTLOR:

HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA, INC.

By: 

President

ATTEST:



My Commission
expires 5-2-2001

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

C/A No. 2012-CP-32-00757

Plaintiffs,)

vs.)

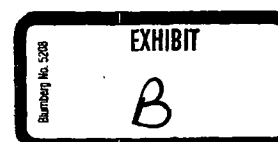
AFFIDAVIT OF DAVID GULLY

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

The affiant being duly sworn testifies as follows:

1. I am over the age of 18 and otherwise qualified to give sworn testimony in court.
2. I am a residential home builder and owner of Central Contracting. I have a residential homebuilder's license.
3. I am the current president of the Home Builders Association of South Carolina for the year 2012. In 2011, I served as vice president of that organization, and in 2010, I served as treasurer. I have been involved with the Home Builders Association of South Carolina for a significant amount of time.



4. I am also a member of the South Carolina Home Builders Self Insurers Fund through my company Central Contracting.

5. My company has been involved with the South Carolina Home Builders Self Insurers Fund for a significant amount of time. The South Carolina Home Builders Self Insurers Fund provides workers compensation coverage for my company.

6. I have been an ex-officio of the South Carolina Home Builders Self Insurers Fund when I was vice president of the Home Builders Association of South Carolina in 2011. I was a voting ex-officio member.

7. The South Carolina Home Builders Self Insurers Fund Trustees voted to remove the ex-officio members or I would still be an ex-officio member of the Self Insurers Fund.

8. The Home Builders Association of South Carolina has approximately 3400 members. The South Carolina Home Builders Self Insurers Fund has approximately 600 members.

9. As recently as several years ago, there were approximately 1700 members of the South Carolina Home Builders Self Insurers Fund. Since that time, membership has been reduced to approximately 600 members.

10. The South Carolina Home Builders Self Insurers Fund is a trust which was created by the Home Builders Association of South Carolina as settlor. A copy of the trust agreement is attached as Exhibit A to my affidavit.

11. As originally set up, the trust was created to serve the members of the Home Builders Association. Originally, in order to be a beneficiary of the Self Insurers Fund trust, the insured had to be owned or controlled by a member of the Home Builders Association of South Carolina.

12. The trustees have recently voted to remove that requirement for beneficiaries.
13. Under this arrangement, each beneficiary of the trust is jointly and severally liable for underfunded losses of the Self Insurers Fund.
14. As such, the trust is to be administered in the best interest of the beneficiaries, and the trustees have a fiduciary duty to the beneficiaries of the trust.
15. The trustees have not fulfilled this fiduciary duty including, but not limited to, the following ways:
 - a. The trustees have voted to remove assets from the trust in order to incorporate a new member owned insurance company which will confer no benefit upon the beneficiaries of the trust.
 - b. The trustees have removed approximately \$5,000,000 from the trust corpus for the purpose of establishing a separate insurance company which will not provide any benefits to the beneficiaries of the trust and will increase the personal risk to the beneficiaries of the trust.
 - c. There is approximately \$20,000,000 remaining in the trust to fund its liabilities which upon information and belief the trustees intend to use to set up a separate insurance company which will convey no benefit to the beneficiaries of the trust.
 - d. The trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit on the beneficiaries of the trust.
 - e. The trustees have used these assets to begin setting up a separate insurance company which will convey no benefit to the beneficiaries of the trust and

have not reimbursed the trust for these costs including the use of facilities, the software computer programs, and the employees of the trust.

- f. Under the trustees' management, the beneficiary membership has decreased such that the risk undertaken by the trust and its beneficiaries is not sufficiently spread.
- g. In order to increase membership in the trust, the trustees have written new policies with high risk that expand past their experience in new construction which will further deplete the assets of the trust and convey no benefit on the beneficiaries of the trust.
- h. The trustees have used trust funds to hire attorneys, consultants, and other employees for the purpose of setting up a competing insurance company which will convey no benefit on the members of the trust.

16. The representative parties in this matter will fairly and adequately protect the interests of the class which consists of the beneficiaries of the trust as they are beneficiaries of the trust and members of the Home Builders Association of South Carolina.

17. The amounts of money sought in this matter are more than \$100 for each beneficiary of the trust as this matter concerns millions of dollars in significant workers compensation insurance payments. The trust beneficiaries will have typical claims with the same claims and defenses for all members of the class.

18. The class consists of all current and former beneficiaries of the trust.

19. It would be in the best interests of the beneficiaries to dissolve the trust holding sufficient funds to cover all losses and distribute the remaining assets to the beneficiaries.

20. If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk. I attach a letter sent by the trustees to beneficiaries of the trust indicating that excess funds held by the trust are not the property of the beneficiaries or intended to be used for the benefit of the beneficiaries. This letter along with other conduct as indicated above in this affidavit forms the basis for this lawsuit.

FURTHER AFFLIANT SAYETH NAUGHT.

D-B-G
David Gully

SWORN to before me this
9 day of August, 2012

Peter S. Hawley

Notary Public for South Carolina

My Commission Expires: 7/18/2017

AGREEMENT AND DECLARATION OF TRUST
CREATING THE
SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

THIS AGREEMENT, made and entered into this 27 day of September, 1995
by and between the Home Builders Association of South Carolina, Inc., a corporation not
for profit, organized and existing under and by virtue of the laws of the State of South
Carolina, hereinafter referred to as the "Setlor", and a Board of Trustees, hereinafter
referred to as the "Trustees", has been designated for the purposes, among others, of
directing the affairs of the Fund.

WITNESSETH:

WHEREAS, the Setlor and the Trustees intend to apply to the South Carolina
Workers' Compensation Commission for the establishment of a group self insurers fund
pursuant to South Carolina statutes for the benefit of the members of the Home Builders
Association of South Carolina, Inc.; and

WHEREAS, the establishment of a group self insurers fund for the purpose of
satisfying an employers' obligation under the South Carolina Workers' Compensation Act
would be in the best interest of the members of the Home Builders Association of South
Carolina, Inc.; and

WHEREAS, it is considered to be in the best interest of the members of the Home
Builders Association of South Carolina, Inc. that an Agreement and Declaration of Trust
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ARTICLE II

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PURPOSE

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*Trustee elections shall be held by mail ballot to all members of the Fund. Trustees receiving a vote of 51% of returned ballots shall be declared duly elected. The Trustees shall elect from one of their number, one Trustee to serve as Chairman. Except for the two Ex-Officio Trustees, only members of the Home Builders Association of South Carolina, Inc. whose businesses participate in the Trust, or their employees, may serve as Trustees. If the Trust wants to change the makeup of the Board of Trustees or requirements for being a Trustee, it must first be approved by the Home Builders Association of South Carolina Board of Directors.

SECTION 2 RESIGNATION OR REMOVAL OF TRUSTEES

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*By-Law change approved by The SCHBSIF Board of Trustees on November 13, 1997.

Association of South Carolina, Inc. may remove a Trustee now serving or any successor Trustee with or without cause, by giving not less than ten (10) days written notice to the Trustee being removed and to the Board of Trustees. Prior to the effective date of such resignation or removal, the Board of Trustees shall nominate a successor Trustee to complete the term of the removed Trustee, subject to the approval of the Executive Committee of the Board of Directors of the Home Builders Association of South Carolina, Inc. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee or subsequent to his resignation or removal as Trustee. A successor Trustee shall not be required to inquire into or take any notice of the prior administration of the Trust Fund. Any successor Trustee, immediately upon his acceptance in writing to the Trust, shall become vested with all the estate, rights, powers, discretion and duties of his predecessor Trustee with like effect as if originally named as Trustee herein.

No Trustee may be appointed who is, or continues to serve as a Trustee after becoming an owner, officer or employee of a service agent.

SECTION 3. TRUSTEES' TITLE.

In case of death, resignation, refusal or inability to act by any one or more of the Trustees, the remaining Trustees shall have all of the powers, rights, estates and interest of this Trust and shall be charged with its duties, provided that in such cases, no action may be taken unless it is concurred in by not less than a majority of the remaining Trustees, which shall be not less than two (2) in number.

SECTION 4. TRUSTEE OFFICERS.

The Trustees shall meet as promptly as possible after execution of this Trust Agreement and elect from among the Trustees a Chairman and a Secretary of the Board of Trustees. The term of such offices shall commence on the date of their election and continue to the end of the fiscal year. Thereafter, such officers shall be elected annually.

ARTICLE V

ADMINISTRATION OF FUND

SECTION 1. MEETINGS.

The Trustees shall meet at least quarterly, and more often if required, at the principal office of the Fund or at such other location as may be acceptable to a majority of the Trustees. The Chairman of the Trustees shall set the date, time and location of each meeting, and notice thereof shall be furnished to each Trustee by the Secretary or Administrator not less than ten (10) days prior to the date of such meeting. Such notice shall specify the date, time and location of such meeting and may specify the purpose thereof and any action proposed to be taken thereat. Whenever any notice is required to be given to any Trustee hereunder, such notice shall be directed to the said Trustee by certified mail, return receipt requested, to the address of such Trustee as recorded in the office of the Fund.

Special meetings of the Trustees may be held at any time and place without notice provided all Trustees execute a waiver of notice and consent to the said meeting.

For the purposes of a duly called and noticed meeting of the Board of Trustees a quorum shall consist of four (4) members of the Board of Trustees, unless the Board of

Trustees consist of less than four (4) Trustees in which case all Trustees shall be required to constitute a quorum. Meetings, including votes, may be conducted by telephone conference. The Secretary, acting Secretary, or his designee shall keep minutes of all meetings, proceedings and acts of the Board of Trustees, but such minutes need not be verbatim. Copies of all minutes of the meetings of the Board of Trustees shall be sent by the Secretary, acting Secretary or a designee to all Trustees.

SECTION 2. VOTING.

All actions by, and decisions of, the Board of Trustees shall be by the vote of a majority of the number of Trustees attending a duly called meeting of the Trustees at which a quorum is present; provided, however, that actions by, and decisions of, the Board of Trustees may be taken by a vote of a majority of the number of Trustees attending a special meeting without notice when a proper waiver and consent has been obtained as provided in Section I above.

SECTION 3. OFFICE OF THE FUND.

The Trustees shall establish and maintain an office of the Fund, the exact location of which is to be made known to the parties interested in or participating in the said Fund and to the appropriate governmental agencies and departments of state. The books and records pertaining to the Fund and its administration shall be kept and maintained at the office of the Trust.

SECTION 4. EXECUTION OF DOCUMENTS.

A certificate signed by the chairman and secretary of the Fund shall be evidence of the action of the Board of Trustees and any such certificate or other instrument so signed shall

conclusively be presumed to be authentic, and all facts and matters stated therein shall conclusively be presumed to be true.

SECTION 5. APPOINTMENT OF ADMINISTRATOR.

The Trustees shall designate a fiscal agent and/or an Administrator to administer the financial affairs of the Fund; provided, however, such fiscal agent or Administrator shall not be an owner, officer, or employee of a service agent.

Any fiscal agent and/or Administrator so appointed shall furnish a fidelity bond with the Trust as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities held by or in the name of the Fund. The amount of the bond shall be determined by the Trustees and evidence of such bond shall be filed with the appropriate governmental agencies and departments.

SECTION 6. APPROVAL OF NEW MEMBERS.

The Trustees, after the inception date of the Fund, shall receive applications for membership from prospective new members to the Fund and shall approve such application for membership in accordance with the Rules for Self-Insurers, the terms of the Indemnity Agreement, and the rules and regulations established and promulgated by the Trustees for the admission of new members to the Fund. The Board of Trustees may delegate the ministerial authority for membership approval to the Administrator or such other person as they select; provided that such Administrator or person designated is not an owner, officer, or employee of a service agent. Membership in the Fund is also contingent on the regulations of the state of South Carolina and approval by the South Carolina Workers' Compensation Commission.

SECTION 7. ESTABLISHMENT OF FUNDS.

The Trustees shall be responsible for establishing such Trustee funds, loss funds, or other funds which may be required from time to time by South Carolina Statutes, or the Rules for Self-Insurers or the Rules of Conduct and Administration of this Fund as may be established by the Trustees from time to time.

SECTION 8. POSTING OF SECURITY.

The Trustees shall be responsible for and shall undertake the posting of such security deposit and/or security bonds as may be required to be posted with the South Carolina Workers Compensation Commission pursuant to South Carolina Statutes, or the Rules for Self-Insurers or such other legislative enactments or administrative regulations which may be established from time to time.

SECTION 9. REPORTS BY TRUSTEES.

The Trustees shall be responsible for and shall cause to be filed such annual or other periodic audits, reports, and disclosures as may be required from time to time pursuant to applicable federal or state statutes or governmental regulations.

SECTION 10. FISCAL MANAGEMENT AND AUTHORITY.

The Trustees shall have said authority and take all necessary precautions to safeguard the assets of the Fund including, but not limited, to the following:

- a. The designation of a fiscal agent and/or Administrator to administer the financial affairs of the Fund, who shall furnish a fidelity bond with the Trustees as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Trustees, and

evidence of such bond shall be filed with the Commission, said bond being one of the conditions required for approval of the establishment and continued operation of a self insurers fund. Such fiscal agent or Administrator shall be an owner, officer, or employee of the service organization.

b. Retaining control of all monies collected or disbursed for the Fund. All loss funds or funds of any type shall remain in the custody of the Trustees or the authorized Administrator. Provided, however, that a revolving fund for payment of compensation benefits due and other related expenses may be established for the use of the authorized service company. The service company shall furnish a fidelity bond covering its employees, with the Trustees as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Provided, however, that should the bond required of the fiscal agent and/or Administrator also cover the monies in the revolving fund, separate bond shall not be required.

c. Having the accounts and records of the Fund audited annually or at any other time as may be necessary to determine the financial stability of the Fund or the adequacy of the monetary reserves, such audits to be made by Certified Public Accountants.

d. The Trustees shall make active efforts to collect delinquent accounts resulting from any unpaid premiums by members.

e. The Trustees or fiscal agent or Administrator shall not utilize any of the monies collected as premium for any purpose unrelated to workers' compensation insurance.

f. The Trustees shall be authorized to invest Trustees' funds, claims funds and unappropriated surplus in the following types of investments only:

1. Savings accounts or certificates of deposit in a duly chartered commercial bank located within the State of South Carolina and insured through the Federal Deposit Insurance Corporation.

2. Share accounts or savings certificates in a duly chartered savings and loan association located within the State of South Carolina and insured through the Federal Savings and Loan Insurance Corporation.

3. Direct obligations of the United States Treasury, such as notes, bonds or bills which are backed by the full faith and credit of the United States Government.

g. The safety of any investment of surplus monies or claims reserves shall be the responsibility of the Trustees.

h. The Trustees shall be prohibited from making any type of investment as authorized by these rules with the intent to trade, dispose or sell the security in any manner other than redeeming it at maturity. Therefore, it shall be the responsibility of the Trustee to purchase securities in such denominations and with dates of maturity to insure that these securities shall be redeemable at the same time and in the same amounts as the Fund's current and long-term liabilities.

i. The Trustees shall report annually, as part of the financial statement of the Fund, a schedule showing the disposition of all investment income earned during the Fund year just ended.

j. The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act which is incorporated herein by

reference as permitted by statute 62-7-703 (b) as if fully set out herein.

SECTION 11. RULES AND REGULATIONS.

The Trustees may prescribe such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided the rules and regulations shall not be inconsistent with the provisions of this Declaration of Trust, the Indemnity Agreement, the Rules for Self Insurers, applicable federal and/or state statutes and applicable governmental regulations.

SECTION 12. TRUSTEES' LIABILITIES.

No Trustees shall be liable for any action taken pursuant to this Trust Agreement in good faith or for an omission, by any other Trustee or by any employee of Trustee.

The Trustees are hereby authorized and empowered to obtain, at the expense of the Fund, liability insurance fully protecting the Trustees and the Fund from any loss or expense incurred, including reasonable attorney's fees, for all acts of the Trustees except bad faith and gross negligence on the part of the Trustees. The Fund hereby agrees to save, hold harmless and indemnify the Trustees while acting in the capacity of Trustees excepting bad faith and gross negligence.

SECTION 13. RELIANCE ON COUNSEL'S OPINION.

The Trustees may consult with legal counsel concerning any questions which may arise with reference to the duties and powers or with reference to any other matter pertaining to this Agreement or the Trust created hereby; and the opinion of such counsel shall be full and complete authorization and protection in respect to any action taken or suffered by the Trustees hereunder in good faith in accordance with the opinion of such counsel, and the

Trustees shall not be liable therefor.

ARTICLE VI

MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Setlor. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by a concurrence of all of the parties to this Agreement, including the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities; in which case, the Trust may continue in perpetuity unless otherwise terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

SECTION 3. SITUS OF THE TRUST.

This Trust Agreement is executed by the parties hereto and accepted by the Trustees in the State of South Carolina, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of South Carolina.

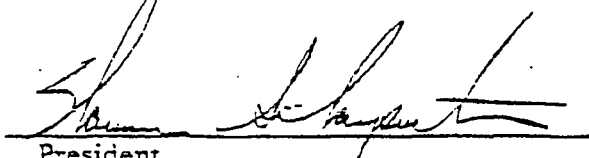
SECTION 4. CONSTRUCTION.

Whenever any words are used in this Agreement in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and whenever any words are used in this Agreement in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and whenever any words were used in the Agreement in the plural form, they shall be construed as though they were also in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, this Agreement and Declaration of Trust has been executed the day and year first above written.

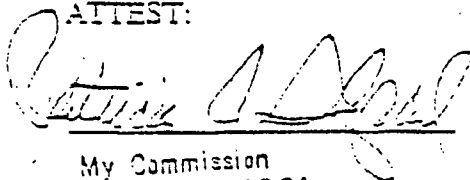
SETTLOR:

HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA INC.

By: 

President

ATTEST:



My Commission
expires 5-2-2001



March 28, 2012

Mr. Tony Thompson
President, HBA of Greater Columbia
PO Box 725
Columbia, SC 29202

Dear Mr. Thompson:

This is in response to your letter dated March 1, 2012.

As you may know, a civil action titled Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, and Michael Nieri, on behalf of themselves and others similarly situated v. Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Civil Action No. 2012-CP-32-00757, has been filed in Lexington County, South Carolina. A copy of the Complaint is attached for your information.

The SIF, its Board of Trustees and their attorneys believe the suit to be without merit and expect to defend the action vigorously. Strangely, most of the plaintiffs voted to approve the actions about which they now complain in their Complaint. Our attorneys have advised the Board and the staff not to discuss the details of the lawsuit. As a result, I will not address the issues in the lawsuit. However, I do want to address some questions that have been raised.

Before answering the questions, I do want to point out that the SIF operates pursuant to a Trust Agreement. Attached is a copy of the Trust Agreement for your ready reference. As you can see from the Trust Agreement, the Board of Trustees has the right to amend the Trust Agreement with the exception of certain limited matters. The Workers' Compensation Commission oversees the administration of the trust and approves or disapproves any amendments. The Trust Agreement has been amended, as the attached agreement reflects. Each amendment has been approved by the Workers' Compensation Commission.

