

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Charleston County Master- in-Equity

Case No. 2011-CP-10-9513

Appellate Case No. 2014-002742

AMH-Ashley Marina, LLC, and AMH Management, LLC Appellants,

v.

The Harborage at Ashley Marina Horizontal
Property Regimes, The Harborage at Ashley
Marina Condominium Association, Eddie
McCoy, Stuart Reeves, Brian Swan, Rich
Cone, and Ed Miskotten, individually, ... Respondents.

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August 17, 2015

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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

AMH-ASHLEY MARINA, LLC and AMH
MANAGEMENT, LLC,)

Plaintiffs,)

vs.)

THE HARBORAGE AT ASHLEY
MARINA HORIZONTAL PROPERTY
REGIME, THE HARBORAGE AT
ASHLEY MARINA CONDOMINIUM
ASSOCIATION, and EDDIE MCCOY,
STUART REEVES, BRIAN SWAN, RICH
CONE, and ED MISKOTTEN, individually)

Defendants.)

BEFORE THE MASTER IN EQUITY
CASE NO. 2011-CP-10-9513

**ORDER DENYING PLAINTIFFS' MOTION
TO ALTER OR AMEND AND GRANTING
DEFENDANTS' MOTION FOR TAXATION
OF ATTORNEY'S FEES AND COSTS**

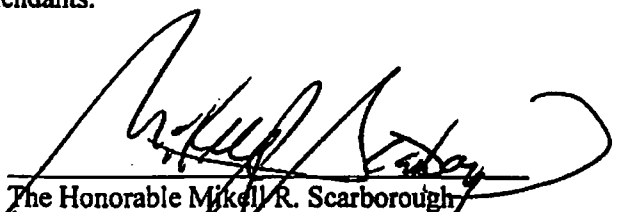
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JULIE J. ARMSTRONG
CLERK OF COURT
BY 

Before the Court are two post-trial motions: (1) Plaintiffs' Rule 59(e) motion to amend the Final Order, filed October 2, 2014; and (2) Defendants' motion for taxation of attorney's fees and costs against Plaintiffs, filed September 30, 2014. Having fully considered the motions, the arguments of counsel, and the applicable law, the Court rules as follows:

1. Plaintiffs' motion to alter or amend the Final Order is hereby DENIED.
2. The Court finds Defendants' motion establishes the right to recover reasonable attorney's fees and costs from the Plaintiffs and, therefore, GRANTS Defendants' motion in an amount to be determined. The determination of the amount of reasonable attorney's fees and costs to be taxed against Plaintiffs shall be stayed pending the outcome of any appeal in this action, or if no appeal is taken, upon request by Defendants.

IT IS SO ORDERED!

This 20 day of Nov, 2014
Charleston, SC 


The Honorable Mikel R. Scarborough
Charleston County Master-in-Equity

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

BEFORE THE MASTER IN EQUITY
CASE NO. 2011-CP-10-9513

AMH-ASHLEY MARINA, LLC and AMH)
MANAGEMENT, LLC,)

Plaintiffs,)

vs.)

THE HARBORAGE AT ASHLEY)
MARINA HORIZONTAL PROPERTY)
REGIME, THE HARBORAGE AT)
ASHLEY MARINA CONDOMINIUM)
ASSOCIATION, and EDDIE MCCOY,)
STUART REEVES, BRIAN SWAN, RICH)
CONE, and ED MISKOTTEN, individually)

Defendants.)

FINAL ORDER

FILED
2014 SEP 19 PM 4:08
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter is before the Court to determine whether a provision contained in a master deed grants the Plaintiffs a perpetual right to manage a condominium association's affairs and related claims. Having considered the entire record, stipulated facts,¹ depositions, exhibits, the Court's record, and applicable law, this Court finds and concludes no perpetual right exists, barring Plaintiffs' claims, and JUDGMENT is hereby entered for Defendants as set forth herein.

FACTS / BACKGROUND

The Harborage at Ashley Marina (the "Marina") is a horizontal property regime located in Charleston County. The Marina was developed pursuant to The Master Deed of The Harborage at Ashley Marina Real Property Regime, recorded April 29, 2005 (the "Master Deed"). (Jt. Exhibit 1). The Harborage at Ashley Marina Condominium Association, Inc. (the "Association") is the owners' association for the Marina. The individually named defendants

¹ The Court adopts the Joint Stipulation of Facts and Exhibits thereto submitted by the parties. The parties also submitted complete copies of all depositions taken in the case and exhibits thereto.

[Handwritten signature]

are members of the Association Board of Directors (the "Board") at times relevant to this action. (Jt. Stipulation, ¶¶ 1, 8, and 9).

AMH Ashley Marina, LLC ("Declarant") developed the Marina and is the Declarant under the Master Deed. It remains a member of the Association. On April 30, 2006, while under the Declarant's control, the Association entered into a contract with AMH Management, LLC, an affiliate of the Declarant, to manage the marina operations (the "2006 Agreement"). (Jt. Stipulation, ¶¶ 3, 10-13).

In December 2007, the Declarant turned over control of the Association to a Board comprised of members of the Association. In December of 2008, the Board notified AMH Management the 2006 Agreement would not be renewed after its expiration on April 29, 2009. The Board then initiated a request for proposals from potential managers to provide services from May 1, 2009 to April 30, 2010. (Jt. Stipulation, ¶¶ 16, 20; Jt. Exhibit 5, p. 210). AMH Management submitted a proposal, and in April of 2009, the Board entered into a new management agreement with AMH Management (the "2009 Agreement"). (Jt. Stipulation, ¶¶ 18, 21 Jt. Exhibit 4). The 2009 Agreement expanded the services previously provided by AMH Management to include management of the Association's affairs, in addition to overseeing the marina. The term of the agreement was for 18 months, with a single 12-month extension through December 31, 2011. (Compare Jt. Exhibit 2, Jt. Exhibit 4).

THE DISPUTE OVER PERPETUAL MANAGEMENT RIGHTS

Prior to the expiration of the 2009 Agreement, the Board again initiated a request for proposals for management services and invited AMH Management to participate. (Jt. Stipulation, ¶ 23; Complaint, ¶¶ 26, 27). This time, Plaintiffs claimed any attempt by the

Association to hire a manager that is not an affiliate of the Declarant violates the Master Deed and is prohibited. (Complaint, ¶ 30, Jt. Stipulation, ¶ 24).

Section 2.3 of the Master Deed provides as follows on the issue of management:

2.3 Agreements.

The Association will and hereby is authorized to enter into such contractual agreement, including without limitation, management contracts, as it may deem necessary or desirable for the administration of and operation of the Condominium and maintenance, repair, and replacement of the Common Elements, subject, however, to the following limitations:

(a) Property Manager; Agreement With Declarant Or Affiliate; Termination Only For Cause.

On or before the date of recording this Master Deed, the Declarant shall cause the Articles of Incorporation of the Association to be filed with the Secretary of State of South Carolina, the appointment of a Board of Directors and Officers of the Association to be made, the Bylaws to be ratified, confirmed and adopted, and an initial budget for the Association to be adopted. Additionally, the Association shall enter into an agreement for the management of the Condominium with the Declarant or an affiliate of the Declarant, which management agreement shall provide that it may be extended in the sole discretion of the "Manager" under said agreement and may not be terminated by the Association except in the event it is terminated by the Association for cause as a result of the Manager's gross negligence or criminal activity in the discharge of such management duties assigned to it under the management agreement.

(Jt. Exhibit 1, pp. 12-13) (emphasis added).

After the Association declined to enter into another contract with AMH Management, Plaintiffs commenced this action on December 22, 2011, nine days before the 2009 Agreement expired. (Complaint, ¶ 26). The Complaint seeks a declaration that under Section 2.3(a) of the Master Deed, the Plaintiffs have a right to continue to manage the Marina and the Association. (Complaint, Prayer for Relief, ¶ A). Plaintiffs further ask this Court to reform the 2009 Agreement to comport with Section 2.3(a) and assert claims for breach of contract, civil conspiracy, and injunctive relief. (Complaint). Defendants denied the material allegations and

asserted counterclaims seeking a declaration that: (i) the 2009 Management Agreement has expired and Plaintiffs have no rights arising thereunder, and (ii) the Plaintiffs have no perpetual management rights. Defendants also seek to enjoin Plaintiffs from interfering with the Association's efforts to hire with a manager of its choosing. (Answer and Counterclaims). The parties consented to a trial before the Charleston County Master-In-Equity.

LAW/ANALYSIS

"In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy." *Gardner v. Mazingo*, 293 S.C. 23, 358 S.E.2d 390 (1987) (emphasis added). The intention of the grantor must be found within the four corners of the deed. *Id.* The construction of a clear and unambiguous deed is a question of law for the court. *Id.* To the extent Plaintiffs' claim the entitlement to perpetual management is a covenant that runs with the land, the covenant must be strictly construed against the grantor and all persons seeking to enforce it, with all doubts resolved in favor of the free use of the property. *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006); *Hoffman v. Cohen*, 262 S.C. 71, 202 S.E.2d 363 (1974).

A. Section 2.3(a) of the Master Deed does not create a perpetual right to manage the Marina.

Section 2.3 is not, itself, a management contract. It contains none of the material terms necessary to the formation of a contract, such as the scope of the services to be rendered or the price to be paid. See *W.E. Gilbert & Associates v. SC Nat'l Bank*, 285 S.C. 421, 423, 330 S.E.2d 307 (Ct. App. 1985) ("In a contract for services two essential elements are the scope of the work to be performed and the amount of compensation."). Instead, Section 2.3 is a provision within the Master Deed that, if enforceable, mandates that the "Association shall enter into an agreement for the management of the Condominium with the Declarant or an affiliate of the

Declarant...." (Emphasis added). Thus, agreement as to the duties, scope of services, and rates of compensation, and other essential terms under the management agreement to be formed is left to future settlement between the parties. This is the fatal flaw in Plaintiffs' case.

South Carolina will not enforce a mere "agreement to agree." In *Fici v. Koon*, 372 S.C. 341, 347, 642 S.E.2d 602 (2007), the South Carolina Supreme Court found unenforceable an agreement to convey land where the boundaries of the property were to be determined based on an agreement to a subsequent survey. The Court explained, "The signed form contract dated February 27 is nothing more than an agreement to agree which is unenforceable under the Statute of Frauds." *Id.* (emphasis added). See also *Trident Constr. Co. v. Austin Co.*, 272 F.Supp. 2d 566, 575-76 (D.S.C. 2003) (finding no oral contract when the plaintiff alleged the defendant told it if the defendant won the bid to build an airplane hangar, it would give the plaintiff the supplier subcontract, because the parties never agreed on price). See also 1 Arthur L. Corbin, *Corbin on Contracts* § 2.8 (Joseph M. Perillo ed., rev. ed. 1993) ("If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called 'contract to make a contract' is not a contract at all.").

The cornerstone of whether an agreement creates a binding contract or is an "agreement to agree" rests upon whether the underlying agreement itself contains the requisite terms necessary to the formation of an enforceable contract. See *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 396 S.C. 338, 346-347, 721 S.E.2d 455 (Ct. App. 2011) ("Rather than focusing on whether the MOU calls for the parties to reach future agreements, the proper inquiry is to determine whether the MOU meets the elements of a contract."). See also *Farr v. Barnes Freight Lines, Inc.*, 97 Ga. App. 36, 37, 101 S.E.2d 906 (Ga. App. 1958) ("If any portion of the proposed terms is not settled, or no mode is agreed on by which it may be settled, there is no

agreement.”). Section 2.3 contains none of the essential terms necessary to the formation of a management agreement. Deposition testimony from Plaintiffs’ 30(b)(6) witnesses proves that future negotiations were required in order to finalize the terms of any agreement. For example, AMH’s Joe Miller testified:

... And we would certainly try and work with the Board and negotiate and discuss all the details. Anything that needed to be massaged or tweaked or changed, we would certainly have a back and forth discussion on. You know, scope of services, levels of insurance, you know, fees, numbers of employees, hours, you know, all those things were always subject to, you know, -- you know, the board -- its always their duty and right to set the terms of the management agreement within reason. And we’re going to – you know, we work for them [the Association]. So, it – this has to be a two way street.”

(Miller Depo., p. 24-25) (emphasis added). When asked what would happen if the Association and AMH Management reached an impasse in negotiating a particular term, such as compensation, Mr. Miller testified, “Well, I don’t know. I assume we would have to be reasonable and get things figured out.” (Miller Depo., p. 26). Bruce Wallace, who was involved in the negotiation of the 2009 Agreement for AMH Management, similarly testified that any management agreement would have to be renegotiated after the 2009 Agreement expired. (Wallace Depo., pp. 30-31). These facts underscore the conclusion that no enforceable agreement existed after December 31, 2011, when the 2009 Agreement expired. *Shealy v. Fowler*, 182 S.C. 81, 188 S.E. 499 (1936)(“If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking.”).

Section 2.3 merely provides that the Association will contract with the Declarant or its affiliate, leaving the essential terms of any purported agreement unresolved. In this way, it is nothing more than an unenforceable agreement to agree that cannot be relied upon as a basis to support Plaintiffs’ claims. *See, e.g., Ford Motor Co. v. Kahne*, 379 F. Supp. 2d 857, 869-871

(E.D. Mich. 2005) (finding unenforceable a services contract in light of certain material terms that were left open to subsequent agreement between the parties).

In their Complaint, Plaintiffs allege the right to manage is a valuable property right. (Complaint ¶ 29). This is a distinction is unavailing. First, the record does not support this conclusory allegation. Further, the evidence reveals Mr. Miller viewed the management right as an "economic" interest. (Miller Depo., p. 27; Depo. Exhibit 15). Regardless, an instrument affecting an interest in real property must, like all other contracts, contain the essential terms. South Carolina's Statute of Frauds specifically applies to "any contract or sale of lands, tenements or hereditaments or any interest in or concerning them[.]" S.C. Code Ann. 32-2-10(4) (emphasis added). See also *Cash v. Maddox*, 265 S.C. 480, 220 S.E.2d 121 (1975); *Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588 (1948). Thus, the outcome is the same either way.

