

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-8512

Appellate Case No. 2015-000180

RECEIVED
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SC Court of Appeals

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; Best
Masonry and its successor in interest, OldCastleAPG;
Headwaters, Inc. d/b/a Best Masonry; and John Doe #1-
10

Defendants,

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.

**RECORD ON APPEAL
VOLUME IV**

Howard A. VanDine, III
A. Mattison Bogan
Erik T. Norton
Tara C. Sullivan
Nelson Mullins Riley &
Scarborough LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Karl Stephen Brehmer
PO Box 7966
Columbia SC 29202

803-771-6600

Attorneys for Appellants

Justin O'Toole Lucey
Stephanie D. Drawdy
Justin O'Toole Lucey, P.A.
415 Mill Street
Mount Pleasant, SC 29201
(843) 849-8400

Emily Ruth Gifford
PO Drawer 7788
Columbia SC 29202
803-771-4400
Sterling Graydon Davies
PO Box 12519
Columbia SC 29211
803-227-2235
Paul David Greene
PO Box 10589
Greenville SC 29063
864-271-9580

Robert Batten Farrar
55 Beattie Place, Suite 1200
Greenville SC 29601
864-241-7012

**RECORD ON APPEAL
INDEX**

VOLUME I

ORDERS

Order of the Honorable L. Casey Manning Dismissing Certain Settling Defendants filed March 5, 2015.....	1
Proposed Order Granting Defendants' Motion for Non-Jury Trial and to Strike Plaintiffs' Class Action Allegations and Jury Trial Demand and Transmittal Letter to the Honorable G. Thomas Cooper, Jr. dated June 19, 2014.....	20
Order of the Honorable G. Thomas Cooper, Jr., Denying Dinerstein and OCIP Defendants' Motion for Non-Jury Trial and to Strike Plaintiffs' Class Action Allegations and Jury Trial Demand filed July 18, 2014.....	34
Order of the Honorable G. Thomas Cooper, Jr., Denying Defendants' Motion to Reconsider filed January 22, 2015.....	51

PLEADINGS

Complaint filed December 26, 2012.....	55
Defendant DDC Construction, Inc.'s Answer to Plaintiffs' Complaint filed March 7, 2013.....	71
Amended Complaint filed May 15, 2013.....	79
Defendant DDC Construction, Inc.'s Answer to Plaintiffs' Amended Complaint filed July 5, 2013.....	98
Defendant DDC Construction, Inc.'s Amended Answer to Plaintiffs' Amended Complaint filed August 5, 2013.....	108
Defendant Columbia Condos, LP's Answer to Plaintiffs' Amended Complaint filed August 5, 2013.....	118
Defendant DC Developers – Columbia Condos, Inc.'s Answer to Plaintiffs' Amended Complaint filed August 5, 2013.....	127

Defendant DMC Builders Co., Inc., Individually and d/b/a The Dinerstein Companies' Answer to Plaintiffs' Amended Complaint filed August 5, 2013.....	137
Defendant DMC Consolidated, Inc.'s Answer to Plaintiffs' Amended Complaint filed August 5, 2013.....	148
Defendant DMC Developers I, Ltd.'s Answer to Plaintiffs' Amended Complaint filed August 5, 2013.....	159
Defendant Associated Concrete Contractors, Inc.'s Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	169
Defendant Bailey Electric Company, LLC's Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	180
Defendant C&B Utilities, LP's Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	191
Defendant Carolina Floor Systems, Inc.'s Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	202
Defendant Cherokee Inc.'s Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	213
Defendant Coronado Stucco, LP's Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	224
Defendant Cross Plains Custom Tile, Inc.'s Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	235
Defendant Lowry Construction & Framing Inc.'s Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	246
Defendant Martin Morales Jr. Painting & Drywall, LLC's Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	258
Defendant Metal Construction Materials, Inc.'s Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	270
Defendant Wyman Acoustics LLC's Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	281
Defendant LTB Construction, Inc.'s Answer to Plaintiffs' Amended Complaint filed August 15, 2013.....	292
Second Amended Complaint filed February 19, 2014.....	304

Defendant Bailey Electric Company, LLC's Answer to Plaintiffs' Second Amended Complaint filed March 13, 2014.....	325
Defendant LTB Construction, Inc.'s Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	335
Defendant Associated Concrete Contractors, Inc.'s Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	348
Defendant C&B Utilities, LP's Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	360
Defendant Century Fire Protection, LLC's Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	372
Defendant Cherokee, Inc.'s Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	385
Defendant Columbia Condos, Inc.'s Answer to Plaintiffs' Second Amended Complaint and Cross-Claims filed March 21, 2014.....	397
Defendant Coronado Stucco, LP's Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	411
Defendant Cross Plains Custom Tile, Inc.'s Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	423
Defendant DC Developers – Columbia Condos, Inc.'s Answer to Second Amended Complaint filed March 21, 2014.....	435
Defendant DDC Construction, Inc.'s Answer to Plaintiffs' Second Amended Complaint and Cross-Claims filed March 21, 2014.....	447
Defendant DMC Consolidated, Inc.'s Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	460
Defendant DMC Developers I, Ltd's Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	473
Defendant Highway One Construction, Inc.'s Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	486

VOLUME II

Defendant Lowry Construction & Framing, Inc.'s Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	499
Defendant Martin Morales, Jr. Painting & Drywall's Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	512
Defendant Metal Construction Materials, Inc.'s Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	525
Defendant Wyman Acoustics, LLC's Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	538
Defendant DMC Builders Co., Inc.'s Answer to Plaintiffs' Second Amended Complaint filed March 21, 2014.....	550
Defendant Carolina Floor Systems, Inc.'s Answer to Plaintiffs' Second Amended Complaint filed March 24, 2014.....	563
Third Amended Complaint filed August 7, 2014.....	576
Defendant Bailey Electric Company's Answer to Plaintiffs' Third Amended Complaint filed September 2, 2014.....	598
Defendant Bailey Electric Company's Amended Answer to Plaintiffs' Third Amended Complaint filed September 2, 2014.....	609
Defendant Associated Concrete Contractors, Inc.'s Answer to Plaintiffs' Third Amended Complaint filed September 5, 2014.....	622
Defendant C&B Utilities, LP's Answer to Plaintiffs' Third Amended Complaint and Cross-Claims filed September 5, 2014.....	636
Defendant Carolina Floor Systems, Inc.'s Answer to Plaintiffs' Third Amended Complaint and Cross-Claims filed September 5, 2014.....	650
Defendant Century Fire Protection, LLC's Answer to Plaintiffs' Third Amended Complaint filed September 5, 2014.....	664
Defendant Columbia Condos, Inc.'s Answer to Plaintiffs' Third Amended Complaint and Cross-Claims filed September 5, 2014.....	677
Defendant Coronado Stucco's LP's Answer to Plaintiffs' Third Amended Complaint and Cross-Claims filed September 5, 2014.....	691

Defendant DC Developers – Columbia Condos, Inc.’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	705
Defendant DDC Construction, Inc.’s Answer to Plaintiffs’ Third Amended Complaint and Cross-Claims filed September 5, 2014.....	719
Defendant DMC Builders Co., Inc.’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	734
Defendant DMC Developers I, Ltd.’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	748
Defendant DMC Consolidated, Inc.’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	762
Defendant Highway One Construction, Inc.’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	776
Defendant Lowry Construction & Framing, Inc.’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	790
Defendant LTB Construction, Inc.’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	804
Defendant Metal Construction Materials, Inc.’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	818
Defendant Martin Morales, Jr. Painting & Drywall’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	831
Defendant Cherokee, Inc.’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	844
Defendant Cross Plains Custom Tile, Inc.’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	857
Defendant Wyman Acoustics, LLC’s Answer to Plaintiffs’ Third Amended Complaint filed September 5, 2014.....	870
Defendant Century Fire Protection, LLC’s Answer to Amended Complaint.....	884

VOLUME III

MOTIONS

Appellants' Motion for Non-Jury Trial and to Strike Plaintiffs' Class Action Allegations and Jury Trial Demand filed March 24, 2014, with Exhibits.....900

Master Deed of the Gates at Williams-Brice Horizontal Property Regime.....908

Respondents' Memorandum in Opposition to Appellants' Motion for Non-Jury Trial and to Strike Plaintiffs' Class Action Allegations and Jury Trial Demand filed June 9, 2014.....1047

Appellants' Supplement to Record in Further Support of Motion for Non-Jury Trial and to Strike Plaintiffs' Class Action Allegations and Jury Trial Demand filed June 19, 2014 with Exhibits.....1073

Bylaws of the Gates at Williams Brice-Homeowners Association.....1077

Deed of Title for Katharine Swinson, which is an exemplar of a Deed of Title for a Gates condominium unit.....1099

Purchase Contract of William Yarborough, which is an exemplar of a purchase contract for a Gates condominium unit.....1102

Relevant excerpts of deposition testimony for Katharine Swinson, named class representative, and William Yarborough, the Association board chair.....1115

Master Deed of the Gates at Williams-Brice Horizontal Property Regime.....1123

Second Amendment to the Master Deed of the Gates at Williams-Brice Horizontal Property Regime.....1261

Appellants' Motion to Reconsider filed August 1, 2014.....1268

VOLUME IV

TRANSCRIPTS

Transcript of Hearing of June 9, 2014.....1289

Relevant Excerpts of Transcript of Deposition of Katharine Swinson dated March 4, 2014.....1333

Relevant Excerpts of Transcript of Deposition of William Yarborough dated March 5, 2014.....1340

MISCELLANEOUS

Notice of Appeal filed January 29, 2015.....	1347
Amended Notice of Appeal filed February 3, 2015.....	1373
Plaintiffs' Deposition Exhibits: 9, 11, 13, and 14.....	1400
William Yarborough's Deposition Exhibits: 1, 29 and 30.....	1411
<i>The Gates at Williams-Brice Condominium Assoc., et al. v. DDC Construction, Inc., et al.</i> , Case No.: 2012-CP-40-8512, Docket as of July 29, 2015 (excerpt).....	1413
Certificate of Counsel	

State of South Carolina

Court of Common Pleas

County of Richland

2012-CP-40-08512

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

-VS-

TRANSCRIPT OF RECORD

DDC Construction, Inc., et al.:

June 9, 2014

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:

Justin O. Lucey, Esquire
Attorney for the Plaintiffs

Herbert W. Louthian, Esquire
Erik T. Norton, Esquire
Alice P. Casey, Esquire
Steve Pharr, Esquire
Brian C. Gambrell, Esquire
Attorneys for the Defendants

Daphne D. Helms
Circuit Court Reporter

1 **The Court:** Be seated. Be seated. Thank you very much.
2 All right. Counsel, this is The Gates at Williams-Brice.
3 I've got three motions on the calendar for today and two of
4 which are in the afternoon, and my law clerk tells me that
5 somebody here has agreed that rather than come back at 2:00,
6 the best thing to do would be hear them all at one time which
7 I'm perfectly willing to do if counsel is -- doesn't mind.

8 So the first motion is the motion to strike the jury
9 trial and to strike the plaintiffs' class actions and jury
10 trial demand. Now, I just happen to have been on vacation
11 last week, so I have not read the memorandum that so far have
12 been submitted. Mr. Lucey?

13 **Mr. Lucey:** Yes, Your Honor.