It appears that there is a fair amount of misinformation floating around. Your questions reflect this. Answers to most of these questions have been previously provided. Nevertheless, it is important to the SIF that you, as a member, have accurate information and have your questions answered. Therefore, I address the questions as follows:



1. How long have you served as Trustee?

ANSWER: See Exhibit A that shows the length of service of each current trustee.

2. When was the last time you all held elections for trustees and why?

ANSWER: The Trust Agreement does not require that elections be held. However, the SIF has historically held elections every year. The last election was held during November of 2006. Elections were thereafter suspended while the effort was made to establish the mutual insurance company so there would be continuity of management.

3. Do you think the trustees for this Fund are a good representation of the image the SCHBSIF would like to portray? This would include business and personal reputation?

ANSWER: Yes, all have been elected by the membership. Most have served in responsible positions in their local and statewide HBA.

4. Do you receive any compensation or perks as a Trustee?

ANSWER: Until 2008, trustees were not compensated at all. However, since then, the trustees receive \$250 for attending monthly board meetings, subject to a maximum of 12 annually. In addition, the trustees' expenses and those of their spouses and guests are paid for attendance at semi-annual meetings with other SIF's held in various locations throughout the country.

5. When will we have an opportunity to elect new members of the Board of Trustees?

ANSWER: Upon advice of counsel, no elections will be held while the lawsuit is pending.

6. Are there still plans to form a mutual insurance company?

ANSWER: Yes. The formation of a mutual insurance company has been studied and worked on since 2003. It is the consensus of the Board that the formation of a mutual insurance company would benefit the members of the SIF who could then obtain insurance coverage from the mutual company, while claims liabilities of the SIF continue to decline over time resulting in the eventual elimination of joint and several liability for claims which exists with the SIF. The SIF membership voted by a margin of 96.5% to proceed with forming a mutual insurance company. The Home Builders Association of South Carolina has agreed that formation of the mutual company would serve the best interest of the members of the SIF.

7. Who owns the SIF? Who do the excess funds of the SIF belong to?

ANSWER: The SIF is a self-insured fund who administers the fund pursuant to the trust agreement, as regulated by the South Carolina Workers' Compensation Commission, legal title is held by the trustees. The assets of the SIF are owned by the SIF until such time as it may close, at which point any surplus assets may be distributed to policyholders with the approval of the South Carolina Workers' Compensation Commission. See attached letter dated August 4, 2011 from the South Carolina Workers' Compensation Commission.



8. **Who owns the office building for the SIF?**
ANSWER: The Building is owned by Center Point V, LLC, a single member LLC which is owned by the SIF. Ken Ormand, a member of the HBASC, handled the real estate transaction for the SIF. The SIF only occupies a part of the building and the remainder of the building is leased or offered for lease. The building is an asset of the SIF and was purchased with the approval of the South Carolina Workers' Compensation Commission. See the attached email copy dated August 9, 2010 from the South Carolina Workers' Compensation Commission.
9. **How many people work for the SIF and what are the salaries of the employees? Are any present or past Trustees employed by the SIF?**
ANSWER: The SIF currently employs 18 full time staff members. Salary information of individual employees is confidential. Salaries are within industry norms. No Trustees, past or present, have been employed by the SIF.
10. **What is the impact of the joint and several liability issues to me as a member of the SIF?**
ANSWER: I am pleased to report that the SIF is financially sound. No assessment is anticipated. It is not anticipated that any member would have exposure with regard to joint and several liability. See the attached letter dated August 4, 2011 from the South Carolina Workers' Compensation Commission.
11. **Now that policyholders from the AGC's fund have been assessed, do you still feel that the HBA policyholders are completely safe from a future assessment?**
ANSWER: The financial condition of the AGC Fund is entirely unrelated to the financial condition of the SIF. While we cannot predict future financial performance of the SIF with complete certainty, the SIF is in very sound financial condition and no assessment is anticipated.
12. **How will the class action lawsuit against the Trustees affect the fund?**
ANSWER: Upon information and belief, not at all other than payment of the cost of defense.
13. **Was the SIF profitable for 2011? If not, how much of the excess funds was used?**
ANSWER: The 2011 policy year audit will not be completed until June 2012; however, preliminary analysis indicates an operating gain will be recorded when the audit is completed.
14. **How much of the policyholders money have been used to hire attorneys to take the actions against the HBA or used since January 1, 2011 outside the normal scope of the SIF?**
ANSWER: None.



15. **Why was the requirement for HBA membership removed by the SIF Board of Trustees?**
ANSWER: This change in the Trust Agreement was made because of the many complaints from members who had no interest in being involved in the HBA but had to join the HBA in order to get their workers' compensation insurance coverage from the SIF. Since the HBA has provided no support, financial or otherwise, to the SIF, the Board made a decision to eliminate the requirement of HBA membership. The premiums will not be reduced but the prospective member will not have the additional cost of membership in the HBA in order to acquire insurance from the SIF. This will therefore reduce the cost to obtain workers' compensation insurance from the SIF. See the attached letters to SIF members dated February 14, 2012, and February 27, 2012.
16. **Will my premiums be reduced now that I am not required to be a HBA member?**
ANSWER: The calculation of premiums is completed independent of any factors not directly related to the SIF's revenues, and claims and operating expenses. HBASC membership is entirely unrelated to these calculations. See also answer to question #15.
17. **Why were the HBA of South Carolina President and Vice President removed as SIF Trustees?**
ANSWER: The President and Vice President of the HBA of South Carolina were ex-officio trustees pursuant to the Trust Agreement. Since the decision was made to sever the relationship with the HBASC and devote more financial resources to the local level, a decision was made to eliminate these two ex-officio trustee positions. See the attached letter to Michael Lowman dated September 15, 2011.
18. **Does the SIF have a written standard for trustees regarding their own financial stability?**
ANSWER: No.
19. **Do any of the trustees owe money to any creditors for which they cannot pay?**
ANSWER: The SIF does not investigate such matters.
20. **Who founded the South Carolina Home Builders Self Insurers Fund and why has "founded by the Home Builders Association of South Carolina" been deleted from your recent description of the South Carolina Home Builders Self Insurers Fund?**
ANSWER: Please refer to the enclosed Trust Agreement.



21. When the Trustees removed \$5 million from the SIF to form the mutual company why was the HBASC not informed? Did moving the money to the mutual company incur any liabilities on the policyholders?
ANSWER: Funds were transferred in response to the ratification of the ballot by SIF policyholders and with the approval of the South Carolina Workers' Compensation Commission. There was no requirement to give notice of this action to the HBASC. However, the HBASC had two ex-officio members on the SIF Board. Therefore, the HBASC had notice. The transfer did not cause any member to incur any liability.
22. Has the \$5 million been placed back into the SIF accounts?
ANSWER: Yes. See the attached email copy dated May 23, 2011 from the South Carolina Workers' Compensation Commission.
23. If those who caused you to be appointed or elected as a trustee requested that you resign as a trustee would you do so?
ANSWER: No.
24. It would seem that it is very abnormal for the trustees to meet monthly especially since none of the trustees have insurance experience. If the Trustees are compensated is it based on a per meeting basis?
ANSWER: The trustees have extensive experience in the leadership and operation of the SIF as evidenced by its strong financial condition. In addition to individual study of risk management and insurance conducted by each trustee, the board of trustees as a group has for many years participated in semi-annual meetings with other home builders' SIF's domiciled in other states that provide training and information about industry changes. It is normal and customary for the leadership of most financial institutions such as banks and insurance companies to meet monthly. The SIF trustees have held monthly meetings year in and year out since 1995. See also answer to question #4.
25. If you agree that the trustees should meet monthly then please explain to us why?
ANSWER: Meetings have been held monthly and are necessary for the proper management and oversight of the Fund.



In closing I would like to assure you and other SIF members that the SIF remains financially sound and in full compliance with Title 42 of the South Carolina Code of Laws, and with Regulation 67-1501 contained therein. The SIF is off to a great year, with 833 renewals (96%) and 29 new members. The Board of Trustees remains committed to serving the SIF and its members, providing a reliable, cost effective source of Workers' Compensation coverage to South Carolina's building community as we have since 1995.

Sincerely,

Herb Witter
Chairman

S. JAHUE MOORE
J. MARK TAYLOR*
DAVID L. THOMAS†
C. VANCE STRICKLIN, JR.
JAMES EDWARD BRADLEY
SHEILA McNAIR ROBINSON
ROBERT D. HAZEL
CHRISTIAN G. SPRADLEY††
C. DAVID SAWYER, JR.††
WILLIAM H. EDWARDS
STANLEY L. MYERS
JANE H. DOWNEY**
S. JAHUE MOORE, JR.
JOHN C. BRADLEY, JR.



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MELISSA K. MOORE
WILLIAM B. FORTINO
R. NICHOLS "NICK" RILEY, JR.
M. BROOKS BIEDIGER
AMBER L. FULMER
SARAH TAYLOR CASSIDY
MARGARET "MEG" HAZEL

RETIRED:
BILLY C. COLEMAN††

††SALUDA OFFICE:
(864) 445-4544 OR (866) 604-4544
†GREENVILLE OFFICE:
(864) 271-6371

January 30, 2013

Pope D. Johnson, III, Esquire
P.O. Drawer 11209
Columbia, SC 29211-1209

Re: Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michel Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, vs. Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund
C/A No. 2012-CP-40-04311

Dear Pope:

It is our understanding that you represent Defendant Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund. In that capacity, please take this letter as a request for action as follows on behalf of your clients. This letter is written to reaffirm previous actions taken and obtain actions from the Trustees of the South Carolina Home Builders Self Insurers Fund.

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

ROA-000247

*Fellow of the American Academy of Matrimonial Lawyers
**Certified Specialist in Bankruptcy & Debtor/Creditor Law



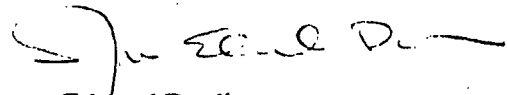
Pope D. Johnson, III, Esquire
January 17, 2013
Page 2

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

I believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. I believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

If your clients' position is any different, please let me know so we can discuss this matter. If I do not hear from you regarding this, I will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Sincerely,



James Edward Bradley

/lgi

cc: Allen Patterson
Stephen Tilton
Richard Sendler
Lincoln Privette
Marc Ellis
Joey Carter
Barry Davis
Michael Nieri
Mark Nix

ROA-000248

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sandler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sandler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2013-CP-40-02655

**MEMORANDUM IN OPPOSITION
TO DEFENDANTS'
MOTION TO RECONSIDER
THE ORDER DENYING DEFENDANTS'
MOTION TO DISMISS**

INTRODUCTION

The Plaintiffs are beneficiaries of a trust and sued the Defendants for breach of their duties as trustees. The matter was originally brought in February 2012 as case number 2012-CP-32-00757. In that case, the Trustees moved for dismissal on the basis that the Trustees must be sued in Probate Court. Judge Manning granted that motion. The Plaintiffs then sued in Probate Court on April 9, 2013, and the case was removed to Circuit Court. The Defendants have now moved to dismiss on the basis that the new lawsuit is a shareholder derivative action and does not comply with Rule 23(b)(1) of the Rules of Civil Procedure governing stockholder actions.

STATEMENT OF FACTS

In September 1995, the South Carolina Home Builders Association created a trust to administer worker's compensation benefits for members of the South Carolina Home Builders Association. That trust is referred to as the South Carolina Home Builders Self Insurers Fund. (Attached as Exhibit A). The fund had several members of the South Carolina Home Builders Association on its board and worked in conjunction with the South Carolina Home Builders Association to sell worker's compensation insurance policies and administer the policies.

The Trustees have made significant actions towards dissolving the trust and creating a new insurance company with the proceeds. The new insurance company would be a mutual insurance company of which the Trustees would all be board members. The insurance company would not have any particular benefit to the beneficiaries of the trust. The assets of the trust would be used to set up a company competing with the trust. The Trustees transferred approximately five million dollars out of the trust to do this. At some point, they transferred the money back into the trust. There is approximately \$20,000,000 remaining in the trust to fund its liabilities. However, the Trustees intend to use these funds to set up a separate insurance company which will convey no benefit to the beneficiaries of the trust.

The Trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit to the beneficiaries of the trust. The Trustees have used these assets to begin setting up a separate insurance company which will convey no benefit to the beneficiaries of the trust and have not reimbursed the trust for these costs including the use of facilities, the software programs, and the employees of the trust. If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk. (Affidavit of

David Gully, attached as Exhibit B). All beneficiaries of the trust are subject to personal liability for any shortfall in trust assets.

ARGUMENT

I. THE HOME BUILDER'S TRUST IS A TRUST, NOT AN UNINCORPORATED ASSOCIATION.

A trust may be created by “written declaration signed by the owner of property that the owner holds identifiable property as trustee.” S.C. Code Ann. § 62-7-401(a)(2) (2013). In order for a trust to be created, there must be “a declaration of the trust, property to which the trust pertained, a Trustee, and named beneficiaries.” *Johnson v. Thornton*, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975). A beneficiary is defined as a “person that has a present or future beneficial interest in a trust, vested or contingent.” S.C. Code Ann. § 62-7-103 (2)(A).

The Home Builder's Trust is a trust. It meets all requirements of a trust in South Carolina. The trust was created by a written declaration. There is identifiable property, named trustees, and the beneficiaries are named or identified. (Home Builder's Trust, p. 1-9, attached as Exhibit A). A trust is not an unincorporated association.

The United States Supreme Court had the opportunity to consider whether a trust should be treated as an unincorporated association for diversity jurisdiction purposes. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 458-59 (1980).¹ In that case, the Respondents asserted that the “trust form masks an unincorporated association.” *Id.* at 461. The Respondents also contended that because the trust's operations were characteristic of an association, including “centralized management, continuity of enterprise, and unlimited duration,” that the trust was “in substance an association.” *Id.* at 461-62.

¹ South Carolina courts rely on federal precedent in derivative actions: “Rule 23(b)(1) of the South Carolina Rules of Civil Procedure adopts the federal derivative suit provision, Fed. R. Civ. P. 23.1....” S.C. Code Ann. § 33-7-400.

The 5th Circuit Court of Appeals and the Supreme Court disagreed. The Supreme Court stated that while certain attributes of the trust were shared by associations, having business-like practices was not dispositive evidence that a trust was an unincorporated association. *Id.* at 462. Even though shareholder beneficiaries had the power to elect and remove trustees, to terminate the trust, and to amend the Declaration or approve a majority disposition of the estate, this was insufficient to classify the trust as an unincorporated association. The Court concluded that despite these association-like characteristics, the trust was indeed a trust because the Trustees had real and substantial control over the property of the trust and the trustees' power was free from any control by the shareholder beneficiaries. *Id.* at 465 n. 14. "That the trust may depart from conventional forms in other respects has not bearing on this determination." *Id.* at 465. "We need not reject the argument that [the trust] shares some attribute of an association. In certain respects, a business trust also resembles a corporation. But this case involved neither an association nor a corporation. [The trust] is an express trust..." *Id.* at 462.

Like the trust in *Navarro*, the Home Builder's Trust may have some unconventional attributes. For example, the beneficiaries in the Home Builder's Trust are jointly and severably liable for underfunded losses. This is allowed under the South Carolina Trust Code. *See* S.C. Code Ann. § 62-7-105.² The Trustees assert that because the beneficiaries are jointly and

² The following items cannot be overridden by the trust code:

- (1) the requirements for creating a trust;
- (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful and possible to achieve;
- (4) the power of the court to modify or terminate a trust under Sections 62-7-410 through 62-7-416;
- (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Part 5;
- (6) the limitations on the ability of a settlor's agent under a power of attorney to revoke, amend, or make distributions from a revocable trust pursuant to Section 62-7-602(e);
- (7) the power of the court under Section 62-7-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (8) the effect of an exculpatory term under Section 62-7-1008;
- (9) the rights under Sections 62-7-1010 through 62-7-1013 of a person other than a trustee or beneficiary;

severally liable, this automatically makes them an unincorporated association. This assertion is illogical. By this reasoning, any joint tortfeasors would automatically qualify as an unincorporated association. Although the beneficiaries of the Homebuilder's Trust share in liability for shortfalls in trust assets, this alone does not make the trust an unincorporated association.

The Trustees also assert that the statutes cited by the court demonstrating that a trust is not an unincorporated association are not relevant. They contend that the statutes cited apply only to the respective categories in which they are located. This reasoning is in error. The statutes cited pose a listing of enterprises recognized in South Carolina. Each listing distinguishes a trust as a separate entity from all other enterprises, including unincorporated associations. S.C. Code Ann. §§12-34-3160(c), 27-29-10(3), 37-25-10(2). While the statutes cited may not fall under Corporations, Partnerships and Associations Title 33, the statutes do list a recognized listing of separate entities in South Carolina. Therefore, the statutes are relevant.

As stated by the United States Supreme Court *supra*, a trust is a separate entity from an unincorporated association. A trust does not become another type of enterprise because it may share some characteristics of that enterprise. The Home Builder's Trust calls itself a trust, calls its board members trustees, and meets the definition of a trust. Trusts are not treated as unincorporated associations in South Carolina, as shown by the statutes cited by the court. There is no authority to the contrary. Therefore, the Home Builder's Trust does not need to meet the derivative action requirements of unincorporated associations.

(10) periods of limitation for commencing a judicial proceeding;

(11) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and

(12) the subject matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 62-7-201 and 62-7-204.

S.C. Code Ann. 62-7-105(a). Therefore, having joint and several liability on the part of the beneficiaries is allowed under the code.

II. THE MEMBERS OF THE HOME BUILDER'S TRUST ARE BENEFICIARIES, NOT MEMBERS OF AN UNINCORPORATED ASSOCIATION.

Defendants assert that since the word "member" is used in place of "beneficiary," the members are not beneficiaries of the trust, but are members of an unincorporated association. This argument fails.

In *Navarro*, the United States Supreme Court referred to the beneficiaries as shareholders: "The respondents ... hold title to real estate investments in trust for the benefit of Fidelity's **shareholders**. The declaration of trust gives the respondents exclusive authority over this property free from any power and control of the **Shareholders** . . ." *Navarro*, 446 U.S. at 459 (internal citations omitted)(emphasis added). Because the trustees had the power to control the trust for the benefit of the shareholders, an express trust was created. *Id.* The Court did not quibble with semantics and used the substance of the written trust to come to its conclusion that the shareholders were beneficiaries. *Id.*

The creators of the Home Builder's Trust used the word "member" as a way to identify the beneficiaries. Just as in *Navarro*, it is clear from the content of the express trust that these members were to benefit from the trust's operations. (Home Builder's Trust, p. 1, 3, attached as Exhibit A). The members of the trust were beneficiaries, not members of an unincorporated association.

