THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-8512

The Gates At Williams-Brice Condominium Association And Katharine Swinson, individually, and on behalf of all others similarly situated,

Respondents,

v.

DDC Construction, Inc.; Kapasi Glass Mart, Inc.; DMC Consolidated, Inc.; DMC Builders, Co. Inc., individually and d/b/a The Dinerstein Companies; DC Developers – Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; 31-W Insulation Company, Inc.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Southwest Ironworks, Inc.; The Clerkley/Watkins Group, LP; Tindall Corporation; Triad Pest Control, Inc.; Wyman Acoustics LLC; Alenco Holding Corporation, Alenco Window GA, LLC, New Alenco Window, Ltd.; AWC Holding Company, Crosby Window, Inc.,

f/k/a/ Action WinDoor Technology, Inc.; Geo-Systems Design & Testing, Inc.; HGE Consulting, Inc.; Maintenance Builders Supply, Ltd.; SCA Engineers, Inc.; Sinclair & Associates, Inc.; Faultless Hardware, individually and d/b/a Pamex Inc.; T & M Concrete, Inc.; Loveless Commercial Contracting, Inc.; Economy Waterproofing, Inc.; BMC West Corporation; Highway One Construction, Inc.; J.I. Windows LLC; Dietrich Industries, Inc., a/k/a Dietrich Metal Framing, Inc., n/k/a Clarkwestern Dietrich Building Systems LLC; HCM Utah, LLC; Headwaters, Inc. d/b/a Best Masonry; Labrador Electric Company; AAA Accurate Plumbing, Heating & Air, LLC, f/k/a AAA Accurate Plumbing Solutions Division of AAA Accurate Backflow Testing & Repair, LLC; Time Warner Cable Southeast, LLC; Southern Equipment Company, Inc., d/b/a Ready Mixed Concrete Company; and John Doe #1-10.,

Defendants,

v.

Of whom DDC Construction, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc., individually and improperly identified as d/b/a The Dinerstein Companies; DC Developers - Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry

Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr, Painting & Drywall, LLC; Metal Construction Materials, Inc.; Wyman Acoustics LLC; and Highway One Construction, Inc. are

Appellants.

MOTION FOR CERTIFICATION

COMES NOW, Respondents, individually and on behalf all others similarly situated, by and through their undersigned counsel, and hereby move this Court to certify this case for review before it has been determined by the Court of Appeals. The above-named Appellants filed a Notice of Appeal to the Court of Appeals on January 29, 2015 appealing two Orders of the Honorable G. Thomas Cooper, Jr.: (i) the Order dated July 18, 2014, denying the Appellant's Motion for Non-Jury Trial and to Strike Plaintiffs' Class Action Allegations and Jury Trial Demand; and (ii) the Order dated January 22, 2015, denying Appellants' Motion to Reconsider.

Rule 204(b) S.C.A.C.R. provides that for any case pending before the Court of Appeals, the Supreme Court, on motion of any party to the case, may certify the case for review before it has been determined by the Court of Appeals. Rule 204(b) further provides that certification is appropriate where the case involves an issue of significant public interest or a legal principle of major importance.

The grounds of this appeal are that it involves issues of first impression in South Carolina and significant public interest that could have far reaching implications for many South Carolina residents. The questions on appeal include, but are not limited to:

(1) whether self-serving, anti-suit provisions inserted in the Master Deed and By-Laws of The Gates' Horizontal Property Regime by the Developer Defendant (Columbia Condos, LP) are unenforceable as against public policy and the general contract principles recognized under South Carolina law;

(2) whether those anti-suit provisions can be legitimately amended out of the Master Deed and By-Laws, and eliminated by a vote of the homeowners pursuant to the amendment provisions that the Developer Defendant set forth in The Gates' Master Deed and By-Laws;

(3) whether the amendment of a Master Deed can be given retroactive effect, including retroactive effect against the Developer Defendant who drafted it; and

(4) whether South Carolina's Uniform Non-Profit Corporation Act applies to challenges to the amendment of a Master Deed as an act of the corporation and, if so, whether the Uniform Non-Profit Corporation Act precludes the Moving Defendants (as non-members to The Gates' Property Owners Association) from challenging the amendment of the Master Deed.

It is the Respondents' position that these issues are novel and of significant public interest and thus merit a review by this Court.[1] As such, Respondents respectfully request this Court to certify this case for review before it is determined by the Court of Appeals, and to ultimately transfer jurisdiction of the case to this Court.

The Orders of the Honorable G. Thomas Cooper, Jr. addressing these issues and findings for the Appellants (The Gates' Condominium Association and Putative Homeowner Class Representative Katharine Swinson) are attached.