The same logic applies to restrictive covenants, which not only are "contractual in nature" but are strictly construed against the grantor and all persons seeking to enforce them. *Hardy*, 369 S.C. 160, 631 S.E.2d 539; *Hoffman*, 262 S.C. 72, 202 S.E.2d 363. Restrictive covenants are Here, Section 2.3 is silent as to what services are required, for what price, and for how long. The Court resolves this ambiguity in favor of the Association and finds Section 2.3(a) does not create an enforceable perpetual management right.

Regardless of the Declarant's intent, Section 2.3 does not create or provide for a perpetual management right. It is, at best, an unenforceable agreement to agree. See *Gardner*, 293 S.C. 23, 358 S.E.2d 390 (noting the intention of the grantor must be ascertained and effectuated "unless that intention contravenes some well-settled rule of law or public policy") (emphasis added). For the reasons cited herein, and based upon the evidence in the record, this Court finds and concludes plaintiffs do not have an enforceable right to continue to manage the

Marina and the Association. The Court's ruling does not invalidate Section 2.3 of the Master Deed except as necessary to find that it does not allow for perpetual management rights.

B. The 2009 Agreement has expired and should not be reformed

Plaintiffs claim the 2009 Agreement should be reformed to comply with Section 2.3 of the Master Deed. (Complaint, ¶ 33). This claim under the 2009 Agreement is unavailing.

"Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties. It is available on the ground of [mutual] mistake or misunderstanding as well as duress and related misconduct." *Crewe v. Blackmon*, 289 S.C. 229, 234 (Ct. App. 1986) (internal quotations and citations omitted). The existence of a contradiction, alone, is not sufficient to warrant reformation, unless the contradiction is the result of a mutual mistake. *Id.* "To entitle the plaintiff to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he sought to have established and that this intention was frustrated, either from some fraud, accident, or mutual mistake of the parties." *Jumper v. Queen Mab Lumber Co.*, 115 S.C. 452 (S.C. 1921). Evidence of a mutual mistake must be shown by clear and convincing evidence." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 51 (S.C. 2013) (citing *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206 (Ct. App. 1987).

The Court finds there is no basis to reform the 2009 Agreement. First, the record fails to demonstrate the presence of a mutual mistake. On the contrary, Bruce Wallace testified the 2009 Agreement was the product of bilateral negotiations. (Wallace Depo., p. 25). In South Carolina "[w]here the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention." *McPherson v. J. E. Sirrine & Co.*, 206 S.C. 183, 204 (1945). The 2009 Agreement contains several references indicating it would have a limited duration. Paragraph 2 provides for the 18-month term and single extension. Paragraph 1 states:



"AMH agrees to provide the Association, for so long as this Agreement is in effect, full marina management support...." (Jt. Exhibit 4, p. 193) (emphasis added). The agreement also provides that had the Board determined not to grant the 12-month extension in any respect, "this [decision] will constitute a termination of this agreement in its entirety." (Jt. Exhibit 4, p. 194). Moreover, Paragraph 21 provides: "This Agreement constitutes the entire agreement pertaining to the subject matter hereof, and supersedes all prior oral and written agreements and understandings in connection herewith. No covenant, representation or condition not expressed in this Agreement will affect or be effective to interpret, change, or restrict the express provisions of this Agreement." (Jt. Exhibit 4, p. 199)(emphasis added).

Further, the evidence demonstrates the Association historically adhered to the termination language used in its two agreements with AMH Management, rather than focusing on Section 2.3. (Jt. Stipulation, ¶¶ 18, 20-22). For example the Association gave notice per its terms that it would not renew the 2006 Agreement. (Jt. Stipulation, ¶¶ 20, 21 Jt. Exhibit 2, p.180; Jt. Exhibit 5, p. 210). Thereafter, AMH Management was awarded the 2009 Agreement, which also provides for a limited term. Any ambiguity in the number of contract extensions the Declarant sought to reserve under Section 2.3(a) must be resolved in favor of Defendants. *See Hardy*, 369 S.C. 160, 631 S.E.2d 539; *Hoffman*, 262 S.C. 71, 202 S.E.2d 363 (strictly construing restrictive covenants against the grantor and all persons seeking to enforce them).

No matter what arguments Plaintiffs advance, the record falls short of the clear and convincing evidence standard required for the remedy of reformation. As such, the Court finds that the 2009 Agreement should not be re-written to provide AMH Management a right to infinite extensions that was not part of the negotiated agreement. *See e.g., York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 90 (Ct. App. 2013) ("South Carolina's general principle is that it is

not the function of the court to rewrite contracts for the parties.”) (internal citations and quotations omitted). *See also S. Atl. Fin. Servs.*, 356 S.C. 444, 447 (“Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly.”).

The Court finds and concludes that Plaintiffs are not entitled to reform the 2009 Agreement. Instead, Defendants are entitled to a finding that the 2009 Agreement has expired and its terms no longer have any force or effect.

C. Plaintiffs claim for breach of contract fails as matter of law

For the reasons set forth herein, Plaintiffs’ claim for breach of contract also fails. This Court finds and concludes that Section 2.3 lacks the terms necessary to form an existing contract and that the 2009 Agreement has expired. Accordingly, the Court finds the 2009 Agreement has not been breached, and judgment is hereby entered in favor of the Defendants.

D. Plaintiffs’ claims for civil conspiracy and injunctive relief fail as a matter of law

Having disposed of the Plaintiffs’ claims relative to its asserted management rights and the management contract, it logically follows that Plaintiffs have no viable claims for civil conspiracy or injunctive relief. Each of these claims necessarily relies upon the existence of a perpetual management right. Having found no such right exists and the 2009 Agreement has expired, these claims must fail.

E. Defendants’ counterclaims for declaratory judgment

For the reasons set forth herein, the Court finds and concludes that Defendants are entitled to a declaratory judgment finding that the 2009 Agreement has expired and Plaintiffs have no enforceable rights arising thereunder. As stated above, the Court also finds that Plaintiffs do not have an enforceable right to perpetually manage the Marina and the Association.



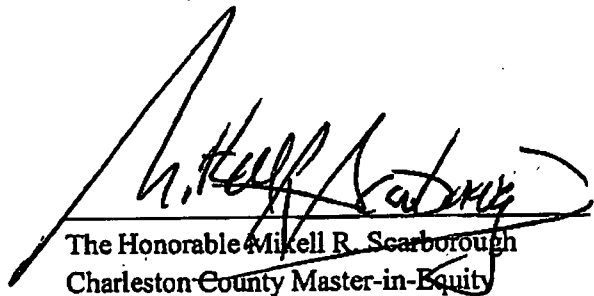
F. Defendants' claim for permanent injunction is not ripe

Defendants seek to enjoin Plaintiffs from interfering with the Association's efforts to enter into a contract with a manager of its choosing. During the pendency of this action, the Association has continued to employ AMH Management as its manager without waiver of either parties' legal rights. For this reason, the Court concludes Defendants' request for injunctive relief is not yet ripe, as it has not attempted to engaged a new manager during this litigation. This determination is without prejudice to Defendants' rights to seek injunctive relief hereafter if their efforts to hire and utilize a new manager are improperly frustrated by Plaintiffs.

NOW, THEREFORE this Court hereby enters JUDGMENT IN FAVOR OF DEFENDANTS, specifically finding as follows:

1. That Plaintiffs have no perpetual right to manage the Marina and the Association;
2. That the 2009 Agreement expired on December 31, 2011 and should not be reformed, and Plaintiffs have no enforceable rights thereunder subsequent to that date;
3. That Plaintiffs failed to establish a claim for breach of the 2009 Agreement;
4. That Plaintiffs claims for civil conspiracy and injunctive relief have not merit; and
5. That Defendants' request for injunctive relief is dismissed without prejudice for lack of ripeness;

IT IS SO ORDERED!


The Honorable Mikell R. Scarborough
Charleston County Master-in-Equity

Charleston, SC

This 18th day of Sept., 2014.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-10-9513

Plaintiffs,

V.

THE HARBORAGE AT ASHLEY MARINA HORIZONTAL PROPERTY REGIME, THE HARBORAGE AT ASHLEY MARINA CONDOMINIUM ASSOCIATION, AND EDDIE MCCOY, STUART REEVES, BRIAN SWAN, RICH CONE, AND ED MISKOTTEN, INDIVIDUALLY,

Defendants.

**ORDER CONDITIONALLY FINDING
PLAINTIFFS IN CONTEMPT**

FILED
2013 MAY 24 PM 2:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

On January 30, 2013, the parties referred this action to the Master in Equity for adjudication of all issues. This Matter is presently before the Court on Defendants' Motion seeking an order finding the Plaintiffs in contempt of court for a discovery violation. This Court issued a Rule to Show Cause, and a hearing on the matter was held on April 29, 2013. Edward K. Pritchard, III, Esquire, appeared on behalf of the Plaintiffs, and Michael A. Timbes, Esquire, appeared on behalf of the moving Defendants. This Court hereby finds Plaintiffs are in contempt of that certain Consent Order dated January 2, 2013, subject to the right of Plaintiffs to purge themselves of this finding of contempt as set forth herein.

BACKGROUND

Plaintiffs and Defendants are involved in a dispute arising under the applicable Master Deed for The Harborage at Ashley Marina Horizontal Property Regime, located in Charleston County, South Carolina. In the course of litigation, Defendants served written discovery requests

upon the Plaintiffs in the form of Interrogatories and Requests for Production of Documents, both dated May 11, 2012. After responses to these discovery devices were not forthcoming, Defendants filed a motion to compel, which motion was resolved pursuant to a Consent Order entered January 2, 2013. Pursuant to the Consent Order, Plaintiffs agreed, and were required, to fully respond to Defendants' discovery requests on or before January 23, 2013. After Plaintiffs failed to timely respond, Defendants filed a Petition for Rule to Show Cause dated February 12, 2013, claiming the Consent Order had been violated by Plaintiffs. On March 8, 2013, this Court ordered the Rule to Show Cause and set a hearing thereon.

FINDINGS AND CONCLUSIONS

It is undisputed that Plaintiffs have failed to provide responses to Defendants' Interrogatories and Requests for Production of Documents as required by the Consent Order. It is further undisputed that counsel for the Parties discharged their respective duties to meet and confer prior to the prosecution of the Rule to Show Cause. As such, this Court finds and concludes that Plaintiffs are in violation of the Consent Order dated January 2, 2013 and Plaintiffs are hereby held in contempt of court for said violation.

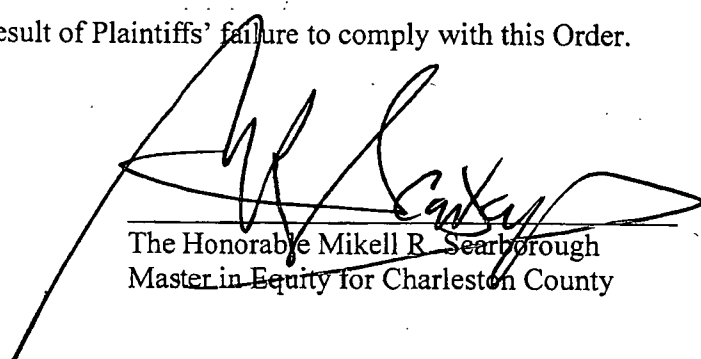
Although Plaintiffs are held in contempt, this Court is inclined to provide Plaintiffs with an opportunity to purge themselves of the contempt finding upon satisfaction of the following:

- (1) Plaintiffs shall immediately provide Defendants with all discoverable documents currently possessed by Plaintiffs' counsel; *and*
- (2) On or before June 10, 2013, Plaintiffs shall provide Defendants with full and complete answers to Defendants Interrogatories and Requests for Production dated May 11, 2012.

If Plaintiffs timely satisfy each of the foregoing requirements, Plaintiffs shall be relieved of the finding of contempt upon application to the Court. Should Plaintiffs fail to timely satisfy either of the foregoing requirements, this Court's finding of contempt shall stand and the following sanctions shall apply:

- (1) Plaintiffs shall fully respond to all outstanding Interrogatories and Requests for Production by June 25, 2013, and failure to do so shall result in further sanctions as this Court deems appropriate upon application by Defendants; and
- (2) Plaintiffs shall reimburse Defendants for all reasonable attorneys' fees incurred in connection with its Motion to Compel, the Consent Order dated January 2, 2013, the Petition for Rule to Show Cause and the prosecution thereof, and any additional and reasonable fees incurred as a result of Plaintiffs' failure to comply with this Order.

IT IS SO ORDERED!



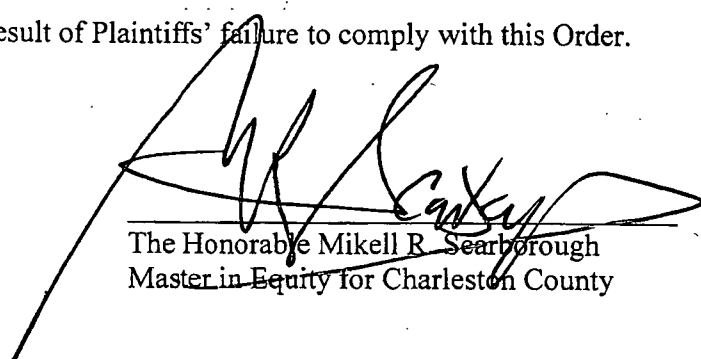
The Honorable Mikell R. Searborough
Master in Equity for Charleston County

This 14 day of May, 2013
Charleston, South Carolina

If Plaintiffs timely satisfy each of the foregoing requirements, Plaintiffs shall be relieved of the finding of contempt upon application to the Court. Should Plaintiffs fail to timely satisfy either of the foregoing requirements, this Court's finding of contempt shall stand and the following sanctions shall apply:

- (1) Plaintiffs shall fully respond to all outstanding Interrogatories and Requests for Production by June 25, 2013, and failure to do so shall result in further sanctions as this Court deems appropriate upon application by Defendants; and
- (2) Plaintiffs shall reimburse Defendants for all reasonable attorneys' fees incurred in connection with its Motion to Compel, the Consent Order dated January 2, 2013, the Petition for Rule to Show Cause and the prosecution thereof, and any additional and reasonable fees incurred as a result of Plaintiffs' failure to comply with this Order.