III. THE DERIVATIVE STATUTE DOES NOT APPLY TO TRUSTS.

In interpreting a statute, "a court should always turn first to one, cardinal canon [of construction] before all others": the plain meaning rule. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). The courts must presume that "Congress says in a statute what it means and means in a statute what it says...." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)(internal quotation marks omitted). When the words of a statute are

unambiguous “this first canon is also the last: ‘judicial inquiry is complete.’ ” *Conn. Nat’l Bank*, 503 U.S. at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). “Where a statute uses a word having a well-recognized meaning in law, the presumption is that the Legislature intended to use the word in that sense.” *Coakley v. Tidewater Construction Corp.*, 194 S.C. 284, 9 S.E.2d 724 (1940). “[L]egislative intent must prevail if it can reasonably be discovered in the language used construed in light of the intended purpose.” *Beaufort County v. Jasper County*, 220 S.C. 469, 68 S.E.2d 421 (1951).

The Defendants assert that SCRCP 23 applies to the Home Builder’s Trust. The Rule reads:

In a derivative action brought by one or more *shareholders or members to enforce a right of a corporation or of an unincorporated association*, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law.

SCRCP Rule 23 (b)(1) (emphasis added). According to the plain meaning of the rule, it applies to corporations and unincorporated associations, not to trusts. If the legislature had intended for the rule to apply to trusts, it would have included trusts in the language of the rule. All case law involving derivative actions in South Carolina involves corporations and unincorporated associations, including partnerships. No South Carolina court has ever applied this rule to trusts. The harm from the mismanagement of the trust flows directly to the beneficiaries, who are liable for any shortfalls in trust assets. The harm does not flow to a corporation. “[A] shareholder’s suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder.” *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (S.C. Ct. App. 2001). Here, the injury is to each beneficiary who must, *individually*, make up for

any shortfall in trust assets. The shortfall will not be made by the trustees or by any corporation. The burden stands on the shoulders of the beneficiaries. Therefore, according to the plain meaning of the rule and the case law on derivative suits, the court was correct in holding that SCRCP 23 does not apply to the action brought by the beneficiaries of the Home Builder's Trust.

IV. DEFENDANTS HAVE ALREADY ASSERTED THAT THE HOME BUILDER'S TRUST IS A TRUST, NOT AN ASSOCIATION OR CORPORATION.

The Plaintiffs are beneficiaries of a trust and sued the Defendants for breach of their duties as trustees. The matter was originally brought in February 2012 as case number 2012-CP-32-00757. In that case, the Trustees moved for dismissal on the basis that the Trustees must be sued in Probate Court. The Trustees stated: "this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust." (Notices of Motion and Motions to Dismiss by Defendants, p. 2, attached as Exhibit C). In support of this motion, the Trustees submitted the affidavit of Jeffrey Ranew. He continually refers to the South Carolina Home Builders Self Insurers Fund as a trust and the funds as a trust corpus. (Affidavit of Jeffrey Ranew, attached as Exhibit D).

Judge Manning granted the motion to dismiss, stating:

In particular, the Defendants have moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involved the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201.... It is clear from the documents submitted to the Court that this dispute concerns a trust.... With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

(Order by Judge Manning, Attached as Exhibit E). The Plaintiffs then sued in Probate Court on April 9, 2013, and the case was removed to Circuit Court.

Now, the Defendants are taking the position that the trust is not a trust, but an unincorporated association. Under the doctrine of judicial estoppel, the Trustees cannot now claim that the trust is not a trust when they previously maintained that it was a trust.

Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997) (citing *Colleton Regional Hosp. v. MRS Med. Rev. Sys.*, 866 F.Supp. 896 (D.S.C. 1994)). Judicial estoppel applies to inconsistent statements of fact. *Id.* “Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.” *Id.*

In *Hayne Federal Credit Union v. Bailey*, Mr. Bailey claimed ownership of a house through a resulting trust. In his divorce, he had disavowed any interest in the property and maintained that the property belonged to his son. The Supreme Court held Mr. Bailey was estopped from later claiming an interest in the property because in his divorce he attributed ownership to his son.

Likewise, the Trustees cannot now claim that the trust is not a trust. The Trustees obtained an Order from the court dismissing the previous lawsuit based on their factual assertion that the SIF was a trust. Now, the Trustees take the position that it is not a trust, but an association, which changes the pleading requirements of the lawsuit. The Trustees cannot assert these two different versions of the facts. They are bound by the assertion made in the previous lawsuit and the order which resulted. Thus, the Homebuilder’s Trust is a trust, not an

unincorporated association, and does not have to comply with SCRCP 23(b)(1) for a derivative action.

V. THE COURT CORRECTLY FOUND THAT THE PLAINTIFFS HAD MET THE REQUIREMENT OF SCRCP RULE 23.

The court held that even though it was not required, the Plaintiffs complied with Rule 23. The rule states that the complaint must be verified. The complaint was verified and the verifications served on Defendants. The rule also required the Plaintiffs to set forth the efforts made to obtain relief. Paragraph 8 of the complaint set forth these efforts. Paragraph 8 also referenced correspondence with the Defendants. This correspondence was in the form of a letter, which also set forth the relief requested.

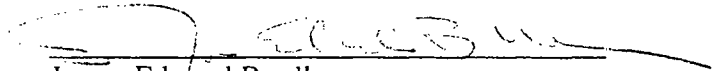
The facts of the sole case cited by Defendants to support the application of Rule 23 are not the same as the current issue. In that case, the shareholders failed to specify *any* type of effort made to resolve the issue. The court referred to language such as “certain information,” “certain actions,” “supplemental demand,” and “proposals” as too vague to comply with the rule that particularized allegations must be part of the complaint. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 189, 539 S.E.2d 402, 409 (S.C. Ct. App. 2000).

The beneficiaries of the Home Builder’s Trust did not use vague language. The court found that the language in Paragraph 8, which referred to a previous letter, was sufficient to meet the requirements of the rule. Therefore, even though it was not required, the Plaintiffs have met the burden of SCRCP 23 for derivative actions.

CONCLUSION

For these reasons, the court should deny the Defendants' Motion to Reconsider the Order Denying the Motion to Dismiss.

Respectfully submitted,



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Attorney for the Plaintiffs

West Columbia, South Carolina

January 6, 2014

AGREEMENT AND DECLARATION OF TRUST

CREATING THE

SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

THIS AGREEMENT, made and entered into this 27 day of September, 1995 by and between the Home Builders Association of South Carolina, Inc., a corporation not for profit, organized and existing under and by virtue of the laws of the State of South Carolina, hereinafter referred to as the "Setlor", and a Board of Trustees, hereinafter referred to as the "Trustees", has been designated for the purposes, among others, of directing the affairs of the Fund.

WITNESSETH:

WHEREAS, the Setlor and the Trustees intend to apply to the South Carolina Workers' Compensation Commission for the establishment of a group self insurers fund pursuant to South Carolina statutes for the benefit of the members of the Home Builders Association of South Carolina, Inc.; and

WHEREAS, the establishment of a group self insurers fund for the purpose of satisfying an employers' obligation under the South Carolina Workers' Compensation Act would be in the best interest of the members of the Home Builders Association of South Carolina, Inc.; and

WHEREAS, it is considered to be in the best interest of the members of the Home Builders Association of South Carolina, Inc. that an Agreement and Declaration of Trust fully setting forth the duties and responsibilities of the Trustees be entered into:

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND is hereby established as follows:

ARTICLE I

DEFINITIONS

Fund - The group self insurers fund or funds which are hereby created for the purposes set forth herein.

Indemnity Agreement - The Indemnity Agreement which shall be filed by the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND pursuant to the Rules for Self Insurers as issued by the South Carolina Workers' Compensation Commission.

Member - A company, firm, corporation, individual, partnership or other legal entity involved in on-site home construction which is a participating member in good standing of the Home Builders Association of South Carolina, Inc.

Rules for Self-Insurers - The Rules for Self Insurers under the South Carolina Workers' Compensation Act as amended from time to time and administered by the South Carolina Workers' Compensation Commission.

Service Agent - Any individual, co-partnership, corporation, firm or other legal entity engaged in the business of servicing approved workers' compensation self-insurance programs which has made application to, and been approved by, the South Carolina Workers' Compensation Commission.

Trustees - The Trustees appointed to serve on the Board of Trustees of this Fund as provided herein.

ARTICLE II

CREATION OF THE TRUST

There is hereby established and created a Trust Fund which shall be known as the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND and the Trustees thereof may hold property, enter into contracts and in all matters as hereinafter set forth act in behalf of the Trust Fund in that name. This Trust Fund shall be used for the purposes as hereinafter set forth.

ARTICLE III

PURPOSE

This Trust Agreement is made and executed for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; to form an overall self insurers fund pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building industry.

ARTICLE IV

DESIGNATION OF TRUSTEES

SECTION 1 NUMBER AND ELIGIBILITY OF TRUSTEES

The operation and administration of the Trust Fund shall be the joint responsibility of a Board of Trustees consisting of a number of Trustees of not less than five (5) nor more than nine (9). The Board of Trustees shall consist of at least one representative from each of the five Home Builders Association of South Carolina, Inc. districts. The President and Vice President of the Home Builders Association of South Carolina, Inc. shall serve as Ex-Officio Trustees; they shall have voting privileges if and only if they are Members of the Fund. Except for the two Ex-Officio Trustees, Trustees shall be elected by the participating Members by a mail ballot.

*Trustee elections shall be held by mail ballot to all members of the Fund. Trustees receiving a vote of 51% of returned ballots shall be declared duly elected. The Trustees shall elect from one of their number, one Trustee to serve as Chairman. Except for the two Ex-Officio Trustees, only members of the Home Builders Association of South Carolina, Inc. whose businesses participate in the Trust, or their employees, may serve as Trustees. If the Trust wants to change the makeup of the Board of Trustees or requirements for being a Trustee, it must first be approved by the Home Builders Association of South Carolina Board of Directors.

SECTION 2 RESIGNATION OR REMOVAL OF TRUSTEES

Any Trustee herein named, or any successor Trustee, may resign at any time, with or without cause, by giving not less than sixty (60) days written notice of the intention to so resign to the Board of Trustees and to the Board of Directors of the Home Builders Association of South Carolina, Inc. The Board of Directors of the Home Builders

*By-Law change approved by The SCHBSIF Board of Trustees on November 13, 1997.

Association of South Carolina, Inc. may remove a Trustee now serving or any successor Trustee with or without cause, by giving not less than ten (10) days written notice to the Trustee being removed and to the Board of Trustees. Prior to the effective date of such resignation or removal, the Board of Trustees shall nominate a successor Trustee to complete the term of the removed Trustee, subject to the approval of the Executive Committee of the Board of Directors of the Home Builders Association of South Carolina, Inc. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee or subsequent to his resignation or removal as Trustee. A successor Trustee shall not be required to inquire into or take any notice of the prior administration of the Trust Fund. Any successor Trustee, immediately upon his acceptance in writing to the Trust shall become vested with all the estate, rights, powers, discretion and duties of his predecessor Trustee with like effect as if originally named as Trustee herein.

No Trustee may be appointed who is, or continues to serve as a Trustee after becoming an owner, officer or employee of a service agent.

SECTION 3. TRUSTEES' TITLE.

In case of death, resignation, refusal or inability to act by any one or more of the Trustees, the remaining Trustees shall have all of the powers, rights, estates and interest of this Trust and shall be charged with its duties, provided that in such cases, no action may be taken unless it is concurred in by not less than a majority of the remaining Trustees, which shall be not less than two (2) in number.

SECTION 4. TRUSTEE OFFICERS.

The Trustees shall meet as promptly as possible after execution of this Trust Agreement and elect from among the Trustees a Chairman and a Secretary of the Board of Trustees. The term of such offices shall commence on the date of their election and continue to the end of the fiscal year. Thereafter, such officers shall be elected annually.

ARTICLE V

ADMINISTRATION OF FUND

SECTION 1. MEETINGS.

The Trustees shall meet at least quarterly, and more often if required, at the principal office of the Fund or at such other location as may be acceptable to a majority of the Trustees. The Chairman of the Trustees shall set the date, time and location of each meeting, and notice thereof shall be furnished to each Trustee by the Secretary or Administrator not less than ten (10) days prior to the date of such meeting. Such notice shall specify the date, time and location of such meeting and may specify the purpose thereof and any action proposed to be taken thereat. Whenever any notice is required to be given to any Trustee hereunder, such notice shall be directed to the said Trustee by certified mail, return receipt requested, to the address of such Trustee as recorded in the office of the Fund.

Special meetings of the Trustees may be held at any time and place without notice provided all Trustees execute a waiver of notice and consent to the said meeting.

For the purposes of a duly called and noticed meeting of the Board of Trustees a quorum shall consist of four (4) members of the Board of Trustees, unless the Board of

Trustees consist of less than four (4) Trustees in which case all Trustees shall be required to constitute a quorum. Meetings, including votes, may be conducted by telephone conference. The Secretary, acting Secretary, or his designee shall keep minutes of all meetings, proceedings and acts of the Board of Trustees, but such minutes need not be verbatim. Copies of all minutes of the meetings of the Board of Trustees shall be sent by the Secretary, acting Secretary or a designee to all Trustees.

SECTION 2. VOTING.

All actions by, and decisions of, the Board of Trustees shall be by the vote of a majority of the number of Trustees attending a duly called meeting of the Trustees at which a quorum is present; provided, however, that actions by, and decisions of, the Board of Trustees may be taken by a vote of a majority of the number of Trustees attending a special meeting without notice when a proper waiver and consent has been obtained as provided in Section I above.

SECTION 3. OFFICE OF THE FUND.

The Trustees shall establish and maintain an office of the Fund, the exact location of which is to be made known to the parties interested in or participating in the said Fund and to the appropriate governmental agencies and departments of state. The books and records pertaining to the Fund and its administration shall be kept and maintained at the office of the Trust.

SECTION 4. EXECUTION OF DOCUMENTS.

A certificate signed by the chairman and secretary of the Fund shall be evidence of the action of the Board of Trustees and any such certificate or other instrument so signed shall

conclusively be presumed to be authentic, and all facts and matters stated therein shall conclusively be presumed to be true.

SECTION 5. APPOINTMENT OF ADMINISTRATOR.

The Trustees shall designate a fiscal agent and/or an Administrator to administer the financial affairs of the Fund: provided, however, such fiscal agent or Administrator shall not be an owner, officer, or employee of a service agent.

Any fiscal agent and/or Administrator so appointed shall furnish a fidelity bond with the Trust as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities held by or in the name of the Fund. The amount of the bond shall be determined by the Trustees and evidence of such bond shall be filed with the appropriate governmental agencies and departments.

SECTION 6. APPROVAL OF NEW MEMBERS.

The Trustees, after the inception date of the Fund, shall receive applications for membership from prospective new members to the Fund and shall approve such application for membership in accordance with the Rules for Self-Insurers, the terms of the Indemnity Agreement, and the rules and regulations established and promulgated by the Trustees for the admission of new members to the Fund. The Board of Trustees may delegate the ministerial authority for membership approval to the Administrator or such other person as they select, provided that such Administrator or person designated is not an owner, officer, or employee of a service agent. Membership in the Fund is also contingent on the regulations of the state of South Carolina and approval by the South Carolina Workers' Compensation Commission.

SECTION 7. ESTABLISHMENT OF FUNDS.

The Trustees shall be responsible for establishing such Trustee funds, loss funds, or other funds which may be required from time to time by South Carolina Statutes, or the Rules for Self-Insurers or the Rules of Conduct and Administration of this Fund as may be established by the Trustees from time to time.

SECTION 8. POSTING OF SECURITY.

The Trustees shall be responsible for and shall undertake the posting of such security deposit and/or security bonds as may be required to be posted with the South Carolina Workers Compensation Commission pursuant to South Carolina Statutes, or the Rules for Self-Insurers or such other legislative enactments or administrative regulations which may be established from time to time.

SECTION 9. REPORTS BY TRUSTEES.

The Trustees shall be responsible for and shall cause to be filed such annual or other periodic audits, reports, and disclosures as may be required from time to time pursuant to applicable federal or state statutes or governmental regulations.

SECTION 10. FISCAL MANAGEMENT AND AUTHORITY.

The Trustees shall have said authority and take all necessary precautions to safeguard the assets of the Fund including, but not limited, to the following:

- a. The designation of a fiscal agent and/or Administrator to administer the financial affairs of the Fund, who shall furnish a fidelity bond with the Trustees as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Trustees, and

evidence of such bond shall be filed with the Commission, said bond being one of the conditions required for approval of the establishment and continued operation of a self insurers fund. Such fiscal agent or Administrator shall be an owner, officer, or employee of the service organization.

b. Retaining control of all monies collected or disbursed for the Fund. All loss funds or funds of any type shall remain in the custody of the Trustees or the authorized Administrator. Provided, however, that a revolving fund for payment of compensation benefits due and other related expenses may be established for the use of the authorized service company. The service company shall furnish a fidelity bond covering its employees, with the Trustees as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Provided, however, that should the bond required of the fiscal agent and/or Administrator also cover the monies in the revolving fund, separate bond shall not be required.

c. Having the accounts and records of the Fund audited annually or at any other time as may be necessary to determine the financial stability of the Fund or the adequacy of the monetary reserves, such audits to be made by Certified Public Accountants.

d. The Trustees shall make active efforts to collect delinquent accounts resulting from any unpaid premiums by members.

e. The Trustees or fiscal agent or Administrator shall not utilize any of the monies collected as premium for any purpose unrelated to workers' compensation insurance.

f. The Trustees shall be authorized to invest Trustees' funds, claims funds and unappropriated surplus in the following types of investments only:

1. Savings accounts or certificates of deposit in a duly chartered commercial bank located within the State of South Carolina and insured through the Federal Deposit Insurance Corporation.

2. Share accounts or savings certificates in a duly chartered savings and loan association located within the State of South Carolina and insured through the Federal Savings and Loan Insurance Corporation.

3. Direct obligations of the United States Treasury, such as notes, bonds or bills which are backed by the full faith and credit of the United States Government.

g. The safety of any investment of surplus monies or claims reserves shall be the responsibility of the Trustees.

h. The Trustees shall be prohibited from making any type of investment as authorized by these rules with the intent to trade, dispose or sell the security in any manner other than redeeming it at maturity. Therefore, it shall be the responsibility of the Trustee to purchase securities in such denominations and with dates of maturity to insure that these securities shall be redeemable at the same time and in the same amounts as the Fund's current and long-term liabilities.

i. The Trustees shall report annually, as part of the financial statement of the Fund, a schedule showing the disposition of all investment income earned during the Fund year just ended.

j. The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act which is incorporated herein by

reference as permitted by statute 62-7-703 (b) as if fully set out herein.

SECTION 11. RULES AND REGULATIONS.

The Trustees may prescribe such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided the rules and regulations shall not be inconsistent with the provisions of this Declaration of Trust, the Indemnity Agreement, the Rules for Self Insurers, applicable federal and/or state statutes and applicable governmental regulations.

SECTION 12. TRUSTEES' LIABILITIES.

No Trustees shall be liable for any action taken pursuant to this Trust Agreement in good faith or for an omission, by any other Trustee or by any employee of Trustee.

The Trustees are hereby authorized and empowered to obtain, at the expense of the Fund, liability insurance fully protecting the Trustees and the Fund from any loss or expense incurred, including reasonable attorney's fees, for all acts of the Trustees except bad faith and gross negligence on the part of the Trustees. The Fund hereby agrees to save, hold harmless and indemnify the Trustees while acting in the capacity of Trustees excepting bad faith and gross negligence.