14 **The Court:** How do you wish to proceed?

15 **Mr. Lucey:** I believe it's the defendants' motion, Your
16 Honor.

17 **The Court:** Well, which one?

18 **Mr. Lucey:** Yes, Your Honor.

19 **The Court:** There are three.

20 **Mr. Lucey:** The motion to strike the jury trial demand
21 and the class pleadings I believe would be appropriate first,
22 and I believe everybody is in agreement to move the other two
23 motions up, assuming counsel is...

24 **The Court:** Anybody screaming an objection? All right.
25 Whose -- it's your motion? Yes, sir.

1 **Mr. Norton:** Yes, Your Honor.

2 **The Court:** You are?

3 **Mr. Norton:** Erik Norton. It's my motion.

4 **The Court:** All right. This may affect all defendants
5 if you're successful? Is that...

6 **Mr. Norton:** I certainly think some of the other
7 defendants think so, Your Honor.

8 **The Court:** All right.

9 **Mr. Norton:** I don't know if Mr. Lucey would agree
10 with---

11 **The Court:** Well, that's a heavy burden for you to
12 carry, all these people looking over your shoulder.

13 **Mr. Gambrell:** We're cheering for him, Your Honor.

14 **The Court:** All right. Mr. Norton, please proceed.

15 **Mr. Norton:** Thank you, Your Honor. As I said, my name
16 is Erik Norton, and I represent DDC Construction and Columbia
17 Condos, a variety of other entities and subcontractors
18 represented under a wrap policy. This dispute arises from
19 alleged construction defects at condominiums known as The
20 Gates at Williams-Brice which are right over there behind the
21 stadium.

22 **The Court:** I have a little bit of involvement with that
23 case.

24 **Mr. Norton:** Well, this is -- this is not the Carolina
25 Walk case, Your Honor. This is a---

1 **The Court:** I know.

2 **Mr. Norton:** This is -- okay. I didn't know if you had
3 had any involvement before or not, but just to make sure,
4 it's been confused a couple of times because I know that case
5 has been around and there have been some other litigation...
6 So you know that these were done as game-day condos and just
7 to sort of help you a little bit with the timeline, you may
8 remember that these were built in 2006 and 2007 and they were
9 turned over to the homeowners association or homeowner-
10 controlled board on August 24, 2009.

11 The master deed, as it existed at the time of turnover
12 and at the time of the filing of this complaint, contains in
13 all caps and bold at the very end right before the signature
14 blocks a jury trial waiver and a waiver of the right to a
15 class action lawsuit. The -- as you know, both of those
16 kinds of waivers have been enforceable under South Carolina
17 law. In this case the waiver specifically covered litigation
18 arising from the master deed or the dealings or relationship
19 both among the developer, its agents, contractors,
20 subcontractors, architects, engineers, and co-owners of the
21 association. So it wraps everybody into it. Both the class
22 representative in this case and the board chair acknowledged
23 in their depositions that they were bound by the master deed,
24 and when this lawsuit was filed in December of 2012, it
25 contained a jury trial demand and a class action demand.

1 despite this language.

2 Our clients answered in March of 2013, and then in June
3 of 2013 the H.O.A. filed an amendment to the master deed,
4 purporting to eliminate the class action waiver and the jury
5 trial waiver. So more than four years after turnover and
6 more than six months after this litigation was filed, the
7 H.O.A. filed an amendment saying: We're not bound by this
8 waiver anymore.

9 It's our position that the waiver is affected at the
10 time of contracting which would have occurred long before
11 litigation was filed and that all of these individuals that
12 would be putative class members, a class rep, an H.O.A. board
13 chair, the current H.O.A. would be bound by the jury trial
14 waiver and bound by the class action bar.

15 Then the memorandum we received this morning from Mr.
16 Lucey, he raises a couple of issues that I'd like to address
17 to maybe shortcut a little bit. The first is that he raises
18 the issue of timeliness saying that we had an obligation to
19 file this motion prior to even filing our responsive
20 pleading. We respectfully submit that's not what the law
21 says.

22 Under Foggie what we have to do is we have to raise the
23 issue at the earliest possible opportunity and we did in our
24 initial pleading to this. They asked for a jury trial and we
25 denied it. They asked for a class action certification and

1 we denied it.

2 So at the very beginning the plaintiffs knew that we had
3 an objection to the mode of trial and, in fact, the timeline
4 shows that they knew it because the complaint was filed.
5 Then the answer was filed denying their right to a jury
6 demand in a class action case and then they amended the
7 master deed.

8 So certainly it was raised in a timely manner. As they
9 point out, you know, we did a little discovery to try to
10 better understand the circumstances and what had been going
11 on at the H.O.A. since my client left some four and a half
12 years ago. And then after they disclosed the amendment, we
13 moved -- after we finally got their depositions scheduled and
14 took them, we were able to move for a non-jury trial within
15 two weeks after.

16 It also -- the opposition spent some time talking about
17 whether we have the right to challenge the amendment or not.
18 At this point we're not challenging the amendment as it might
19 apply prospectively to other people. We're simply
20 challenging it as it applies to our client. There's also an
21 argued that it is in some way intertwined with an arbitration
22 right which we've not exercised in this case, and I would
23 submit to you, Your Honor, that that's not -- not accurate at
24 all. In fact, the jury trial waiver is entirely separate and
25 the class action waiver is entirely separate from the

1 arbitration language which has some limitations on its
2 applicability.

3 Ultimately, Your Honor, there's nothing unconscionable
4 about this. It just does it the same as these consumer cases
5 that the plaintiffs cite. In this case the arbitration -- I
6 mean, excuse me, the jury trial waiver and the class action
7 waiver is in all caps, bold-type, on a publicly-recorded
8 document that was explained to these individuals when they
9 purchased their property by a lawyer. All of this occurred
10 as a matter of closing. This didn't happen in the back room
11 of some car dealership or something.

12 So it's our position that these are enforceable
13 contracts or enforceable waiver provisions and have a valid
14 master deed publicly recorded, and should be enforced in this
15 case. Thank you.

16 **The Court:** All right. Mr. Lucey?

17 **Mr. Lucey:** May it please the Court?

18 **The Court:** Uh-huh.

19 **Mr. Lucey:** Addressing the Court's first question first,
20 Your Honor, plaintiff does contest that even if there was a
21 valid waiver that it would benefit any party besides the
22 grantor of the master deed. The grantor of the master deed,
23 the seller of the single-purchase entity that this
24 development took place through, the seller for all these
25 condos, that would be Columbia Condos, L.P.

1 Our case law in this state is clear that a waiver must
2 be -- must be the result of a negotiated -- a contractual
3 waiver must be the result of a negotiated transaction between
4 the parties. It is strictly construed and it only applies to
5 the parties to the agreement because it must be part of a
6 negotiated transaction, and the plaintiff would call the
7 Court's attention to the case called Carolina Amusement at
8 437 Southeast Second 122, our Court of Appeals in 1993, for
9 that proposition that even if a waiver were found that it
10 would not benefit any other party to this case including the
11 parties represented by the other counsel in this courtroom.

12 Revisiting the timeline for a moment, sir, since that's
13 where counsel spent a decent amount of his argument: For
14 starters, the transfer to the homeowner-controlled regime
15 occurred in the fall of 2009. By way of just background
16 which will be more relevant to the next motions but just to
17 keep the timeline in place, Your Honor, the homeowners didn't
18 learn of these defects until they hired a caulking company to
19 come do some maintenance on the buildings in November of
20 2012. In November of 2012 that caulking company - it's named
21 Watertight - refused to give them a bid and said: You've got
22 defects on these buildings; we're not touching them; you need
23 to go see an engineer. The plaintiff homeowners association
24 and the class representative promptly filed suit within a
25 month thereafter.

1 The suit was filed, I believe, the day after Christmas
2 which brings us into the missing portion of counsel's
3 timeline, Your Honor. The developers, all these entities,
4 all these affiliates, they answered the suit on March 13th --
5 excuse me, March 3rd, I believe, 2013. Yes, their answer
6 contained a general denial, but at no point in that answer
7 did they say, "By the way, you have waived your right to a
8 jury trial and we're relying on that" or that "you have
9 waived your right to a class action and we're relying on
10 that."

11 There was no specific reference to either of those
12 defenses, Your Honor, contained in the initial complaint and,
13 Your Honor, under Rule 12 -- I believe it's 12(f), a motion
14 to strike must be filed within 30 days and that's what
15 they're here trying to do. They're trying to get -- they're
16 trying to strike our jury trial demand. They're trying to
17 strike our class action pleadings.

18 That motion had to be brought instantly. It had to be
19 brought within the first 30 days, and that is in line -- very
20 much in line with the Foggie case cited in our brief, that
21 motions that affect the mode of trial must be brought to the
22 Court's attention very quickly in the process.

23 Well, Your Honor, it doesn't stop there. On July 24th,
24 2013, the defendants, the developer defendants, filed an
25 answer to plaintiffs' amended complaint. Again, they failed

1 to call out or set forth an affirmative defense in any way
2 relating to the alleged waiver or -- the alleged waiver as to
3 the jury trial demand or as to the class action pleadings.
4 In fact, it was not until these defendants filed an answer to
5 the second amended complaint -- I believe it's over a year
6 after the original filing -- that the defendants for the first
7 time assert that they're relying on a waiver that is
8 contained in the master deed.

9 It happens to be, Your Honor, if you fill in that
10 timeline, to the extent it matters -- and we would submit to
11 you that the amendment to the master deed is effective from
12 -- ab initio, the cases we cite to the Court show that that
13 amendment to the master deed makes it as if it had always
14 read that way. So plaintiffs believe that that amendment has
15 retroactive effect.

16 To the extent that the Court were to view it otherwise,
17 these defendants did not plead those waivers until the
18 waivers had already been removed from the master deed. So in
19 the timeline in the sequence, the -- the -- the waivers are
20 nonexistent by the time these defendants try to avail
21 themselves of that, even ignoring the failure to move to
22 strike those portions of the plaintiffs' pleading within the
23 30 days as the -- as the rules require them to do.

24 Your Honor, not only is -- not only is the waiver -- is
25 the amendment to the master deed completely effective as to

1 bar this effort by these defendants, even if it were not so,
2 Your Honor, they cannot avail themselves of this waiver. And
3 in analyzing this, Your Honor, I would remind the Court that
4 there's two different plaintiffs in this case. The first
5 plaintiff is the homeowners association itself which didn't
6 exist until shortly before this master deed was recorded.
7 The second plaintiff is a single homeowner and is a class
8 representative for the remaining homeowners.

9 A waiver under South Carolina law must be knowing for it
10 to be effective. The association in its infancy had no
11 existence. It had no board of directors. It had no agents.
12 It had no managers. At the time they created this master
13 deed, they are, in fact, in part under our statutes creating
14 the homeowners association. It is a virtual and physical and
15 absolute impossibility for the association to have had a
16 knowing waiver when it wasn't even in existence and it had
17 nobody to speak for it.

18 The -- as to -- as to the -- the right to challenge the
19 amendment, Your Honor, moving on to another topic, the
20 defendants on the one hand say they're not challenging it,
21 but on the other hand they're saying they're challenging the
22 retroactive effect of it. South Carolina statutes governing
23 nonprofit entities have specific rules about who can
24 challenge an act by a nonprofit entity and in what
25 circumstances and in what type of proceeding and what grounds

1 and standing you must have.