[1] As an aside, the 158 owners at The Gates need closure to affect their repairs, and a direct appeal will shorten the appeal process, including the inevitable petition for certification, by more than several years. Moreover, the defective conditions at The Gates are progressively worsening, reducing the structural integrity and components at The Gates Any additional delay for any amount of time caused by a protracted appeal will exacerbate The Gates' already defective conditions, leading to further waste and additional resulting damages that will increase both parties' damages

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By: _____

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February 13, 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-40-8512

The Gates At Williams-Brice Condominium Association And Katharine Swinson, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

DDC Construction, Inc.; Kapasi Glass Mart, Inc.; DMC Consolidated, Inc.; DMC Builders, Co. Inc., individually and d/b/a The Dinerstein Companies; DC Developers – Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; 31-W Insulation Company, Inc.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Southwest Ironworks, Inc.; The Clerkley/Watkins Group, LP; Tindall Corporation; Triad Pest Control, Inc.; Wyman Acoustics LLC; Alenco Holding Corporation, Alenco Window GA, LLC, New Alenco Window, Ltd.; AWC Holding Company; Crosby Window, Inc., f/k/a/ Action WinDoor Technology, Inc.; Geo-Systems Design & Testing, Inc.; HGE Consulting, Inc.; Maintenance Builders Supply, Ltd.; SCA Engineers, Inc.; Sinclair & Associates, Inc.; Faultless Hardware, individually and d/b/a Pamex Inc.; T & M Concrete, Inc.; Loveless Commercial Contracting, Inc.; Economy Waterproofing, Inc.; BMC West Corporation; Highway One Construction, Inc.; J.I. Windows LLC; Dietrich Industries, Inc., a/k/a Dietrich

ORDER DENYING DINERSTEIN AND OCIP DEFENDANTS' MOTION FOR NON-JURY TRIAL AND TO STRIKE PLAINTIFFS' CLASS ACTION ALLEGATIONS AND JURY TRIAL DEMAND

Metal Framing, Inc., n/k/a Clarkwestern Dietrich Building Systems LLC; Best Masonry and its successor in interest, OldCastleAPG; Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-10.

Defendants.

This matter came before the Court on June 9, 2014 on the Dinerstein and OCIP Defendants[1] Motion for Non-Jury Trial and to Strike Plaintiffs[2] Class Action Allegations and Jury Trial Demand (hereinafter the "Motion") based on Rules 12(f), 23(d)(1), 38 and 39 of the South Carolina Rules of Civil Procedure ("SCRCP"). Attending for the Plaintiffs was Justin O'Toole Lucey, Esq., with Erik Norton, Esquire attending for the Defendants. Having heard oral arguments presented by counsel,[3] and for the reasons set forth below, this Court **DENIES** Defendants' Motion.

BRIEF PROCEDURAL AND FACTUAL BACKGROUND

This action arises out of alleged defects in the construction of a condominium complex, The Gates at Williams-Brice ("The Gates"), in Columbia, South Carolina. The Dinerstein and OCIP Defendants' Motion seeks to enforce provisions of the Master Deed of The Gates at

[1] The Defendants who brought the Motion include the Dinerstein-affiliated Defendants and those subcontractors covered under the Dinerstein-affiliated Defendants' Owner Controlled Insurance Policy (hereinafter collectively referred to as the "Dinerstein and OCIP Defendants"). The Dinerstein affiliated Defendants include DDC Construction, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc., individually and d/b/a The Dinerstein Companies; DC Developers-Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; and Highway One Construction. The OCIP Defendants include Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee, Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing, Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; and Wyman Acoustics, LLC.

[2] The Plaintiffs include The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others similarly situated (hereinafter collectively referred to as "Plaintiffs").

[3] Oral arguments were heard on June 9, 2014. Plaintiffs were represented by Justin O'Toole Lucey, Esquire; Defendants were represented by Erik Norton, Esquire.

Williams-Brice Horizontal Property Regime ("The Regime") that were drafted by the Dinerstein Defendants in their capacity as Developer.

The Dinerstein Defendants began construction of The Gates mid-2006 and received the Certificate of Occupancy on or about July 1, 2007. From July 2007 until approximately December 2009, the Dinerstein Defendants maintained control of The Gates' Horizontal Property Regime and Property Owners Association ("POA"). In July 2007, the Dinerstein Defendants drafted and recorded The Gates' Master Deed and By-Laws. Defendants amended the Master Deed in April 2009.[4] In December 2009, the Dinerstein Defendants transferred control of the POA to the homeowners. This transfer constituted a de facto surrender and termination of the developers' rights in the Regime pursuant to the terms of the Master Deed.

In November 2012, the homeowner-controlled POA was first notified of some of the construction deficiencies giving rise to this suit when a maintenance company, Watertight Systems, Inc., refused to place a bid in connection with an exterior caulking/sealant job because of perceived construction issues.

On December 26, 2012, approximately one month after the Watertight discovery, the Plaintiffs filed their initial Complaint against DDC Construction, Inc. ("DDC") and others, asserting negligence and gross negligence claims, breach of warranty claims, and strict liability claims. DDC filed its Answer on March 4, 2013. DDC's Answer failed to raise defenses regarding Plaintiffs' right to a jury trial or right to bring a class action. On May 15, 2013, Plaintiffs filed an Amended Complaint to add other Dinerstein Defendants as well as OCIP Defendants and asserted the same causes of action.