SECTION 13. RELIANCE ON COUNSEL'S OPINION.

The Trustees may consult with legal counsel concerning any questions which may arise with reference to the duties and powers or with reference to any other matter pertaining to this Agreement or the Trust created hereby; and the opinion of such counsel shall be full and complete authorization and protection in respect to any action taken or suffered by the Trustees hereunder in good faith in accordance with the opinion of such counsel, and the

Trustees shall not be liable therefor.

ARTICLE VI MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Senator. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by a concurrence of all of the parties to this Agreement, including the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities; in which case, the Trust may continue in perpetuity unless otherwise terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

SECTION 3. SITUS OF THE TRUST.

This Trust Agreement is executed by the parties hereto and accepted by the Trustees in the State of South Carolina and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of South Carolina.

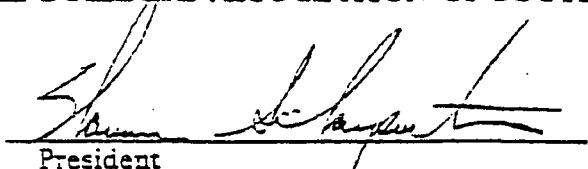
SECTION 4. CONSTRUCTION.

Whenever any words are used in this Agreement in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and whenever any words are used in this Agreement in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and whenever any words were used in the Agreement in the plural form, they shall be construed as though they were also in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, this Agreement and Declaration of Trust has been executed the day and year first above written.

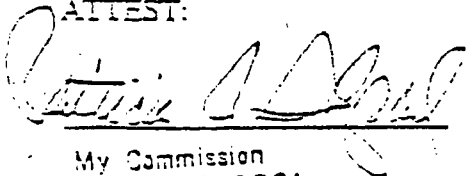
SETTLOR:

HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA INC.

By: 

President

ATTEST:



My Commission
expires 5-1-2001

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2012-CP-32-00757

AFFIDAVIT OF DAVID GULLY

The affiant being duly sworn testifies as follows:

1. I am over the age of 18 and otherwise qualified to give sworn testimony in court.
2. I am a residential home builder and owner of Central Contracting. I have a residential homebuilder's license.
3. I am the current president of the Home Builders Association of South Carolina for the year 2012. In 2011, I served as vice president of that organization, and in 2010, I served as treasurer. I have been involved with the Home Builders Association of South Carolina for a significant amount of time.

4. I am also a member of the South Carolina Home Builders Self Insurers Fund through my company Central Contracting.

5. My company has been involved with the South Carolina Home Builders Self Insurers Fund for a significant amount of time. The South Carolina Home Builders Self Insurers Fund provides workers compensation coverage for my company.

6. I have been an ex-officio of the South Carolina Home Builders Self Insurers Fund when I was vice president of the Home Builders Association of South Carolina in 2011. I was a voting ex-officio member.

7. The South Carolina Home Builders Self Insurers Fund Trustees voted to remove the ex-officio members or I would still be an ex-officio member of the Self Insurers Fund.

8. The Home Builders Association of South Carolina has approximately 3400 members. The South Carolina Home Builders Self Insurers Fund has approximately 600 members.

9. As recently as several years ago, there were approximately 1700 members of the South Carolina Home Builders Self Insurers Fund. Since that time, membership has been reduced to approximately 600 members.

10. The South Carolina Home Builders Self Insurers Fund is a trust which was created by the Home Builders Association of South Carolina as settlor. A copy of the trust agreement is attached as Exhibit A to my affidavit.

11. As originally set up, the trust was created to serve the members of the Home Builders Association. Originally, in order to be a beneficiary of the Self Insurers Fund trust, the insured had to be owned or controlled by a member of the Home Builders Association of South Carolina.

12. The trustees have recently voted to remove that requirement for beneficiaries.
13. Under this arrangement, each beneficiary of the trust is jointly and severally liable for underfunded losses of the Self Insurers Fund.
14. As such, the trust is to be administered in the best interest of the beneficiaries, and the trustees have a fiduciary duty to the beneficiaries of the trust.
15. The trustees have not fulfilled this fiduciary duty including, but not limited to, the following ways:
 - a. The trustees have voted to remove assets from the trust in order to incorporate a new member owned insurance company which will confer no benefit upon the beneficiaries of the trust.
 - b. The trustees have removed approximately \$5,000,000 from the trust corpus for the purpose of establishing a separate insurance company which will not provide any benefits to the beneficiaries of the trust and will increase the personal risk to the beneficiaries of the trust.
 - c. There is approximately \$20,000,000 remaining in the trust to fund its liabilities which upon information and belief the trustees intend to use to set up a separate insurance company which will convey no benefit to the beneficiaries of the trust.
 - d. The trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit on the beneficiaries of the trust.
 - e. The trustees have used these assets to begin setting up a separate insurance company which will convey no benefit to the beneficiaries of the trust and

have not reimbursed the trust for these costs including the use of facilities, the software computer programs, and the employees of the trust.

- f. Under the trustees' management, the beneficiary membership has decreased such that the risk undertaken by the trust and its beneficiaries is not sufficiently spread.
- g. In order to increase membership in the trust, the trustees have written new policies with high risk that expand past their experience in new construction which will further deplete the assets of the trust and convey no benefit on the beneficiaries of the trust.
- h. The trustees have used trust funds to hire attorneys, consultants, and other employees for the purpose of setting up a competing insurance company which will convey no benefit on the members of the trust.

16. The representative parties in this matter will fairly and adequately protect the interests of the class which consists of the beneficiaries of the trust as they are beneficiaries of the trust and members of the Home Builders Association of South Carolina.

17. The amounts of money sought in this matter are more than \$100 for each beneficiary of the trust as this matter concerns millions of dollars in significant workers compensation insurance payments. The trust beneficiaries will have typical claims with the same claims and defenses for all members of the class.

18. The class consists of all current and former beneficiaries of the trust.

19. It would be in the best interests of the beneficiaries to dissolve the trust holding sufficient funds to cover all losses and distribute the remaining assets to the beneficiaries.

20. If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk. I attach a letter sent by the trustees to beneficiaries of the trust indicating that excess funds held by the trust are not the property of the beneficiaries or intended to be used for the benefit of the beneficiaries. This letter along with other conduct as indicated above in this affidavit forms the basis for this lawsuit.

FURTHER AFFIANT SAYETH NAUGHT.

D-2B-GU
David Gully

SWORN to before me this
9 day of August, 2012

Peter S. Hawley
Notary Public for South Carolina

My Commission Expires: 7/18/2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sendler, Lincoln Privette,)
Marc Ellis, Joey Carter, Betty Davis,)
And Michael Nier on behalf of)
Themselves and others similarly)
situated,)

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

**Notice of Motion and Motion to Dismiss
by Defendant South Carolina Home
Builders Self Insurers Fund**

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

TO: THE PLAINTIFFS and their attorneys

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Home Builders Self Insurers Fund ("SIF") will move to dismiss the Complaint in this action upon the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCF, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the plaintiffs to obtain the action they desire from the trustees or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.
2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the defendant from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew which is attached to the companion Motion of

#1 www
ROA-000279

EXHIBIT

Defendants Herb Witter and the other Trustees and is incorporated by reference herein.

3. The cause of action for breach of contract should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached.
4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRPC, regarding allegations of fraud.
5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.
6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. The Affidavit of Jeffrey M. Ranew is submitted in support of this motion.
7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.
8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the trustees have been studied and considered in good faith and the defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.

#2 www

ROA-000280

9. This action should be transferred for improper venue. S.C. Code Ann. Section 62-7-204 provides that the venue for a judicial proceeding involving a trust is the county in which the trust's principal place of administration is located, and the principal place of administration of the trust in this case is Richland County. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Home Builders Self Insurers Fund moves for a protective order pursuant to Rule 26(c)(1) and (2), SCRCP, upon the grounds that it should be protected from having to respond to the plaintiffs' Request for Production and the plaintiffs' Interrogatories until such time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment.



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**Attorneys for Defendant South Carolina
Home Builders Self Insurers Fund**

Columbia, South Carolina
March 15, 2012

#3

ROA-000281

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton.)
Richard Sendler, Lincoln Privette,)
Marc Ellis, Joey Carter, Betty Davis,)
And Michael Nier on behalf of)
Themselves and others similarly)
situated,)

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

**Notice of Motion and Motion to Dismiss
by Defendants Herb Witter, Colin
Campbell, Eddie Weaver, Tom
Markovich, Keith Smith, and Jim
Gregorie, Individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund**

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

TO: THE PLAINTIFFS and their attorneys

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as trustees of the South Carolina Home Builders Self Insurers Fund, move to dismiss the Complaint in this action upon the following grounds:

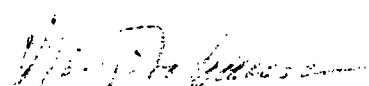
1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCP, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the plaintiffs to obtain the action they desire from the trustees or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.
2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the defendant from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew.

3. The cause of action for breach of contract should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached.
4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRPC, regarding allegations of fraud.
5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.
6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. The Affidavit of Jeffrey M. Ranew is submitted in support of this motion.
7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.
8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the trustees have been studied and considered in good faith and the defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.
9. This action should be transferred for improper venue. S.C. Code Ann. Section 62-7-204 provides that the venue for a judicial proceeding involving a trust is the county in which the trust's principal place of

administration is located, and the principal place of administration of the trust in this case is Richland County. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurance Fund, will move for a protective order pursuant to Rule 26(c)(1) and (2), SCRCF, upon the grounds that they should be protected from having to respond to the plaintiffs' Request for Production and the plaintiffs' Interrogatories until such time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCF, to consider matters outside of the Complaint and treat the motion as one for summary judgment.


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**Attorney for Defendants Herb Witter,
Colin Campbell, Eddie Weaver, Tom
Markovich, Keith Smith and Jim
Gregorie, individually and as trustees of
the South Carolina Home Builders Self
Insurers Fund**

Columbia, South Carolina
March 15, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

C/A No. 2012-CP-40-4311

Allen Patterson, Steve Tilton, Richard
Sandler, Lincoln Privette, Marc Ellis, Joey
Carter, Betty Davis, and Michael Nier,
on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

**MOTION TO DISMISS AMENDED
COMPLAINT BY DEFENDANTS HERB
WITTER, COLIN CAMPBELL, EDDIE
WEAVER, TOM MARKOVICH, KEITH
SMITH, JIM GREGORIE, INDIVIDUALLY
AND AS TRUSTEES OF THE SOUTH
CAROLINA HOME BUILDERS SELF
INSURERS FUND**

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund (the "Trustees") move for an Order dismissing Plaintiffs' Complaint on the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the Plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCP, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the Plaintiffs to obtain the action they desire from the Trustees or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.

2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the Trustees from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew, which is incorporated herein by reference and was previously attached to the Motion of the Defendant Trustees filed on March 20, 2012.

3. The cause of action for breach of contract should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of

action in that the trust agreement is not a contract between the Plaintiffs and the Defendants and there are no allegations as to how a contract was created, nor how that contract was breached.

4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the Plaintiffs and the Defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRCP, regarding allegations of fraud.

5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.

6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. This motion is supported by the Affidavit of Jeffrey M. Ranew.

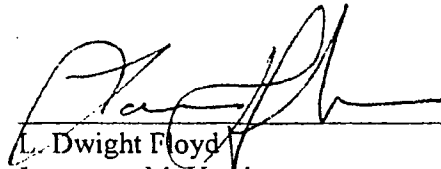
7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.

8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the Trustees have been studied and considered in good faith and the Defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, will move for a protective order pursuant to Rule 26(c)(1) and (2), SCRCP, upon the grounds that they should be protected from having to respond to the Plaintiffs' Request for Production and the Plaintiffs' Interrogatories until such

time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment.



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Attorneys for Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund

July 3, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

C/A No. 2012-CP-40-4311

Allen Patterson, Steve Tilton, Richard
Sandler, Lincoln Privette, Marc Ellis, Joey
Carter, Betty Davis, and Michael Nier,
on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

**MOTION TO DISMISS AMENDED
COMPLAINT BY DEFENDANT SOUTH
CAROLINA HOME BUILDERS SELF
INSURERS FUND**

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Home Builders Self Insurers Fund ("SIF") moves for an Order dismissing Plaintiffs' Complaint on the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the Plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCP, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the Plaintiffs to obtain the action they desire from the SIF or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.

2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the Trustees from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew, which is incorporated herein by reference and was previously attached to the Motion of Defendant Trustees filed on March 20, 2012.

3. The cause of action for breach of contract should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the Plaintiffs and the

ROA-000288

Defendants and there are no allegations as to how a contract was created, nor how that contract was breached.

4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the Plaintiffs and the Defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRCF, regarding allegations of fraud.

5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.

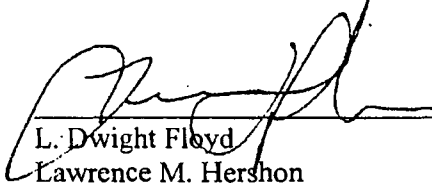
6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. This motion is supported by the Affidavit of Jeffrey M. Ranew.

7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.

8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the Trustees have been studied and considered in good faith and the Defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendant the South Carolina Home Builders Self Insurers Fund, will move for a protective order pursuant to Rule 26(c)(1) and (2), SCRCF, upon the grounds that they should be protected from having to respond to the Plaintiffs' Request for Production and the Plaintiffs' Interrogatories until such time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCF, to consider matters outside of the Complaint and treat the motion as one for summary judgment.



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Attorneys for Defendant the South Carolina Home
Builders Self Insurers Fund.

July 3, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sandler, Lincoln Privette,)
Marc Ellis, Joey Carter, Betty Davis,)
And Michael Nier on behalf of)
Themselves and others similarly)
situated,)

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

vs.)

Affidavit of Jeffrey M. Ranew

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

PERSONALLY APPEARED BEFORE ME, Jeffrey M. Ranew, who being duly sworn, deposes and says:

1. I am Jeffrey M. Ranew. I am the Administrator of the South Carolina Home Builders Self Insurers Fund ("SIF") and I have served in this capacity since March 24, 2003. I make this affidavit based upon personal knowledge.

2. The administration of the SIF is regulated and controlled by the South Carolina Workers' Compensation Commission. The SIF is not an insurance company and the South Carolina Department of Insurance has no control over the administration of the SIF. The SIF does not issue policies of insurance. If a home builder wants to become a member of the SIF in order to satisfy his employer's obligation under the South

Carolina Workers' Compensation Act, he completes a workers' compensation application, completes a WCC Form 6a, and pays a \$25.00 non-refundable fee to the South Carolina Workers' Compensation Commission. Attached as Exhibit A is a copy of the workers' compensation application. Attached as Exhibit B is the WCC Form 6a. The WCC Form 6a and the check is then submitted to the Commission for approval. Upon approval, the home builder receives a certificate confirming that he is a member of the SIF. The SIF then provides the new member with a new member package with information about the SIF and the management of the SIF. Attached as Exhibit C is a new member package. After five weeks and a report on his operation, the new member is billed for the premium relating to his business. Attached as Exhibit D is a copy of the certificate that is issued. The certificate sets forth the responsibilities of the employer and the SIF. There are no written contracts signed by the member and the SIF. There are no written contracts signed by the member and the trustees.

3. The Complaint alleges that the defendants have used trust funds to purchase a building. Use of SIF funds for this purpose was approved by the South Carolina Workers' Compensation Commission. See Exhibit E. The building is owned by Center point V, LLC which is owned by the SIF. The SIF occupies part of the building, with the remainder being leased out or available for lease.

4. The Complaint alleges that the defendants removed approximately \$5,000,000.00 from the trust corpus for the purpose of establishing a separate mutual insurance company which would not provide any benefit to the beneficiaries of the trust. The funds were only transferred and held in an account after 96.5% of the SIF

membership voted to approve the transfer of the funds. The SIF mailed out 933 ballots and the vote was as follows:

- 533 marked "yes"
- 33 marked "no"
- 188 designated by recipient as "proxy"
- 179 abstentions subsequently recorded as "proxy"

After Board approval and acceptance of proxy votes, pursuant to the balloting letter, the vote tally was recorded as follows:

- Yes: 900 votes (96.5%)
- No: 33 votes (3.5%)

The plaintiffs voted as follows, as shown by their ballots marked Exhibit F:

- Lincoln Privette voted "yes" with conditions and his vote was counted as a "no" vote
- Joey Carter approved it
- Marc Ellis approved it
- Barry Davis approved and disapproved it
- Allen Patterson authorized the Board to vote on his behalf
- Richard Sandler approved it
- Michel Nieri approved it through his Authorized Agent Maureen Smirdall
- Ron Boshan approved it on behalf of Steve Tilton

Prior to the transfer of the funds, an agreement was reached that the \$5,000,000.00 would be returned to the SIF if an agreement could not be reached with the Home Builders Association of South Carolina ("HBASC") regarding the establishment and operation of the proposed mutual insurance company. The South Carolina Workers' Compensation Commission approved the transfer of the funds. See Exhibit G. When an agreement could not be reached with the HBASC regarding the establishment and operation of the proposed mutual insurance company, the application for a mutual insurance company was withdrawn, and the \$5,000,000.00 was returned to the SIF.

5. The establishment of a separate mutual insurance company has been studied and under consideration by the SIF since 2003 when the SIF Board Chairman and Administrator introduced the concept of a mutual insurance company to a meeting of the Home Builders Association of South Carolina senior leadership and received a provisional endorsement. Attached as Exhibit H are copies of Board Minutes beginning in 2003 wherein the establishment of a mutual insurance company has been addressed. There are real and substantial benefits in transitioning from a self insured fund to a mutual insurance company. Members of a mutual insurance company are not jointly and severally liable for claims as members of a self insured fund such as the SIF are. While SIF members would continue to remain jointly and severally liable for claims until the SIF is terminated, formation of a mutual company would start the process leading to termination of the SIF and the eventual end of exposure for joint and several liability. A mutual company could offer other types of insurance to a broader customer base which would help insure the viability and availability of the insurance coverage. The number of members of the SIF has been reduced because of the negative impact of the recession on the home building industry. The SIF's effort to move from a self insured fund to a mutual insurance company using \$5,000,000.00 in non-pledged assets of the SIF was approved last year by the South Carolina Workers' Compensation Commission. See Exhibit I.

6. The Complaint alleges that the trustees did not advise the beneficiaries that the funds that were being transferred to establish the mutual company could have been returned to the membership. Attached as Exhibit J is a letter from the South Carolina Workers' Compensation Commission which outlines all of the requirements for

seeking to distribute dividends to the membership. A return of member contributions in the amount of \$750,000.00 was made in 2009. Member contributions in the amount of \$750,000.00 were returned in 2010. However, there is no pending request to the Commission for additional return of member contributions or the payment of dividends.