2 This plaintiff not only has not followed the act to
3 challenge the amendment, but it would have no standing under
4 the act anyway. This plaintiff, the developer -- excuse me.
5 This defendant, the developer, no longer has sufficient legal
6 interest in the association for the law to recognize it as an
7 interested party. It has sold out all of its -- all of its
8 units. It has no more interest in the management of the
9 association.

10 It tendered the association to the homeowners three
11 years ago, and in the case cited in our brief, the courts in
12 South Carolina have held that that developer now no longer
13 has any property interest or any interest in that entity.
14 And so that -- that developer has no standing to bring a
15 derivative action or any other type of action under the
16 nonprofit act to challenge this amendment.

17 Additionally, Your Honor, contrary to the movants'
18 arguments, the waivers that they're trying to assert are, in
19 fact, integral to unconscionable arbitration and waiver of
20 liability clauses that are stuck into this master deed. Your
21 Honor, these clauses, among other things, attempt to waive
22 any monetary recovery ever by the homeowners or the
23 association.

24 They attempt to waive the warranty of habitability.
25 They attempt to waive the warranty of workmanship. Under the

1 Kirkland case set forth in our brief, you cannot waive the
2 warranty of habitability without certain threshold
3 requirements, none of which are met here and none of which
4 are met in the master deed. You cannot waive the warranty of
5 service -- of workmanlike service. You cannot waive all
6 right to monetary recovery. Those are unconscionable
7 provisions.

8 The recent case of Smith vs. D.R. Horton considered such
9 a provision in that case, and they found that the
10 unconscionability of all these restrictions on recovery
11 permeated the arbitration agreement. It was not in a
12 position -- because there were so many of them and it was so
13 bad and it was so permeated that the Court was not in a
14 position to rewrite those limitations on liability and the
15 limitations on access to the courts, and the Smith court
16 threw them all out, refused to recognize any of them, did not
17 sever them from each other. And we'd respectfully submit
18 with the same unconscionable terms in this document this
19 Court should do the same.

20 With regards to the homeowners knowing waiver, Your
21 Honor, there are cases cited in our brief that your waiver
22 cannot be knowing as to unknown bad torts. In this
23 particular case, Your Honor, the plaintiff has already shown
24 dozens, if not hundreds, of violations of the building code.

25 The building code is actually the minimum standard of

1 care. It's not even the reasonable standard of care. There
2 was no way for a homeowners to have anticipated that they
3 were waiving the right to have a building comply with the
4 building code by purchasing this unit which referenced the
5 master deed. There's no way for a homeowner to have
6 contemplated that. Under the cases that we've cited in our
7 brief, Your Honor, their inability to contemplate that makes
8 it such that they're unable to provide a knowing waiver of
9 their right to a jury trial or their right to have a class
10 action.

11 Your Honor, the retroactive nature of the amendment
12 is -- the cases supporting that are set forth at pages 9 and
13 10 of the plaintiffs' brief, and they include not only Am
14 Jur, the general proposition from Am Jur that, in fact, the
15 -- the -- the amendment is retroactive and it's as if it was
16 written into the master deed from the get-go. We've also
17 cited for the Court the cases of Queens Grant and the Frantz
18 versus Picadilly Place and Crest Builders on that
19 proposition. The Uniform Nonprofit Corporation Act that
20 would preclude a challenge to this is also briefed at page 11
21 of our brief, and it's Code Section 33-31-304.

22 Your Honor, plaintiffs -- the defendants created this
23 master deed. This master deed had an avenue for amendment.
24 There was no prohibition in the master deed for the
25 plaintiffs to make this amendment. They made it pursuant to

1 the rules that the builder set forth, the developer set
2 forth, in the master deed. So they have, in fact, removed
3 the jury trial waiver and they have removed the class action
4 waiver pursuant to the exact terms that this developer set
5 forth in the master deed.

6 I would also call out to the Court's attention the fact
7 that at the time the master -- that at the time the grantor
8 inserted these anti-suit clauses into the master deed, that
9 was a clear violation of the grantor's fiduciary duty to this
10 ensuing neighborhood, both under the Dunes West case and
11 under the Goddard case set forth in our brief at page -- I
12 believe it's page 14. At the time of the inception, they
13 owed a fiduciary duty for the developer to value his own
14 rights and assets, his own benefit, over that of the
15 homeowners and the ensuing neighborhood. By restricting the
16 homeowners and the association from the ability to hold the
17 developer accountable was a breach of that fiduciary duty,
18 and to condone it would be for the Court to condone that
19 breach of fiduciary duty which the courts should not do.

20 I would also call out to the Court the fact that South
21 Carolina law and these -- these governing documents mandate
22 that the common elements remain indivisible and any covenant
23 -- and this is in the South Carolina Horizontal Property
24 Regime Act -- any covenant that is contrary to the indivisible
25 nature of this property is void underneath the Horizontal

1 Property Regime Act.

2 By the defendants attempting to have the plaintiffs
3 bring individual actions for each segment, for each little
4 undivided interest that they have in the common elements, the
5 limited common elements of this property, is, in fact, a
6 violation of the Horizontal Property Act which says this
7 property is supposed to remain as a single unit and not
8 supposed to be divided.

9 This is the first step by the plaintiff -- by the
10 defendant on this matter, Your Honor. After this motion gets
11 ruled upon, the defendant is then going come to this court
12 and say the property owners association itself doesn't have
13 the right to bring an action in which case they will have
14 broken this regime completely up into 200 different units as
15 opposed to what it's supposed to be.

16 And, Your Honor, all those arguments are detailed at
17 greater length in the plaintiffs' memorandum that's been
18 submitted to the Court.

19 **The Court:** All right. Mr. Norton?

20 **Mr. Norton:** Your Honor, just -- just briefly.
21 Obviously that's a lot of arguments that were just raised.
22 We received that brief about 45 minutes before we began this
23 morning, and to the extent that we're not able to answer Your
24 Honor's questions, we'd like to have the opportunity to
25 respond in writing to that brief because there's a lot of new

1 issues that weren't raised until this morning.

2 I just will hit a couple of things real briefly, if you
3 don't mind. The first thing is is that the arguments about
4 the timeliness under Rule 12(f) are not necessarily
5 applicable here; in fact, they're not at all. We threw it in
6 there in the litany of motions, but Rule 39 permits a motion
7 at any time with regard to the jury trial right, and it's not
8 -- there's no time requirement on when that's filed.

9 In fact, it would be unfair, Your Honor, to kind of --
10 to put that burden on a defendant in a case like this. There
11 are amendments. There's another amended complaint pending
12 right now that continues to add parties and claims to the
13 action. You need to have the ability to evaluate your rights
14 on an ongoing basis when things change to that degree.

15 The other thing I'd point out is that under Foggie it
16 doesn't say you have to file a motion. That case is -- you
17 know, it's one paragraph -- I don't have it with me because it
18 was just attached to their memo this morning -- that raised
19 the timeliness issue for the first time. All it says is you
20 have to raise the issue, and we raised it by denying their
21 allegations with regard to class action claims and jury trial
22 demands at the very beginning and we filed this well in
23 advance. This is not the eve of trial or anything like that.
24 We filed it as soon as we could get everybody in the case and
25 moving along.

1 The argument with regard to the amendment having a
2 retroactive effect is a slippery slope, Your Honor, and I
3 would encourage you, first of all, to think about a couple of
4 things. First of all, I think it's important to note that in
5 that master deed as a matter of contract it notes that these
6 provisions are a material inducement to the developer, the
7 grantor, giving this deed.

8 It's clearly something that the developer, the grantor,
9 was relying on in the process of giving the deed at the very
10 end. It's the last part of the jury trial waiver section.
11 Because it is a material inducement, it's patently unfair to
12 allow the homeowners here not only to amend it after the
13 developer leaves but also to amend it after the litigation
14 was filed.

15 Clearly I think, Your Honor, by the terms of the
16 contract itself -- and, of course, under Mr. Lucey's own
17 cases, they tell you you're supposed to construe these things
18 in accordance with the plain language. It mentions that the
19 jury trial waiver is supposed to be applicable as to the
20 grantor, its agents, contractors, subcontractors, architects,
21 engineers, and the co-owner. All those folks are involved
22 and it shows very specifically that when the homeowners
23 entered into this agreement and decided to purchase these
24 units, they knew that construction defect claims would be
25 covered by this jury trial waiver. Why else would you have

1 subcontractors, et cetera -- architects, et cetera, listed
2 in there?

3 So I don't think that there's any real argument that
4 this wasn't timely filed. I don't think there's any real
5 argument that these homeowners didn't have notice that this
6 kind of case would be covered by this particular provision.
7 I don't think there's any argument really that it can have
8 retroactive effects after litigation is filed.

9 I mean, obviously, Your Honor, if we had a credit card
10 company in here come in and say that, "Hey, by the way, we
11 altered the terms of the agreements -- we unilaterally
12 altered the terms of the agreements of our credit card
13 agreement, so now all our cases, instead of pending here,
14 have a forum in Delaware or an arbitration," we wouldn't give
15 that any credence, and this shouldn't be any different than
16 because it is a material inducement to the developer.

17 The arguments about not following the act, I mean
18 obviously the developer here is uniquely positioned. It's
19 not like any other homeowner. It is a clear beneficiary of
20 this master deed. There are still many references to the
21 grantor/developer in the master deed itself, and so it has to
22 have an opportunity to enforce provisions that are related
23 to -- to the developer or grantor in actions against it.

24 Finally, Your Honor, I would just reiterate that there's
25 -- an arbitration provision, a non-jury waiver, a class

1 action waiver -- and I lumped them all together just because
2 Mr. Lucey mentioned them and their cases mention them. If
3 they're unconscionable in a publicly-filed document that is
4 explained to consumers, homeowner -- homeowner purchases in
5 this case by lawyers, I'm not sure what else you can possibly
6 do.

7 It's in all caps. It's in bold type. It's explained to
8 them by lawyers. They understood at the time when they
9 purchased the units that either the homeowners association
10 would be turned over to them or for many of these homeowners
11 they bought after the homeowners association was already
12 turned over and this provision was in there.

13 The homeowners association board knew how to amend this
14 document. They amended it twice before or at least once and
15 maybe attempted once before, taking out the arbitration -- I
16 mean, the jury trial and class action demands. So I really
17 don't think that there's any question but that you have a
18 pretty conspicuous, obvious -- it's unambiguous jury trial
19 and class action waiver, and it should be enforced. And if
20 you would like us to hit any of these other issues in more
21 detail, we'd be glad to submit a brief.

22 **The Court:** Tell me: How do you account for the Caspie
23 Glass (verbatim) case?

24 **Mr. Norton:** I don't know the case, Your Honor.

25 **The Court:** Well, it's my case at the Gates of

1 Williams-Brice.

2 **Mr. Norton:** Oh, the capacity.

3 **The Court:** Capacity? What did I say?

4 **Mr. Norton:** I'm sorry. I just didn't recognize the
5 name.

6 **The Court:** Where I have already ruled that the regime
7 has standing to bring the action and that -- relying on
8 Queen's Grant and that -- I didn't recall the exact language
9 of it, that the condominium association and proper party
10 may -- in the defendant's motion to dismiss the class action
11 claims are hereby denied.