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[4] *See* First Amendment to The Gates' Master Deed and By-Laws, which related to conformance with lending approval requirements (attached as Exhibit C).

On May 23, 2013, the Homeowners passed a Second Amendment to The Gates' Master Deed and By-Laws, removing provisions of the Master Deed included by the Dinerstein Defendants that purported to limit the POA and Homeowners' rights. The deleted provisions purported to eliminate the POA and Homeowners' rights: (1) to bring suit and to demand a jury trial by requiring binding arbitration; and (2) to hold the developer/builder responsible in warranty, including the disclaimer of the warranties of merchantability, soundness, quality, workmanlike service, value, suitability, fitness, habitability and fitness for a particular purpose.[5] On June 5, 2013, the Second Amendment was recorded in Richland County, South Carolina in Deed Book 1867, page 408.

On July 5, 2013, DDC filed an Answer to Plaintiffs' Amended Complaint and again failed to raise defenses regarding Plaintiffs' right to a jury trial or right to bring a class action. On August 5, 2013, DDC filed an Amended Answer to Plaintiffs' Amended Complaint in which it again failed to raise any defenses regarding Plaintiffs' right to a jury trial or right to bring a class action. On August 5 and 15, 2013, respectively, the newly added Dinerstein Defendants and OCIP Defendants filed Answers to Plaintiffs' Amended Complaint in which they also failed to raise defenses regarding Plaintiffs' right to a jury trial or right to bring a class action. On August 8, 2013, former Defendant Kapasi Glass Mart, Inc. ("Kapasi") filed a Motion to Dismiss Plaintiffs' Class Action Claims,[6] a motion that this Court subsequently denied

On February 19, 2014, Plaintiffs filed a Second Amended Complaint, naming additional parties and asserting the same causes of action as previously pled. On March 21, 2014, one year after DDC filed its original Answer to the Complaint, the Dinerstein and OCIP Defendants filed

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5 The Second Amendment was prepared in accordance with the provisions required for amendment under the Master Deed in Section XXVII and Section XIII, subpart 4 and passed with a vote that complied with the Master Deed's requirements for amendment.

6 Following this Court's denial of its motion, Defendant Kapasi subsequently settled with Plaintiffs.

Answers to the Second Amended Complaint in which they asserted that Plaintiffs had waived their right to a jury trial and the right to bring a class action for the first time. On March 24, 2014, approximately ten months after the Second Amendment to the Master Deed and By-Laws was recorded in Richland County, the Dinerstein and OCIP Defendants filed their Motion for Non-Jury Trial and To Strike Plaintiffs' Class Action Allegations and Jury Trial Demand.

BRIEF SUMMARY OF SECOND AMENDMENT TO WAIVER PROVISIONS

The Gates' Board of Directors has broad powers to manage and direct the affairs of the Association subject only to approval of the Association where such approval is specifically required by the Master Deed or By-Laws. These powers include the power to call for amendment of the Master Deed. Section 4(j) of the By-Laws provides the Board with powers to legally enforce the Master Deed, By-Laws and Articles of Incorporation, "to carry out the maintenance, care, upkeep, repair, replacements, operation, surveillance, and the management of the general and limited elements, services, and facilities of the Regime wherever the same is required to be done and accomplished by the Association for the benefit of its members," and "to otherwise carry out all other duties and responsibilities set forth in the Master Deed, By-Laws, and Rules and Regulations of the Association, explicitly stated or implied therein."[7] Using these powers, on May 23, 2013, the Board called for a vote on the Second Amendment to Master Deed and By-Laws to remove the anti-suit provisions and warranty limitations included by the Dinerstein Defendants in the Master Deed. On June 5, 2013, the Second Amendment was duly executed and recorded by the POA and its members pursuant to the Regime Instruments and the Horizontal Property Regime Act.

[7] The By-Laws set forth the Board of Director's powers (By-Laws at 7-9).

The pertinent provisions deleted from The Gates' Master Deed attempted to restrict both the POA and its members' rights to bring suit and to receive a jury trial as well as to disclaim Defendants' liability and waive express and implied warranties:

> **Arbitration**[8]
>
> EACH AND EVERY CLAIM AND CAUSE OF ACTION ARISING OUT OF OR RELATED IN ANY WAY TO THE DESIGN, CONSTRUCTION, SALE, MAINTENANCE, HABITABILITY OF, OR CONDITION OF ANY UNIT OR ANY COMMON AREA THAT IS ASSERTED BY (I) ANY PERSON OR ENTITY THAT NOW HAS OR HEREAFTER ACQUIRES ANY INTEREST IN A UNIT, (II) THE GRANTOR OR EVELOPER, (III) THE UNIT OWNER'S ASSOCIATION (INCLUDING ANY CORPORATION OR OTHER ENTITY FORMED TO SERVE AS UNIT OWNERS' ASSOCIATION), (IV) ANY PERSON OR ENTITY THAT HAS PREVIOUSLY OR HEREAFTER SUPPLIES (DIRECTLY OR INDIRECTLY) LABOR, MATERIALS, DESIGN SERVICES, EQUIPMENT OR OTHER THINGS OF VALUE IN CONNECTION WITH THE CONSTRUCTION OR MAINTENANCE OF ANY UNIT OR THE COMMON AREA, OR (V) ANY HEIR, SUCCESSOR, DELEGATEE OR ASSIGNEE OF ANY SUCH PERSONS OR ENTITIES, SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION BEFORE A PANEL OF THREE ARBITRATORS PURSUANT TO THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION AS MODIFIED HEREIN.
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> ***
>
> THE GRANTOR, DEVELOPER, CONTRACTOR, ARCHITECT, THE ASSOCIATION, AND THE INDIVIDUAL UNIT OWNERS EXPRESSLY WAIVE ALL RESORT TO TRIAL BY JURY OF ANY AND ALL ISSUES OTHERWISE SO TRIABLE. ANY CLAIM OR CAUSE OF ACTION NOT COVERED BY THIS ARBITRATION AGREEMENT SHALL BE COVERED BY ARTICLE XXXV HEREIN.
>
> Pre-amended Master Deed at 3-6, Ex. B (underscore added).

[8] The arbitration provisions of The Gates' Pre-Amended Master Deed are not recited in their entirety since the Dinerstein and OCIP Defendants' Motion is not one to compel arbitration.

The Master Deed later provides in a second "Alternative Dispute Resolution" section:

> **Waiver of Jury Trial**
>
> BY ACCEPTANCE OF A DEED TO ANY UNIT OR OTHER PROPERTY HEREUNDER COOWNER(S) HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREE, THAT:
>
> (i) NEITHER CO-OWNER NOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF CO-OWNER OR GRANTOR, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THE MATTERS SET FORTH HEREUNDER, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE GRANTOR, ITS AGENTS, CONTRACTORS, SUBCONTRACTORS, ARCHITECTS, ENGINEERS AND THE CO-OWNERS OR THE ASSOCIATION, INCLUDING WITHOUT LIMITATION WAIVER OF ANY TYPE OF CLASS ACTION SUIT;
>
> (ii) NEITHER CO-OWNER NOR GRANTOR WILL SEEK TO CONSOLIDATE ANY SUCH ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED;
>
> (iii) NEITHER OWNER NOR GRANTOR HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS SECTION WILL NOT BE FULLY ENFORCED IN ALL INSTANCES; AND
>
> (iv) THE PROVISIONS CONTAINED IN THIS ARTICLE ARE A MATERIAL INDUCEMENT FOR GRANTOR TO MAKE THE DECLARATIONS SET FORTH HEREIN.
>
> Pre-amended Master Deed at 40-41, Ex. B (underscore added).

In addition to the foregoing provisions, the pre-amended Master Deed contained other provisions, drafted and incorporated by the Dinerstein Defendants, which attempted to disclaim and abrogate other rights and remedies available to Plaintiffs such as: (a) express and implied warranties, including merchantability, soundness, quality, workmanlike service, value, suitability, fitness, habitability and fitness for a particular purpose; (b) Plaintiffs' right to receive

monetary damages; and (c) Plaintiffs' right to bring claims within statutorily prescribed time frames.

DISCUSSION

A. *The DDC[9] And OCIP Defendants Failed to Timely Raise Issues Relating to the Mode of Trial*

As set forth above, the Dinerstein and OCIP Defendants failed to insert defenses/objections to Plaintiffs' right to a jury trial or right to bring a class action in DDC's original Answer to Plaintiffs' Complaint filed March 4, 2013, DDC's Answer to Plaintiffs' Amended Complaint filed July 2, 2013, DDC's Amended Answer to Plaintiffs' Amended Complaint filed August 5, 2013, or the remaining Dinerstein Defendants and the OCIP Defendants' Answers to Plaintiffs' Amended Complaint filed August 5 and 15, 2013 respectively. On March 21, 2014, ten months after the recording of the Second Amendment, the Dinerstein and OCIP Defendants raised, for the first time, the defenses of waiver of right to jury trial and waiver of right to proceed as a class action.

It is well established "issues regarding mode of trial must be raised in the trial court *at the first opportunity*." *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) (emphasis added). Here, the Dinerstein and OCIP Defendants' Motion is based upon issues "regarding the mode of trial," issues that they now raise eighteen months after the filing of Plaintiffs' Complaint and fifteen months after the Dinerstein and OCIP Defendants filed their Answer. Doing so now is not "at the first opportunity," thus rendering their Motion untimely.

Defendants' obligation to file either a Motion to Dismiss pursuant to Rule 12(b) *SCRCP*, or a Motion to Strike pursuant to Rule 12(f), *SCRCP*, prior to answering Plaintiffs' Complaint/Amended Complaint was the "first opportunity" to raise these issues. *See* Rule

[9] DDC was the Dinerstein-affiliated defendant named in the initial complaint and is the Dinerstein entity that constructed the buildings that comprise The Gates.