7. The Complaint alleges that the trustees have taken significant amounts of money out of the trust for their own benefit by virtue of payments to themselves for unnecessary means and for other unnecessary payments. However, for the period from 1995 to 2008, the trustees received no compensation for time/travel to regularly scheduled board meetings. Beginning in 2008, the trustees began to receive \$250.00 for time/travel expense for each board meeting attended. There are 12 board meetings per year. If the trustee attends all meetings, he receives a maximum of \$3,000.00 per year. Board meetings frequently take as much as a full day. Some trustees travel from Seneca, Greenville and Charleston to attend these meetings. In addition thereto, approximately every six months, the trustees attend a meeting with similar SIF's from other states. The expense incurred for travel and meals for trustees and their spouses or guests are reimbursed by the SIF. According to the SIF records, trustees have attended such meetings since the mid-1990's.

8. In December 2007, the SIF hired a consulting firm to assist in selecting a new software computer program. The recommendation of the consulting firm was accepted and on December 19, 2008, the Board of Trustees voted to purchase the new software program.

9. To my knowledge, plaintiffs have filed no petitions with the South Carolina Workers' Compensation Commission seeking relief regarding the actions of the

defendants. Plaintiff Ellis did participate on behalf of the HBASC in a mediation between the SIF and the HBASC regarding establishment of the mutual insurance company. However, the plaintiffs have never contacted the SIF or sought to appear before the SIF Board to address and/or resolve their claims which are set forth in their complaint.

10. Attached hereto as Exhibit K is a true and genuine copy of the Agreement and Declaration of Trust dated September 27, 1995, with amendments, all of which have been approved by the South Carolina Workers' Compensation Commission as shown by the initials. Attached as Exhibit L are letters from the Commission regarding their approval.

11. The SIF's business office is located in Richland County and has always been located in Richland County. The offices are located at 1370 Browning Road, Suite 130, Columbia, South Carolina 29210, which is the principal place of administration of the Trust.

12. None of the alleged acts or omissions referred to in the Complaint have taken place in Lexington County. All SIF actions have taken place in Richland County.

SWORN TO AND SUBSCRIBED BEFORE ME

this 15 day of March, 2012

[Signature]
Notary Public for South Carolina

My Commission Expires: 7/9/15

[Signature]
Jeffrey M. Ranew

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2012-CP-40-0431

RICHLAND COUNTY
FILED
2013 MAR -5 AM 10:19
JEANETTE H. McBRIDE
C.C.P. & G.S.

**ORDER DISMISSING MATTER
WITHOUT PREJUDICE**

This matter came before the Court on Tuesday, September 4, 2012 at 9:30 a.m.. S. Jahue Moore appeared on behalf of the Plaintiffs. Pope Johnson and Dwight Floyd appeared on behalf of the Defendants.

This matter is brought as a class action by members and beneficiaries of the Trust entitled the South Carolina Home Builders Self Insurers Fund.

The Defendants have set forth at least eight separately numbered reasons to dismiss this matter. The Court heard arguments from all parties regarding the motions to dismiss.

ROA-000297

EXHIBIT

SCANNED

In particular, the Defendants moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involves the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201. That section indicates that "[s]ubject to the provisions of Section 62-1-302(d), the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts." Based upon this section, the Court is concerned that this matter should be initially filed in Probate Court rather than Circuit Court. The South Carolina Code also indicates that a matter of this type may be removed from Probate Court to Circuit Court under South Carolina Code Section 62-1-302(d)(4).

The Court is concerned regarding the matters of alleged lack of subject matter jurisdiction. The Court is concerned that this matter could be litigated in full and the subject matter question raised later. This would lead to a waste of judicial resources.

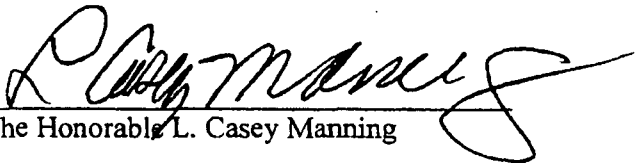
It is clear from the documents submitted to the Court that this dispute concerns a trust. It is also clear that the South Carolina Code at least implies that trust actions should originate in Probate Court.

With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

AND IT IS SO ORDERED.

Columbia, South Carolina

March 4, 2013


The Honorable L. Casey Manning

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND) Civil Action No. 2013-CP-40-02655

Allen Patterson, Steve Tilton, Richard
Sendler, Lincoln Privette, Marc Ellis, Joey
Carter, Barry Davis, Michel Nieri, Allen
Patterson Residential LLC, Tilton Group,
Sendler Construction Co., Inc., Privette
Enterprises, Ellis Construction Company,
Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter,
LLC, on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

**DEFENDANTS' REPLY TO PLAINTIFFS'
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO
RECONSIDER**

The Defendants reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Reconsider as follows:

1. Plaintiffs' statement of facts is full of glaring misstatements.

a. Plaintiffs' Memorandum provides the Court with what may be best summed up as a jury argument rather than a true statement of facts. Examples include:

- That the insurance company that SIF has attempted to establish would "not have any particular benefit to the beneficiaries of the trust."
- That the Trustees "intend to use" \$20,000,000 "to set up a separate insurance company."
- That "there will be insufficient assets to cover [SIF's] risks which will expose the beneficiaries to additional risk."

ROA-000299

The Court need look no further than the Affidavit of Jeffrey Ranew, filed in the previous litigation, to obtain an accurate picture of the facts of this case. Key facts include:

- Jeffrey Ranew does not state that SIF is a trust, as alleged by Plaintiffs in the Memorandum of Law; instead, when the word “trust” is used, it is qualified, stating, for example, that “The Complaint alleges that the defendants have used trust funds....” This is not an admission that SIF is a trust; rather, it is a restatement of the allegations against SIF. [Affidavit of J. Ranew, March 15, 2012, ¶ 3, 4]
- The \$5,000,000 withdrawal for the purpose of establishing a mutual insurance company was done with the approval of the Works’ Compensation Commission and used non-pledged assets. When the application for establishing the insurance company was withdrawn, the \$5,000,000 was returned to the Fund. [*Id.*, ¶ 4, 5]
- SIF, through a wholly owned limited liability company, purchased a building with the approval of the Workers’ Compensation Commission. The building generates revenue, as part of the building is available for lease. [*Id.*, ¶3]
- A mutual insurance company will confer great benefits to the members of SIF, and has been studied as an option since 2003: members of a mutual insurance company are not jointly and severally liable for claims; the creation of the insurance company would allow for a transition of all members from SIF and terminate the risk of joint and several liability; and because the insurance company would likely have a larger membership, per-member costs would decrease due to a greater sharing of risk of loss among a larger membership base. [*Id.*, ¶5]

The Memorandum is based on conjecture and is supported by an affidavit that relies on hearsay that should not be considered by the Court, per Rule 56, SCRPC.

b. Plaintiffs’ statement of facts acts as a distraction from the true issues in the Motion to Dismiss and Motion to Reconsider. Regardless of the misstatement of facts and the disagreement between the parties as to the facts, the Court can and should dismiss the lawsuit based on the law, as cited in the previous filings with the Court. The discussion instead must be focused on South Carolina law: (1) SIF is not a trust and (2) the requirements of Rule 23 have not been met.

2. Navarro Savings Ass'n v. Lee is entirely inapplicable to the case at bar.

a. The subject matter of *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980) is entirely unrelated and inapplicable to the case at bar. *Navarro* involves the single issue of whether the residence of shareholders or trustees of a business trust organized under the laws of Massachusetts should be considered for determining subject matter jurisdiction in diversity lawsuits in federal courts. The sole issue in *Navarro* was whether shareholder citizenship of a real estate trust is relevant for establishing diversity jurisdiction, and has no relevance here. Derivative action requirements (Rule 23) were not at issue and indeed were never mentioned anywhere in the opinion. In fact, several states, in addition to Massachusetts, utilize this form of business trust and define it as an "unincorporated association." See, e.g., Indiana (IND. CODE § 23-5-1-2); Washington (WASH. REV. CODE § 23.90.020); Ohio (OHIO REV. CODE ANN. § 1746.01). These business trusts, like SIF, operate for business, rather than testamentary, purposes. These business trusts are unincorporated associations for purposes of Rule 23. Likewise, SIF is an unincorporated association.

3. Judicial estoppel does not apply.

a. As is clearly stated in the Motions to Dismiss in the previous lawsuit, the remedy of dismissal for failure to file the lawsuit in the Probate Court was pled in the alternative. In fact, *it was the Plaintiffs* who submitted the order executed by Judge Manning dismissing the lawsuit on the grounds that it was not filed in the Probate Court; the proposed order submitted by Defendants argued for dismissal based on Rule 23 grounds.¹ Plaintiffs cannot use an alternative argument made by Defendants (and, in the end,

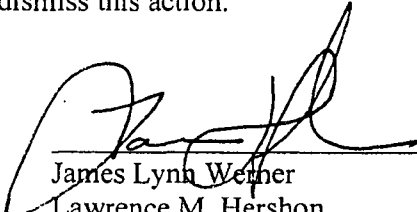
¹ The Defendants' proposed order from the previous lawsuit is attached hereto as Exhibit A; Plaintiffs' proposed order is attached as Exhibit B.

supported by *Plaintiffs*) and bootstrap it to prevent Defendants from pursuing their primary justifications for dismissal. That alternative pleading is similar to the position the Plaintiffs took in this motion: first alleging that the SIF was a trust and then alleging that the Complaint met the requirements of Rule 23.

b. Plaintiffs' Memorandum omits a very important qualification regarding the application of judicial estoppel from the *Hayne Federal* case: "the doctrine does not apply to conclusions of law or assertions of legal theories." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). This is the exact situation presented by Plaintiffs; therefore, judicial estoppel is inapplicable.

Conclusion

Based on the law and arguments cited in Defendants' previously filed Motion to Reconsider and Memorandum of Law in Support of their Motion to Dismiss, Defendants respectfully request that this Court reconsider its Order entered November 12, 2013 and alter, amend or vacate its previous Order, and dismiss this action.

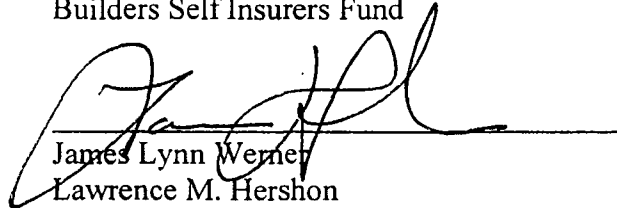


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Attorneys for Defendants Herb Witter, Colin
Campbell, Eddie Weaver, Tom Markovich, Keith
Smith and Jim Gregorie, individually and as
Trustees of the South Carolina Home Builders Self
Insurers Fund

January 10, 2014
Columbia, South Carolina

ROA-000303

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND) Civil Action No. 2012-CP-40-04311

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis, Joey)
Carter, Barry Davis, Michel Nieri, Allen)
Patterson Residential, LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis)
Construction Company, Inc., The)
Barry Davis Company, Inc., Great)
Southern Homes, and J. Carter, LLC on)
behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self-Insurers Fund, and the South)
CarolinaHome Builders Self Insurers)
Fund,)

Defendants.)

**ORDER DISMISSING SECOND
AMENDED COMPLAINT**

Before the Court are the Defendants' Motions to Dismiss the Plaintiffs' Second Amended Complaint (the "Amended Complaint") pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The Defendants have moved to dismiss the Amended Complaint in its entirety against all Defendants, as a matter of law, based upon pleading deficiencies. On September 4, 2012, the undersigned presided over oral argument regarding this Motion. The Defendants submitted an affidavit in support of its motion, but based on the deficiencies in the Amended Complaint, it is unnecessary to convert the motion into one for summary judgment. For the

reasons stated herein, the Court grants the Defendants' Motion to Dismiss the Amended Complaint.

I

Through their Amended Complaint, the Plaintiffs' allege that they are beneficiaries of an Agreement and Declaration of Trust that created the South Carolina Home Builders Self Insurers Fund ("SIF"). Established in 1995, SIF is an organization comprised of South Carolina homebuilders who have joined together to provide a secure source for workers' compensation coverage. SIF is operated by a Board of Trustees. The Plaintiffs are all home builders who claim to be beneficiaries of the SIF; they seek to serve as class representatives for a proposed class of all SIF beneficiaries in the subject lawsuit. The gravamen of the Plaintiffs' Amended Complaint alleges that misconduct by the Trustees has harmed SIF. The Plaintiffs allege that the Trustees have engaged in the following misconduct:

1. The Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust.
2. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.
3. The Trustees did not advise the beneficiaries that the funds could have been returned to them.
4. The Trustees have failed to advise the members of the potential tax consequences of their action.
5. The Trustees have purchased a building as well as expensive software programs for the purpose of creating a member owned insurance company which will convey no benefit on the beneficiaries of the Trust.
6. The Trustees have used trust funds to purchase the building and the insurance software program.

7. The Trustees have used trust funds and assets to hire attorneys, consultants, and other employees for the purpose of setting up a member owned insurance company which will convey no benefit on the members of the Trust.

8. The Trustees have used and intend to use trust assets to pay employees and other costs for setting up the member owned insurance company which will convey no benefit on the beneficiaries of the Trust.

9. The Trustees have taken significant amounts of money out of the Trust for their own benefit by virtue of payments to themselves for unnecessary meetings and other unnecessary payments.

(Amended Complaint, p. 3-4). The Plaintiffs have alleged that they are entitled to the following relief:

1. The plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded, enjoining further violations of the fiduciary duties and trust agreement, and awarding the plaintiffs and the class actual and punitive damages.

(Amended Complaint, p. 5).

Although this Court is presented with a complex case, the subject motion is straight forward. It can be resolved by answering one question: who is entitled to recover damages? The Plaintiffs assert that they and the class of beneficiaries they seek to represent are entitled to individual damages. The Plaintiffs, therefore, seek to prosecute this lawsuit as a class action. The Defendants', however, assert that the Plaintiffs' allegations plead derivative claims. Consequently, the Defendants assert that any damages belong to SIF, and not each individual in the putative class. As detailed below, this Court finds that the subject lawsuit is a derivative action and, therefore, must comply with the requirements of Rule 23(b)(1), SCRCP.

II

A motion to dismiss pursuant to Rule 12(b)(6) requires this Court to accept as true the well-pleaded facts in the complaint, but the Court need not give any weight to conclusions of law alleged therein. *Jones v. Gilstrap*, 288 S.C. 525, 343 S.E.2d 646 (Ct. App. 1986); *Charleston County School Dist. v. S.C. State Ports Authority*, 283 S.C. 48, 320 S.E.2d 727 (Ct. App. 1984). It is fundamental that a complaint must allege all facts necessary to satisfy each of the legal elements to support a cause of action or it should be dismissed. The motion to dismiss must be granted if the facts alleged in the complaint, and inferences reasonably deducible therefrom, do not entitle plaintiff to the relief sought. *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001) (citing *Jarrell v. Petoseed Co.*, 500 S.E.2d 793, 794 (Ct. App. 1998)).

III

Based upon the allegations and the relief sought by the Plaintiffs, this Court finds that the subject lawsuit is a derivative action. The Court's conclusion is driven by two critical determinations: (1) the gravamen of the Plaintiffs' Amended Complaint is that SIF has been harmed by the conduct of the Board. *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) ("A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder."); and (2) the allegations of the Amended Complaint assert identical harm to each beneficiary. *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (noting that allegations of "identical harm to all shareholders . . . [gives] rise to a classic shareholders' derivative suit"). The Court further concludes that notwithstanding the allegation that SIF is a trust, the same rules of corporate

litigation apply.¹ *Ex parte Callan Assocs., Inc.*, 87 So. 3d 1161, 1165 (Ala. 2011) (“[B]efore a beneficiary may proceed with filing a derivative claim on behalf of the trust, the beneficiary ‘must first move the trustee to act, or show some sufficient reason for the failure to do so.’”(citations omitted)); *accord Saunders v. Muratori*, 251 P.3d 550, 553 (Colo. Ct. App. 2010) (“In equity, trust beneficiaries may bring a suit for the benefit of a trust when the trustees refuse to do so. . . . Such a suit is analogous to a shareholder derivative suit on behalf of a corporation.”).²

A. Plaintiffs’ have pleaded a derivative lawsuit

When a plaintiff alleges corporate malfeasance “that result[s] in identical harm to all shareholders,” he has alleged a “breach of fiduciary duty claim that [gives] rise to a classic shareholders’ derivative suit.” *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006). Identical harm to all shareholders results in a derivative claim because identical harm connotes harm to the corporation or trust. A derivative suit is one “brought by the plaintiff in the right of the corporation.” *Johnson v. Baldwin*, 221 S.C. 141, 149, 69 S.E.2d 585, 588 (1952); *see also Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (“An action seeking to remedy a loss to the corporation is generally a derivative one.”). It is brought for the corporation or trust because the “liability of directors for loss to a corporation due to their

¹ As an alternative ground, if SIF is not a trust then it is an unincorporated association. The same rules of corporate litigation apply to unincorporated associations. Rule 23(b)(1), SCRCF (“In a derivative action brought by one or more . . . members to enforce a right of . . . an unincorporated association . . .”).

² An analogous situation is a wrongful death action; the South Carolina Supreme Court has stated that the “rule, which is frequently cited in . . . instances of trusteeship,” is that the beneficiary may himself bring an action “[i]f a trustee refuse[s], after demand, to bring an action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust.” *Bailes v. S. Ry. Co.*, 227 S.C. 176, 182-83, 87 S.E.2d 481, 484 (1955) (“[T]he beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust.”).

mismanagement is an asset of the corporation and any recovery on such a cause of action belongs solely to the corporation.” *Id.* at 149, 69 S.E.2d at 588 (emphasis added). Where the alleged injury falls directly on a corporation or a trust and only secondarily on shareholders or trust beneficiaries, the plaintiff’s claim is necessarily derivative. See *Ex parte Morgan Asset Mgmt., Inc.*, 86 So. 3d 309 (Ala. 2011) (holding that plaintiffs, who were beneficiaries of trusts that held shares of investment funds, and who claimed they were injured by diminution in value of funds, were alleging injury that fell directly on funds and only secondarily on plaintiffs, making their claim derivative).

The allegations of the Amended Complaint confirm that this is a derivative lawsuit. For example, and as detailed in full above, the Plaintiffs allege that “[t]he Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust”; they further allege that “[t]he Trustees have used and intend to use trust assets to pay employees and other costs for setting up the member owned insurance company which will convey no benefit on the beneficiaries of the Trust.” (Amended Complaint, p. 3-4). The Plaintiffs’ allegations refer to a harm that is felt by all beneficiaries of SIF. These allegations plead a classic derivative suit. *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (noting that where a plaintiff asserts allegations of corporate mismanagement “that result[] in identical harm to all shareholders,” that plaintiff has asserted a “classic shareholder’s derivative suit”).

B. Plaintiffs are not entitled to maintain individual actions

The Plaintiffs seek to represent a class of all current beneficiaries of SIF with the goal of recovering individual damages for each beneficiary (shareholder). (Amended Complaint, p.5 (“Plaintiffs are entitled to an Order . . . awarding the[m] . . . and the class actual and punitive

damages.”)). Since this is a derivative action, the proposed class is not entitled to individual damages as all damages, if any, belong to SIF. This conclusion is confirmed by the body of case law addressing a shareholder or beneficiary’s entitlement to bring a direct or individual action.