12 **Mr. Norton:** I don't believe that that was relying on
13 the class action waiver language, Your Honor. I believe that
14 they were making arguments related to their particular scope
15 of work.

16 **The Court:** I'm sure they were.

17 **Mr. Norton:** I'm sorry?

18 **The Court:** I'm sure they were.

19 **Mr. Norton:** Yes, sir, and I don't -- I don't think that
20 that's any different or any -- has any bearing necessarily
21 with what we're arguing here. I mean, we're not arguing that
22 the H.O.A. doesn't have standing as to all elements of the
23 particular claim. I think pretty clearly the H.O.A. would
24 have standing as to some parts of the allegations. I don't
25 -- I don't know that I dispute that at all.

1 Our argument is based -- you know, the class
2 representative and the H.O.A. board chair testified that they
3 as the H.O.A. and they as the homeowner at the Gates at
4 Williams-Brice were obligated to follow with that master
5 deed. And so I think it's a pretty clear question of law
6 here, Your Honor, as to whether or not they can, after this
7 litigation is filed, amend out valid waivers of class action
8 claims and jury trial -- and the right to a jury trial.
9 They're -- We're not seeking to dismiss any particular claim
10 here.

11 **The Court:** All right. I thought that that Foskey
12 (verbatim) case said there was no reason why the case could
13 not proceed as a class action.

14 **Mr. Norton:** I don't -- I don't believe, Your Honor,
15 that it was binding in that particular way. There was no
16 motion to certify the class at that time.

17 **The Court:** There was not; that's correct.

18 **Mr. Norton:** And there's been a lot of discovery done.
19 I don't believe that's binding on the rest of the defendants
20 in this particular case.

21 **The Court:** Well, I'll keep it in mind as I review the
22 statutes.

23 **Mr. Norton:** Yes, Your Honor. And we -- if you'd like
24 for us to brief that particular issue, I'm glad to do it.
25 You know, these are issues that weren't raised...

1 **The Court:** I would be concerned about issuing
2 conflicting orders.

3 **Mr. Norton:** Understood, Your Honor. I don't believe
4 that they are conflicting. I believe that their arguments
5 were based specifically on the scope of what work that they
6 were particularly doing.

7 **The Court:** All right, Mr. Lucey?

8 **Mr. Lucey:** Yes, Your Honor, briefly. Even if they do
9 move under Rule 39, Sub Rule 12(f), the Foggie case would
10 come back into play which requires the mode of trial issues
11 to be brought to the Court's attention promptly. In this
12 case it would seem they've filed three answers without
13 bringing it to the Court's attention.

14 And, Your Honor, I think that counsel and the movant
15 would like to dodge the issue of their standing to challenge
16 our amendment. It's a huge issue. They have no standing,
17 not only under the nonprofit act but under the case cited in
18 our brief, the Reyhani case versus Stone Creek Cove Condo.
19 Once they deed away all the property and they don't have a
20 legally-recognizable interest in the association, they don't
21 have the right to challenge internally the association's
22 conduct. They have to do it properly, and they don't have
23 standing.

24 So they don't even have standing to challenge whether or
25 not the amendment is retroactive or not, and it happens to be

1 that the chronology counts and it should count as to the
2 failure to make a timely motion, but to the extent that it
3 counts, they didn't make this motion until March of 2014;
4 after they deposed our board president on March 5th of 2014
5 and learned apparently for the first time that there was no
6 waiver in any of these documents and then they filed this
7 motion. So they cannot claim any prejudice on those issues.

8 **The Court:** All right. All right, counsel. I'll
9 have -- Mr. Norton, I don't know that you need to do a
10 separate memorandum in response to the plaintiffs'
11 memorandum, but in a proposed order -- I think you can make
12 your arguments in a proposed order.

13 **Mr. Norton:** Yes, Your Honor.

14 **The Court:** Rather than doing a proposed -- a memorandum
15 and then regurgitating it in the proposed order.

16 **Mr. Norton:** Yes, Your Honor, I can do that.

17 **The Court:** Ten days?

18 **Mr. Norton:** Yes, sir.

19 **The Court:** All right. All right. The next motion I've
20 got on this roster, Southern Equipment. Good morning.

21 **Ms. Casey:** Good morning.

22 **The Court:** Ms. Casey?

23 **Ms. Casey:** Yes, Your Honor. My name is Alice Parham
24 Casey. I'm here on behalf of Southern Equipment doing
25 business as Ready Mixed Concrete.

1 **Court Reporter:** I'm sorry. Can you speak up, please?

2 **Ms. Casey:** Yes. I'm here on behalf of Southern
3 Equipment Company, doing business as Ready Mixed Concrete.
4 We've moved---

5 **The Court:** All right. You may proceed.

6 **Ms. Casey:** We've moved to dismiss this case. We were
7 served on March the 3rd, 2014, with a complaint in which we
8 were not named as a defendant. We debated even whether or
9 not we needed to respond, but because there were John Doe
10 defendant listed 1 through 10 and because we were served with
11 a summons and it appeared that our registered agent was
12 identified and our name was identified in the cover letter,
13 out of an abundance of caution we did respond and moved to
14 dismiss the case.

15 We believe we should be dismissed for three separate
16 independent reasons. One, as I've stated, we have not been
17 named as a defendant and we do not---

18 **The Court:** This is going to be a first for me.

19 **Ms. Casey:** Me as well, Your Honor.

20 **The Court:** Somebody arguing that they should be
21 dismissed when they've never been named. Go ahead.

22 **Ms. Casey:** Even if we are one of the John Doe
23 defendants or could be considered one, the complaint states
24 no causes of action against any of those defendants, and
25 thirdly, the statute of limitations has run, in any case.

1 Under the -- under our first reason -- for some reason we
2 have not yet been named as a defendant and this is the third
3 complaint the plaintiffs have filed. The first one was in
4 2002 as you heard earlier this morning, the second in 2013 --
5 I'm sorry. 2012, 2013, and then this is the third one.
6 Even -- we initially thought we might have been considered
7 one of the John Does, but now the plaintiffs have actually---

8 **The Court:** Are there any allegations that even come
9 close to what you did out there?

10 **Ms. Casey:** No, Your Honor, not at all. The complaint
11 is 111 paragraphs -- 110 paragraphs. There are two
12 paragraphs that address the John Doe defendants, 56 and 57,
13 and all they say are: The address and identity of John Doe
14 defendants 1 through 10 is unknown at this time, and then
15 defendants John Doe 1 through 10 are subcontractors and/or
16 other entities involved in the design, construction, product
17 manufacturing and/or supplying or repair of the gates.
18 That's it. There's nothing else alleged against the John Doe
19 defendants.

20 And, finally, as you heard this morning, the Gates were
21 constructed in 2007. The plaintiff -- the named plaintiff
22 purchased her unit in 2010. We were not served with the
23 complaint until March of 2014, seven years after the project
24 was -- was -- was built and four years after the named
25 plaintiff was---

1 **The Court:** What's the 2007 date? Is that the
2 certificate of occupancy?

3 **Ms. Casey:** I'm not certain, Your Honor.

4 **The Court:** What -- just...

5 **Ms. Casey:** In any case---

6 **The Court:** What is the 2007 date?

7 **Ms. Casey:** That's my understanding of when it was
8 constructed.

9 **Mr. Lucey:** The C.O. is July 1, 2007, Your Honor.

10 **The Court:** All right, Thank you. All right. All
11 right.

12 **Ms. Casey:** The naming of a John Doe defendant in this
13 complaint does not toll the statute of limitations. That was
14 made clear in Jackson versus Doe, and I have copies of any of
15 these cases if they would be helpful, Your Honor. That was
16 a -- that's a 2000 case. It's 537 Southeast Second 567.

17 In addition, the date when a plaintiff learns of a
18 potential new defendant has absolutely no bearing on the
19 timing of the statute of limitations. That's Gillman versus
20 the County of Beaufort. While the discovery rule may permit
21 the limitations period to run after the date an injury is
22 first discovered, this case -- and I'll quote it: "The date
23 when a plaintiff learns of a potential new defendant has
24 absolutely no bearing on the timing of the statute of
25 limitations."

1 Now, the fact that the plaintiffs are now seeking to
2 amend their complaint for yet another time -- they filed a
3 motion to amend. They've filed the proposed amended
4 complaint with that. That complaint does name my client, in
5 addition to John Doe defendants 1 through 10, does not change
6 the analysis because of Rule 15(c).

7 "An amendment changing the party" - and I'm reading from
8 the statute - "against whom a claim is asserted relates back
9 if the foregoing provision is satisfied, and within the
10 period provided by law for commencing the action against him
11 the party to be brought in by amendment has, one, received
12 such notice of the institution of the action that he will not
13 be prejudiced in maintaining his defense on the merits and"
14 not or "and, two, knew or should have known that but for a
15 mistake concerning the identity of the proper party the
16 action would have been brought against him."

17 In this case neither of those conditions have been met.
18 This is certainly not a case of mistaken identity. We had no
19 idea this case was even proceeding. In fact, our client was
20 a little bit miffed that we didn't get the job to provide
21 concrete on this -- on this project. We weren't involved in
22 it at all, and that's exactly why it's very important for a
23 plaintiff to name -- to allege the allegations specifically
24 against each defendant.

25 **The Court:** You mean they didn't do any work out there?

1 **Ms. Casey:** They didn't do any work out there, even
2 though their Key Road plant is only about a quarter mile
3 away. They've looked through all their files at this point,
4 and there is one individual who remembers being a little bit
5 upset that they didn't even get the job.

6 As far as prejudice is concerned, just to wrap it up,
7 there have already been 23 depositions taken in this case.
8 We received notice of none of them. The plaintiff's
9 deposition was taken one day after we were served. Fourteen
10 depositions were taken after we were served. But in any
11 case, for us to maintain our defense on the merits of this
12 case would be -- would cause us a severe prejudice.

13 **The Court:** Mr. Lucey?

14 **Mr. Lucey:** Yes, sir. Your Honor, if I may approach and
15 hand the Court up the November 13th, 2012, Watertight report
16 that I referred to in my earlier argument. This was the
17 report that gave the plaintiff notice that they had
18 construction defects. I'm working in reverse order on the
19 issue of the statute of limitations just to get rid of that
20 issue.

21 There is no issue of statute of limitations. We would
22 have until November 13th, 2015, to file against this party
23 based upon the discovery rule. There's no need for us to
24 seek a relation back ruling from the Court as to our service
25 of a John Doe defendant. This -- this -- a new suit, in

1 fact, could be filed against this defendant at any time
2 within the statute of limitations.

3 **The Court:** Give me that 2015 date again. Where do you
4 -- how do you figure that?

5 **Mr. Lucey:** Because we discovered the defects on
6 November 13th, 2012. Watertight, this subcontractor, brought
7 them to the association's attention, and under the discovery
8 rule the association would have three years from this date to
9 sue any at-fault parties.

10 **The Court:** She says she didn't even do any work on the
11 site.

12 **Mr. Lucey:** That's her contention. The job -- the job
13 file from the contractor reflects that they did supply
14 concrete to the site. If, in fact, they did not and if that
15 can be shown and proved, it will be an easy summary judgment
16 motion for them to win. We happen to be here on a motion to
17 dismiss.