IT IS SO ORDERED!



The Honorable Mikell R. Searborough
Master in Equity for Charleston County

This 14 day of May, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
AMH-ASHLEY MARINA, LLC, and	)	Civil Action No. 2011-CP-10-_____
AMH MANAGEMENT, LLC,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	COMPLAINT
	)	(Jury Trial Demanded)
	)	
THE HARBORAGE AT ASHLEY	)	
MARINA HORIZONTAL PROPERTY	)	
REGIME, THE HARBORAGE AT	)	
ASHLEY MARINA CONDOMINIUM	)	
ASSOCIATION, and EDDIE MCCOY,	)	
STUART REEVES, BRIAN SWAN,	)	
RICH CONE, and ED MISKOTTEN,	)	
individually,	)	
_____	)	

FILED
2011 DEC 22 PM 4:29
JULIE J. ARYSTRONG
CLERK OF COURT
BY _____

Plaintiffs, AMH-Ashley Marina, LLC (hereinafter referred to as "AMH") and AMH Management, LLC (hereinafter individually referred to as "Management," would respectfully show unto the Court:

**FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)**

1. That Ashley is and at all times relative hereto was a South Carolina limited liability company doing business in Charleston County, South Carolina, with its principal place of business in Charleston County, South Carolina.

2. That Management is and at all times relative hereto was a South Carolina limited liability company doing business in Charleston County, South Carolina, with its principal place of business in Charleston County, South Carolina.

3. That AMH is and at all times relative hereto was a South Carolina limited liability company doing business in Charleston County, South Carolina, with its principal place of business in Charleston County, South Carolina.

4. That, on information and belief, Defendant, Eddie McCoy (hereinafter referred to as "McCoy"), is a citizen and resident of Charleston County, South Carolina.

5. That, on information and belief, Defendant, Stuart Reeves (hereinafter referred to as "Reeves"), is a citizen and resident of Charleston County, South Carolina.

6. That, on information and belief, Defendant, Brian Swan (hereinafter referred to as "Swan"), is a citizen and resident of Charleston County, South Carolina.

7. That, on information and belief, Defendant, Rich Cone (hereinafter referred to as "Cone"), is a citizen and resident of Charleston County, South Carolina.

8. That, on information and belief, Defendant, Ed Miskotten (hereinafter referred to as "Miskotten") is a citizen and resident of Charleston County, South Carolina.

9. That, on information and belief, The Harborage at Ashley Marina Horizontal Property Regime (hereinafter referred to as "The Harborage") is an unincorporated horizontal property regime existing under the South Carolina Horizontal Property Regime Act (hereinafter referred to as the "HPR Act") and has its principal place of business in Charleston County, South Carolina.

10. That, on information and belief, The Harborage at Ashley Marina Condominium Association (hereinafter referred to as the "Association") is an eleemosynary corporation organized and existing pursuant to the laws of the state of South Carolina and has its principal place of business in Charleston County, South Carolina.

11. That on April 29, 2005, Ashley executed the Master Deed of The Harborage at Ashley Marina Horizontal Property Regime, and recorded the same in the Office of the Register of Mesne Conveyance for Charleston County, South Carolina, on May 17, 2005, in Deed Book V-534, at page 308, a copy of which Master Deed is attached hereto as Exhibit I and incorporated herein by reference (hereinafter referred to as the "Master Deed").

12. That under the terms of the Master Deed, the property described in Exhibit "A" thereto was submitted to The Harborage.

13. That the Master Deed creates individual condominium units as defined therein, consisting of certain "wet slips" (hereinafter referred to as "Units" or, in the singular, "Unit") as well as common elements, as likewise defined therein (hereinafter referred to as "Common Elements").

14. That the Units were conveyed to various different persons, both natural and non-natural subsequent to the recording of the Master Deed.

15. That under the terms of the Master Deed, the Unit owners are the owners of the Common Elements.

16. That the Unit owners are the members of the Association.

17. That pursuant to Section 2.1 found on page 6 of the Master Deed, "[t]he administration of the . . . [the Harborage], maintenance, repair, and replacement of the Common Elements . . . [is] the responsibility of the Association. . . ."

18. That Section 2.3, found on pages 6 and 7 of the Master Deed, provides:

2.3 Agreements.

The Association will be and hereby is authorized to enter into such contractual arrangements, including without limitation, management contracts, as it may deem necessary or desirable for the administration and

operation of the Condominium and maintenance, repair, and replacement of the Common Elements, subject, however, to the following limitations:

(a) Property Manager: Agreement With Declarant Or Affiliate: Termination Only For Cause.

On or before the date of recording this Master Deed, the Declarant shall cause the Articles of Incorporation of the Association to be filed with the Secretary of State of South Carolina, the appointment of a Board of Directors and Officers of the Association to be made, the Bylaws to be ratified, confirmed and adopted, and an initial budget for the Association to be adopted. Additionally, the Association shall enter into an agreement for the management of the Condominium with the Declarant or an affiliate of the Declarant, which management agreement shall provide that it may be extended in the sole discretion of the 'Manager' under said agreement and may not be terminated by the Association except in the event it is terminated by the Association for cause as a result of the Manager's gross negligence or criminal activity in the discharge of such management duties assigned to it under the management agreement.

19. That as provided in Section 2.3(a), the Association's Articles of Incorporation were filed with the Secretary of State of South Carolina prior to the recording of the Master Deed, to-wit: April 27, 2005, and are attached to the Master Deed as Exhibit "D" thereto.

20. That a Board of Directors and officers of the Association were appointed prior to the recording of the Master Deed.

21. That By-Laws for the Association were adopted prior to the recording of the Master Deed, a copy of which By-Laws are attached to the Master Deed as Exhibit "E" thereto.

22. That an initial budget for the Association was adopted prior to the recording of the Master Deed.

23. That as provided in Section 2.3(a), the Association entered into an agreement for the management of the Harborage with Management, an affiliate of AMH.

24. That the management agreement between the Association and Management for the management of Harborage was subsequently renewed on April 30, 2009, a copy of which

written management agreement is attached hereto as Exhibit II and incorporated herein by reference (hereinafter referred to as the "2009 Management Agreement").

25. That, on information and belief, McCoy, Reeves, Swan, Cone and Miskotten constitute the current members of the Board of Directors of the Association.

26. That the current management agreement is set to expire at midnight on December 31, 2011.

27. That AMH and Management are informed and believe that the Association, acting through its Board of Directors, to-wit: McCoy, Reeves, Swan, Cone and Miskotten have entered into and/or intend to enter into a management agreement with an entity other than AMH or Management, which entity is not affiliated with AMH in violation of the Master Deed.

28. That AMH and Management are informed and believe that the actions of the Association into entering into an agreement for the management of the Harborage with an entity other than AMH and/or Management or an entity affiliated with AMH is in violation of Section 2.3(a) of the Master Deed.

29. That the right to manage the Harborage set forth in Section 2.3(a) of the Master Deed constitutes a valuable property right of AMH.

30. That AMH and Management are informed and believe that they are entitled to a judgment against Defendants declaring and upholding the terms of Section 2.3(a) of the Master Deed and declaring that any attempt to enter into a management agreement with any entity not affiliated with AMH is in violation of the Master Deed, and, therefore, not permitted.

**FOR A SECOND CAUSE OF ACTION
(Reformation)**

31. That each and every relevant and consistent allegation set forth in Paragraph 1 through Paragraph 30 herein above is incorporated herein as if fully set forth herein verbatim.

32. That the 2009 Management Agreement provides that it expired December 31, 2010, but provides for a twelve (12) month extension until December 31, 2011.

33. That the 2009 Management Agreement is in contradiction to the provisions of Section 2.3(a) of the Master Deed which is binding on all parties to this action.

34. That, on information and belief, the 2009 Management Agreement must be reformed to conform to the provisions of Section 2.3(a) of the Master Deed.

35. That, on information and belief, AMH and Management are entitled to an order of this Court reforming the 2009 Management Agreement to conform to the provisions of the Master Deed.

**FOR A THIRD CAUSE OF ACTION
(Breach of Contract)**

36. That each and every relevant and consistent allegation set forth in Paragraph 1 through Paragraph 35 herein above is incorporated herein as if fully set forth herein verbatim.

37. That AMH and Management are informed and believe that Defendants individually and/or collectively issued a request for proposals seeking bids from other management companies to manage the Harborage.

38. That AMH and Management are informed and believe that the Association, by and through McCoy, Reeves, Swan, Cone and Miskotten, have entered into or are in the process of entering into an agreement with someone other than AMH or an affiliate of AMH for the management of the Harborage.

39. That, on information and belief, entering into a management agreement with an entity other than AMH and/or Management constitutes a breach of contract.

40. That, on information and belief, as a direct and proximate consequence of the Association's breach of contract, AMH and/or Management are entitled to a judgment against

the Association and/or Harborage in an amount equal to all future management fees and all consequential damages flowing from the Association's and/or Harborage's breach of contract.

**FOR A FOURTH CAUSE OF ACTION
(Civil Conspiracy)**

41. That each and every relevant and consistent allegation set forth in Paragraph 1 through Paragraph 40 herein above is incorporated herein as if fully set forth herein verbatim.

42. That, on information and belief, McCoy, Reeves, Swan, Cone and Miskotten have combined for the purpose of injuring AMH and/or Management, thereby causing them special damages, specifically deprivation of AMH's and/or Management's rights under the Master Deed.

43. That the damages caused by the actions of McCoy, Reeves, Swan, Cone and Miskotten by virtue of their conspiracy are beyond the damages alleged in all of the causes of action herein.

44. That, on information and belief, by virtue of McCoy's, Reeves', Swan's, Cone's and Miskotten's conspiracy as set forth herein, AMH and/or Management are entitled to judgment against McCoy, Reeves, Swan, Cone and Miskotten, jointly and severally, in an amount equal to the damages suffered by AMH and/or Management as a result thereof.

**FOR A FIFTH CAUSE OF ACTION
(Permanent Injunction)**

45. That each and every relevant and consistent allegation set forth in Paragraph 1 through Paragraph 44 herein above is incorporated herein as if fully set forth herein verbatim.

46. That AMH and Management are informed and believe that they are entitled to an order from this Court permanently enjoining Defendants from violating the terms of the Master Deed.

WHEREFORE, Plaintiffs, AMH-Ashley Marina, LLC and AMH Management, LLC having complained of Defendants, The Harborage at Ashley Marina Horizontal Property Regime, The Harborage at Ashley Marina Condominium Association, and Eddie McCoy, Stuart Reeves, Brian Swan, Rich Cone and Ed Miskotten, individually, pray that this Court enter judgment in favor of Plaintiffs, AMH-Ashley Marina, LLC and AMH Management, LLC, as follows:

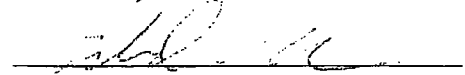
- A. For a declaratory judgment action declaring the rights of the parties under the Master Deed, specifically declaring that under Section 2.3(a) of the Master Deed, Plaintiffs, AMH-Ashley Marina, LLC and AMH Management, LLC, have a right to continue managing Defendant, The Harborage at Ashley Marina Horizontal Property Regime and the Harborage at Ashley Marina Condominium Association;
- B. For an order from the Court reforming the 2009 Management Agreement to conform with the Master Deed;
- C. For judgment against Defendants, The Harborage at Ashley Marina Horizontal Property Regime and the Harborage at Ashley Marina Condominium Association, as a direct and proximate result of their breach of contract;
- D. For a judgment against Defendants, Eddie McCoy, Stuart Reeves, Brian Swan, Rich Cone and Ed Miskotten, as a direct and proximate consequence of their civil conspiracy;
- E. For an injunction enjoining Defendants, The Harborage at Ashley Marina Horizontal Property Regime, The Harborage at Ashley Marina Condominium Association, Eddie McCoy, Stuart Reeves, Brian Swan, Rich Cone and Ed

Miskotten. from violating the terms of the Master Deed, specifically 2.3(a) thereof; and,

F. For such other and further relief as this Court deems just and proper.

Respectfully submitted,

PRITCHARD & ELLIOTT
129 Broad Street
Charleston, SC 29401
Phone: (843) 722-3300;
Fax: (843) 722-3379



Edward K. Pritchard, III
Attorneys for Plaintiffs

Charleston, South Carolina
December 22, 2011

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP-10-9513

AMH-ASHLEY MARINA, LLC and AMH
MANAGEMENT, LLC,

Plaintiffs,

vs.

THE HARBORAGE AT ASHLEY
MARINA HORIZONTAL PROPERTY
REGIME, THE HARBORAGE AT
ASHLEY MARINA CONDOMINIUM
ASSOCIATION, and EDDIE MCCOY,
STUART REEVES, BRIAN SWAN, RICH
CONE, and ED MISKOTTEN, individually

Defendants.

**DEFENDANTS' ANSWER AND
COUNTERCLAIMS TO THE
PLAINTIFFS' COMPLAINT**

(Jury Trial Demanded)

2012 FEB 22 11:11:51
JULIE J. ARAGSTROM
CLERK OF COURT

FILED

COME NOW the above-named Defendants, The Harborage at Ashley Marina Horizontal Property Regime, The Harborage at Ashley Marina Condominium Association, Eddie McCoy, Stuart Reeves, Brian Swan, Rich Cone, and Ed Miskotten, Individually (collectively "Defendants," except where individually referenced) and, fully answering the allegations of the Plaintiffs' Complaint, herewith allege and show unto this Honorable Court as follows:

ANSWER AND FIRST AFFIRMATIVE DEFENSE

For a first defense, Defendants respond to the specifically numbered paragraphs of the Plaintiffs' Complaint as follows:

1. Except as expressly admitted or qualified herein, Defendants deny each and every allegation of the Plaintiffs' Complaint and demand strict proof thereof.
2. Defendants cannot admit or deny the allegations of Paragraph 1 of the Plaintiffs' Complaint because the party "Ashley" is not defined in said Paragraph and, as such, is unknown

to Defendants. Defendants hereby move for a definite statement as to whom this allegation is directed.