12(b)(7), *SCRCP* ("Every defense, in law or fact, to a cause of action in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (7) failure to join a party under Rule 19, . . ."); Rule 12(f), *SCRCP* (providing Motions to Strike must be made before responding to a pleading or within 30 days following the service of the pleading if no response is required).

B. The Gates' Master Deed Does Not Contain a Jury Trial or Class Action Waiver

The Dinerstein and OCIP Defendants' sole grounds for this Motion is that Plaintiffs waived the right to a jury trial and the right to bring a class action based on provisions no longer in the Master Deed. The Master Deed, via its Second Amendment, contains neither of these alleged waivers, and Defendants do not challenge the Second Amendment's validity. Accordingly, Defendants' Motion is procedurally precluded – Defendants failed to challenge the validity of the Second Amendment deleting the alleged waivers from the Master Deed, and thus, Defendants cannot maintain an argument as to the effectiveness of such waivers.

1. Amendments to The Gates' Master Deed Apply Retroactively

In spring 2008, the Dinerstein Defendants acted under the terms of the Master Deed to pass the First Amendment to the Master Deed and By-Laws. Since that time, the First Amendment has been held to be part of the original Master Deed. Following the Dinerstein Defendants' turnover of the Board to the Association, the current Board has been vested with the same right to amend the Master Deed, and their Second Amendment is also now part of the original Master Deed.

The amendment to a document establishing a condominium association is recognized as having "the same force and effect as if it had been part of the original Declaration." *Apple II Condo. Ass'n v. Worth Bank & Trust Co.*, 277 Ill.App.3d 345, 351, 659 N.E.2d 93, 98 (Ill. App.

Ct. 1995) *cf. Wavburn v. Smith*, 270 S.C. 38, 42, 239 S.E.2d 890, 892 (1977) (In South Carolina, "the deed must be construed as a whole, and effect given to every part thereof"); *see also* 15A Am. Jur. 2d §9 (2000) ("The power of a condominium's governing body to make amendments to the declaration is limited by a determination of whether the action is unreasonable, arbitrary, capricious, or discriminatory."). Thus, where a property owner's association enacts a valid amendment to the Master Deed, the amended Master Deed then controls the rights of the owner's association, the unit owners, and the developer. *Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 365, 628 S.E.2d 902, 915 (S.C. Ct. App. 2006) *citing* S.C. Code Ann. § 27-31-100(f) (The Act requires that the master deed include a comprehensive list of particulars, including "a description of the full legal rights and obligations, both currently existing and which may occur, of the apartment owner, the co-owners, and the person establishing the regime.").

This is consistent with the rights of parties to a contract to give retroactive effect to contractual provisions. *See e.g., Frantz v. Piccadilly Place Condominium Ass'n*, 278 Ga. 103, 105, 597 S.E.2d 354, 357 (2004) (holding that an amendment to condominium declaration applied retroactively to condominium association's claims against a unit owner); *Crest Builders, Inc. v. Willow Falls Improvement Ass'n*, 74 Ill. App. 3d 420, 423, 393 N.E.2d 107, 109-10 (Ill. 1979) (holding a developer could not have a vested interest in right to advertise units under a declaration where the condominium association amended the declaration to remove those rights and the developer had not included a provision that prevented amendments to those rights and did not retain a veto power); *see also Easterby-Thackston, Inc. v. Chrysler Corp.*, 477 F. Supp. 954, 956 (D.S.C. 1979) (finding that a change to a contract that was contemplated in the language of the original contract was valid and binding and did not create a new contract

between the parties); *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1331-32 (4th Cir. 1995) (upholding a contractual provision that permitted one party to the contract to retroactively modify the terms where the modification had to be done pursuant to the process outlined in the contract and the changes were contemplated by the parties at the time of execution).

2. The Dinerstein and OCIP Defendants Failed to Challenge the Second Amendment and Cannot Do So Within This Motion

As evidenced by its Motion and Memorandum in Support, the Dinerstein and OCIP Defendants failed to challenge the validity of the Second Amendment and may not do so here.

i. The Uniform Non-Profit Corporation Act Precludes Defendants From Challenging the Amendment.

First, Defendants are barred from challenging the Amendment by the applicable provisions of South Carolina's Uniform Non-Profit Corporation Act. *See* S.C. Code Ann. § 33-31-403(a)-(c). Specifically, Defendants are not a member of the POA, and thus, Defendants cannot meet the requirements of Section 33-31-403(b) of the Act, which mandates such proceedings must be brought by a "member or members" of the non-profit corporation.

Specifically, Section 33-31-403 of the South Carolina Code provides as follows:

> (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> (b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.
>
> (c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee, or other legal representative, or in the case of a public benefit corporation, by the Attorney General.

S.C. Code Ann. § 33-31-403 (a)-(c) (underscore added).