18 Your Honor may be aware that in construction cases it
19 often is a long time between -- before all participants in a
20 particular job are completely identified. The -- you have to
21 get through 60,000 pages in a general contractor's file once
22 they peruse it. You have to get a subpoena out to all the
23 subcontractors. All the subcontractors traditionally -- many
24 of them will have what are called second-tier subcontractors.
25 They have their own files and their suppliers, and it can be

1 quite an arduous procedure to actually identify all the at-
2 fault parties.

3 Southern was identified after the second amendment --
4 amended complaint was filed. They were served as a John Doe
5 defendant, and the allegations in the complaint as to the
6 John Doe are vastly understated by movant. Yes, the John
7 Does are identified to the extent that they can be. Their
8 existence is identified in Paragraph 56, but then it goes on
9 to -- the Complaint goes on to detail the -- that all
10 defendants have participated in the defects that are alleged
11 in this complaint, and John Does are a defendant.

12 And it goes on to say, by the way, on that issue of
13 statute of limitations -- in Paragraph 61 it specifically
14 alleged that these are latent defects and the -- in a later
15 paragraph that I'll identify, it's in the estoppel as to the
16 statute of limitations, Paragraph 83. It alleges display
17 exercise and reasonable diligence. Plaintiffs could not have
18 discovered the defective condition with the Gates and, in
19 fact, they didn't discover it until that November 13th report
20 from Mark Warren (phonetic).

21 So factually the complaint goes on to say that all the
22 defendants participated in the construction of these
23 buildings with latent defects, that the defects have resulted
24 in leakage, that they had a duty to develop, design,
25 construct, and repair the gates in a workmanlike manner, that

1 they breached those duties, and that as a direct and
2 approximate result of all the defendants' violations we have
3 been damaged. And then the John Doe defendants are, in fact,
4 included in the causes of action for negligence and for
5 breach of implied warranties and express warranties and, in
6 fact, the defective nature of the concrete is expressly
7 referenced in the strict liability cause of action, the third
8 cause of action in Paragraph 98.

9 Now, in making this motion to dismiss, Southern
10 Equipment did not make a special appearance. They have now
11 appeared in this case, and not only are the allegations set
12 forth against the John Doe identified in the second amended
13 complaint, but the motion to amend the third amended
14 complaint is also pending in front of the Court where they
15 will be expressly named. And we have -- plaintiff has the
16 consent to all parties except for the two parties with the
17 motion to dismiss -- Southern Contracting and Lovelace -- for
18 that amended complaint.

19 So we would submit to Your Honor by not making a special
20 appearance they have, in fact, submitted to the jurisdiction
21 of the Court, and we can solve their issue with being named
22 John Doe instead of Southern Contracting if the third amended
23 complaint is permitted by the Court.

24 **The Court:** When -- is that scheduled?

25 **Mr. Lucey:** Your Honor, we moved for an expedited

1 hearing on it, and we brought the signatures with us. We
2 moved a week ago. There was the 10-day notice. We got
3 consent from everybody except for the two parties that have
4 moved to dismiss, and I have those signatures with me.

5 **The Court:** All right. Yes, ma'am.

6 **Ms. Casey:** Your Honor, our consent was not even sought
7 to that third amended complaint, I might add. The law is
8 very clear that naming a John Doe defendant does not toll the
9 statute of limitations. The law is also very clear that the
10 date a plaintiff learns of a potential new defendant does not
11 toll the statute of limitations, even though that situation
12 can have a very harsh outcome in some cases, and if you would
13 allow me, I'm going to hand you up two cases, Your Honor,
14 that---

15 **The Court:** Sure.

16 **Ms. Casey:** I don't know if you -- we have -- we
17 submitted a memorandum on Wednesday. The fact that the
18 plaintiff is now trying to amend the complaint which is---

19 **The Court:** I can't quite hear. You're talking---

20 **Ms. Casey:** The fact that the plaintiff is now trying to
21 amend the complaint to add us does not change the analysis.
22 If you look at the Gillman case on the third page of what I
23 just handed you, the middle paragraph on the right discusses
24 the discovery rule and how, yes, it's true that a claim can
25 be brought after an injury is discovered, but that does not

1 permit them to add a new defendant. After his own party
2 files a lawsuit, the statute has run as to that defendant.

3 And at the bottom of the page, the case quotes the
4 Bagwell versus Hinton case which is rather old but still good
5 law, holding in a pre-rule decision that that's--

6 **The Court:** Lawyers always, when they refer to old
7 cases, say, "That's really good law." Go ahead.

8 **Ms. Casey:** It does say that a statute providing for the
9 amendment of pleadings does not permit a court under the
10 color of ordering an amendment to abrogate the statute of
11 limitations. In Jackson versus Doe on the third page of that
12 case at the top of the right page, it cites to a case - and I
13 quote - "The statute of limitations may sometimes work a
14 great hardship in special cases, but under the principle that
15 litigation and contention must have an ending, and that the
16 repose and quiet of the many compensates for the loss of the
17 few, such statutes have been adopted and strictly enforced in
18 most countries, as wise, and as contributing to best interest
19 of society," such as the doctrine in this case.

20 And in that particular case, Jackson versus Doe, it had
21 a very harsh result. It was an injured plaintiff who didn't
22 discover the identity of the driver who hit her until four
23 years after her injury, but she had filed a lawsuit against
24 the John Doe defendant. She was not permitted to add
25 Milligan, I believe is the name of the defendant, after she

1 discovered his identity.

2 This case is no different, and the prejudice in this
3 case that would result to my client is severe. We can't go
4 back and take any of those 23 depositions. We can't take the
5 deposition of the plaintiff; it's already occurred. The
6 plaintiff has had her opportunity -- its opportunity to bring
7 the lawsuit against the proper parties and we're not a proper
8 party, and it's very clear that we should be dismissed from
9 this case without having to go through discovery and file a
10 summary judgment motion.

11 **The Court:** All right.

12 **Mr. Lucey:** Your Honor, movant's argument completely
13 ignores the discovery rule. The movant doesn't proffer to
14 the Court a proper date for the statute of limitations to
15 begin to run. The movant doesn't proffer to the Court any
16 evidence that the statute began any day before November 17th,
17 2012. The statute runs three years from the discovery rule.

18 The plaintiffs are not seeking any tolling of the
19 statute by use of the John Doe mechanism. We seek no tolling
20 by any -- by the Court's ruling. We simply -- we're simply
21 sued them as a John Doe because we didn't know who they were.
22 We now have identified them and they have entered an
23 appearance in the matter, not a special appearance but a
24 general appearance.

25 The statute of limitations is not a ground for the

1 dismissal of their case. The statute of limitations is
2 objective. It's an objective rule. It doesn't matter how
3 many depositions have or haven't been taken. There's no
4 grounds for the number of depositions being taken that
5 somehow lengthen or shorten the statute of limitations. It's
6 a three-year rule. The plaintiffs have satisfied it; they
7 made a general appearance. Thank you, sir.

8 **The Court:** All right. Thank you. Ten-day orders,
9 please. Lovelace? Is anybody here on Lovelace? Looks
10 like... Obviously they didn't get the morning notice. Well,
11 Mr. Lucey, looks like you're going to stick around 'til 2:00.

12 **Mr. Lucey:** Yes, sir..

13 **The Court:** Mr. Lovelace -- I mean, Mr. Louthian is not
14 present. I'm assuming he only got the notice for 2:00.

15 **Mr. Lucey:** May I call him and see if he's nearby and
16 cares to come down?

17 **The Court:** Sure.

18 **Mr. Lucey:** Thank you, sir.

19 **The Court:** Anybody else want to jump in?

20 **Mr. Pharr:** Thank you very much though.

21 **The Court:** I don't make that offer very often.

22 (Pause in proceedings.)

23 **The Court:** We'll stand at ease and see if we can find
24 -- locate Mr. Louthian.

25 **Mr. Lucey:** He says he'll be here in 15 minutes.

1 **The Court:** Okay. Great. Thank you.

2 (Pause in proceedings.)

3 **The Court:** All right. Thank you. Be seated. Mr.
4 Louthian, is this your motion?

5 **Mr. Louthian:** Yes, Your Honor.

6 **The Court:** You may proceed.

7 **Mr. Louthian:** I represent Lovelace Commercial
8 Contracting, Inc., Your Honor, and I've carefully read this
9 complaint several times and I filed a 12(b)(6) motion to
10 dismiss on the following grounds: Paragraph 40 -- and I'm
11 searching for places where Lovelace is mentioned or anything
12 with Lovelace having to do with the contract, but let me
13 explain from the beginning.

14 Lovelace was a sub-subcontractor. Tindall was a
15 subcontractor who did the slab construction for the parking
16 garage, and as far as I know that's all -- that's the extent
17 of Tindall's scope of work.

18 **The Court:** They were subbed, and you're the sub sub.

19 **Mr. Louthian:** Yes, sir, and Tindall then had a
20 subcontract with my client, Lovelace. Lovelace's job was to
21 pour what they call pour strips, P-O-U-R, strips in the
22 garage between slabs. As I understand it, it's a space about
23 two feet wide between the slabs on the floor of the parking
24 garage and is used to control expansion and contraction of
25 the joints, and when traffic goes over the slabs in the

1 parking garage, the joints go up and down. So that was his
2 job. I think it's \$78,000 worth of work.

3 And I've looked at the complaint and the only things I
4 can find that refer to Lovelace even inferentially are --
5 Paragraph 49 of the complaint says that: "At all times
6 relevant to this action, Lovelace provided and/or installed
7 pour strips in the garage, among other work at the Gates."
8 Well, that's what we did.

9 Paragraph 61 of the complaint says the Gates contained
10 latent building defects. There's no reference to the garage.
11 Paragraph 63 says, "The latent building defects, weather,
12 repeated water intrusion and/or other events that resulted in
13 consequential damages to building components."

14 Paragraph 64 alleges water intrusion into and through
15 the exterior building in the load, failure of other various
16 building components including widespread spalling with
17 consequential damages resulting therefrom. And the
18 complaint, as Your Honor knows, I'm sure, alleges negligence,
19 breach of warranty, and strict liability in tort.

20 There's no allegations that Lovelace had anything to do
21 with the building, which I understand to be the problem.
22 Lovelace's job and only job was to install pour strips in the
23 garage. There's no allegation in the complaint that any
24 defects in the garage or the pour strips contributed to
25 any---

1 **The Court:** They don't indicate spalling with the floor
2 strips?

3 **Mr. Louthian:** I don't know. It says widespread
4 spalling. I don't know where it was. There's concrete all
5 over the place. And there's just no way we can defend
6 against the complaint unless we know what the allegations
7 are. There's nothing in the complaint that says that
8 Lovelace did anything wrong, and so we contend, Your Honor,
9 that it should be dismissed.

10 We understand the burden that we have, taking everything
11 in the complaint as true, and I've applied that and I simply
12 cannot find any allegation as to my defendant.

13 **The Court:** All right. Maybe Mr. Lucey can enlighten
14 us.