3. Upon information and belief, Defendants admit the allegations of Paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the Plaintiffs' Complaint.

4. As to the allegations of Paragraph 11 of the Plaintiffs' Complaint, Defendants move for a more definite statement as to the identity of the party "Ashley" and further crave reference to the purported documents in Exhibit I, as no such Exhibit was attached to the Complaint. Subject to the foregoing, Defendants further respond and show that the applicable Master Deed documents for The Harborage at Ashley Marina Horizontal Property Regime on record with the Register of Mesne Conveyance for Charleston County, South Carolina speak for themselves and are the best evidence of their terms, content and meaning, if any. Defendants deny any interpretation inconsistent therewith.

5. As to the allegations of Paragraphs 12, 13, 14, and 15 of the Plaintiffs' Complaint, Defendants crave reference to the documents referenced therein and on file with the Register of Mesne Conveyance for Charleston County, South Carolina, which speak for themselves and are the best evidence of their terms, content and meaning, if any. Defendants deny any interpretation inconsistent therewith.

6. Defendants admit the allegations of Paragraph 16 of the Complaint upon information and belief.

7. As to the allegations of Paragraphs 17, 18 and 19 of the Plaintiffs' Complaint, including all subparts referenced therein, Defendants crave reference to the documents and materials referenced therein, which speak for themselves and are the best evidence of their terms, content and meaning, if any. Defendants deny any interpretation inconsistent therewith.

8. As to the allegations of Paragraphs 20, 21, and 22 of the Plaintiffs' Complaint, Defendants would show that the dates and records of the actions, appointments, adoptions and recordings described therein speak for themselves and are the best evidence of their terms contents and meaning, if any. Defendants deny any interpretation consistent therewith.

9. As to the allegations of Paragraph 23 of the Plaintiffs' Complaint, Defendants admit only so much as would show that a written contract for management services was entered into with AMH Management, LLC, which document speaks for itself and is the best evidence of its terms, content and meaning. Defendants deny any interpretation inconsistent therewith.

10. As to the allegations of Paragraph 24 of the Plaintiffs' Complaint, Defendants crave reference to the "2009 Management Agreement" purportedly attached as Exhibit II, as no such Exhibit was attached to the Complaint. Subject to the foregoing, Defendants generally admit that the contract for management services entered into between the association and AMH Management, LLC was renewed by mutual agreement. Defendants show that said agreement for management services, as extended, speaks for itself and is the best evidence of its terms, content and meaning.

11. Upon information and belief, Defendants admit the allegations of Paragraph 25 of the Plaintiffs' Complaint as of the time of answering.

12. As to the allegations of Paragraph 26 of the Plaintiffs' Complaint, Defendants would show that the contract for management services between the association and AMH Management, LLC, as extended, has expired.

13. As to the allegations of Paragraphs 27 of the Plaintiffs' Complaint, Defendants admit only so much as would show that the members of the Association have voted to authorize the hiring of a company other than AMH Management, LLC, whose contract has expired

pursuant to its terms, to perform various services. AMH Management, LLC and/or AMH-Ashley Marina, Inc., by and through its owners, officers, managers and agents have, upon information and belief, wrongfully and intentionally frustrated and interfered with all efforts to retain another company to perform such services. Except as admitted or qualified herein, the allegations of Paragraph 27 are denied.

14. Defendants deny the allegations of Paragraphs 28, 29 and 30 of the Plaintiffs' Complaint and demand strict proof thereof.

15. As to the allegations of Paragraph 31 of the Plaintiffs' Complaint, Defendants hereby incorporate the responses in each and every preceding Paragraph as if the same were set forth herein verbatim.

16. As to the allegations of Paragraph 32 of the Plaintiffs' Complaint, Defendants crave reference to the management agreement, as extended, referenced therein, which documents and materials speak for themselves and are the best evidence of their terms, content and meaning. Defendants deny any interpretation inconsistent therewith.

17. Defendants deny the allegations of Paragraphs 33, 34, and 35 of the Plaintiffs' Complaint and demand strict proof thereof. Defendants deny that the Plaintiffs are entitled to any remedy or form of relief prayed for in the Plaintiffs' Complaint.

18. As to the allegations of Paragraph 36 of the Plaintiffs' Complaint, Defendants hereby incorporate the responses in each and every preceding Paragraph as if the same were set forth herein verbatim.

19. As to the allegations of Paragraphs 37 of the Plaintiffs' Complaint, Defendants would show the board of directors, on behalf of the association members, requested bids from management companies, including, but not limited to, AMH Management, LLC to provide

management services following the expiration of the management services contract with AMH Management, LLC.

20. As to the allegations of Paragraph 38 of the Plaintiffs' Complaint, Defendants admit only so much as would show that the members of the Association have voted to authorize the hiring of a company other than AMH Management, LLC, whose contract has expired pursuant to its terms. AMH Management, LLC and/or AMH-Ashley Marina, Inc., by and through its owners, officers, managers and agents have, upon information and belief, wrongfully and intentionally frustrated and interfered with all efforts to retain another company to perform such services. Except as admitted or qualified herein, the allegations of Paragraph 38 are denied.

21. Defendants deny the allegations of Paragraphs 39 and 40 of the Plaintiffs' Complaint and demand strict proof thereof.

22. As to the allegations of Paragraph 41 of the Plaintiffs' Complaint, Defendants hereby incorporate the responses in each and every preceding paragraph as if the same were set forth herein verbatim.

23. Defendants deny the allegations of Paragraphs 42, 43, and 44 of the Plaintiffs' Complaint and demand strict proof thereof.

24. As to the allegations of Paragraph 45 of the Plaintiffs' Complaint, Defendants hereby incorporate the responses in each and every preceding paragraph as if the same were set forth herein verbatim.

25. No response is required to the allegations of Paragraph 46 of the Plaintiffs' Complaint, which call for a legal conclusion. Defendants respectfully refer all questions of law to the Court for determination. To the extent a response is deemed required, Defendants deny said allegations.

26. Defendants deny that the Plaintiffs are entitled to any remedy or form of relief prayed for in the Plaintiffs' Complaint, being all the remaining allegations thereof.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Freedom of Contract)

27. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

28. Plaintiffs, through this lawsuit, are attempting to force one or more of the Defendants to enter into a services contract, despite the fact that Plaintiffs have no contracts in place with any defendant, all prior contracts concerning any of the Defendants have expired, and Plaintiffs' demanded terms are unconscionable, impracticable, commercially unreasonable, and exorbitant in relation to other competitive bids for the same services.

29. Plaintiffs' claims are barred because they violate the constitutionally protected rights of freedom of contract.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Unconscionability)

30. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

31. The Plaintiffs' claims are barred because they require enforcement of one or more unconscionable contracts or one or more unconscionable clauses in said purported contract(s) or master deeds.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Duress)

32. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

33. Some or all of the Plaintiffs' claims are barred because one or more of the contracts or clauses in contracts were the product of duress.

34. Plaintiffs demand and have attempted to force one or more of the Defendants to enter into an agreement for management services upon terms that are so grossly disproportionate to the fair market value for said services that no person or entity would agree to such terms absent the exercise of such force and duress such that the affected parties are deprived of their right to freely choose.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Commercial Impracticability)

35. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

36. The alleged agreement(s) or master deeds, or severable provisions thereof, are unenforceable as the result of impracticability of performance. The terms demanded to be enforced by the Plaintiffs are so commercially unreasonable so as to render the purported agreements and terms thereof impracticable and unenforceable.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Breach of Covenants of Good Faith and Fair Dealing)

37. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

38. Implied in every contract are the covenants of good faith and fair dealing.

39. Plaintiffs, or either of them, violated the covenants of good faith and fair dealing arising under its management services agreement, which constitutes a material breach and bars any claimed enforceability thereof.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Estoppel)

40. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

41. Plaintiffs are equitably estopped from recovering under some or all of the claims alleged in the Complaint.

42. Plaintiffs freely and voluntarily negotiated and entered into one or more applicable and controlling agreements, the terms of which are dispositive of the matters alleged in the Complaint. One or both of the Plaintiffs are estopped to deny the material terms and conditions of the contracts to which they are or were bound, barring Plaintiffs claims.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Waiver and Release)

43. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

44. Some or all of Plaintiffs' claims are barred by waiver, as the Plaintiffs voluntarily, knowingly and willingly waived and/or released the alleged rights or interests that are at the heart of Plaintiffs' claims.

45. Having negotiated for and agreed to the very terms about which the Plaintiffs' complain, the Plaintiffs cannot, as a matter of law, recover.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Contract is Expired)

46. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

47. Some or all of Plaintiffs' claims are barred because the contract at the heart of Plaintiffs' claims expired per its terms, and no longer has any legal or operable effect.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Merger Clause - Entire Agreement)

48. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

49. Some or all of Plaintiffs' claims are barred because the matters set forth therein were subsumed by or excluded as a result of the merger clause in the applicable contract documents, which represents the entire agreement of the parties.

50. The merger provision expressly states that no covenant, representation, or condition not expressed in said agreement will affect or be effective to interpret, change or restrict the express provisions thereof. Plaintiffs, or either of them, bargained for and agreed to this provision.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Rule Against Perpetuities)

51. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

52. Some or all of Plaintiffs' claims are barred by the Rule Against Perpetuities.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Contract Fully Performed)

53. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

54. Some or all of Plaintiffs' claims are barred because all of the contractual matters about which they complain are fully performed, and no performance is outstanding or due from Defendants, or any of them.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Failure to State a Claim – Rule 12(b)(6))

55. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

56. Some or all of the Plaintiffs' causes of action fail to state a claim against the Defendants upon which relief can be granted, and, therefore, must be dismissed pursuant to Rule 12(b)(6), SCRCP.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Lack of Standing)

57. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

58. One or both of the Plaintiffs is not a real party in interest to the subject matter of this action, or certain claims asserted therein.

59. As such, one or both of the Plaintiffs lacks standing to assert the matters alleged in the Complaint.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Course of Conduct – Ratification)

60. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

61. One or more of the claims of the Plaintiffs must fail because the Plaintiffs, or either of them, engaged in a regular and deliberate course of conduct inconsistent with the allegations of the Complaint and impliedly or expressly ratified the terms and conditions about which the Plaintiffs complain.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Civil Conspiracy Claim Barred)

62. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

63. Any perceived correlation between the facts or circumstances alleged in the Complaint and these Defendants is the product of disconnected circumstances, barring any claim for civil conspiracy.

64. Responding further, Defendants have engaged in no concerted action with any persons or others as required to state a claim for civil conspiracy.

65. Plaintiffs cannot demonstrate any specialized damages that are beyond the damages alleged to exist under Plaintiffs' other causes of action, all of which are denied, which is a complete bar to Plaintiffs' claim of civil conspiracy.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Agents of Disclosed Principal)

66. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

67. The claims against Defendants Eddie McCoy, Stuart Reeves, Brian Swan, Rich Cone, and Ed Miskotten are barred as Plaintiffs dealt with these persons, if at all, as agents for a disclosed principal.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Ambiguity – Lack of Essential Terms)

68. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

69. The alleged agreement, or severable provisions thereof, is unenforceable as the result of latent or patent ambiguity.

70. In the alternative, one or more of the agreements or provisions of the purported agreements, contracts or master deeds lacks the essential terms necessary to create a binding obligation and, therefore, are unenforceable.

71. The master deed in question fails to set forth any reserved rights with sufficient particularity so as to permit the construction requested by the Plaintiffs, rendering the applicable provisions unenforceable.

FURTHER ANSWERING AND AS AN ADDITIONAL
AND AFFIRMATIVE DEFENSE
(Reformation Improper)

72. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

73. The contract for management services is not the product of any mutual mistake, but instead is the product negotiations freely and voluntarily undertaken and completed by the Plaintiffs, barring any claim for reformation.

**FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE
AND BY WAY OF COUNTERCLAIMS AGAINST THE PLAINTIFFS**

74. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

75. Plaintiffs are subject to the jurisdiction of this Court by reason of their commencement of this lawsuit in said jurisdiction and venue.

76. AMH Management, LLC entered into that certain agreement attached hereto as Exhibit A (the "Management Contract").

77. Pursuant to the Management Contract, AMH Management, LLC agreed to provide various management services, in exchange for fee, subject to the terms thereof.

78. The Management Contract was executed on April 20, 2009.

79. The Management Contract, in the form attached as **Exhibit A** hereto, constituted the "Entire Agreement" of the parties to that agreement, as stated in Paragraph 21 thereof.

80. The Term of the Management Contract was for a period of 18 months, effective on April 30, 2009, and expiring on December 31, 2010.

81. The Management Contract provided for one (1) twelve (12) month extension after the agreement's original expiration on December 31, 2010, which extension was to be at the discretion of the Board of Directors for the Harborage.

82. The Board of Directors agreed to extend the term of the Management Contract for twelve months, extending the expiration date of the Management Contract to December 31, 2011.

83. Prior to the expiration of the extended term of the Management Contract, Plaintiffs knew and were informed that requests for proposals for the management services would be sought.

84. Plaintiffs failed and refused to participate in the bid for the work. Instead, one or both of the Plaintiffs insisted that it had a perpetual contractual right to provide the management services, notwithstanding the clear and unambiguous language of the Management Contract. Plaintiffs informed one or more of the Defendants that it would insist on continuing to perform the management services work. Further, the price Plaintiffs indicated it would then charge an increased rate for the same services it previously provided, which price was exorbitant and commercially unreasonable.

85. The association of members of the Harborage, by and through its Board of Directors, then requested and received competitive bids. The bids further revealed the excessiveness of the charges demanded by Plaintiffs.