A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. *See Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 362, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995); *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012). In order for an individual to suffer a “separate and distinct” injury, he must suffer a specific injury that is not equally felt by the corporation. *See Ward v. Griffin*, 295 S.C. 219, 367 S.E.2d 703 (Ct. App. 1988) (“If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder.”). A classic example of a “separate and distinct” shareholder injury is that of an aggrieved minority shareholder. *See generally Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001).

Plaintiffs fail to allege an injury that is separate and distinct from the injury to the other Trust beneficiaries or injury to the Trust. The Amended Complaint makes it clear that it was the Trust that was allegedly directly injured, and only through that harm to the Trust were the beneficiaries allegedly (and derivatively) injured. As a result, Plaintiffs’ claims are of a derivative nature and the proposed class is not entitled to recover as individuals. *Gary v. Matthews*, 148 S.C. 125, 145 S.E. 702 (1928) (“A stockholder cannot maintain a suit for the indirect injury done him as an indirect result of an injury to the corporation.”). Accordingly, the Plaintiffs may only proceed with this manner as a derivative action.

IV

Having concluded that the Plaintiffs' lawsuit is exclusively derivative, the Court will now turn to whether the Plaintiffs' have complied with Rule 23(b)(1), SCRCP. This rule provides as follows:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. . . .

Thus, under Rule 23(b)(1), a plaintiff must meet certain pleading requirements in order to institute a derivative action. This Rule seeks to prevent the unrestrained use of derivative actions, "which would undermine the basic principle of corporate governance that the decisions of the corporation should be made by its management." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2001). The rule requires that the Plaintiffs file a verified complaint, and that they allege with particularity their efforts to obtain the action they desire from the Trustees and the reason for their failure to not obtain the action (the "demand requirement"). If the Plaintiffs have not made the demand requirement, then they must state the reasons for not making the effort. Rule 23(b)(1), SCRCP. "A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCP is properly dismissed pursuant to Rule 12(b)(6)." *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339 (citing *Whittle*, 343 S.C. 176, 539 S.E.2d 402).

The particularized allegations surrounding the demand requirement must illustrate the efforts made to demand that the board take the action sought, and they must support an earnest effort to induce remedial action on the part of the board. *Id.* at 189-90, 539 S.E.2d at 410. At a

minimum, the demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused, and request remedial relief. *Id.* at 189, 539 S.E.2d at 409. The same demand requirements apply to derivative actions in the context of a trust. *Ex parte Callan*, 87 So. 3d at 1165 (action by mother of designated beneficiary of Prepaid Affordable College Tuition Trust Fund on behalf of beneficiary and Fund was premature, where mother failed to make a demand on trustees prior to bringing suit); *Ex parte Morgan Asset Mgmt. Inc.*, 86 So. 3d 309 (Ala. 2011) (holding that trust beneficiaries' must comply with requirements of Rule 23.1 of the Alabama Rules of Civil Procedure, titled "Derivative Actions by Shareholders").

A review of the Amended Complaint confirms that the Plaintiffs' have failed to comply with the requirements of this Rule. First, the Plaintiffs' Complaint is not verified. Second, it fails to allege that the Plaintiffs made or attempted to make a demand on the Trustees prior to filing suit. Third, the Plaintiffs also fail to allege the reasons for not making such a demand on the Trustees. Accordingly, the Court is compelled to dismiss the Amended Complaint. Because this Court is dismissing the Amended Complaint pursuant to Rule 12(b)(6) for failure to comply with Rule 23(b)(1), it declines to address the Defendants' jurisdictional arguments for dismissal.

CONCLUSION

As detailed above the Plaintiffs' have pleaded a derivative action. The Amended Complaint does not comply with the requirements of Rule 23(b)(1), SCRCF. Accordingly, the Plaintiffs' Amended Complaint is hereby dismissed.

IT IS SO ORDERED.

The Honorable L. Casey Manning
Circuit Court Judge, 5th Judicial Circuit

January __, 2013
Columbia, South Carolina

ROA-000312

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2012-CP-40-04311

**ORDER DISMISSING MATTER
WITHOUT PREJUDICE**

This matter came before the Court on Tuesday, September 4, 2012 at 9:30 a.m.. S. Jahue Moore appeared on behalf of the Plaintiffs. Pope Johnson and Dwight Floyd appeared on behalf of the Defendants.

This matter is brought as a class action by members and beneficiaries of the Trust entitled the South Carolina Home Builders Self Insurers Fund.

The Defendants have set forth at least eight separately numbered reasons to dismiss this matter. The Court heard arguments from all parties regarding the motions to dismiss.

ROA-000313

EXHIBIT B

In particular, the Defendants moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involves the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201. That section indicates that “[s]ubject to the provisions of Section 62-1-302(d), the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts.” Based upon this section, the Court is concerned that this matter should be initially filed in Probate Court rather than Circuit Court. The South Carolina Code also indicates that a matter of this type may be removed from Probate Court to Circuit Court under South Carolina Code Section 62-1-302(d)(4).

The Court is concerned regarding the matters of alleged lack of subject matter jurisdiction. The Court is concerned that this matter could be litigated in full and the subject matter question raised later. This would lead to a waste of judicial resources.

It is clear from the documents submitted to the Court that this dispute concerns a trust. It is also clear that the South Carolina Code at least implies that trust actions should originate in Probate Court.

With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

AND IT IS SO ORDERED.

Columbia, South Carolina

The Honorable L. Casey Manning

_____, 2013

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) Civil Action No. 2013-CP-40-02655

Allen Patterson, Steve Tilton, Richard
Sendler, Lincoln Privette, Marc Ellis, Joey
Carter, Barry Davis, Michel Nieri, Allen
Patterson Residential LLC, Tilton Group,
Sendler Construction Co., Inc., Privette
Enterprises, Ellis Construction Company,
Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter,
LLC, on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFFS' MOTION
TO RECONSIDER**

The Defendants respond to Plaintiffs' Motion to Reconsider the Court's February 11, 2014 Order as follows:

1. For all of the reasons set forth in Defendants' Motion to Reconsider Order Denying Motion to Dismiss, dated November 27, 2013, and Defendants' Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Reconsider, dated January 10, 2014, the Plaintiffs' request for reconsideration of the Court's Order dated February 11, 2014 should be denied.

2. In addition, as directed by the Court in the February 11, 2014 Order, the Board of the South Carolina Home Builders Self Insurers Fund will respond to the January 30, 2013 letter received from Plaintiffs as a demand made pursuant to Rule 23, SCRCF. If Plaintiffs deem the

response to the demand letter unsatisfactory and decide to file yet another shareholder's derivative lawsuit, the complaint would properly be filed in the Circuit Court.

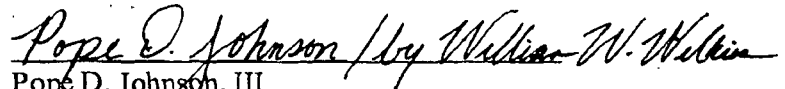
Respectfully submitted,



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*Counsel for the South Carolina Home Builders Self
Insurers Fund*



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lawrencehershon@parkerpoe.com

Counsel for Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Board Members of the South Carolina Home Builders Self Insurers Fund

March 13, 2014
Greenville, South Carolina

S. JAHUE MOORE
J. MARK TAYLOR*
DAVID L. THOMAS†
C. VANCE STRICKLIN, JR.
JAMES EDWARD BRADLEY
SHEILA McNAIR ROBINSON
ROBERT D. HAZEL
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January 30, 2013

Pope D. Johnson, III, Esquire
P.O. Drawer 11209
Columbia, SC 29211-1209

Re: Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michel Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, vs. Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund
C/A No. 2012-CP-40-04311

Dear Pope:

It is our understanding that you represent Defendant Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund. In that capacity, please take this letter as a request for action as follows on behalf of your clients. This letter is written to reaffirm previous actions taken and obtain actions from the Trustees of the South Carolina Home Builders Self Insurers Fund.

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

ROA-000318

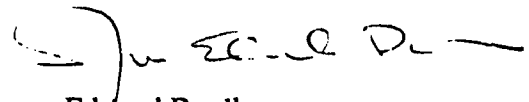
Pope D. Johnson, III, Esquire
January 17, 2013
Page 2

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

I believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. I believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

If your clients' position is any different, please let me know so we can discuss this matter. If I do not hear from you regarding this, I will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Sincerely,



James Edward Bradley

/lgi

cc: Allen Patterson ✓
Stephen Tilton ✓
Richard Sandler ✓
Lincoln Privette ✓
Marc Ellis ✓
Joey Carter ✓
Barry Davis ✓
Michael Nieri ✓
Mark Nix ✓

ROA-000319

POPE D. JOHNSON, III
Attorney at Law

1230 RICHLAND STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE 803-799-9791
FAX 803-253-6084

Direct Dial: 803-376-8965
E-Mail: pope@popejohnsonlaw.com

April 16, 2014

James Edward Bradley, Esquire
Moore Taylor & Thomas, P.A.
1700 Sunset Boulevard
West Columbia, SC 29171

RE: Response to January 30, 2013 Demand Letter

Dear Ward:

I write you on behalf of the South Carolina Home Builders Self Insurers Fund ("Fund") and its Board of Trustees ("Board") in response to your demand letter dated January 30, 2013, a copy of which is attached as Exhibit A. In responding to your letter, I want to make several points and then set forth the Board's response to your specific demands. The Board has met and has approved and authorized me to send this letter to you, as is shown by the copy of the Board's resolution marked as Exhibit B.

First, the Board and the Fund have sought to be open and transparent throughout this dispute with your clients. When the original complaint was filed, we served the attached Affidavit of Jeffrey M. Ranew without the supporting exhibits (Exhibit C) that addressed the issues you and your clients were raising. We thought if you knew the facts, you would reconsider your position about your suit. Needless to say, we were disappointed when your clients re-filed the action with many of the same allegations even though they had in hand information that showed that many of their allegations were baseless or simply wrong.

Second, you served discovery requests in the first civil action and we assembled the responsive documents. However, we objected to the discovery requests and moved for a protective order to prohibit discovery until there was a ruling on our motion to dismiss. We offered to meet with your clients and go over the documents provided your clients would consent to a confidentiality order. Your clients refused to consent to a confidentiality order and did not avail themselves of the opportunity to meet and see the records. However, Jeff Ranew, the Fund's administrator, Mike Hill, the Fund's Chief Financial Officer, Herb Witter, Chairman of the Board of Trustees, and I met with you and went over the documents and answered questions. Insofar as I know, we answered all of your questions and had the necessary records available for your review.

Third, as you know, after the first lawsuit was dismissed we invited your clients to meet with the Board to discuss the issues they were raising. Attached as Exhibit D is a copy of the letter that was sent to each of your clients. None of your clients availed themselves of the opportunity to meet with the Board and discuss these issues.

ROA-000320

Against this backdrop, the Board addresses your specific demands as follows:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

Answer: The Board has concluded that distribution of the \$5,000,000 you refer to would not be in the best interest of the SCHBSIF (SIF) and its members. It is also important to make clear that the proposed mutual insurance company was never intended to, and would not, operate as a competing entity; it was proposed to operate as a successor entity, and under a corporate form that would not expose its membership to personal liability, as is presently the case. In addition, any distribution of funds rests in the sole discretion of the Board, subject to the approval of the S.C. Workers Compensation Commission. The S.C. Workers Compensation Commission must approve in advance any distribution and its Director of the Self-Insurance Division, Mr. W.C. Smith, has advised that it would not approve of this distribution. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.

Answer: Since its inception the SIF has always maintained an accounting of all funds, and has consistently made quarterly and annual accounting to the S.C. Workers Compensation Commission. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.

Answer: The Agreement and Declaration of Trust dated September 27, 1995, as amended, states in Definitions that Trustees shall be appointed. In Article IV, Section 1, the Agreement states that Trustees shall be elected by the participating members. The Agreement does not require or provide for any schedule for holding elections and none are scheduled at this time.

4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.

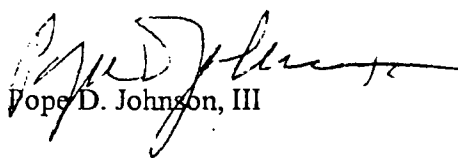
Answer: The Board has no current plans or time tables to establish a mutual insurance company. It is also important to make clear that the proposed mutual insurance company was never intended to, and would not, operate as a competing entity; it was proposed to operate as a successor entity, and under a corporate form that would not expose its membership to personal liability, as is presently the case. Until a successor mutual insurance

company has been established that would provide workers compensation insurance coverage to the members of the SIF, the Board has concluded that it would not be appropriate to dissolve the Fund. In addition, the S.C. Workers Compensation Commission must approve in advance any dissolution and its Director of the Self-Insurance Division, Mr. W.C. Smith, has advised that it would not approve of this action. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

Answer: The Board has concluded that it would not be in the best interest of the SIF and its members to sell any assets owned by the Fund. In addition, subject to approval of the S.C. Workers Compensation Commission, distributions to members rest in the sole discretion of the Board.

Sincerely,

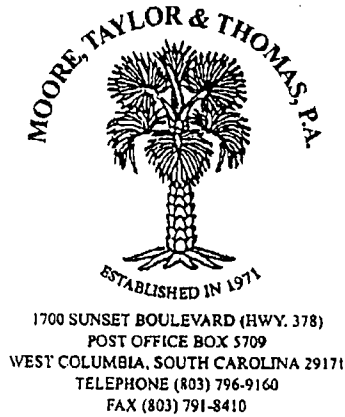


Pope D. Johnson, III

PDJIII/swv
Enclosures

6770

S. JAHUE MOORE
J. MARK TAYLOR*
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†GREENVILLE OFFICE:
(864) 271-6371

January 30, 2013

RECEIVED FEB 1 2013

Pope D. Johnson, III, Esquire
P.O. Drawer 11209
Columbia, SC 29211-1209

Re: Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michel Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, vs. Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund
C/A No. 2012-CP-40-04311

Dear Pope:

It is our understanding that you represent Defendant Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund. In that capacity, please take this letter as a request for action as follows on behalf of your clients. This letter is written to reaffirm previous actions taken and obtain actions from the Trustees of the South Carolina Home Builders Self Insurers Fund.

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

*Fellow of the American Academy of Matrimonial Lawyers
**Certified Specialist in Bankruptcy & Debtor/Creditor Law

ROA-000323



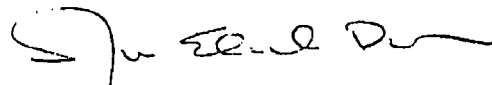
Pope D. Johnson, III, Esquire
January 17, 2013
Page 2

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
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I believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. I believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

If your clients' position is any different, please let me know so we can discuss this matter. If I do not hear from you regarding this, I will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Sincerely,



James Edward Bradley

/lgi

cc: Allen Patterson
Stephen Tilton
Richard Sandler
Lincoln Privette
Marc Ellis
Joey Carter
Barry Davis
Michael Nieri
Mark Nix

ROA-000324

**RESOLUTION OF THE BOARD OF TRUSTEES
DATED APRIL 16, 2014**

WHEREAS, Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential, LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and other similarly situated, brought a derivative action against the Board of Trustees and the South Carolina Home Builders Self Insurers Fund ("SIF") in Civil Action No. 2013-CP-40-02655; and

WHEREAS, the Board of Trustees and the SIF moved to dismiss the action upon the grounds that the plaintiffs had failed to comply with the requirements of Rule 23, SCRCF, including the requirement of making a demand for relief on the Board prior to bringing the suit; and

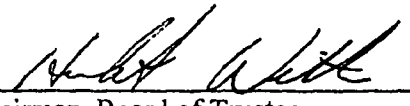
WHEREAS, the attorneys for the Board of Trustees and the SIF, at the hearing on the motion to dismiss, agreed to treat the plaintiffs' letter dated January 30, 2013 attached as Exhibit 1 as a demand letter as required by Rule 23(b)(1), SCRCF, and respond to it; and

WHEREAS, the Court dismissed the aforesaid civil action by an Order dated February 11, 2014 and gave the Board of Trustees and the SIF sixty (60) days within which to make a written response to the letter dated January 30, 2013.

NOW, THEREFORE, the Board of Trustees for the SIF and on behalf of the SIF at its regularly scheduled meeting on April 16, 2014, has resolved as follows:

1. The Board of Trustees has considered the response that should be made to the demand letter dated January 30, 2013.
2. The Board of Trustees, after due consideration and deliberation, has voted unanimously to approve the letter attached as Exhibit 2 as the Board's response to the demand letter.
3. The Board of Trustees has authorized and directed that its attorney, Pope D. Johnson, III, send the response, Exhibit 2, to James Edward Bradley in satisfaction of the Board's responsibility as set forth in the Order dated February 11, 2014.

AND IT WAS SO RESOLVED.



Chairman, Board of Trustees

Date: 4/16/14



ROA-000325

S. JAHUE MOORE
J. MARK TAYLOR*
DAVID L. THOMAS†
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JAMES EDWARD BRADLEY
SHEILA McNAIR ROBINSON
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January 30, 2013

RECEIVED FEB 1 2013

Pope D. Johnson, III, Esquire
P.O. Drawer 11209
Columbia, SC 29211-1209

Re: Allen Patterson, Steve Tilton, Richard Sandler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michel Nieri, Allen Patterson Residential LLC, Tilton Group, Sandler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, vs. Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund
C/A No. 2012-CP-40-04311

Dear Pope:

It is our understanding that you represent Defendant Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund. In that capacity, please take this letter as a request for action as follows on behalf of your clients. This letter is written to reaffirm previous actions taken and obtain actions from the Trustees of the South Carolina Home Builders Self Insurers Fund.

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.



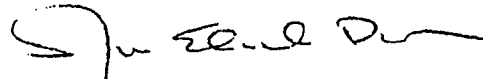
Pope D. Johnson, III, Esquire
January 17, 2013
Page 2

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

I believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. I believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

If your clients' position is any different, please let me know so we can discuss this matter. If I do not hear from you regarding this, I will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Sincerely,



James Edward Bradley

/lgi

cc: Allen Patterson
Stephen Tilton
Richard Sandler
Lincoln Privette
Marc Ellis
Joey Carter
Barry Davis
Michael Nieri
Mark Nix

ROA-000327

POPE D. JOHNSON, III
Attorney at Law

1230 RICHLAND STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE 803-799-9791
FAX 803-253-6084

Direct Dial: 803-376-8965
E-Mail: pope@popejohnsonlaw.com

April 16, 2014

James Edward Bradley, Esquire
Moore Taylor & Thomas, P.A.
1700 Sunset Boulevard
West Columbia, SC 29171

RE: Response to January 30, 2013 Demand Letter

Dear Ward:

I write you on behalf of the South Carolina Home Builders Self Insurers Fund ("Fund") and its Board of Trustees ("Board") in response to your demand letter dated January 30, 2013, a copy of which is attached as Exhibit A. In responding to your letter, I want to make several points and then set forth the Board's response to your specific demands. The Board has met and has approved and authorized me to send this letter to you, as is shown by the copy of the Board's resolution marked as Exhibit B.