15 **Mr. Lucey:** Yes, Your Honor. As the counselor said, in
16 Paragraph 49 we do clearly identify Lovelace's scope of work
17 which is the pour strips, and in Paragraph 64 -- the garage,
18 it is a building. So that concrete is part of the building,
19 and that building is spalling, widespread spalling, which is
20 what's set forth in the complaint. And the only thing
21 they're accused of doing is concrete, and the concrete is
22 spalling.

23 To the extent that it matters or -- or anybody is
24 interested, all concrete, all the different forms of concrete
25 -- there are many forms of concrete here, and the many forms

1 of concrete have spalling, specifically the pour strips
2 installed by Lovelace have that spalling.

3 **The Court:** Why can't you say that in the complaint?

4 **Mr. Lucey:** Your Honor, we'd be happy to. We were just
5 trying to keep the complaint a manageable length and, in
6 fact, the same allegation would actually -- actually applies
7 to probably four or five other concrete suppliers and
8 subcontractors which is why we put a broad allegation in
9 about the concrete.

10 **The Court:** Well, Mr. Louthian says he can't defend
11 against general allegations. I mean, if he brought a motion
12 to require you to be more definite and certain, I might have
13 considered granting that. I don't know if I can just
14 entirely dismiss him if you've got general allegations
15 against him, but he ought to be able to focus in on what he
16 has to defend.

17 **Mr. Lucey:** And, Your Honor, had he made a motion to be
18 more definite, we might have voluntarily done that. He
19 didn't make that motion and he never told us what the grounds
20 of the motion to dismiss were. There was nothing for us to
21 address. It simply said 12(b)(6). And the complaint does go
22 on to say that each of the defendants had a duty to construct
23 in a workmanlike manner and that they failed to and that's --
24 that is why we're here on negligence and that he's liable for
25 it.

1 So we do believe -- we set forth specifically what his
2 scope of work was, and we said the concrete is spalling and
3 that's unworkmanlike and that's breach of the duty. So we do
4 believe we stated a cause of action. We do have an amended
5 complaint pending by motion, and we'd be happy to be more
6 definite, Your Honor.

7 **The Court:** How about that, Mr. Louthian?

8 **Mr. Louthian:** That's --- certainly I have no problem
9 with that, Your Honor. If we can find out what we did wrong
10 or allegedly did wrong, then we can defend, but from this
11 complaint I cannot say---

12 **The Court:** I'm agreeing with you and --- and he says
13 that your concrete is spalling, but that's perhaps not
14 sufficient to allow you to enter an answer based on
15 plaintiffs' counsel's remarks that I've been hearing.

16 **Mr. Louthian:** Well, if the plaintiff has a complaint
17 against the pour strips specifically contributing to a
18 problem, whether it's spalling or anything else, then -- then
19 fine; we'd like to know about it.

20 **The Court:** All right.

21 **Mr. Louthian:** And an amended complaint, if you can do
22 that for us, would be fine.

23 **Mr. Lucey:** Yes, Your Honor.

24 **The Court:** I'll order it. I'll grant his sua sponte
25 motion to require you to be more definite and certain with

1 regard to Lovelace.

2 **Mr. Lucey:** Yes, sir.

3 **The Court:** All right?

4 **Mr. Lucey:** Thank you.

5 **The Court:** And deny the motion to dismiss.

6 **Mr. Lucey:** Thank you, sir.

7 **Mr. Louthian:** Thank you, sir.

8 **The Court:** Let me ask you this. This is just sort of
9 for general information. I always -- I know what an
10 expansion joint is, but I've never heard of pour strips to
11 serve as an expansion joint. Is that---

12 **Mr. Lucey:** Yes, sir. They actually serve as a cover to
13 an expansion joint. So you have two precast slabs coming in.
14 Maybe they have to be separated by an inch or so. Maybe
15 they're supported by a structure runner underneath, and
16 rather than having a big gaping hole in the deck of the
17 parking garage, the pour strip looks like -- what it looks
18 like is a fake speed bump, but it pours over this gap and it
19 sits on a shelf on the lower structural runners.

20 **The Court:** Okay. Why would you have a separate
21 contractor do that apart from your slab guy?

22 **Mr. Lucey:** The entire parking garage---

23 **The Court:** It's on precast---

24 **Mr. Lucey:** Subcontracted with Tindall and Tindall had
25 brought up the secondary subs with the different components.

1 and---

2 The Court: I got it. Thank you.

3 Mr. Lucey: Thank you, Your Honor.

4 The Court: I'll do that in my Form 4.

5 Mr. Louthian: Yes, sir. And, Your Honor, how long do
6 we have to respond to the amended complaint?

7 The Court: Well, he hasn't even served it.

8 Mr. Louthian: I know but...

9 The Court: 30 days.

10 Mr. Louthian: All right, sir.

11 The Court: Just like any other case.

12 Mr. Louthian: Thank you, sir.

13 (Whereupon, the proceedings were concluded. There were
14 no exhibits introduced.)
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25

I, the undersigned Daphne D. Helms, official court reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for Richland County, South Carolina, on the 9th of June, 2014.

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

April 28, 2015.

Daphne D. Helms, court reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

THE GATES AT WILLIAMS-BRICE CONDOMINIUM
ASSOCIATION AND KATHARINE SWINSON,
INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff(s),

vs.

Case No.: 2012-CP-40-8512

DDC CONSTRUCTION, INC., ET AL.,

Defendant(s).

D E P O S I T I O N

WITNESS: KATHARINE SWINSON

DATE: Tuesday, March 4, 2014

TIME: 9:20 a.m.

LOCATION: Nelson, Mullins, Riley & Scarborough,
1320 Main Street, 17th Floor
Columbia, South Carolina

TAKEN BY: Attorneys for the Defendants

REPORTED BY: SHERI L. BYERS
Registered Professional Reporter

COMPUSCRIPTS, INC.
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Post Office Box 7172
Columbia, South Carolina 29202
803-988-0086
1-888-988-0086
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1 experienced with the condenser or the Freon leak?

2 Let me ask that again.

3 Has anyone else told you that they are having
4 similar problems with condensers or Freon leaks?

5 A. I have not spoken to anybody personally, but
6 I will tell you that I did see over the past few
7 summers many different HVAC companies out there. Which
8 I will presume that they were fixing somebody's problem
9 with their HVAC.

10 Q. Let me ask, did you have any regular
11 maintenance or service done on your HVAC?

12 A. Any regular?

13 Q. Yeah. Did you have somebody come out and do
14 kind of a spring or fall --

15 A. No.

16 Q. How often do you change your filters in your
17 unit?

18 A. Every two months. One to two months.

19 Q. What kind of filters do you buy?

20 A. I believe they're -- is it 3M? TM?
21 Something.

22 Q. Where do you buy them from?

23 A. Either Target or Wal-Mart.

24 Q. Have you spoken with anyone else, any of your
25 neighbors that are having similar problems with their

1 electrical system, their lightbulbs?

2 A. I have heard the complaint about having to
3 change the lightbulbs frequently.

4 Q. Any specific people, or are you just --

5 A. I couldn't -- I can't remember exactly, but I
6 do remember hearing an agreement in the complaint of
7 that.

8 Q. So at the time that you filed your complaint
9 back in December of 2012, those four issues were the
10 only problems you were having with your particular
11 unit?

12 A. Well, I -- I'm sorry, I'm just trying to
13 think of all the things. What four issues? Can you
14 list them out for me?

15 Q. You list cracks in walls, plumbing problems,
16 HVAC, and electrical.

17 A. I guess those would be the main things that I
18 saw in my own. But as I started to talk to more
19 people, I started to realize that this was a widespread
20 problem and other people were having other issues that
21 were similar, if not the same, yeah.

22 Q. Well, let me ask you about some of the other
23 things. Were you having any problems with your
24 windows?

25 A. Not that I -- I have not inspected myself

1 not sure the status of it. But, anyway, it's going to
2 be if it hasn't been at some point.

3 I wanted to ask you just a few questions. If
4 you can flip over to first page of the actual
5 complaint. There's a motion form on the front,
6 whatever, so it should be the first page of Exhibit 1.

7 A. Does it say "Second Amended Complaint" on it?

8 Q. It does. It does. Right at the very top.

9 A. Okay.

10 Q. Okay. I'll ask you just a couple of
11 questions, the first of all, is that this indicates
12 that you are filing this complaint individually on
13 behalf of all other similarly situated.

14 Who are those people that are similarly
15 situated to you?

16 A. All the other owners of units at The Gates.

17 Q. So all the other owners, right?

18 A. Uh-huh.

19 Q. And the HOA also is bringing an action
20 separately, correct?

21 A. Uh-huh.

22 Q. Are -- is the HOA and you and all the other
23 unit owners that you're here representing as the named
24 plaintiff bound by the master deed?

25 MS. DRAWDY: Objection.

1 BY MR. NORTON:

2 Q. Do you know what the master deed is?

3 A. Yes.

4 Q. What is the master deed? Can you tell me
5 what it is? You can look at it if you want.

6 A. Yeah.

7 Q. If that will help you, you're welcome to take
8 a look at it. I have one extra copy. I was going to
9 mark this as an exhibit.

10 A. The master deed relates to the entire
11 building as a whole, correct?

12 Q. I'm asking you what your understanding of the
13 master deed --

14 A. I do not know the ins and outs of what a
15 master deed has. I know that it is related to the
16 entire property and the regime as a whole.

17 Q. Let me back up just a little bit. Have you
18 ever read the master deed?

19 A. This --

20 Q. This document?

21 A. -- huge packet?

22 Q. This huge packet, have you ever read it?

23 A. Not fully, no.

24 Q. Have you ever read it in part?

25 A. I don't believe I have, but likely that my

1 parents had. But I have not.

2 Q. Okay. So -- okay. So do you have any idea
3 what's in this document as you sit here today?

4 A. Looking through it, I just see floor plans
5 and descriptions and not specifically what's in it.

6 Q. Okay.

7 A. I know it gives the association rights --

8 Q. Yeah.

9 A. -- and the rules and regulations and stuff.

10 Q. So is it your understanding that all the unit
11 owners are bound by this document?

12 MS. DRAWDY: Objection.

13 THE WITNESS: If they designed it, I believe
14 so.

15 BY MR. NORTON:

16 Q. Do you know if this runs with the land?

17 A. I don't know if it does.

18 Q. Do you want to take a second and look through
19 it?

20 A. I would like to.

21 Q. As to my question, you might want to pay
22 particular attention to Section 33.

23 A. Can you tell me what page that's on?

24 Q. 37.

25 A. It does say that it runs with the land here.

1 Q. And it's binding upon all those who become
2 co-owners of the units, right?

3 A. Yes. It's what it says.

4 Q. Okay. All right. So I guess asking my
5 question again -- well, I guess we're fine.

6 Let's look back at the complaint here for a
7 second. When your parents purchased the unit
8 initially, were they given any warranty?

9 A. I don't believe so. They bought it from an
10 individual owner.

11 Q. And when you were added to the deed, you
12 weren't given any warranty, presumably, from your
13 parents?

14 A. No.

15 Q. Okay. Did you ever have occasion to speak
16 with anyone that you would identify as the developer of
17 this project?