Thus, according to above-referenced provisions of the Uniform Non-profit Corporation Act, the Dinerstein and OCIP Defendants lack the capacity to challenge both the Second Amendment as well as the POA's commencement of this action. Neither the Dinerstein Defendants nor the OCIP Defendants are members of the POA. Moreover, an affirmative defense is not a "derivative proceeding" as defined in the Non-profit Corporation Act, nor is it a suit to enjoin corporate action or a demonstrative action, the only two forms of action allowed under §33-31-403(b). Further, South Carolina courts have historically limited challenges to the actions of a corporation under the doctrine of *ultra vires* to only those persons who are members of the corporation. For example, in *Deborde* v. *St. Michaels and All Angels Church,* the S.C. Supreme Court confirmed that the doctrine of *ultra vires* "cannot be used as a sword by a third party to try and invalidate a corporate action." S.C. Code Ann. § 33-31-304, Reporters' cmt. (citing *Deborde v. St. Michaels and All Angels Church,* 272 S.C. 490, 252 S.E.2d 876 (1979)). In *Deborde,* third-party non-church members filed a lawsuit in which they argued that the church could not build a cemetery since there was not a specific provision setting forth the power to build a cemetery in its charter. *Id.* at 501. The S.C. Supreme Court stated that although the Plaintiffs were persons affected by the action of the corporation, they had no standing to raise the claim since they were not members of the church. *Id.*

C. ***There Has Been No Knowing, Voluntary Waiver By The Association Or The Owners***

Plaintiffs have not knowingly and voluntarily waived their right a jury trial or to proceed as a class action. Under South Carolina jurisprudence, "waiver" has been repeatedly defined as the intentional relinquishment of a known right. *See Sanford v. S.C. State Ethics Com'n,* 385 S.C. 483, 496, 685 S.E.2d 600, 607, *opinion clarified,* 386 S.C. 274, 688 S.E.2d 120 (2009); *Strickland v. Strickland,* 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) ("Waiver requires a party

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to have known of a right, and known that the party was abandoning that right."); *King v. James*, 388 S.C. 16, 30, 694 S.E.2d 35, 42 (S.C. Ct. App. 2010) (noting same). As noted by our Supreme Court in *Harvey v. Jefferson Standard Life Ins. Co.*, 165 S.C. 427, 164 S.E. 6, 8 (1932):

> The knowledge of the legal right is not limited to the knowledge that there exists such right in one's favor; *but it must be also a knowledge of the circumstances in which the parties are placed when the waiver is alleged to have occurred.* It must be a voluntary act, with knowledge of the conditions calling for action, or the voluntary refraining from action. One cannot relinquish his right voluntarily and knowingly *when he does not know that his right is in peril or in question.*

Based upon the foregoing definition, the Plaintiff POA waived none of its rights because the Plaintiff POA, as it was being formed, was controlled by the Dinerstein Defendants, and thus, independently had no way to "voluntarily" relinquish any rights. The South Carolina Court of Appeals has recognized that a POA lacks control during the period that a developer-controlled board is in place. *See Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (S.C. Ct. App. 2012) (rejecting the developer's argument that the statute of limitations barred a property owners association's claims where the developer's officers comprised the POA's board of directors following the turnover of the properties and finding "unpersuasive [the developer's] claim that an organization they controlled would have initiated an action against itself during this period"). Here, Plaintiffs clearly had no choice or input as to any aspect of the pre-amended Master Deed, including the Deed's legal remedies provisions. The POA was created in part by this Master Deed and essentially did not exist prior to all predicates - incorporation, Master Deed, and adoption of By-Laws – and, as such, it could not have negotiated a waiver of rights or knowingly consented to waiver. Rather, the terms of the Master Deed were unilaterally imposed on it.

D. *The Alleged Jury Trial and Class Action Waivers are Integral to the Arbitration Provisions, which Defendants have Waived*

In South Carolina, it is generally held that the right to enforce an arbitration clause may be waived. *See, e.g., Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (S.C. Ct. App. 2011); *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (S.C. Ct. App. 1992) ("A party may waive the right to arbitrate given by a contract."). In fact, it is uniformly accepted in this State that a party who: (a) fails to timely request arbitration; (b) engages in deceptive conduct; or (c) fully avails itself of the Court's discovery processes by noticing multiple depositions and engaging in substantial written discovery has waived its right to invoke an arbitration clause.[10]

The Dinerstein and OCIP Defendants have: (a) participated in numerous depositions; (b) taken homeowner and Board Member depositions; (b) filed cross-claims against other defendants; (d) conducted written discovery of other defendants; (e) filed motions; and (f) actively litigated. Such actions over a lengthy period of time indicated that the Dinerstein and OCIP Defendants have waived their rights under the arbitration provisions of the Master Deed.