First, the Board and the Fund have sought to be open and transparent throughout this dispute with your clients. When the original complaint was filed, we served the attached Affidavit of Jeffrey M. Ranew without the supporting exhibits (Exhibit C) that addressed the issues you and your clients were raising. We thought if you knew the facts, you would reconsider your position about your suit. Needless to say, we were disappointed when your clients re-filed the action with many of the same allegations even though they had in hand information that showed that many of their allegations were baseless or simply wrong.

Second, you served discovery requests in the first civil action and we assembled the responsive documents. However, we objected to the discovery requests and moved for a protective order to prohibit discovery until there was a ruling on our motion to dismiss. We offered to meet with your clients and go over the documents provided your clients would consent to a confidentiality order. Your clients refused to consent to a confidentiality order and did not avail themselves of the opportunity to meet and see the records. However, Jeff Ranew, the Fund's administrator, Mike Hill, the Fund's Chief Financial Officer, Herb Witter, Chairman of the Board of Trustees, and I met with you and went over the documents and answered questions. Insofar as I know, we answered all of your questions and had the necessary records available for your review.

Third, as you know, after the first lawsuit was dismissed we invited your clients to meet with the Board to discuss the issues they were raising. Attached as Exhibit D is a copy of the letter that was sent to each of your clients. None of your clients availed themselves of the opportunity to meet with the Board and discuss these issues.

ROA-000328

EXHIBIT

2

Against this backdrop, the Board addresses your specific demands as follows:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

Answer: The Board has concluded that distribution of the \$5,000,000 you refer to would not be in the best interest of the SCHBSIF (SIF) and its members. It is also important to make clear that the proposed mutual insurance company was never intended to, and would not, operate as a competing entity; it was proposed to operate as a successor entity, and under a corporate form that would not expose its membership to personal liability, as is presently the case. In addition, any distribution of funds rests in the sole discretion of the Board, subject to the approval of the S.C. Workers Compensation Commission. The S.C. Workers Compensation Commission must approve in advance any distribution and its Director of the Self-Insurance Division, Mr. W.C. Smith, has advised that it would not approve of this distribution. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.

Answer: Since its inception the SIF has always maintained an accounting of all funds, and has consistently made quarterly and annual accounting to the S.C. Workers Compensation Commission. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.

Answer: The Agreement and Declaration of Trust dated September 27, 1995, as amended, states in Definitions that Trustees shall be appointed. In Article IV, Section 1, the Agreement states that Trustees shall be elected by the participating members. The Agreement does not require or provide for any schedule for holding elections and none are scheduled at this time.

4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.

Answer: The Board has no current plans or time tables to establish a mutual insurance company. It is also important to make clear that the proposed mutual insurance company was never intended to, and would not, operate as a competing entity; it was proposed to operate as a successor entity, and under a corporate form that would not expose its membership to personal liability, as is presently the case. Until a successor mutual insurance

company has been established that would provide workers compensation insurance coverage to the members of the SIF, the Board has concluded that it would not be appropriate to dissolve the Fund. In addition, the S.C. Workers Compensation Commission must approve in advance any dissolution and its Director of the Self-Insurance Division, Mr. W.C. Smith, has advised that it would not approve of this action. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

Answer: The Board has concluded that it would not be in the best interest of the SIF and its members to sell any assets owned by the Fund. In addition, subject to approval of the S.C. Workers Compensation Commission, distributions to members rest in the sole discretion of the Board.

Sincerely,

Pope D. Johnson, III

PDJIII/sww
Enclosures

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sendler, Lincoln Privette,)
Marc Ellis, Joey Carter, Betty Davis,)
And Michael Nier on behalf of)
Themselves and others similarly)
situated,)

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

vs.)

Affidavit of Jeffrey M. Ranew

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

FILED
2012 MAR 20 A 8:24
BETH A. CARRIGS
CLERK OF COURT
LEXINGTON SC

PERSONALLY APPEARED BEFORE ME, Jeffrey M. Ranew, who being duly sworn, deposes and says:

1. I am Jeffrey M. Ranew. I am the Administrator of the South Carolina Home Builders Self Insurers Fund ("SIF") and I have served in this capacity since March 24, 2003. I make this affidavit based upon personal knowledge.

2. The administration of the SIF is regulated and controlled by the South Carolina Workers' Compensation Commission. The SIF is not an insurance company and the South Carolina Department of Insurance has no control over the administration of the SIF. The SIF does not issue policies of insurance. If a home builder wants to become a member of the SIF in order to satisfy his employer's obligation under the South



ROA-000331

Carolina Workers' Compensation Act, he completes a workers' compensation application, completes a WCC Form 6a, and pays a \$25.00 non-refundable fee to the South Carolina Workers' Compensation Commission. Attached as Exhibit A is a copy of the workers' compensation application. Attached as Exhibit B is the WCC Form 6a. The WCC Form 6a and the check is then submitted to the Commission for approval. Upon approval, the home builder receives a certificate confirming that he is a member of the SIF. The SIF then provides the new member with a new member package with information about the SIF and the management of the SIF. Attached as Exhibit C is a new member package. After five weeks and a report on his operation, the new member is billed for the premium relating to his business. Attached as Exhibit D is a copy of the certificate that is issued. The certificate sets forth the responsibilities of the employer and the SIF. There are no written contracts signed by the member and the SIF. There are no written contracts signed by the member and the trustees.

3. The Complaint alleges that the defendants have used trust funds to purchase a building. Use of SIF funds for this purpose was approved by the South Carolina Workers' Compensation Commission. See Exhibit E. The building is owned by Center point V, LLC which is owned by the SIF. The SIF occupies part of the building, with the remainder being leased out or available for lease.

4. The Complaint alleges that the defendants removed approximately \$5,000,000.00 from the trust corpus for the purpose of establishing a separate mutual insurance company which would not provide any benefit to the beneficiaries of the trust. The funds were only transferred and held in an account after 96.5% of the SIF

membership voted to approve the transfer of the funds. The SIF mailed out 933 ballots and the vote was as follows:

- 533 marked "yes"
- 33 marked "no"
- 188 designated by recipient as "proxy"
- 179 abstentions subsequently recorded as "proxy"

After Board approval and acceptance of proxy votes, pursuant to the balloting letter, the vote tally was recorded as follows:

- Yes: 900 votes (96.5%)
- No: 33 votes (3.5%)

The plaintiffs voted as follows, as shown by their ballots marked Exhibit F:

- Lincoln Privette voted "yes" with conditions and his vote was counted as a "no" vote
- Joey Carter approved it
- Marc Ellis approved it
- Barry Davis approved and disapproved it
- Allen Patterson authorized the Board to vote on his behalf
- Richard Sendler approved it
- Michel Nieri approved it through his Authorized Agent Maureen Smirdall
- Ron Boshan approved it on behalf of Steve Tilton

Prior to the transfer of the funds, an agreement was reached that the \$5,000,000.00 would be returned to the SIF if an agreement could not be reached with the Home Builders Association of South Carolina ("HBASC") regarding the establishment and operation of the proposed mutual insurance company. The South Carolina Workers' Compensation Commission approved the transfer of the funds. See Exhibit G. When an agreement could not be reached with the HBASC regarding the establishment and operation of the proposed mutual insurance company, the application for a mutual insurance company was withdrawn, and the \$5,000,000.00 was returned to the SIF.

5. The establishment of a separate mutual insurance company has been studied and under consideration by the SIF since 2003 when the SIF Board Chairman and Administrator introduced the concept of a mutual insurance company to a meeting of the Home Builders Association of South Carolina senior leadership and received a provisional endorsement. Attached as Exhibit H are copies of Board Minutes beginning in 2003 wherein the establishment of a mutual insurance company has been addressed. There are real and substantial benefits in transitioning from a self insured fund to a mutual insurance company. Members of a mutual insurance company are not jointly and severally liable for claims as members of a self insured fund such as the SIF are. While SIF members would continue to remain jointly and severally liable for claims until the SIF is terminated, formation of a mutual company would start the process leading to termination of the SIF and the eventual end of exposure for joint and several liability. A mutual company could offer other types of insurance to a broader customer base which would help insure the viability and availability of the insurance coverage. The number of members of the SIF has been reduced because of the negative impact of the recession on the home building industry. The SIF's effort to move from a self insured fund to a mutual insurance company using \$5,000,000.00 in non-pledged assets of the SIF was approved last year by the South Carolina Workers' Compensation Commission. See Exhibit I.

6. The Complaint alleges that the trustees did not advise the beneficiaries that the funds that were being transferred to establish the mutual company could have been returned to the membership. Attached as Exhibit J is a letter from the South Carolina Workers' Compensation Commission which outlines all of the requirements for

seeking to distribute dividends to the membership. A return of member contributions in the amount of \$750,000.00 was made in 2009. Member contributions in the amount of \$750,000.00 were returned in 2010. However, there is no pending request to the Commission for additional return of member contributions or the payment of dividends.

7. The Complaint alleges that the trustees have taken significant amounts of money out of the trust for their own benefit by virtue of payments to themselves for unnecessary means and for other unnecessary payments. However, for the period from 1995 to 2008, the trustees received no compensation for time/travel to regularly scheduled board meetings. Beginning in 2008, the trustees began to receive \$250.00 for time/travel expense for each board meeting attended. There are 12 board meetings per year. If the trustee attends all meetings, he receives a maximum of \$3,000.00 per year. Board meetings frequently take as much as a full day. Some trustees travel from Seneca, Greenville and Charleston to attend these meetings. In addition thereto, approximately every six months, the trustees attend a meeting with similar SIF's from other states. The expense incurred for travel and meals for trustees and their spouses or guests are reimbursed by the SIF. According to the SIF records, trustees have attended such meetings since the mid-1990's.

8. In December 2007, the SIF hired a consulting firm to assist in selecting a new software computer program. The recommendation of the consulting firm was accepted and on December 19, 2008, the Board of Trustees voted to purchase the new software program.

9. To my knowledge, plaintiffs have filed no petitions with the South Carolina Workers' Compensation Commission seeking relief regarding the actions of the

defendants. Plaintiff Ellis did participate on behalf of the HBASC in a mediation between the SIF and the HBASC regarding establishment of the mutual insurance company. However, the plaintiffs have never contacted the SIF or sought to appear before the SIF Board to address and/or resolve their claims which are set forth in their complaint.

10. Attached hereto as Exhibit K is a true and genuine copy of the Agreement and Declaration of Trust dated September 27, 1995, with amendments, all of which have been approved by the South Carolina Workers' Compensation Commission as shown by the initials. Attached as Exhibit L are letters from the Commission regarding their approval.

11. The SIF's business office is located in Richland County and has always been located in Richland County. The offices are located at 1370 Browning Road, Suite 130, Columbia, South Carolina 29210, which is the principal place of administration of the Trust.

12. None of the alleged acts or omissions referred to in the Complaint have taken place in Lexington County. All SIF actions have taken place in Richland County.

SWORN TO AND SUBSCRIBED BEFORE ME

this 15 day of March, 2012

[Signature]
Notary Public for South Carolina

My Commission Expires: 7/5/12

[Signature]
Jeffrey M. Ranew



March 26, 2013

Mr. Lincoln Privette
Privette Enterprises, Inc.
PO Box 19
Darlington, SC 29540

Dear Mr. Privette:

Enclosed you will find documents regarding the South Carolina Home Builders Self Insurance Fund (SIF); specifically, enclosed please find financial information with an exhibit of trustee travel reimbursement, and a copy of the amended trust agreement.

The SIF Board of Trustees has instructed me to send you this letter which will serve as a personal invitation to you to attend a meeting. The Board of Trustees has set aside April 17, 2013 at 11:00 a.m. for you to personally meet with Herb Witter, the Chairman of the Board of Trustees, possibly other trustees, and me at the SIF's office. The purpose of the meeting if you wish to attend will be to answer your questions regarding the SIF and its administration.

This would be a meeting without lawyers where hopefully businessmen and homebuilders can engage in discussion regarding any questions you have about the SIF. The Fund and the trustees believe that such a meeting would provide the forum to answer and resolve all questions.

Please let me know if you want to sit down with us. We will address your questions.

Sincerely,


Jeff Ranew



STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sendler, Lincoln Privette,)
Marc Ellis, Joey Carter, Barry Davis,)
Michael Nieri, Allen Patterson)
Residential, LLC, Tilton Group,)
Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis)
Construction Company, Inc., The)
Barry Davis Company, Inc., Great)
Southern Homes, and J. Carter,)
LLC, on behalf of themselves and)
others similarly situated,)

Civil Action No. 2013-CP-40-02655

Plaintiffs,)

vs.)

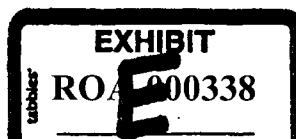
Affidavit of W. C. Smith

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

PERSONALLY APPEARED BEFORE ME, W. C. Smith, who being duly sworn,
deposes and says:

1. I am W. C. Smith. I am the Director of the Self-Insurance Division of the
South Carolina Workers' Compensation Commission. Attached as Exhibit A are two
pages from the Commission's webpage which identify me as the Director and provides
information regarding the Self-Insurance Division.



2. Also attached as Exhibit B is a letter dated March 13, 2014 from Jeff Ranew asking me to answer the questions contained in the letter. I answered the questions by checking the appropriate box and by initialing my checkmark.

SWORN TO AND SUBSCRIBED BEFORE ME

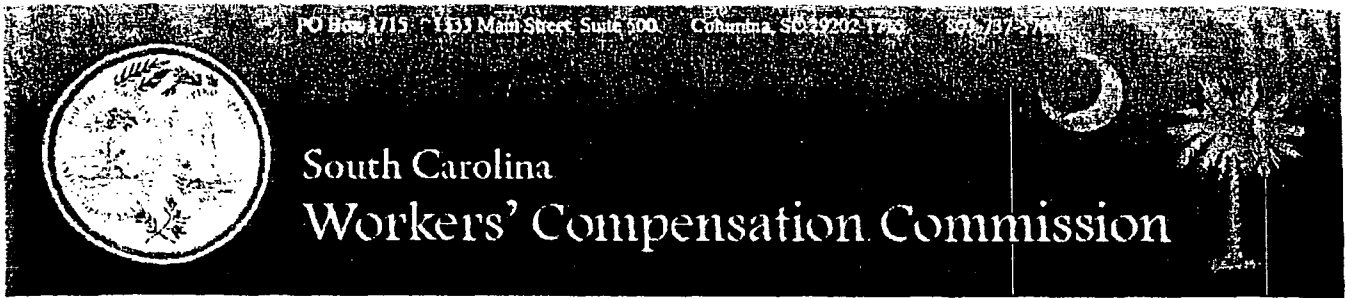
this 28 day of March, 2014

Priscilla Johnson
Notary Public for South Carolina

My Commission Expires: 7/5/15

W.C. Smith

W. C. Smith



Raven Cliff Falls

Photo courtesy of SC Department of
Parks, Recreation and Tourism
www.discoverouthcarolina.com
1-803-734-1700

[Home](#) > Insurance and Medical Services

Insurance And Medical Services

The Insurance and Medical Services Department is responsible for monitoring required workers' compensation insurance coverage; investigating matters of non-compliance and enforcing compliance with the law; administering the workers' compensation self-insurance program; establishing the fee schedules for hospitals, physicians and ambulatory surgery centers and overseeing and coordinating the creation of all Commission claim files.

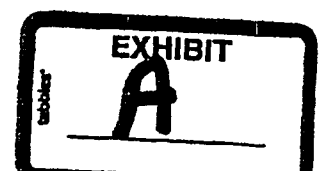
This is accomplished through the efforts of four divisions.

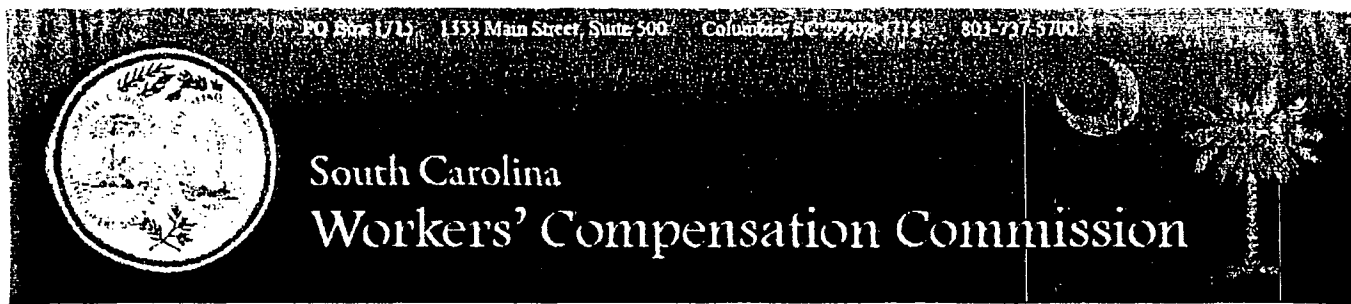
<u>Coverage & Compliance</u>	Wayne Ducote, Director wducote@wcc.sc.gov	(803) 737-6203
<u>Self-Insurance</u>	W.C Smith, Director wsmith@wcc.sc.gov	(803) 737-5712
<u>Medical Services</u>	Bridgette Amick, Medical Policy Analyst bamick@wcc.sc.gov	(803) 737-5743

Contact Information:

Insurance and Medical Services
Telephone: 803-737-6203
Fax: 803-737-1258

ROA-000340





[Home](#) > [Insurance and Medical Services](#) > Self-Insurance

Self-Insurance Division

The Self-Insurance Division approves and regulates self-insured employers, singly or as political subdivisions and group self-insured funds, to assure their compliance with [South Carolina Workers' Compensation Law, Title 42](#) and [Workers' Compensation Commission Regulation 67-1500](#).

Self-insured employers are required to provide all appropriate workers' compensation benefits to their injured workers in accordance with South Carolina Law, and to secure excess insurance and post with the Commission a surety in the form of a surety bond or letter-of-credit to be determined by the Self-Insurance Division.

Employers who wish to self-insure must provide three years' audited GAAP financial statements with their application. Once approved, the self-insurer is required to provide the Self-Insurance Division its annual audited GAAP financial statement to ensure it continues to meet financial requirements.

Approved self-insurers are required to pay the state a self-insurance tax at the end of their fiscal year. The tax rate is 2.5% of the self-insurer's total paid expenses for the program in South Carolina. This tax is collected by the Self-Insurance Division and is also due from former self-insured employers until all claims and expenses from their self-insured period have been satisfied. Additionally, self-insured employers and self-insured funds are required to pay an annual assessment to the South Carolina Second Injury Fund.

A list of self-insured employers and self-insured funds and their claims address is available for a fee. Please call the Self-Insurance Division at 803-737-5704.