86. The Association, by and through its Board of Directors, desires to enter into an agreement with another company to provide the management services now that the Management Contract has expired by its own terms and in light of the fact that the new terms proposed by Plaintiffs are commercially unreasonable.

87. Plaintiffs have, upon information and belief, threatened that they will interfere with any efforts by Defendants to enter into a new agreement.

FOR A FIRST CAUSE OF ACTION AND COUNTERCLAIM
(Declaratory Judgment)

88. Defendants incorporate and re-allege the preceding paragraphs as if fully set forth herein verbatim.

89. Defendant's claims are brought pursuant to, *inter alia*, the applicable provisions of the South Carolina Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10, *et seq.*, as amended, to determine, among other things, the rights, title, and interests of the parties in and to the Management Contract.

90. The matters in controversy involve the provision of services pursuant to a contract, not any substantive property rights.

91. The management services contract is or was to be performed in Charleston County, South Carolina.

92. A real, actual and justiciable controversy exists as between Defendants and Plaintiffs, or some of them, as alleged herein in that there is a question as to the parties' rights under the management services agreement in question.

93. All parties who have or may claim an interest in and to the controversies before this Court have been named above as parties to this action.

94. Defendants seek and are entitled to a judgment from this Court declaring that the Management Contract, as extended, has expired pursuant to its terms, and Plaintiffs have no rights arising thereunder.

95. Defendants further seek and are entitled to a judgment from this Court that Plaintiffs have no right to perpetually provide management services for the Harborage.

96. Defendants further seek a judgment from this Court that Plaintiffs have no rights under the master deed to force Defendants, or any of them, to enter into a contract with them for management services.

97. In the alternative, Defendants further seek and are entitled to a judgment from this Court that Plaintiffs have no rights under the master deed to force Defendants, or any of them, to enter into a contract for management services for the Harborage where the terms of said contract are not consistent with fair market value for services of like kind.

FOR A SECOND CAUSE OF ACTION AND COUNTERCLAIM
(Permanent injunction)

98. Defendants incorporate and re-alleges the preceding paragraphs as if fully set forth herein verbatim.

99. Plaintiffs have, upon information and belief, interfered with and threatened to interfere with any effort to contract for management services unless said contract is with AHM Management, LLC, whose rights have expired.

100. Plaintiffs are trying to force the association to re-hire it to perform management services after its contract expired pursuant to its terms.

101. Such interference deprives the association of members at the Harborage and those acting on its behalf of their valuable right of freedom of contract.

102. The competitive proposals given to the association of members in response to its Board of Directors' requests for proposals offer substantial cost savings, which are important and valuable.

103. Plaintiffs' conduct in interfering with the association's efforts to execute an agreement with a competitor of the Plaintiffs is and will continue to cause the association substantial damages.

104. Plaintiffs conduct in interfering with the performance of the management services from any other entity is intentional.

105. Defendants seek and are entitled to a temporary and permanent injunction from the Court prohibiting Plaintiffs or their agents from interfering with any efforts to enter into a new contract of management services.

106. Defendants further seek and are entitled to a temporary and permanent injunction prohibiting the Plaintiffs or their agents from performing and claiming an interest in performing any of the management services articulated in its expired contract without first having obtained the express consent of the Defendants.

WHEREFORE, Defendants request that this Honorable Court inquire into the matters set forth herein and enter a judgment as follows:

(a) That the Plaintiffs' Complaint be dismissed in its entirety as to Defendants, with prejudice, with a finding that the Plaintiff take nothing and receive no benefit thereunder; or

(b) That this matter be tried before a jury of Defendants' peers; and

(c) That judgment be entered against the Plaintiffs and in favor of Defendants as to each and every claim or cause of action alleged in the Plaintiffs' Complaint; and

(d) That judgment be entered against the Plaintiffs and in favor of Defendants as to any and all forms or relief requested in the Complaint; and

(e) That judgment be entered against the Plaintiffs and in favor of Plaintiffs on each of the Counterclaims set forth herein; and

(f) That Defendants shall recover from the Plaintiffs all attorney's fees, costs, and expenses to investigate and defend this action as provided for in the parties' contract(s); and

(g) That Defendants shall be awarded such other and further relief as this Court deems just equitable and proper.

Respectfully submitted,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

By: 

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Attorneys for the Defendants

This 20th day of February 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

AMH-Ashley Marina, LLC and AMH Management, LLC,
Plaintiff,

vs. CASE NO. 2011-CP-10-9513

The Harborage at Ashley Marina Horizontal Property
Regime, The Harborage at Ashley Marina Condominium
Association and Eddie McCoy, Stuart Reeves, Brian
Swan, Rich Cone, and Ed Miskotten, individually

Defendants.

Hearing before the Honorable Mikell R.
Scarborough, reported by Christine A. Smith, Court
Reporter and Notary Public, at 10:27 a.m. on November
20, 2014 at 100 Broad Street, Courtroom 2A,
Charleston, South Carolina.

COPY

CHRISTINE A. SMITH, Court Reporter

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13
14 (INDEX AT REAR OF TRANSCRIPT)
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P R O C E E D I N G S

MR. PRITCHARD: Your Honor, you've issued a horrendous order, and I've come to help you fix it.

THE COURT: Okay.

MR. PRITCHARD: Let me give you a two-second background. AMH Ashley Marina developed the dockiminiums over there.

(Off-the-record conference.)

MR. PRITCHARD: Ashley Marina developed a dockiminium over there, right there by the James Island Connector, not the City marina but the other one. In the process they put together a Master Deed that revolved around the dockiminiums. In the Master Deed they put the following provision on here. It says -- it's reported in your order -- on or before the date of the recording of this Master Deed the deferential call of the Articles of Incorporation, the Association, meaning the Homeowners' Association, is to be filed with the Secretary of State, the appointment of a Board of Directors, and the officers of the Association be made, the bylaws, be ratified, confirmed, adopted in the initial budget for the Association to be adopted.

Then it goes on to say, Additionally, the

1 Association shall enter into an agreement for the
2 management of the condominium with deferent or an
3 affiliate of deferent which management agreement
4 shall provide and it may be extended in the sole
5 discretion of the manager under said agreement and
6 may not be terminated by the Association except in
7 the event it is terminated by the Association for
8 cause as a result of the manager's gross negligence
9 or criminal activity in the discharge of such
10 management duties assigned to another management
11 agreement.

12 That's in the Master Deed, which the developer
13 transferred when they filed the declaration. Also on
14 the other side of that equation at that point was the
15 same person. So the intent really is going to be
16 difficult to assail because the same person that gave
17 it is the same person that received it at that point
18 in time.

19 So the successors in interest, the subsequent
20 association, they take subject to whatever agreement
21 was in place when it came down there, whenever the
22 Master Deed came down there. Now, the sole question
23 before you at this point in the game --

24 THE COURT: The argument being its perpetual
25 management? Perpetual?

1 MR. PRITCHARD: Yes.

2 THE COURT: There's a rule against that
3 perpetuity; is there not?

4 MR. PRITCHARD: Not necessarily. That's not
5 really where your ruling is here. The sole question
6 right now before you is, does that Master Deed grant
7 a perpetual right to manage. Now, in your analysis,
8 in your order -- and I'm shocked that Spencer let
9 this get through -- is that you can't enter an
10 agreement to enter into an agreement. In other
11 words, you can't contract to contract. I agree with
12 that principal of law. The problem is, this isn't a
13 question of contract law. This is a question of
14 property law.

15 THE COURT: From which the rule against
16 perpetuity arises, correct?

17 MR. PRITCHARD: Well, because you've got
18 entities. I mean, these are 21 years, and it's still
19 there.

20 THE COURT: Okay.

21 MR. PRITCHARD: They're still in effect. They
22 were in effect at the time.

23 THE COURT: Keep going.

24 MR. PRITCHARD: You don't even mention the
25 rule against perpetuities in here. If you did we

1 would have a different argument at this point. This
2 order discusses contract. This is not a contractual
3 case. This is a property case. If this order stands
4 you're going to get some amicus briefs because the
5 whole development of the upper part of the peninsula
6 is premised on this very idea.

7 All of these condominiums that are being
8 developed by Gray Stern when they sell under these
9 they hold back the right to manage in --

10 THE COURT: -- in perpetuity?

11 MR. PRITCHARD: Yes. In the Master Deed. So
12 it's going to wreak havoc if this stands. If this
13 order stands it's going to cause some problems. So I
14 think you've to go back and we've got to reconsider
15 this on property grounds, not contractual grounds.
16 This is not a contractual issue.

17 Now, the point -- if you have to set the
18 management terms in the Master Deed, i.e. the
19 compensation, et cetera and so forth, that's really
20 an unrealistic idea. The reason is this: -- well
21 first off, let me back up on the perpetuity issue.
22 Restrictive covenants in perpetuity. Any restrictive
23 covenant is in perpetuity. It doesn't violate the
24 rule against perpetuity. This is all this is in a
25 way. It's just another form of restrictive covenant.

1 So I challenge you on the rule against perpetuity
2 question.

3 THE COURT: Okay.

4 MR. PRITCHARD: Secondly, if we were to put
5 down the compensation rate and all that and the other
6 into the Master Deed it really is an unrealistic idea
7 because the situation is going to change over time.
8 It might be that at times they need eight dockhands.
9 There might be times when they need two dockhands.
10 Things are going to change over time and it needs to
11 be revisited over time, i.e. the actual terms, the
12 compensation, the amount of service given them needs
13 to be revisited over and over and over again at set
14 intervals.

15 That was the idea contemplated in this, that
16 they would have a right to manage, but what level of
17 management was delivered was based on what level of
18 management was needed and they would have those
19 discussions and they would reopen those every few
20 years because there's no point in putting eight
21 dockhands out there if they only needed two and
22 charging them for eight dockhands while six of them
23 sleep. That's not fair to the homeowners'
24 association.

25 Conversely if they need eight but they're only

1 paying for two it's not fair to the manager to have
2 to provide eight at the cost of two. So you would
3 revisit that so that you could deal with
4 circumstances on the ground and look forward. I
5 don't think you can defeat the property right, and
6 you addressed it as a matter of contractual right,
7 and I think that was just blatantly wrong. Spencer
8 let it get through.

9 THE COURT: What would happen in the event --
10 let's just talk about this -- what happens in the
11 event the manager just flat out goes out of business?
12 Is that provided for?

13 MR. PRITCHARD: Yes, it is actually. That's
14 not been raised by them. We would have a different
15 case if it had. It says as a result, the gross
16 negligence or criminal activity and the discharge of
17 such management duties.

18 I would think that if you went out of business
19 you would make a good argument that there's gross
20 negligence, that they just didn't even show up. That
21 would be a gross negligence cause.

22 THE COURT: What were those two? Gross
23 negligence and what?

24 MR. PRITCHARD: Criminal activity. If we were
25 stealing from them or something like that they would

1 have every right to terminate, I think, and that's
2 what's called for.

3 (Off-the-record conference.)

4 THE COURT: Mr. Timbes?

5 MR. TIMBES: Thank you, Judge. Michael Timbes
6 on behalf of the Defendants in this case.
7 Procedurally, I do want to not be remiss in
8 mentioning -- these are the first arguments the
9 Plaintiffs have advanced in this case. There's been
10 no pretrial brief submitted. There were no proposed
11 orders submitted, and the law is pretty set in that
12 you cannot raise arguments for the first time via a
13 Rule 59 motion. This is a Motion to Reconsider not
14 to consider.

15 Aside from that a technical reason -- there's
16 really no need to upset the ruling. First off, I
17 don't agree that this is a property issue just
18 because it's contained in the form of a restrictive
19 covenant. The law is well settled that restrictive
20 covenants are contractual in nature.

21 I've cited cases in my pretrial briefs and in
22 our post orders and in your order, Your Honor, to
23 that effect. Secondly, restrictive covenants are
24 going to be construed against the grantor when there
25 is a scenario -- when you have a limitation on the

1 right to the free use of property, which is exactly
2 what they're saying here. We control who you can and
3 cannot hire as a manager, not you guys -- textbook
4 following within that explanation of the case law.
5 We don't have to get into this analysis over property
6 interests.

7 Secondly, the record doesn't even reflect
8 that. It is alleged in the Complaint. So if you
9 look into the depositions that are submitted and the
10 paperwork that's been provided along with those
11 depositions and the joint submission of facts,
12 Joe Miller, the developer, the president, and the
13 manager of all these entities very clearly testifies
14 that his is an economic interest that he was
15 reserving, not a property right.

16 So merely alleging something in a Complaint
17 without supporting it somewhere in the record does
18 not pass the bar. So in so far as this idea that we
19 ignore this contract scenario -- Judge, if I may, I'm
20 going to pass up a case here.

21 The case really pertains to my Motion for
22 Attorney's Fees, and in it there just happens to be
23 language. This is, by the way, one of your cases
24 that the Court of Appeals says you got right.

25 THE COURT: I'm familiar with Mr. Berger.

1 MR. TIMBES: The first line of this case --

2 THE COURT: Thankfully Mr. Miller is not
3 Mr. Berger, but --

4 MR. TIMBES: What is interesting is -- this is
5 from Head Note II of -- this is Seabrook Island
6 Property Owners versus Berger. It says, restrictive
7 covenants are contractual in nature. It says -- it
8 cites several cases and gives a parenthetical,
9 restrictive covenants are contractual in nature and
10 bind the parties thereto in the same manner as any
11 other contract.

12 So when we review the Master Deed and all it
13 states is that the parties to wit -- whether they be
14 the owners, the Association, or the managers it
15 represents shall enter into a contract. It's
16 contemplating a future event. When it describes --
17 you know, the standard of gross negligence or
18 criminal activity that could cause grounds for
19 termination it says, In the discharge of such
20 management duties as are assigned to it under that
21 management agreement. There's no indication of
22 compensation. There's no indication of what the
23 duties are, or what they are limited to.