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[10] *Partain v. Upstate Automotive Group*, 386 S.C. 488, 494-495, 689 S.E.2d 602, 605 (2010) (arbitration clause held to be unenforceable where auto dealership's fraudulent conduct of substituting lesser quality car was unforeseeable to purchaser); *Aiken v. World Fin. Corp. of S.Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007)("because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings."; *Rhodes v. Benson Chrysler–Plymouth, Inc.*, 374 S.C. 122, 128, 647 S.E.2d 249, 252 (S.C. Ct. App. 2007) (finding a ten-month period in which parties exchanged written interrogatories and requests to produce and took five depositions was sufficient to demonstrate waiver); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 551, 575 S.E.2d 74, 77 (S.C. Ct. App. 2003) ("We find evidence in the record that Accent availed itself of discovery tools unavailable in arbitration, thereby prejudicing Evans by obtaining information from her it might not have been able to otherwise obtain. . . As the party seeking arbitration, Accent bore the onus to halt discovery by seeking the court's protection. Instead, Accent failed to seek court protection and continued to engage in discovery to its benefit "); *Liberty Builders, Inc. v. Horton*, 336 S C. 658, 667, 521 S.E.2d 749, 754 (S.C. Ct. App. 1999) (holding the right to compel arbitration waived where plaintiff pursued litigation for two-and-a-half years before moving to stay action in favor of mediation); *see also Davis*, 394 S.C. at 131, 713 S.E.2d at 807 (noting the three factors to consider when determining whether a party has waived its right to compel arbitration include: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration).

E. *The Alleged Jury Trial and Class Action Wavier is Unconscionable*

An additional sustaining ground supporting this Court's denial of Defendants' Motion is based upon the unconscionable waiver terms the Dinerstein and OCIP Defendants seek to enforce. Under our jurisprudence, "unconscionability" is defined to include both an absence of meaningful choice as well as oppressive, one-sided contractual provisions. *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007); *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (defining unconscionability as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them."). Given the absence of meaningful choice necessarily involved in connection with boilerplate documents such as the Master Deed, coupled with the one-sided nature of the Master Deed's remedial provisions, this Court finds these provisions unenforceable.

1. The Waivers Contain Oppressive and One-Sided Terms.

The South Carolina Court of Appeals in *Smith v. D.R. Horton*[11] recently affirmed a trial court's decision finding that an arbitration provision contained in a D.R. Horton purchase contract unconscionable and unenforceable due to the "cumulative effect" of one-sided provisions that riddled the purchase contract. The trial court, confronted with a motion to compel arbitration brought by D.R. Horton, viewed the warranties and arbitration section of the purchase contract as a whole, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies. . ." *Id.*

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11 *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 15, 742 S.E.2d 37, 40.

Upon review, the trial court held the sections' collective attempt to disclaim implied warranty claims was oppressive and unconscionable. The trial court further found "perhaps even more stark [were] the provisions in the Limitations of Liability. . ." in which D.R. Horton claimed it could not be liable for monetary damages of any kind. Based upon the foregoing, the trial court concluded, and our Court of Appeals subsequently affirmed, the arbitration provision was "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions." *Id.*

A review of the pre-amended Master Deed reveals similar warranty limitations and disclaimers to those addressed, and ultimately rejected, by the *D.R. Horton* Court. Thus, akin to *D.R. Horton,* all offending pre-amended Master Deed provisions should be read together, and ultimately rejected together (which, technically, Plaintiffs already accomplished via way of the Second Amendment). *See Smith v. D.R. Horton,*742 S.E.2d at 42 ("We conclude the *arbitration clause in this case should not be severed from the numerous unconscionable provisions* (aka read together) and particularly [D.R.] Horton's attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.") (emphasis added); *see also Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165, 1180 (9th Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter").

In addition to their confusing language and inconspicuous placement, the deleted class action and jury waivers attempt to disclaim the Dinerstein Defendants' liability and unconscionably restrict both the POA and its members' right to bring suit and to receive a jury

trial. Moreover, the waivers are ambiguous on their face – they are embedded under an "Alternative Dispute Resolution" Heading; they reference only "jury trial" in its caption; and they are written in boilerplate language undecipherable to an unsophisticated party. The waiver caption makes no reference to "class action," and the language of the "jury trial" part of the waiver, itself, makes no reference to the POA.

CONCLUSION

Based upon the foregoing, this Court **DENIES** the Motion because the Dinerstein and OCIP Defendants: (a) failed to timely challenge the mode of trial at their first opportunity prior to submitting an answer (by way of a Rule 12(b) or Rule 39 motion or otherwise); (b) improperly seek to enforce class action and jury trial waivers that no longer exist in the Master Deed; (c) failed to timely challenge the Second Amendment to the Master Deed and By-Laws; (d) cannot overcome Plaintiffs' right to amend the Master Deed; (e) seek to enforce arbitration provisions that were waived by Defendants' failure to timely request arbitration; (f) and cannot enforce waivers that are apart of unconscionable arbitration and alternative dispute resolution provisions that contain oppressive, one-sided terms.

IT IS SO ORDERED.