Contact Information:

W.C. Smith, III, CPCU, ARM
Director
Telephone: 803-737-5704
Fax: 803-737-1258
self-insurance@wcc.sc.gov



March 3, 2014

W. C. Smith
SC Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

RE: Allen Patterson etal. v. Herb Witter etal.
Civil Action No. 2013-CP-40-02655

Dear Mr. Smith:

The plaintiffs in the above-referenced matter commenced a derivative action against the defendants. I have enclosed herewith a copy of the Summons and Complaint in Civil Action No. 2012-CP-40-04311. The action has been dismissed without prejudice. A copy of the Order dismissing the action is enclosed.

As you can see from the Order, an issue was whether the plaintiffs had made a proper demand to satisfy the pleading requirements of Rule 23, SCRCF. The defendants agreed that if the court dismissed the action, the defendants would treat the letter of the plaintiffs' attorney dated January 30, 2013 as a demand letter and would respond within 60 days to the questions set forth in that letter. I have enclosed a copy of the letter dated January 30, 2013 which the defendants have agreed can be treated as a demand letter under Rule 23, SCRCF.

I need your assistance and position in order to respond to paragraphs 1, 2 and 4. Please let me have your response to these questions as set forth below. If any explanation is needed, feel free to provide any such explanations.

In responding to these questions, I ask that you keep in mind that the Fund has 1,100+ members at the present time and the plaintiffs (8 individuals and their companies) are the only ones who have submitted a demand letter.



1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

Would making the \$5,000,000 disbursement require approval by the South Carolina Workers' Compensation Commission?

☒ YES ☐ NO

Would the Commission approve a disbursement of \$5,000,000 as set forth above based upon the request of 8 members?

☐ YES ☒ NO

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.

Does the Fund provide a quarterly accounting and a yearly accounting to the Commission?

☒ YES ☐ NO

Has the Commission identified any excess funds?

☐ YES ☒ NO

Are there any excess funds available for distribution?

☐ YES ☒ NO

If so, what is the amount of excess funds? _____

4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.

Would the Commission approve the dissolution of the Fund based upon the request of 8 members?

☐ YES ☒ NO

Is there any current request by the South Carolina Home Builders Self Insurers Fund to form a competing entity?

☐ YES ☒ NO

Does the South Carolina Home Builders Self Insurers Fund continue to serve its functions?

☒ YES

☐ NO

yes

Sincerely,

W.C. Smith

Jeffrey M. Ranew

B

AGREEMENT AND DECLARATION OF TRUST
CREATING THE
SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

THIS AGREEMENT, made and entered into this 27 day of September, 1995
by and between the Home Builders Association of South Carolina, Inc., a corporation not
for profit, organized and existing under and by virtue of the laws of the State of South
Carolina, hereinafter referred to as the "Settlor", and a Board of Trustees, hereinafter
referred to as the "Trustees", has been designated for the purposes, among others, of
directing the affairs of the Fund.

W I T N E S S E T H:

WHEREAS, the Settlor and the Trustees intend to apply to the South Carolina
Workers' Compensation Commission for the establishment of a group self insurers fund
pursuant to South Carolina statutes for the benefit of the members of the Home Builders
Association of South Carolina, Inc.; and

WHEREAS, the establishment of a group self insurers fund for the purpose of
satisfying an employers' obligation under the South Carolina Workers' Compensation Act
would be in the best interest of the members of the Home Builders Association of South
Carolina, Inc.; and

WHEREAS, it is considered to be in the best interest of the members of the Home
Builders Association of South Carolina, Inc. that an Agreement and Declaration of Trust
fully setting forth the duties and responsibilities of the Trustees be entered into;

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND is hereby established as follows:

ARTICLE I

DEFINITIONS

Fund - The group self insurers fund or funds which are hereby created for the purposes set forth herein.

Indemnity Agreement - The Indemnity Agreement which shall be filed by the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND pursuant to the Rules for Self Insurers as issued by the South Carolina Workers' Compensation Commission.

Member - A company, firm, corporation, individual, partnership or other legal entity involved in on-site home construction which is a participating member in good standing of the Home Builders Association of South Carolina, Inc.

Rules for Self-Insurers - The Rules for Self Insurers under the South Carolina Workers' Compensation Act as amended from time to time and administered by the South Carolina Workers' Compensation Commission.

Service Agent - Any individual, co-partnership, corporation, firm or other legal entity engaged in the business of servicing approved workers' compensation self-insurance programs which has made application to, and been approved by, the South Carolina Workers' Compensation Commission.

Trustees - The Trustees appointed to serve on the Board of Trustees of this Fund as provided herein.

ARTICLE II

CREATION OF THE TRUST

There is hereby established and created a Trust Fund which shall be known as the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND and the Trustees thereof may hold property, enter into contracts and in all matters as hereinafter set forth act in behalf of the Trust Fund in that name. This Trust Fund shall be used for the purposes as hereinafter set forth.

ARTICLE III

PURPOSE

This Trust Agreement is made and executed for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; to form an overall self insurers fund pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building industry.

ARTICLE IV

DESIGNATION OF TRUSTEES

SECTION 1 NUMBER AND ELIGIBILITY OF TRUSTEES

The operation and administration of the Trust Fund shall be the joint responsibility of a Board of Trustees consisting of a number of Trustees of not less than five (5) nor more than nine (9). The Board of Trustees shall consist of at least one representative from each of the five Home Builders Association of South Carolina, Inc. districts. The President and Vice President of the Home Builders Association of South Carolina, Inc. shall serve as Ex-Officio Trustees: they shall have voting privileges if and only if they are Members of the Fund. Except for the two Ex-Officio Trustees, Trustees shall be elected by the participating Members by a mail ballot.

*Trustee elections shall be held by mail ballot to all members of the Fund. Trustees receiving a vote of 51% of returned ballots shall be declared duly elected. The Trustees shall elect from one of their number, one Trustee to serve as Chairman. Except for the two Ex-Officio Trustees, only members of the Home Builders Association of South Carolina, Inc. whose businesses participate in the Trust, or their employees, may serve as Trustees. If the Trust wants to change the makeup of the Board of Trustees or requirements for being a Trustee, it must first be approved by the Home Builders Association of South Carolina Board of Directors.

SECTION 2 RESIGNATION OR REMOVAL OF TRUSTEES

Any Trustee herein named, or any successor Trustee, may resign at any time, with or without cause, by giving not less than sixty (60) days written notice of the intention to so resign to the Board of Trustees and to the Board of Directors of the Home Builders Association of South Carolina, Inc. The Board of Directors of the Home Builders

*By-Law change approved by The SCHBSIF Board of Trustees on November 13, 1997.

Association of South Carolina, Inc. may remove a Trustee now serving or any successor Trustee with or without cause, by giving not less than ten (10) days written notice to the Trustee being removed and to the Board of Trustees. Prior to the effective date of such resignation or removal, the Board of Trustees shall nominate a successor Trustee to complete the term of the removed Trustee, subject to the approval of the Executive Committee of the Board of Directors of the Home Builders Association of South Carolina, Inc. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee or subsequent to his resignation or removal as Trustee. A successor Trustee shall not be required to inquire into or take any notice of the prior administration of the Trust Fund. Any successor Trustee, immediately upon his acceptance in writing to the Trust, shall become vested with all the estate, rights, powers, discretion and duties of his predecessor Trustee with like effect as if originally named as Trustee herein.

No Trustee may be appointed who is, or continues to serve as a Trustee after becoming an owner, officer or employee of a service agent.

SECTION 3. TRUSTEES' TITLE.

In case of death, resignation, refusal or inability to act by any one or more of the Trustees, the remaining Trustees shall have all of the powers, rights, estates and interest of this Trust and shall be charged with its duties, provided that in such cases, no action may be taken unless it is concurred in by not less than a majority of the remaining Trustees, which shall be not less than two (2) in number.

SECTION 4. TRUSTEE OFFICERS.

The Trustees shall meet as promptly as possible after execution of this Trust Agreement and elect from among the Trustees a Chairman and a Secretary of the Board of Trustees. The term of such offices shall commence on the date of their election and continue to the end of the fiscal year. Thereafter, such officers shall be elected annually.

ARTICLE V

ADMINISTRATION OF FUND

SECTION 1. MEETINGS.

The Trustees shall meet at least quarterly, and more often if required, at the principal office of the Fund or at such other location as may be acceptable to a majority of the Trustees. The Chairman of the Trustees shall set the date, time and location of each meeting, and notice thereof shall be furnished to each Trustee by the Secretary or Administrator not less than ten (10) days prior to the date of such meeting. Such notice shall specify the date, time and location of such meeting and may specify the purpose thereof and any action proposed to be taken thereat. Whenever any notice is required to be given to any Trustee hereunder, such notice shall be directed to the said Trustee by certified mail, return receipt requested, to the address of such Trustee as recorded in the office of the Fund.

Special meetings of the Trustees may be held at any time and place without notice provided all Trustees execute a waiver of notice and consent to the said meeting.

For the purposes of a duly called and noticed meeting of the Board of Trustees a quorum shall consist of four (4) members of the Board of Trustees, unless the Board of

Trustees consists of less than four (4) Trustees in which case all Trustees shall be required to constitute a quorum. Meetings, including votes, may be conducted by telephone conference. The Secretary, acting Secretary, or his designee shall keep minutes of all meetings, proceedings and acts of the Board of Trustees, but such minutes need not be verbatim. Copies of all minutes of the meetings of the Board of Trustees shall be sent by the Secretary, acting Secretary or a designee to all Trustees.

SECTION 2. VOTING.

All actions by, and decisions of, the Board of Trustees shall be by the vote of a majority of the number of Trustees attending a duly called meeting of the Trustees at which a quorum is present; provided, however, that actions by, and decisions of, the Board of Trustees may be taken by a vote of a majority of the number of Trustees attending a special meeting without notice when a proper waiver and consent has been obtained as provided in Section I above.

SECTION 3. OFFICE OF THE FUND.

The Trustees shall establish and maintain an office of the Fund, the exact location of which is to be made known to the parties interested in or participating in the said Fund and to the appropriate governmental agencies and departments of state. The books and records pertaining to the Fund and its administration shall be kept and maintained at the office of the Trust.

SECTION 4. EXECUTION OF DOCUMENTS.

A certificate signed by the chairman and secretary of the Fund shall be evidence of the action of the Board of Trustees and any such certificate or other instrument so signed shall

conclusively be presumed to be authentic, and all facts and matters stated therein shall conclusively be presumed to be true.

SECTION 5. APPOINTMENT OF ADMINISTRATOR.

The Trustees shall designate a fiscal agent and/or an Administrator to administer the financial affairs of the Fund; provided, however, such fiscal agent or Administrator shall not be an owner, officer, or employee of a service agent.

Any fiscal agent and/or Administrator so appointed shall furnish a fidelity bond with the Trust as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities held by or in the name of the Fund. The amount of the bond shall be determined by the Trustees and evidence of such bond shall be filed with the appropriate governmental agencies and departments.

SECTION 6. APPROVAL OF NEW MEMBERS.

The Trustees, after the inception date of the Fund, shall receive applications for membership from prospective new members to the Fund and shall approve such application for membership in accordance with the Rules for Self-Insurers, the terms of the Indemnity Agreement, and the rules and regulations established and promulgated by the Trustees for the admission of new members to the Fund. The Board of Trustees may delegate the ministerial authority for membership approval to the Administrator or such other person as they select; provided that such Administrator or person designated is not an owner, officer, or employee of a service agent. Membership in the Fund is also contingent on the regulations of the state of South Carolina and approval by the South Carolina Workers' Compensation Commission.

SECTION 7. ESTABLISHMENT OF FUNDS.

The Trustees shall be responsible for establishing such Trustee funds, loss funds, or other funds which may be required from time to time by South Carolina Statutes, or the Rules for Self-Insurers or the Rules of Conduct and Administration of this Fund as may be established by the Trustees from time to time.

SECTION 8. POSTING OF SECURITY.

The Trustees shall be responsible for and shall undertake the posting of such security deposit and/or security bonds as may be required to be posted with the South Carolina Workers Compensation Commission pursuant to South Carolina Statutes, or the Rules for Self-Insurers or such other legislative enactments or administrative regulations which may be established from time to time.

SECTION 9. REPORTS BY TRUSTEES.

The Trustees shall be responsible for and shall cause to be filed such annual or other periodic audits, reports, and disclosures as may be required from time to time pursuant to applicable federal or state statutes or governmental regulations.

SECTION 10. FISCAL MANAGEMENT AND AUTHORITY.

The Trustees shall have said authority and take all necessary precautions to safeguard the assets of the Fund including, but not limited, to the following:

- a. The designation of a fiscal agent and/or Administrator to administer the financial affairs of the Fund, who shall furnish a fidelity bond with the Trustees as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Trustees, and

evidence of such bond shall be filed with the Commission, said bond being one of the conditions required for approval of the establishment and continued operation of a self insurers fund. Such fiscal agent or Administrator shall be an owner, officer, or employee of the service organization.

b. Retaining control of all monies collected or disbursed for the Fund. All loss funds or funds of any type shall remain in the custody of the Trustees or the authorized Administrator. Provided, however, that a revolving fund for payment of compensation benefits due and other related expenses may be established for the use of the authorized service company. The service company shall furnish a fidelity bond covering its employees, with the Trustees as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Provided, however, that should the bond required of the fiscal agent and/or Administrator also cover the monies in the revolving fund, separate bond shall not be required.

c. Having the accounts and records of the Fund audited annually or at any other time as may be necessary to determine the financial stability of the Fund or the adequacy of the monetary reserves, such audits to be made by Certified Public Accountants.

d. The Trustees shall make active efforts to collect delinquent accounts resulting from any unpaid premiums by members.

e. The Trustees or fiscal agent or Administrator shall not utilize any of the monies collected as premium for any purpose unrelated to workers' compensation insurance.

f. The Trustees shall be authorized to invest Trustees' funds, claims funds and unappropriated surplus in the following types of investments only:

1. Savings accounts or certificates of deposit in a duly chartered commercial bank located within the State of South Carolina and insured through the Federal Deposit Insurance Corporation.

2. Share accounts or savings certificates in a duly chartered savings and loan association located within the State of South Carolina and insured through the Federal Savings and Loan Insurance Corporation.

3. Direct obligations of the United States Treasury, such as notes, bonds or bills which are backed by the full faith and credit of the United States Government.

g. The safety of any investment of surplus monies or claims reserves shall be the responsibility of the Trustees.

h. The Trustees shall be prohibited from making any type of investment as authorized by these rules with the intent to trade, dispose or sell the security in any manner other than redeeming it at maturity. Therefore, it shall be the responsibility of the Trustee to purchase securities in such denominations and with dates of maturity to insure that these securities shall be redeemable at the same time and in the same amounts as the Fund's current and long-term liabilities.

i. The Trustees shall report annually, as part of the financial statement of the Fund, a schedule showing the disposition of all investment income earned during the Fund year just ended.

j. The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act which is incorporated herein by

reference as permitted by statute 62-7-703 (b) as if fully set out herein.

SECTION 11. RULES AND REGULATIONS.

The Trustees may prescribe such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided the rules and regulations shall not be inconsistent with the provisions of this Declaration of Trust, the Indemnity Agreement, the Rules for Self Insurers, applicable federal and/or state statutes and applicable governmental regulations.

SECTION 12. TRUSTEES' LIABILITIES.

No Trustees shall be liable for any action taken pursuant to this Trust Agreement in good faith or for an omission, by any other Trustee or by any employee of Trustee.

The Trustees are hereby authorized and empowered to obtain, at the expense of the Fund, liability insurance fully protecting the Trustees and the Fund from any loss or expense incurred, including reasonable attorney's fees, for all acts of the Trustees except bad faith and gross negligence on the part of the Trustees. The Fund hereby agrees to save, hold harmless and indemnify the Trustees while acting in the capacity of Trustees excepting bad faith and gross negligence.

SECTION 13. RELIANCE ON COUNSEL'S OPINION.

The Trustees may consult with legal counsel concerning any questions which may arise with reference to the duties and powers or with reference to any other matter pertaining to this Agreement or the Trust created hereby; and the opinion of such counsel shall be full and complete authorization and protection in respect to any action taken or suffered by the Trustees hereunder in good faith in accordance with the opinion of such counsel, and the

Trustees shall not be liable therefor.

ARTICLE VI

MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Settlor. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by a concurrence of all of the parties to this Agreement, including the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities: in which case, the Trust may continue in perpetuity unless otherwise terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

SECTION 3. SITUS OF THE TRUST.

This Trust Agreement is executed by the parties hereto and accepted by the Trustees in the State of South Carolina, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of South Carolina.

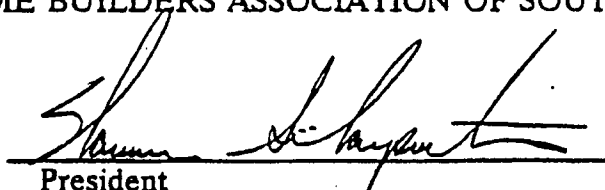
SECTION 4. CONSTRUCTION.

Whenever any words are used in this Agreement in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and whenever any words are used in this Agreement in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and whenever any words were used in the Agreement in the plural form, they shall be construed as though they were also in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, this Agreement and Declaration of Trust has been executed the day and year first above written.

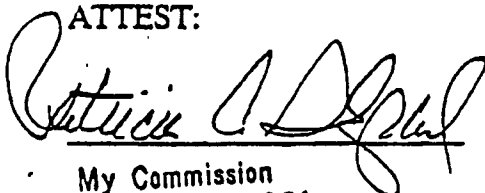
SETTLOR:

HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA, INC.

By: 

President

ATTEST:

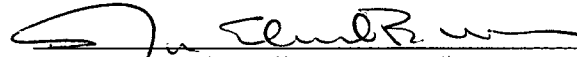


My Commission
expires 5-2-2001

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 30, 2014



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OCT 30 2014

SC Court of Appeals

ROA-000359

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2014-000963

RECEIVED

OCT 30 2014

SC Court of Appeals

Allen Patterson, Steve Tilton, Richard Sendler,
Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis,
Michel Nieri, Allen Patterson Residential LLC, Tilton
Group, Sendler Construction Co., Inc., Privette Enterprises,
Ellis Construction Company, Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter, LLC, on behalf of
themselves and others similarly situated.....Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver,
Tom Markovich, Keith Smith, Jim Gregorie,
individually and as Trustees of the South
Carolina Home Builders Self Insurers Fund, and
the South Carolina Home Builders Self Insurers Fund.....Respondents.

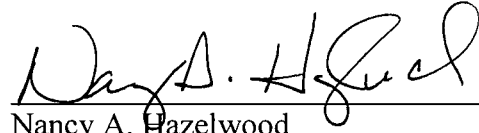
PROOF OF SERVICE

I certify that I have served the Record on Appeal on the Respondents by
depositing a copy of it in the United States Mail, postage prepaid, on October 30, 2014,
addressed to their attorneys of record as follows:

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Columbia, SC 29201

William W. Wilkins, Esquire
P.O. Drawer 10648
Greenville, SC 29603

Lawrence Hershon, Esquire
P.O. Box 1509
Columbia, SC 29202



Nancy A. Hazelwood

West Columbia, South Carolina

October 30, 2014