18 A. No.

19 Q. Okay. We're looking at your -- at this
20 Second Amended Complaint. Have you ever reviewed this
21 document?

22 A. Not in its entire -- this document, no. The
23 Second Amended Complaint, no.

24 Q. Did you review the initial complaint?

25 A. Yes. Back in 2012.

1 STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
2 COUNTY OF RICHLAND

3
4 THE GATES AT WILLIAMS-BRICE CONDOMINIUM
ASSOCIATION AND KATHARINE SWINSON,
5 INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

6 Plaintiff(s),

7 vs. Case No.: 2012-CP-40-8512

8 DDC CONSTRUCTION, INC., ET AL.,

9 Defendant(s).

10
11
12 DEPOSITION

13 WITNESS: BILL YARBOROUGH
14 DATE: Wednesday, March 5, 2014
15 TIME: 9:14 a.m.
16 LOCATION: Nelson, Mullins, Riley & Scarborough
1320 Main Street, 17th Floor
17 Columbia, South Carolina
18 TAKEN BY: Attorneys for the Defendants
19
20 REPORTED BY: SHERI L. BYERS
Registered Professional Reporter

21 - - - - -

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1 Q. Was there a vote taken to amend?

2 A. Well, all the residents -- it was a decision
3 of the residents to do it. It had to be a decision of
4 the owners to do it, to make the amendment.

5 Q. So there was some sort of vote taken?

6 A. Yes..

7 Q. There was a board meeting and the vote done?

8 A. I believe it was explained at a board meeting
9 and might have been a written-proxy-type thing.

10 Q. So there should be some minutes somewhere --

11 A. Yes..

12 Q. -- reflecting that?

13 A. Yes, sir.

14 Q. The board still keeps minutes to its
15 meetings?

16 A. Yes, sir.

17 Q. Do you know if all of the board meeting
18 minutes have been turned over to your counsel?

19 A. I'm sure they have, yes, sir.

20 Q. To date?

21 A. Oh, yes, sir.

22 Q. As your -- as you understand it, the HOA is
23 sort of governed by the master deed; is that fair to
24 say?

25 A. I would say it's governed by the master deed

1 until we see something we need to address.

2 Q. Okay. Well, I guess what I'm saying, this is
3 a document that the HOA is obligated to follow. Would
4 you agree with that?

5 A. I don't think so because we had it amended.

6 Q. The document as amended would be --

7 A. Yes, sir. As amended would be, I would think
8 so.

9 Q. If the amendment was proper and all that
10 stuff, then you would be obligated to follow --

11 A. I agree.

12 Q. -- whatever the document is?

13 A. I think so, yes, sir.

14 Q. And each individual unit owner is also
15 obligated to follow the rules of the master deed; would
16 you agree with that?

17 A. I would agree with that.

18 Q. And, in fact, as the HOA, you oftentimes take
19 actions against unit owners if they don't comply with
20 the master deed in some way; is that also true?

21 A. We take actions on different things. Whether
22 it's, you know, part of the master deed, I'm just not
23 sure.

24 Q. Certainly if they break the HOA rules in some
25 way --

1 (DEFT. EXH. 30, Second Agreement to the
2 Master Deed of the Gates at Williams-Brice Horizontal
3 Property Regime, GWB_037308 and 037309, was marked for
4 identification.)

5 BY MR. NORTON:

6 Q. Mr. Yarborough, I've handed you what we
7 marked as Exhibit 30 to your deposition.

8 Is this the amendment you are referring to
9 that you believe gave the HOA board the right to file
10 this litigation?

11 A. Okay. What was your question?

12 Q. Is this the amendment you were referring to
13 earlier today that you testified gave the HOA board the
14 right to file this litigation?

15 A. No, sir. I think we had the right to file
16 the litigation on the common property anyway.

17 Q. You don't think you had to have any approval
18 by the homeowners themselves?

19 A. Not to file -- not to file the litigation for
20 the common property.

21 Q. Okay. You did sign this amendment --

22 A. I did.

23 Q. -- to the master deed?

24 A. Right.

25 Q. And it was done on June 5, 2013, right?

1 A. Right.

2 Q. And that's, what, some six months or
3 approximately after the lawsuit was filed?

4 A. Yes, sir.

5 Q. Why did you -- why did the board amend the
6 master deed at that time?

7 A. From recollection, I think it was so that we
8 could exert all of our rights to seek all remedies for
9 the damages. That's my recollection.

10 Q. Okay. Let's go through the changes. Do you
11 know why the warranty section was deleted and forever
12 waived?

13 A. I can't -- I don't recall the details, no,
14 sir.

15 Q. Was there -- it says there was an affirmative
16 vote of the owners of at least two-thirds percent of
17 the total interest in the common elements?

18 When was that vote taken?

19 A. Just the first five months of the year.

20 Q. Was it done in writing, or was it done in a
21 meeting?

22 A. I would say it was done by proxy.

23 Q. And does the HOA board secretary keep records
24 of those proxies?

25 A. Either the secretary or the Weston Management

1 would have those records..

2 Q. Okay. Do you know how many homeowners voted
3 for the amendment?

4 A. More than we needed for the two-thirds.

5 Q. Do you know how many specifically?

6 A. I think there was a 77 percent number
7 associated with it, one of these things that we had.
8 We wanted to get more than the minimum.

9 Q. But you don't know why the warranty section
10 was deleted and waived?

11 A. I'm sure I did at one time, but I just don't
12 recall. This is something that an attorney would have
13 to interpret.

14 Q. Well, the board voted on it and approved --
15 excuse me. The homeowners voted on it and approved it,
16 right?

17 A. Yes, sir. We did it at direction and
18 explanation of counsel, and I just do not remember the
19 details.

20 Q. Well, okay. Did counsel provide an
21 explanation to all of the unit owners?

22 A. Absolutely. It was in the form of a proxy we
23 all had to sign. There's just so much that has
24 happened since the letter that I just don't remember
25 the specifics of this document.

1 Q. And the same would be true for why additional
2 warranty exclusions were deleted and waived as well,
3 you just don't remember?

4 A. I just -- just legalese to me.

5 Q. What about alternative dispute resolution, do
6 you know why that was deleted and waived?

7 A. No, sir. I'm sure I did at the time, I just
8 don't recall the details.

9 Q. Have there been any other amendments to the
10 master deed since then?

11 A. Not that I recall.

12 Q. Are there any others proposed?

13 A. Not that I'm aware of.

14 Q. You're the board chair, you would be aware of
15 them if there were proposed amendments, right?

16 A. You mean currently proposed?

17 Q. Yeah, currently pending.

18 A. No, sir.

19 (DEFT. EXH. 31, Gates at Williams-Brice
20 Deficiency Tracking List, July 20, 2013, GWB_004940
21 through 004948, was marked for identification.)

22 BY MR. NORTON:

23 Q. I've handed you what we marked as Exhibit 31.
24 Would you like to take a second to look through it?

25 A. Please.

41087101063

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SS Court of Appeals

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., 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., et al., ...

Appellants.

NOTICE OF APPEAL

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. (hereinafter "Appellants") timely appeal from two orders of the

Honorable G. Thomas Cooper in the above matter: (1) the Order filed July 18, 2014, Denying Dinerstein and OCIP Defendants' Motion for Non-Jury Trial and to Strike Plaintiffs' Class Action Allegations and Jury Trial Demand and (2) the Order Denying Defendants' Motion to Reconsider filed January 22, 2015. Copies of these orders are attached hereto. Appellant received written notice of the entry of the first of these orders on July 21, 2014, and received written notice of the second of these orders on January 28, 2015.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Howard A. VanDine, III, SC Bar No. 009818

E-Mail: howard.vandine@nelsonmullins.com

Erik T. Norton, SC Bar No. 73860

E-Mail: erik.norton@nelsonmullins.com

A. Mattison Bogan, SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Appellants.

Columbia, South Carolina.

January 29, 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

RICHLAND COUNTY
FILED
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JERAMIE W. HOBBS
C.C.P. & S.S.

SCANNED

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 Defendants¹ Motion for Non-Jury Trial and to Strike Plaintiffs² 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.

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

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:

Arbitration⁸

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 DEVELOPER, (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.

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 DDC⁹ 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) *SCRPC*, or a Motion to Strike pursuant to Rule 12(f), *SCRPC*, 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), *SCRPC* ("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), *SCRPC* (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. Wayburn 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

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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

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.

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 Waiver 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.*

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

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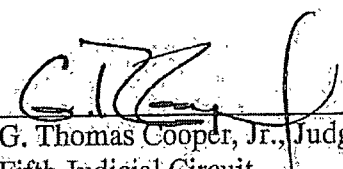
trial. Moreover, the waivers are ambiguous on their face — they are embedded under an “Alternative Dispute Resolution” Heading; they reference only “jury trial” in its caption; and they are written in boilerplate language undecipherable to an unsophisticated party. The waiver caption makes no reference 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.; Lovelless
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

2015 JAN 22 AM 8:58
ENTERED
C.C.P.

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 comes before the Court by way of defendants' 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. (collectively, "Moving Defendants") Motion to Reconsider its Order filed July 18, 2014. Specifically, pursuant to Rule 59(e), SCRCP, Moving Defendants ask the Court to Reconsider its Order Denying Moving Defendants' Motion for Non-Jury Trial and To Strike Class Action Allegations and Jury Trial Demand.

After 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 has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered.

This Court notes as an additional sustaining ground for its Order that Moving Defendants failed to provide a copy of their Motion To Reconsider to the undersigned within ten days of filing the Motion as Rule 59(g), SCRCP mandates.



For these reasons, this Court hereby **DENIES** Moving Defendants' Motion under Rule 59(e), SCRPC, 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 Court of Appeals

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., 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., et al., ...

Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins
Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served
all counsel in this action with a copy of the document(s) hereinbelow specified by
mailing a copy of the same by United States Mail, postage prepaid, to the following
address(es):

Document(s):

Notice of Appeal

RECEIVED

80 Court of Appeals

Counsel Served:

Justin O'Toole Lucey, Esq.
Stephanie D. Drawdy, Esq.
Justin O'Toole Lucey, P.A.
415 Mill Street
Mount Pleasant, SC 29464
jlucey@lucey-law.com
sdrawdy@lucey-law.com
(Attorneys for Plaintiffs)

Shelley Sunderman Montague, Esq.
Jessie Waller, Esq.
Gallivan, White & Boyd, PA
P. O. Box 7368
1201 Main Street, Suite 1200
Columbia, SC 29202
smontague@gwblawfirm.com
jwaller@gwblawfirm.com
(Attorneys for AAA Accurate Plumbing)

Emily Gifford, Esq.
1900 Barnwell Street
Columbia, SC 29201
EGifford@RichardsonPlowden.com
(Attorneys for Carolina Floor Systems, Inc.)

Christopher Adams, Esq.
Collins & Lacy, P. C.
1330 Lady Street, 6th Floor
Columbia, SC 29201
cadams@collinsandlacy.com
(Attorneys for HGE Consulting, Inc.)

Paul Greene, Esq.
Gallivan White & Boyd
One Liberty Square
55 Beattue Okace/ Suite 1200 (29601)
Post Office Box 10589
Greenville SC 29603
(Attorneys for Cross Plains Custom Tile)

Steve M. Pharr, Esq.
Leslie Sherrill, Esq.
Pharr Law, PLLC
8 W 3rd St # 600
Winston-Salem, NC 27101
spharr@pharrlaw.com
lsherrill@pharrlaw.com
(Attorneys for AWC Holding Company
Alenco Holding Corporation
Alenco Windows GA LLC
New Alenco Window Ltd)

Franklin J. Smith, Jr., Esq.
Richardson, Plowden, Carpenter &
Robinson, P.A.
1900 Barnwell Street
Columbia, SC 29201
fsmith@rpcrlaw.com
(Attorneys for SCA Engineers, Inc.)