Columbia, South Carolina
July 17, 2014

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

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-40-8512

The Gates At Williams-Brice Condominium Association And Katharine Swinson, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

DDC Construction, Inc.; Kapasi Glass Mart, Inc.; DMC Consolidated, Inc.; DMC Builders, Co. Inc., individually and d/b/a The Dinerstein Companies; DC Developers – Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; 31-W Insulation Company, Inc.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Southwest Ironworks, Inc.; The Clerkley/Watkins Group, LP; Tindall Corporation; Triad Pest Control, Inc.; Wyman Acoustics LLC; Alenco Holding Corporation, Alenco Window GA, LLC, New Alenco Window, Ltd.; AWC Holding Company; Crosby Window, Inc., f/k/a/ Action WinDoor Technology, Inc.; Geo-Systems Design & Testing, Inc.; HGE Consulting, Inc.; Maintenance Builders Supply, Ltd.; SCA Engineers, Inc.; Sinclair & Associates, Inc.; Faultless Hardware, individually and d/b/a Pamex Inc.; T & M Concrete, Inc.; Loveless Commercial Contracting, Inc.; Economy Waterproofing, Inc.; BMC West Corporation; Highway One Construction, Inc.; J.I. Windows LLC; Dietrich Industries, Inc., a/k/a Dietrich

ORDER DENYING DEFENDANTS' MOTION TO RECONSIDER

For these reasons, this Court hereby **DENIES** Moving Defendants' Motion under Rule 59(e), SCRCP, to Reconsider this Court's Order filed July 18, 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
January 14, 2015

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-8512

The Gates At Williams-Brice Condominium Association And Katharine Swinson, individually, and on behalf of all others similarly situated,

Respondents,

v.

DDC Construction, Inc.; Kapasi Glass Mart, Inc.; DMC Consolidated, Inc.; DMC Builders, Co. Inc., individually and d/b/a The Dinerstein Companies; DC Developers – Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; 31-W Insulation Company, Inc.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB Construction, Inc.; Martin Morales Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; Southwest Ironworks, Inc.; The Clerkley/Watkins Group, LP; Tindall Corporation; Triad Pest Control, Inc.; Wyman Acoustics LLC; Alenco Holding Corporation, Alenco Window GA, LLC, New Alenco Window, Ltd.; AWC Holding Company; Crosby Window, Inc., f/k/a/ Action WinDoor Technology,

Inc.; Geo-Systems Design & Testing, Inc.; HGE Consulting, Inc.; Maintenance Builders Supply, Ltd.; SCA Engineers, Inc.; Sinclair & Associates, Inc.; Faultless Hardware, individually and d/b/a Pamex Inc.; T & M Concrete, Inc.; Loveless Commercial Contracting, Inc., Economy Waterproofing, Inc.; BMC West Corporation; Highway One Construction, Inc.; J.I. Windows LLC; Dietrich Industries, Inc., a/k/a Dietrich Metal Framing, Inc., n/k/a Clarkwestern Dietrich Building Systems LLC; HCM Utah, LLC; Headwaters, Inc. d/b/a Best Masonry; Labrador Electric Company; AAA Accurate Plumbing, Heating & Air, LLC, f/k/a AAA Accurate Plumbing Solutions Division of AAA Accurate Backflow Testing & Repair, LLC; Time Warner Cable Southeast, LLC; Southern Equipment Company, Inc., d/b/a Ready Mixed Concrete Company; and John Doe #1-10.,

Defendants,

v.

Of whom DDC Construction, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc., individually and improperly identified as d/b/a The Dinerstein Companies; DC Developers - Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing Inc.; LTB

Construction, Inc.; Martin Morales Jr, Painting & Drywall, LLC; Metal Construction Materials, Inc.; Wyman Acoustics LLC; and Highway One Construction, Inc. are

Appellants.

Proof of Service for Motion for Certification

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I, Justin O'Toole Lucey, Esquire, hereby certify that on February 13, 2015, I served a copy of the ***Motion for Certification*** submitted by the Respondents on the ***South Carolina Court of Appeals*** and ***Counsel*** listed below, via the United States Mail, postage pre-paid, and addressed as follows:

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Mount Pleasant, SC
February 13, 2015

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Reply to
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Mt Pleasant, SC 29465

February 13, 2015

BY REGULAR MAIL
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others similarly situated, v DDC Construction, Inc., et al*
Appeal from the Richland County, Court of Common Pleas
Case Action No.: 2012-CP-40-8512

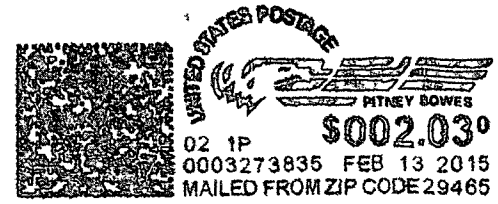
Dear Mr. Shearouse:

Enclosed please find the original and seven copies of a *Motion for Certification* I also enclose a *Proof of Service* indicating service of the *Motion for Certification* and the *Proof of Service* upon the South Carolina Court of Appeals and Counsel of Record. Finally, I enclose our firm check in the amount of $25.00 as payment for the filing fee. I would greatly appreciate you filing the *Motion for Certification* and the *Proof of Service* with the Supreme Court of South Carolina and returning a date stamped copy of each to my attention in the enclosed self-addressed, stamped envelope.

If you need anything else or I otherwise may be of any assistance to you or to Supreme Court of South Carolina regarding this matter, please feel free to contact me at your convenience.

Best regards,

Laura W. Knight



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