24 So you don't have any material term that is
25 necessary to the formation of the services agreement

1 spelled out into the -- it's spelled out in the
2 Master Deed. That kind of begged the question -- so
3 what if you decide that this is enforceable? Then
4 what? How do we sit these two parties down and say
5 enter into a contract? You can't make them. The
6 Court can't make them. Courts don't create
7 contracts. That's the very reason behind the rule
8 that you can't have a contract to enter into a future
9 contract.

10 So that's the end of the analysis. I do want
11 to procedurally point out, that that's the only issue
12 that they've raised and by virtue of Rule 59, all the
13 other causes of action have been left alone. Those
14 aren't before you today.

15 I do want to make one final point about this
16 contract issue. If we look back in time, setting
17 aside the issue of the unenforceability of Section
18 2.3, they actually did enter into a contract. They
19 entered into two as a matter of fact.

20 So what Section 2.3 required them to do they
21 did. They signed -- I might have the dates wrong. I
22 believe it's a 2006 agreement, that agreement which
23 was prepared, as is just indicated, dealt with
24 themselves -- the manager and the association at the
25 time -- it was controlled by the manager. They dealt

1 with themselves. They built in termination
2 provisions to their own contract. When that contract
3 was subsequently amended it was prepared by the
4 Association, I mean by the manager. That's in the
5 depositions that were part of this record.

6 Again, they built in termination provisions to
7 it, so the manager controlled the very termination
8 provisions that have now come. They've expired.
9 That's the end of it.

10 He could have put the language in there. So
11 it's not a situation where the Association pulled a
12 gotcha. The contracts that this contemplates were
13 entered into. They were entered into on terms that
14 were mutually negotiated and they expired by their
15 own terms. Even if this was enforceable it's been
16 performed. In light of the arguments that we have
17 made throughout this case, and in light of hearing
18 arguments for the first time today, there's really no
19 basis to reconsider the ruling that's been entered,
20 Your Honor.

21 THE COURT: Very good.

22 MR. PRITCHARD: Let me address the 59(e) scope
23 first. On Page 7 at the top of the first paragraph
24 you state clearly, In their Complaint Plaintiffs
25 allege the right to manage is a valuable property

1 right. If that's not an argument I don't know what
2 is. You acknowledge that it was arguable right
3 there. Then it goes on to say, This distinction is
4 unavailable.

5 Now, I appreciate Mr. Timbes bringing the
6 Seabrook Island Property Owner's Association versus
7 Berger up. I failed to do that in my initial
8 argument because it, in fact, supports my right to
9 perpetually manage. You see, in every Master Deed
10 probably that comes before you it says, reasonable
11 attorney fees, doesn't it? Because we don't know
12 eight years from now, six years from now, two years
13 from now, point four years from now what the
14 prevailing attorney fee rate is going to be in
15 Charleston County. That's why we don't put at \$212
16 per hour and three hours because we don't know how
17 long it's going to take the attorney; we don't know
18 what all is going to be involved; we don't know what
19 the prevailing rate is going to be; et cetera and so
20 forth.

21 So if this case affirms you, it is basically
22 saying the right to manage also has to be dealt with
23 as circumstances change because we don't know what
24 the going rate for management is. We don't know what
25 level of service they're going to need, et cetera,

1 and so forth.

2 So if you take this ruling, it's going have to
3 start vacating these reasonable attorney fee
4 provisions because you don't have the terms in there.
5 You don't have the amounts in there. I can't sit
6 there with a Master Deed right now and tell you
7 exactly what that attorney fee is going to be based
8 on any formula nine years from now.

9 So this is exactly the argument that we're
10 making that you were affirmed on in Seabrook Island
11 versus Berger.. That's exactly what we've got here.
12 We've got to go back and revisit this every so often
13 to ascertain what the fair rate is, and to ascertain
14 what level of service they need under the
15 circumstances.

16 It may be that they need half as many boats
17 parked there in two years in which case they're just
18 not going to need that same level of service. You're
19 not going to need the trash emptied as often, et
20 cetera and so forth. Why should they have to pay for
21 a full marina if they only have half a marina.

22 Consequently, why should we be paying for
23 managing half a marina if we have to service a full
24 marina? That's the whole idea behind this.
25 Candidly, you --

1 THE COURT: Well, you get into sort of the
2 substance of it, but aren't you -- what they charge
3 would be negotiable, correct?

4 MR. PRITCHARD: Yes.

5 THE COURT: But who they decide to contract
6 with is what this is all about; is it not?

7 MR. PRITCHARD: That is.

8 THE COURT: Well, I just don't think that
9 that's a viable argument. Okay?

10 MR. PRITCHARD: Okay. That's what's going on
11 on Meeting Street like crazy.

12 THE COURT: They can keep trying it, but I'm
13 going to say this -- it's like being a good parent.
14 You try to be consistent. So I've already ruled
15 against one of these arguments on Johns Island. I'm
16 going to rule against it at the Harborage and if the
17 ones come before me on the Peninsula.

18 There's certain time periods with which they
19 are clearly manifested with the intent, but once the
20 declarant has turned over the right to manage the
21 property to a homeowners' association I see no reason
22 under contract law or Constitutional law as to why
23 they should be able to choose who they want to
24 contract with.

25 MR. PRITCHARD: Well, under what provision of

1 contract law because it seems to me -- I mean
2 Constitutional law? It seems to me that the
3 Constitution requires that if you've got property it
4 can't be abrogated by the State without due
5 compensation.

6 THE COURT: I guess that's where you-all are
7 going to take this argument to somebody who gets paid
8 higher than I do. All right?

9 MR. PRITCHARD: All right.

10 THE COURT: Very good. I'm going to deny the
11 motion then. Are you seeking attorney's fees as
12 well? What are you seeking?

13 MR. TIMBES: We did file a Motion for
14 Attorney's Fees. There is a contract between the
15 parties that provides for it. That's the basis as
16 far as the legal reason.

17 MR. PRITCHARD: Why shouldn't that be
18 suspended under the same reasoning?

19 MR. TIMBES: I'm going to make this real easy
20 for you, Judge.

21 THE COURT: Okay.

22 MR. TIMBES: We can go forward on this. It
23 doesn't upset the apple cart on your ruling on this
24 because Jackson versus Speed tells us six factors to
25 consider whether attorney's fees are reasonable. I

1 don't think there's a case out there that gives us
2 six or ten or 12 factors on how a management contract
3 should be negotiated with an HOA. I don't want to go
4 there.

5 The ruling -- the reason why I handed you up
6 the Seabrook Island versus Berger case is I'm just
7 going to ask you to follow the same blueprint. In
8 that case Judge Young first, as a result of being the
9 prevailing party said that Seabrook Island was
10 entitled to a grant of attorney's fees.

11 In anticipation of there being an appeal he
12 stated the amount would be determined at a later
13 time, and then he stayed the determination until the
14 appeal process was complete. So I would ask you to
15 do the same thing today. We're entitled under the
16 contract for attorney's fees. Hold that decision
17 until Mr. Pritchard decides whether or not they're
18 going to appeal. If they don't we'll be back in
19 front of you next month. If they do we will come
20 back and see you when the appeal process is over. If
21 not I'm sure he will file a similar motion.

22 THE COURT: I'll grant that.

23 MR. TIMBES: Thank you, Judge.

24 THE COURT: Do you want to send me a formal
25 order, or do you just want a Form IV?

1 MR. PRITCHARD: A Form IV is fine by me. Will
2 that be the final appealable order? Or will we have
3 to wait for the attorney fee issue to be resolved?

4 MR. TIMBES: We can consolidate them in a
5 short order, Judge.

6 THE COURT: Why don't you do that?

7 MR. PRITCHARD: That way I can take it all at
8 one time.

9 MR. TIMBES: That's right. I can send you
10 something.

11 THE COURT: All right. Formal order to
12 follow. I'll just put that in. I'll do a Form IV
13 just saying a formal order to file and look for that.
14 You-all run that by each other.

15 I understand your argument, Mr. Pritchard. I
16 just don't agree with it.

17 MR. PRITCHARD: I've had that happen before.

18 MR. TIMBES: Have a good Thanksgiving.

19 THE COURT: You, too.

20 MR. PRITCHARD: As they say, Your Honor, I may
21 be wrong, but I'm never in doubt.

22

23

24 (The proceedings were concluded at 11:05 a.m.)

25

1. State of South Carolina)
2 County of Charleston) C E R T I F I C A T E

3
4 I, Christine A. Smith, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the foregoing
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to
9 nor counsel for any party to the cause pending or
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 4th day of December, 2014 at
13 Charleston, Charleston County, South Carolina.

14
15
16
17 

18 Christine A. Smith
19 Notary Public
20 My Commission Expires
21 May 12, 2021
22
23
24
25

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
3 AMH-ASHLEY MARINA, LLC,) CASE NO. 2011-CP-10-9513
4 et al.,)
5 Plaintiff(s),) HEARING
6 -vs)
7 THE HARBORAGE AT ASHLEY)
8 MARINA HORIZONTAL)
9 PROPERTY REGIME, et al.)
Defendant(s),)
-----)

10

11

12 Given before The Honorable Judge Mikell Scarborough in
13 the Charleston County Courthouse, 100 Broad Street, Suite
14 269, Charleston, South Carolina on Monday, June the 23,
15 2014, commencing at 10:15 o'clock a.m.

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INDEX TO EXHIBITS

(None were marked.)

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1 THE COURT: Y'all are here on the Ashley Marina
2 case. Mr. Pritchard indicated then that he seemed to think
3 it was more of a question of law and y'all could submit
4 something to me. I'm happy to do that. I just wanted both
5 of y'all here on the record and making sure we had some
6 record to make so that I could cover where we need to be.

7 MR. PRITCHARD: Sure. Just briefly, and I don't
8 remember when it was, but we were here for a hearing back,
9 several months back. And during that time this was set for
10 today. We got an order setting it for at 10:00 o'clock. So
11 when I didn't hear it during the roster meeting on Friday
12 that's when I brought it to the Court's attention. And you
13 said come on down.

14 Mr. Timbes and I have submitted depositions and
15 stipulated facts. And I'll just give you the one minute
16 skinny and then we can go from there. Basically my
17 client -- or excuse me -- not my client, but a predecessor
18 in interest of my client developed Ashley Marina. And it
19 subsequently got turned over to a HOA board. And in the
20 master deed, which is in the stipulated facts, it says, my
21 view anyway that we have a perpetual right to manage the
22 marina. There has been some dispute about whether or not
23 that in fact gives us that right. And it also, there's been
24 some dispute about whether or not we waived that right by
25 virtue of a new contract. Was it 2006?

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1 MR. TIMBES: The first was 2006, then one in 2009.

2 MR. PRITCHARD: I think really it's just sort of a
3 matter of the Court looking at the evidence and making an
4 interpretation. I think Mr. Timbes may actually have a
5 brief. I myself would just like to submit a proposed order,
6 but I have limited time to do it because I've got, I'm just
7 stacking up with trials all the sudden. So you know, it's
8 going to take me a while to plow through all this material
9 to begin with. And I'll do my best, and I'm sure Mr. Timbes
10 has to point you in the direction of the various language
11 and the various arguments. But I think at the end of the
12 day it's really a dispute of fact per se other than what the
13 documents, you know, how they're interpreted and how the
14 evidence should be interpreted. But the evidence is what it
15 is, because the testimony is what it is.

16 THE COURT: And so have y'all submitted that or
17 are you going to submit it?

18 MR. PRITCHARD: Well, we submitted the stipulation
19 of facts and the depositions.

20 THE COURT: Okay. Thank you.

21 MR. TIMBES: These are the facts that we've
22 stipulated to and the exhibits and the master deed. And
23 then these are the deposition transcripts.

24 MR. PRITCHARD: The reality of the matter is it's
25 only about two pages of that master deed that really come

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1 into play and will point you in the right direction. But we
2 just felt it was appropriate to submit the entire master
3 deed in case the Court felt some need to --

4 THE COURT: Here's what I would like you to do,
5 and that would be to go ahead and submit to me proposed
6 orders. And how much time do you need, Mr. Pritchard?

7 MR. PRITCHARD: Your Honor, realistically end of
8 July.

9 THE COURT: I typically give 30 days, so that's
10 not a problem.

11 (Hearing concluded at 10:30 o'clock a.m.)
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1 STATE OF SOUTH CAROLINA)

2 : C-E-R-T-I-F-I-C-A-T-E

3 COUNTY OF DORCHESTER)

4 I, Stacey L. Scoggan, Court Reporter and Notary Public,
5 certify that I did have The Honorable Judge Mikell
6 Scarborough to appear before me at 10:15 o'clock a.m. on
7 Monday, June 23, 2014, at the Charleston County Courthouse,
8 100 Broad Street, Suite 269, Charleston, South Carolina;
9 that the witness was sworn and cautioned to tell the truth,
10 the pages constitute a true and accurate transcript of the
11 testimony given at that time and place.

12 I further certify that I am not of counsel or kin to
13 any of the parties to this cause of action, nor am I
14 interested in any manner in its outcome.

15 IN WITNESS WHEREOF, I have hereunto set my hand and
16 seal this the 30th day of May, 2015.

17

18

19

20



Stacey L. Scoggan

21

Notary Public for South Carolina

22

My Commission Expires: February 23, 2021

23

24

25

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-VS-

Charlottesville, Virginia

REPORTED BY: Renee A. McDermid, RPR

1 Deposition of JOE MILLER, taken and
2 transcribed on behalf of the Defendants, by and
3 before Renee A. McDermed, Registered Professional
4 Reporter and Notary Public in and for the
5 Commonwealth of Virginia at large, pursuant to Rule
6 4:5 of the Rules of the Supreme Court of Virginia,
7 and by Notice to Take Depositions; commencing at
8 11:17 a.m., August 13, 2013, at Cavalier Reporting &
9 Videography, 415 4th St N.E., Charlottesville,
10 Virginia.