Michael B. T. Wilkes, Esq.
Ellen S. Cheek, Esq.
Derek M. Newberry, Esq.
Wilkes Law Firm, P.A.
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
mwilkes@wilkeslaw.com
ec cheek@wilkeslaw.com
dnewberry@wilkeslaw.com
(Attorneys for Sinclair & Associates, Inc.)

William K. Luyties, Esq.
Lorance & Thompson, P.C.
2900 North Loop West, Suite 500
Houston, TX 77092
wkl@lorancethompson.com
(Attorneys for SCA Engineers, Inc.)

J. Ryan Oates, Esq.
Brent Boyd, Esq.
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, SC 29260
roates@murphygrantland.com
bboyd@murphygrantland.com
(Attorneys for Southwest Ironworks,
Inc.)

John Moylan, Esq.
Tally Parham Casey
Wyche, P.A.
801 Gervais St, Suite B
Columbia, SC 29201
jmoylan@wyche.com
tparham@wyche.com
(Attorneys for Southern Equipment
Company, Inc. d/b/a Ready Mixed
Concrete Company)

N. Ward Lambert, Esq.
Harper, Lambert & Brown, P.A.
P.O. Box 908
Greenville, SC 29602
wlambert@hlblegal.com
(Attorneys for Tindall Corporation)

Bradford W. Cranshaw, Esq.
Grier, Cox & Cranshaw, LLC
P.O. Box 2823
Columbia, SC 29202-2823
bcranshaw@griercoxcranshaw.com
(Attorneys for T & M Concrete, Inc.)

Josh Bennett, Esq.
Geoff Osborn, Esq.
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, South Carolina 29202-3200
Geoff.Osborn@rtt-law.com
josh.bennett@rtt-law.com
(Attorneys for Best Masonry and its
successor in interest, OldCastleAPG
Headwaters, Inc. d/b/a Best Masonry)

Jim Werner, Esq.
Olesya Vaskevich, Esq.
Parker Poe Adams & Bernstein, LLP
1201 Main Street
Suite 1450
Columbia, SC 29201
jimwerner@parkerpoe.com
olesyavaskevich@parkerpoe.com

Lisa S. Shumpert
Lisa S. Shumpert

January 29, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

FEB 03 2015

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

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 MetalFraming, Inc. n/k/a Clarkwestern
Dietrich Bilding Systems LLC; Best Masonry and its

successor in interest, OldCastleAPG, Headwaters, Inc.
d/b/a Best Masonry; and John Doe #1-10..... Defendants.

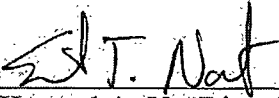
Of whom DDC Construction, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc., individually and improperly identified as d/b/a The Dinerstein Companies; DC Developers – Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; Associated Concrete Contractors, Inc.; Bailey Electric Company, 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.

AMENDED NOTICE OF APPEAL

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. (hereinafter "Appellants") timely appeal from two orders of the Honorable G. Thomas Cooper in the above matter: (1) the Order filed July 18, 2014,

Denying Dinerstein and OCIP Defendants' Motion for Non-Jury Trial and to Strike Plaintiffs' Class Action Allegations and Jury Trial Demand and (2) the Order Denying Defendants' Motion to Reconsider filed January 22, 2015. Copies of these orders are attached hereto. Appellant received written notice of the entry of the first of these orders on July 21, 2014, and received written notice of the second of these orders on January 28, 2015.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Howard A. VanDine, III, SC Bar No. 009818

E-Mail: howard.vandine@nelsonmullins.com

Erik T. Norton, SC Bar No. 73860

E-Mail: erik.norton@nelsonmullins.com

A. Mattison Bogan, SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Appellants.

Columbia, South Carolina
February 3, 2015

Other Counsel of Record:

Justin O'Toole Lucey, Esq.

Stephanie D. Drawdy, Esq.

Justin O'Toole Lucey, P.A.

415 Mill Street

Mount Pleasant, SC 29464

jlucey@lucey-law.com

sdrawdy@lucey-law.com

F: 843-849-8406

T: 843-849-8400

Attorneys for Respondents.

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,
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Plaintiffs,

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Condos, Inc.; Columbia Condos, LP; DMC
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Stucco, LP; Cross Plains Custom Tile, Inc.;
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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**

RICHLAND COUNTY
FILED
2014 JUL 18 AM 10:37
JEROME W. HERRICK
C.C.P. & G.S.

SCANNED

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 Defendants¹ Motion for Non-Jury Trial and to Strike Plaintiffs² 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.

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

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.

GZ 4

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:

Arbitration⁸

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 DEVELOPER, (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.

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 DDC⁹ 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) SCRPC, or a Motion to Strike pursuant to Rule 12(f), SCRPC, 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

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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.

1. 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

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.

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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.

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); *Alken 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 Waiver 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 Serys, 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.

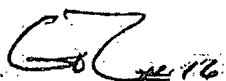
The South Carolina Court of Appeals in *Smith v. D.R. Horton*¹¹ recently affirmed a trial court's decision finding that an arbitration provision contained in a D.R. Horton purchase contract unconscionable and unenforceable due to the "cumulative effect" of one-sided provisions that riddled the purchase 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.*

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

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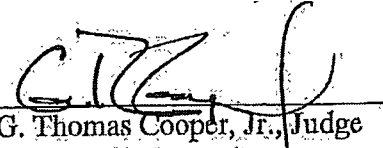
trial. Moreover, the waivers are ambiguous on their face – they are embedded under an “Alternative Dispute Resolution” Heading; they reference only “jury trial” in its caption; and they are written in boilerplate language undecipherable to an unsophisticated party. The waiver caption makes no reference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

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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 comes before the Court by way of defendants' 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. (collectively, "Moving Defendants") Motion to Reconsider its Order filed July 18, 2014. Specifically, pursuant to Rule 59(e), SCRCP, Moving Defendants ask the Court to Reconsider its Order Denying Moving Defendants' Motion for Non-Jury Trial and To Strike Class Action Allegations and Jury Trial Demand.

After 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 has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered.

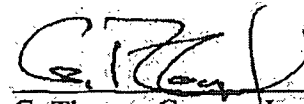
This Court notes as an additional sustaining ground for its Order that Moving Defendants failed to provide a copy of their Motion To Reconsider to the undersigned within ten days of filing the Motion as Rule 59(g), SCRCP mandates.



For these reasons, this Court hereby **DENIES** Moving Defendants' Motion under Rule 59(e), SCRPC, 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 Court of Appeals

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., 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., et al.,.....

Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins
Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served
all counsel in this action with a copy of the document(s) hereinbelow specified by
mailing a copy of the same by electronic mail, postage prepaid, to the following
address(es):

Document(s): Amended Notice of Appeal

Counsel Served:

Justin O'Toole Lucey, Esq.
Stephanie D. Drawdy, Esq.
Justin O'Toole Lucey, P.A.
415 Mill Street
Mount Pleasant, SC 29464
jlucey@lucey-law.com
sdrawdy@lucey-law.com
(Attorneys for Plaintiffs)

Shelley Sunderman Montague, Esq.
Jessie Waller, Esq.
Gallivan, White & Boyd, PA
P. O. Box 7368
1201 Main Street, Suite 1200
Columbia, SC 29202
smontague@gwblawfirm.com
jwaller@gwblawfirm.com
(Attorneys for AAA Accurate Plumbing)

Emily Gifford, Esq.
1900 Barnwell Street
Columbia, SC 29201
EGifford@RichardsonPlowden.com
(Attorneys for Carolina Floor Systems, Inc.)

Christopher Adams, Esq.
Collins & Lacy, P. C.
1330 Lady Street, 6th Floor
Columbia, SC 29201
cadams@collinsandlacy.com
(Attorneys for HGE Consulting, Inc.)

Paul Greene, Esq.
Gallivan White & Boyd
Post Office Box 10589
Greenville SC 29603
pgreene@gwblawfirm.com
(Attorneys for Cross Plains Custom Tile)

Steve M. Pharr, Esq.
Leslie Sherrill, Esq.
Pharr Law, PLLC
8 W 3rd St # 600
Winston-Salem, NC 27101
spharr@pharrlaw.com
lsheerrill@pharrlaw.com
(Attorneys for AWC Holding Company
Alenco Holding Corporation
Alenco Windows GA LLC
New Alenco Window Ltd)

Franklin J. Smith, Jr., Esq.
Richardson, Plowden, Carpenter &
Robinson, P.A.
1900 Barnwell Street
Columbia, SC 29201
fsmith@rpcrlaw.com
(Attorneys for SCA Engineers, Inc.)

Michael B. T. Wilkes, Esq.
Ellen S. Cheek, Esq.
Derek M. Newberry, Esq.
Wilkes Law Firm, P.A.
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
mwilkes@wilkeslaw.com
echeek@wilkeslaw.com
dnewberry@wilkeslaw.com
(Attorneys for Sinclair & Associates, Inc.)

William K. Luyties, Esq.
Lorance & Thompson, P.C.
2900 North Loop West, Suite 500
Houston, TX 77092
wkl@lorancethompson.com
(Attorneys for SCA Engineers, Inc.)

J. Ryan Oates, Esq.
Brent Boyd, Esq.
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, SC 29260
roates@murphygrantland.com
bboyd@murphygrantland.com
(Attorneys for Southwest Ironworks,
Inc.)

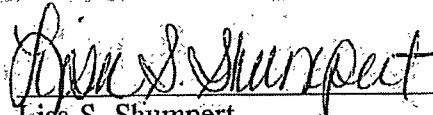
John Moylan, Esq.
Tally Parham Casey
Wyche, P.A.
801 Gervais St, Suite B
Columbia, SC 29201
jmoylan@wyche.com
tparham@wyche.com
(Attorneys for Southern Equipment
Company, Inc. d/b/a Ready Mixed
Concrete Company)

N. Ward Lambert, Esq.
Harper, Lambert & Brown, P.A.
P.O. Box 908
Greenville, SC 29602
wlambert@hlblegal.com
(Attorneys for Tindall Corporation)

Bradford W. Cranshaw, Esq.
Grier, Cox & Cranshaw, LLC
P. O. Box 2823
Columbia, SC 29202-2823
bcranshaw@griercoxcranshaw.com
(Attorneys for T & M Concrete, Inc.)

Josh Bennett, Esq.
Geoff Osborn, Esq.
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, South Carolina 29202-3200
Geoff.Osborn@rtt-law.com
josh.bennett@rtt-law.com
(Attorneys for Best Masonry and its
successor in interest, OldCastleAPG
Headwaters, Inc. d/b/a Best Masonry)

Jim Werner, Esq.
Olesya Vaskevich, Esq.
Parker Poe Adams & Bernstein, LLP
1201 Main Street
Suite 1450
Columbia, SC 29201
jimwerner@parkerpoe.com
olesyavaskevich@parkerpoe.com


Lisa S. Shumpert

February 3, 2015