11

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1 (11:17 a.m., August 13, 2013)

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3

JOE MILLER,

4

was sworn and testified as follows:

5

E X A M I N A T I O N

6

7 BY MR. TIMBES:

8

Q Good morning. For the record, this is

9

Michael Timbes on behalf of the defendants; and

10

we're here to take the continuation of the 30(b)(6)

11

depositions of the plaintiffs, both Ashley --

12

AMH-Ashley Marina, LLC; and AMH Management, LLC.

13

And, Mr. Miller, I understand that these

14

are companies that you -- you both own; and I guess

15

you own some interest in them with your wife as

16

well; is that right?

17

A I think I'm just the manager now, Michael,

18

or Mr. Timbes, I think I'm just the manager.

19

Q Okay. You can call me Michael, please.

20

A Okay.

21

Q And we're going to speed through this

22

stuff as quickly as possible. I know you're not

23

comfortable today and having some back issues. So,

24

I will be as accommodating as we can be and try to

25

be as fast as we can be. If you need a break at any

1 try to avoid being duplicitous with what we've
2 covered with the other witnesses; but there were
3 some items that due to their dates of employment,
4 they weren't able to help me with. I want to get a
5 little bit of a timeline together.

6 A Okay.

7 Q The master deed was recorded in April of
8 2005 for the Ashley Marina. Does that sound about
9 right?

10 A Yes, sir.

11 Q Okay. And that master deed was prepared,
12 I am assuming, by Nexsen Pruet; is that right?

13 A I believe so.

14 Q What was your involvement in that process?

15 A I'm sure I had involvement, Mr. Timbes.
16 You know, this was a very long time ago and we had
17 so much going on at the time and my memory is pretty
18 fuzzy eight years ago. But I certainly had some
19 involvement, as did a number of my employees.

20 Q And was -- I guess AMH-Ashley as an
21 entity, the AMH-Ashley, LLC, is that who
22 commissioned the preparation of the master deed; or
23 was it through another company of yours?

24 A I believe that was the company that did
25 it. If that was the buyer of the marina, that was

1 the company that did it.

2 Q I got you. That's one thing I have zero
3 understanding of is, I guess, kind of in that time
4 frame of April of 2005, what was the status of the
5 at least the facilities of the Ashley Marina?

6 A Well, I don't remember exactly when we
7 closed. We contracted to buy the marina and we were
8 going to redevelop it and we were selling slips.
9 And there was a, you know, a contract period. I'm
10 not sure. I don't remember when we closed.

11 The master deed would have, I guess, been
12 prepared during our what I would call our
13 predevelopment period and along with, you know, a
14 lot of other documents. But I don't exactly
15 remember the timeline myself.

16 Q That's fair enough. The -- when you say
17 predevelopment; can you just -- I don't need too
18 much detail. I just want to get an idea of what
19 changes were made to facilities as they existed from
20 the date of closing.

21 A You're talking about after we closed?

22 Q That's right.

23 A We redeveloped much of the marina. We
24 redid the docks, redid the dock house, redid all the
25 electrical, the plumbing, parking lots, landscaping,

1 Q That's okay. The -- during the
2 redevelopment, was it still an active, ongoing
3 marina?

4 A I can't remember if we staged it or if we
5 cleared everybody out. You know, Mr. Timbes, I had
6 about, you know, 20 employees that I was paying
7 in-house to work on all these things. It was a
8 pretty big operation. We were trying to do a lot of
9 other projects at the time. And a lot of this stuff
10 runs together in my head, but I can't remember if we
11 staged and kept -- I'm thinking we did and tried to
12 keep, keep boats there, but I just -- you know, I
13 would have to get some of my construction guys to
14 give you more detail on that.

15 Q I understand. Are any of those guys still
16 employed with you?

17 A No, sir. You know, Bruce Wallace might
18 have some better recollection of that than I would;
19 but the other ones are gone.

20 Q I gotcha. If we leap forward from, I
21 guess, April of 2005 when the master deed was
22 recorded, the next, I guess, instrument that I have
23 and a timeline would be the marina management
24 services agreement that was entered into in April of
25 2006. Are you familiar with that?

1 A You know, I know there was one. And, you
2 know -- I don't know how you define familiar but --

3 Q Let me ask this: Prior to April 30, 2006,
4 at least, which is the date on the contract -- and
5 for the record, it's Exhibit 7 from Ms. McMenemy's.
6 Was AMH Management, LLC, performing any marina
7 management services on the docks?

8 A Yes. We were managing the facility. I
9 don't -- I don't remember when AMH was formed. So,
10 I can't answer with specificity as to that. But,
11 yes, we managed the facility from the day we bought
12 it.

13 Q And I guess that was why I -- kind of what
14 I was trying to understand is I would imagine that
15 if you all are managing it from the day you bought
16 it, then there would have been ongoing, I guess, you
17 know, usage by the -- by boat owners of the marina.
18 It would be a working marina.

19 A I would think so. I just -- I just can't
20 tell you exactly how we staged it and, you know --
21 in other words, we renovated Ripley Light Marina a
22 couple years ago. That was more recent. I have a
23 better recollection. This was just, you know, eight
24 years ago; and I don't know exactly how we staged
25 it. But, yes, it was still a working marina to some

1 extent.

2 Q Sure. To the extent any services were
3 being provided by AMH Management prior to the -- at
4 least the first marina management services agreement
5 that I have, do you know, was there any type of
6 contract or agreement in place that would spell out
7 what was being done?

8 A I do not know. And I don't know, you
9 know, we've got -- we've had -- we have a number of
10 entities and had a number of entities. I'm not
11 sure -- I mean, our entire staff was actively
12 engaged in, you know, the renovation and the
13 management of the marina. I'm not sure when we
14 formalized a contract, what entities were involved.
15 I just -- I don't recall.

16 Q All right.

17 MR. TIMBES: And, Madam Court Reporter,
18 earlier I had asked about, I guess, Exhibits 1
19 through 14, whatever they may be numbered, I guess
20 the original exhibits. If you could just hand Mr.
21 Miller Exhibit No. 7, please; and that would be the
22 2006 agreement.

23 A I've got it.

24 BY MR. TIMBES:

25 Q I just want to make sure we're all on the

1 same page. Do you recognize this as the 2006
2 agreement between the Harborage at Ashley Marina and
3 AMH Management back in 2006?

4 A Yes, sir, I'm assuming it is.

5 Q All right. Did you have any involvement
6 in the formation of this agreement?

7 A I just -- I don't recall. I mean, again,
8 we had a lot of people working on the -- everything
9 we were doing at the time, Mr. Timbes; and I don't
10 recall specifically.

11 Q That's fair enough. Landon Bridges, if
12 I'm reading his handwriting right --

13 A Yes, sir.

14 Q -- was he one of your guys?

15 A He was one of my employees, yes, sir.

16 Q Do you -- in the timeline of events, do
17 you have a sense of when the turnover from
18 AMH-Ashley as the declarant occurred so that control
19 was shifted to the board of the association?

20 A No. I'm sure there's a date of record. I
21 don't -- I don't recall offhand when that was. You
22 know, I think the way the statute is read, and once
23 you sell a certain number of slips, you turn it over
24 and that's -- I think that's what we did. But I
25 just don't remember when that was.

1 Q And would it help you -- I'll tell you, I
2 have been advised that it was at the annual meeting
3 in December of 2007. Does that help at all or ring
4 any bells?

5 A I will stipulate to that if that's what
6 you've been told, I'm sure that's right.

7 Q Okay. And then I guess on my timeline,
8 the next agreement that I have that relates to
9 management of the marina is the 2009, April 2009
10 agreement.

11 MR. TIMBES: And, Madam Court Reporter,
12 that's Exhibit 9, if could you find that for me.

13 A Got it.

14 BY MR. TIMBES:

15 Q Do you recognize this as the 2009
16 agreement between the Harborage at Ashley Marina and
17 AMH Management?

18 A Hang on one second.

19 Q Okay.

20 A Yes, sir.

21 Q And just so I can get oriented on what I
22 can get into with you or not, did you have
23 involvement in the formation of this document?

24 A Well, I signed it. I don't have a
25 specific memory of involvement. But I certainly, as

1 manager of AMH Management, I certainly, you know, I
2 see that I signed it. I just can't remember
3 specifics. I apologize.

4 Q That's okay. And I was just curious. I
5 know that this one, unlike the 2006 document, has
6 some exhibits to it that outline the scope of
7 services and things of that nature. I just wanted
8 to see if you had any involvement in developing
9 those scopes.

10 A I don't recall. I may have; I may not.
11 Again, we had a pretty big staff at that time. And
12 obviously, there was a -- I guess there was a board
13 at that time. And, you know, there was obviously
14 some detail worked out. And I don't recall my level
15 of involvement. I'm not trying to avoid the
16 question. It's just too many concussions in
17 football, I guess. But I have trouble remembering
18 what I did yesterday, much less four years ago, five
19 years ago.

20 Q Mr. Miller, I've got two more documents I
21 just want to get oriented on.

22 MR. TIMBES: Madam Court Reporter, they
23 are Exhibits 12 and 14 that were from the earlier
24 depositions.

25 A All right. I've got 12, and I've got 14.

1 signed. And it is dated January 1, 2012. And I
2 guess kind of the same general line of questioning,
3 I'm trying to get an idea of was this a contract
4 that AMH Management was asking the marina to sign?

5 A Well, I don't -- again, I don't recall
6 specifically because I don't know in what context
7 this was found or presented. But, you know, it
8 could be one of a series of contracts that had been
9 under discussion.

10 For several years, we had been trying to
11 right this ship -- that's how I'm going to put it --
12 and get this contentious relationship behind us and
13 move on and do what we were supposed to be doing and
14 let the board do other things other than argue with
15 us.

16 So, I know we have put forth some proposed
17 documents we thought would do that. I'm sure this
18 is probably one of them. I guess my point --

19 Q Go ahead.

20 A Never mind. I think I answered the
21 question.

22 Q And let me -- it's a good segue for where
23 we're going because that's kind of what the heart of
24 the matter is, as I will characterize it. And you
25 let me know if you disagree with how I'm framing

1 this issue.

2 The 2009 agreement that we were looking
3 at, Exhibit No. 9, had an expiration date in it
4 under its terms that has now lapsed. And there is
5 an inconsistency, as I understand it, as alleged in
6 the complaint, between what the contract language
7 says versus what the master deed says.

8 A Uh-huh.

9 Q Is that fairly characterized?

10 A Well, I don't know if I would call it
11 inconsistent. I think maybe some understandings
12 maybe were not on the same page as the board with
13 our understanding of how this was all going to work.
14 You know, we never meant for us to stop managing.
15 You know, we were okay with putting in place a time
16 period and redoing contracts, but it was -- you may
17 not agree because you're on the other side, but our
18 intent all along was to manage this marina forever,
19 same thing over at Shem Creek, which we also
20 redeveloped, you know, similar master deed there.

21 So, our intent was always to manage this
22 place. We knew we had to have contracts that
23 detailed what we did, what we got paid, et cetera.
24 We're certainly happy to redo those at certain
25 intervals. I think they probably need to be

1 revisited at certain intervals.

2 We never -- by signing an agreement with a
3 certain term, we never meant to relinquish our
4 management rights. I think maybe what we tried to
5 do is make that clearer with later proposed
6 documents since it seemed to create a
7 misunderstanding, if you will. So, this may be why
8 there is some differing language in the term
9 provision.

10 Q When you say the differing language, just
11 so I'm on the same page with you, I guess what
12 you're saying is in the 2011 proposed amendment or
13 the 2012 proposed amendment, some of the red line
14 changes that are in there are trying to add clarity
15 to this issue that has arisen in the 2009 agreement?

16 A Yeah. I think what we did was we went
17 back and probably just mirrored the language in the
18 master deed, thereby doing a better job of honoring
19 the original intent because, you know, my view is
20 that the board has misinterpreted what we did
21 originally. And they thought we were planning to go
22 away or just allow them to bring somebody else in.
23 And that's certainly not the case.

24 You know, we're glad to revisit terms and,
25 you know, maybe the management fee needs to go up or

1 down, maybe we need to change the number of hours or
2 employees, you know, insurance, scope of work, any
3 number of issues that, you know -- I don't think you
4 sign a contract in 2013 that's still good in 2050.
5 There are going to be changes. So, we're glad to
6 revisit the details.

7 But we never, ever sought to waive or
8 waived our rights to manage. And, you know, the
9 board, I think, has been off on a wild goose chase
10 on this issue; and that's what's caused this entire
11 litigation and a lot of the problems we now have at
12 the marina.

13 So, you know, I think they're trying to
14 circumvent the very clear language of the master
15 deed. What we tried to do to clear that up so there
16 would be no misunderstanding, I think, is put maybe
17 some clear language in a later document. I don't
18 think we ever signed a later document, but we were
19 certainly trying to make it more clear.

20 Q I'm with you. I'm with you. Thank you.
21 As far as -- let me back up. Let's forget that
22 there is a dispute between your company and the
23 association right now. You were indicating the
24 process would be sorting out the terms and some of
25 the changes you were referencing. How does that

1 unfold as your understanding?

2 A You have to rephrase that question. I'm
3 not sure what you're asking.

4 Q Yeah. It's in my head. It's not coming
5 off my tongue very well, sorry.

6 A That's okay.

7 Q Let me ask you this way: If we were to
8 take Exhibit 12, it seems to be the most recently
9 submitted proposed management services agreement,
10 how does that document get refined until it's an
11 agreement?

12 A On our side or together with the board?

13 Q Either way.

14 A Well, on our side, all of the employees of
15 the management company would participate. You know,
16 again, it's a smaller company than it used to be;
17 but everybody would have input. And then we would
18 certainly try and work with the board and negotiate
19 and discuss all details. Anything that needed to be
20 massaged or tweaked or changed, we would certainly
21 hope to have a back and forth discussion on. You
22 know, scope of services, levels of insurance, you
23 know, fees, number of employees, hours, you know,
24 all those things were always subject to, you know --
25 you know, the board -- it's always their duty and

1 right to set the terms of the management agreement
2 within reason. And we're going to -- you know, we
3 work for them. So, it -- this has to be a two-way
4 street.

5 Q In the -- in the course of those
6 discussions with the board, if we're just kind of
7 continuing with the discussion as we're refining
8 Exhibit 12, if there is an impasse over a particular
9 provision or term, how is that impasse resolved?

10 A Well, you maybe talk hypothetically
11 because there haven't been a lot of discussions
12 lately. If you're talking --

13 Q And I am.

14 A All right. Well, I mean, everybody on our
15 side would be involved, you know, certainly Bruce
16 and myself and maybe, you know, Chris and Rebecca
17 would have input. Maybe Davis Rackley, who is there
18 at the marina.

19 But we all try and, you know, provide
20 input and thought. We would typically try and deal
21 with somebody at the board, you know -- sometimes
22 all five of them, sometimes one person. I'm not
23 sure how to answer your question without a real life
24 example, I guess, but --

25 Q Well, it sounds like if there were -- if

1 there was a hangup and you guys were stuck on a term
2 that each side couldn't agree to, that you all would
3 just have to knuckle under and sit down and work
4 through it.

5 A That, Mr. Timbes, theoretically, that's
6 how it's supposed to happen.

7 Q Okay. And if there was -- if both sides
8 put their heels in the ground, what happens then?

9 A Well, I don't know. I assume we would
10 have to be reasonable and get things figured out.
11 These are not hard items to figure out. I think --
12 I think we have to go back and look at the original
13 intent and what people expected when they bought
14 their slips. They expected professional management.
15 They expected a level of services. All that has to
16 be provided by the board and the management company.
17 And if the board wants to deviate from that, then
18 they're doing the wrong thing.

19 So, I think they have to, you know, to go
20 back and honor that and try and negotiate a document
21 which provides those things. You know, that's going
22 to require a certain minimum number of hours,
23 minimum staff; they're going to have to do the right
24 thing when it comes to insurance and reserves and
25 you know, et cetera, et cetera.

1 So, there shouldn't be big disagreements.
2 You know, you could certainly disagree, negotiate on
3 certain items. But I don't see really how there
4 should be an impasse on anything if you've got a
5 reasonable board because I can tell you we're
6 reasonable people on our side.

7 Q If I understand the master deed correctly
8 or at least the argument as far as perpetual
9 services go, am I correct that the master deed
10 doesn't obligate, in your mind, AMH to stay on site
11 for perpetuity? It just reserves the right for AMH
12 to stay as long as AMH wants to?

13 A I guess that would be a fair description.
14 I mean, you know, you can't make -- if AMH didn't
15 exist or the declarant or associated company didn't
16 exist, you couldn't make somebody manage that wasn't
17 there.

18 So, you know, hypothetically, or
19 theoretically, I think what you're saying is
20 probably true. We were the developer. This is an
21 economic interest and a right we reserve for
22 ourselves. Everybody was aware of it and put on
23 notice when they bought their slips. But are we
24 obligated on our side to provide it? You know,
25 probably not.

1 MR. PRITCHARD: I would note just for the
2 record that any agreement that would require
3 somebody to provide a management service they didn't
4 want to provide would violate the 13th Amendment,
5 you know, prohibition against indentured servitude.

6 MR. TIMBES: Fair enough.

7 BY MR. TIMBES:

8 Q In terms of where we stand kind of today
9 on things -- let me back up. Let me ask you about
10 the master deed a little bit. I think that the
11 particular provision that we are concerned with
12 primarily is Article 2.3, Subpart A.

13 A Yes, sir, that sounds correct. I've got
14 it. I think I've got the master deed right here.

15 Q Yeah, it's Exhibit 6, if the court
16 reporter has it with her.

17 A Yes, sir. Do you want me to turn to that?

18 Q Yeah, I think it would be helpful. It's
19 on Page 7.

20 A I got it.

21 Q Are you with me?

22 A Yes, sir.

23 Q And I guess it starts on Page 6 and
24 continues on to Page 7. I didn't mean to lead you
25 in the wrong direction.

1 A I got it.

2 Q As I understand it, this is the provision
3 that the plaintiffs are relying on as far as
4 creating a right of perpetual management; is that
5 right?

6 A Yes, sir.

7 Q Are there any other provisions in the
8 master deed that create any perpetual rights other
9 than this one insofar as management duties are
10 concerned?

11 A I would have to refer you to Mr. Pritchard
12 or somebody smarter than me. I don't have --

13 Q And that's fair.

14 A I don't have the whole thing with me.

15 MR. PRITCHARD: Certify that comment that
16 I'm smarter than he is. Thank you.

17 THE WITNESS: I'm just trying to make you
18 feel good.

19 MR. TIMBES: That is forever in black and
20 white now.

21 MR. PRITCHARD: I'm going to frame that.

22 BY MR. TIMBES:

23 Q As I understand -- and, Mr. Miller, I know
24 I'm going to probably test your memory here. So,
25 just answer what you can, I guess.

1 A Okay.

2 Q It's my understanding that from 2006 up
3 until 2009, the marina management operations were
4 handled by AMH Management; and the association
5 management matters were handled by, is it,
6 Southeastern Management Group?

7 A I think that's correct, yes, sir.

8 Q Okay. And so that you and I are on the
9 same page, marina management, I'm going to talk
10 about things dealing solely with the dock and of
11 course the marina -- sorry, the association
12 management will deal with typical HOA issues. Fair
13 enough?

14 A Yes, sir.

15 Q Okay. At some point, there was a shift
16 and AMH Management began to handle both sides of the
17 fence. They were doing the marina management as
18 well as the HOA management; is that right?

19 A Yes, sir.

20 Q Okay. What I'm curious to know from your
21 position is this: Is under the master deed, does
22 AMH Management claim an entitlement to perform both
23 of those functions; or is it just the marina
24 management function?

25 A No, I think it's both of those functions.

1 AMH shall be solely responsible for expenses
2 incurred, including but not limited to, expendable
3 supply, salaries of daytime staff, and dock hands --

4 A I'm sorry, Mr. Timbes, tell me again where
5 you are. I'm sorry..

6 Q I'm sorry, Paragraph 1 on the first page.

7 A First page. I thought you were farther in
8 the document. Okay. I got it.

9 Q One, two, three, four -- in the fifth line
10 down.

11 A Uh-huh, okay.

12 Q You see where I'm reading from?

13 A Yes, sir.

14 Q Okay. So, under this agreement, the 2006
15 agreement, AMH was covering its own costs as far as
16 the services it was providing?

17 A Let me just read something here. This is
18 the one originally signed when we still -- is this
19 when we still controlled everything?

20 Q That's correct.

21 A Okay. You know, I think this is probably
22 just, you know -- and I can't speak to all the
23 details. I don't remember. But an accounting
24 function, if -- at the time, we were just -- you
25 know, we had a number of related companies. And it

1 hadn't been turned over to the regime. I'm sure
2 things, you know, might have been done differently.

3 Q And is that the explanation then if we
4 look into the 2009 agreement under Paragraph 1,
5 Subpart B, we see a shift where the association is
6 solely responsible for all expenses and carrying out
7 the services of that agreement?

8 A Well, I'm assuming. In other words, I
9 don't know what our fee was, but you wouldn't -- you
10 wouldn't have payroll of 180,000, then get a fee of
11 60. That wouldn't be, you know -- obviously,
12 wouldn't make very much sense. So, I think the
13 difference is probably because we were all related
14 companies, I'm just guessing, back in '06. And then
15 when we turned it over, then we had, you know, a
16 separate arm's length arrangement. And somehow the
17 dock hands and dock master and everybody have got to
18 get paid. And, you know, we needed to get paid a
19 fee for management. So --

20 Q Can you explain to me how the \$15,000
21 reimbursement works? Are you familiar with what I'm
22 asking about?

23 A Are you talking about the sharing of the
24 employee for the leasing?

25 Q Yes, sir.

1 A I don't know. You would need to talk to
2 Chris and Bruce, quite honestly. You know,
3 obviously, if your payroll was \$180,000, you really
4 only needed 165, you should just pay 165. All the
5 audit is is to see if you put 180 in the kitty and
6 you go back and see how much you actually spent.

7 My point is Bruce knows how to minimize
8 the cost to the regime, and he's not allowed to do
9 that during the year. So, what they do is they
10 allocate a set number, which is not tied to realty,
11 and then they -- and then they get whatever's left,
12 get it back. All the audit is is just basically
13 going back and looking at what the payroll was for
14 12 months, the actual payroll. I mean, it's pretty
15 simple.

16 But, again, Bruce and Chris, much better
17 at answering this type of question than me. I'm
18 giving you the 10,000-foot view or explanation.

19 Q No, I understand. Mr. Miller, what I want
20 to do at this point is I want to quickly go through
21 a few exhibits just so I know what I'm looking at
22 and then we'll hopefully not be too much longer.

23 A Okay.

24 MR. TIMBES: Madam Court Reporter, I'm
25 going to go a little bit out of order and ask you to

1 present Exhibit 16.

2 A Okay.

3 BY MR. TIMBES:

4 Q Mr. Miller, this looks like a letter from
5 November 4th of 2008. And I don't have a signed
6 copy, but I have your name listed at the bottom of
7 it; is that right?

8 A Let's see. It does have my name on it,
9 yes, sir.

10 Q Okay. Do you remember writing this?

11 A No, sir. That doesn't mean I didn't write
12 it. It just means I don't remember.

13 Q I gotcha. And let me know if this jogs
14 your memory or if I'm off in left field. It looks
15 like on the bottom paragraph of the first page,
16 there's a dialogue about moving both the marina
17 management and the regime management under one
18 entity, that being AMH Management; is that right?

19 A Let's see, looks like that's the case.

20 Q And the following pages talk about just
21 the scope of some of the services that are going to
22 be provided.

23 A Is that a question?

24 Q Yes, sir.

25 A Looks like that.

1 Q Okay. And then I guess the last page sets
2 out the price and some general cost terms; is that
3 correct?

4 A It would like -- it would look that way,
5 yes, sir.

6 Q All right. And am I safe in assuming this
7 November 4, 2008, letter was circulated around and
8 about in connection with the negotiations that
9 ultimately led to the April 2009 contract that
10 combined the services for the marina management and
11 association management?

12 A I'm sure this was part of a number of
13 steps in that process. You know, assuming -- again,
14 I don't know where this came from; but I'm not sure
15 if it was delivered or it came from the board or
16 where you got it. And I don't remember writing it,
17 don't remember delivering it. But, you know, I'm --
18 I'm sure it's safe to assume that it was part of the
19 steps involved in that process.

20 Q I gotcha. And I'm just trying -- I'm
21 trying to find out if this is an AMH document or
22 not.

23 A Well, it sure looks like one. Yes, I'm
24 sure it is.

25 Q The next one I wanted to ask about was

1 actually one step back, Exhibit 15.

2 A Okay.

3 Q And I'm looking to see if there's a date
4 on this. I don't see one, but my recollection is
5 that this is somewhat recent just given the issues
6 that are raised. Am I correct?

7 A Looks like an e-mail to the regime
8 members. So, I'm sure it's in the past year or so.

9 Q And do you know who wrote this?

10 A Well, let's see, is there -- anybody sign
11 it?

12 Q No, sir.

13 A It was probably written by our -- you
14 know, the employees of our management company.

15 Q All right. Would they have circulated
16 that prior to your reviewing and approving it?

17 A I'm sure I would have been involved.

18 Q I don't know that that answers my
19 questions.

20 A I don't know what you mean by circulating
21 it. I'm sure I would have been actively involved
22 in, you know, writing it.

23 Q I guess before it went public to the
24 members, would you have approved its content?

25 A Yeah, I don't -- we don't have a formal

1 approval process. But if you mean was I privy to
2 it, did I participate, yes.

3 Q Okay. What I wanted to ask you about in
4 this particular communication is really kind of
5 discussed in a couple of areas on the second page.
6 And I'll just frame it in general.

7 There's discussions about fee increases
8 and terms that AMH will agree to under the
9 conditions that Mr. McCoy step down, and things of
10 that nature. And what I am interested to determine
11 is whether or not AMH believes it has the right to
12 impose an increase in its fee based upon the
13 composition of the board.

14 A No, but AMH certainly has the right to
15 negotiate a fee. And, you know, in negotiations, I
16 think any party can take into account any factors
17 if -- well, I mean, if you want me to elaborate, go
18 ahead and ask me some more questions. I'm sorry.

19 Q Well, I guess what I'm trying to resolve
20 is can, in your mind, AMH Management impose a fee
21 that it demands to be paid for its services upon the
22 board and the association?

23 A No, I don't think we can impose a fee. I
24 mean, you know, if we could do that, we would just
25 impose a \$50 million fee and retire. Obviously,

1 not. It has to be a reasonable market-based fee
2 based on what the scope of services is.

3 Q And the reason I ask it that way is down
4 at the bottom of this Exhibit 15, on Page 2 of it,
5 it appeared to me the way I read this letter to the
6 members was that if Mr. McCoy were to step down, AMH
7 would agree to keep its current management fee in
8 place.

9 And I guess the reverse translation of
10 that is if Mr. McCoy does not step down, AMH would
11 refuse to keep its current pricing in place. Is
12 that a fair reading?

13 A Well, what you have to understand is
14 Mr. McCoy, due to his involvement and his what I
15 would call harassment of our employees, we spent an
16 inordinate amount of time on this account, much more
17 so than we would with anybody else.

18 Mr. McCoy, it would probably take an
19 entire day to discuss the things he does; and Bruce
20 and Chris would be better to talk to you about that.
21 But there is a cost in manpower and time and staff
22 costs, overhead costs that is certainly incurred
23 because of Mr. McCoy's involvement.

24 There's certainly been a cost to this
25 company because of all of his actions, because of

1 this litigation, which I blame on him. We've got
2 very real incremental costs due to Mr. McCoy's
3 involvement. So, I think it's more than justified
4 to charge more if he is on the board.

5 Q And understanding that, if the board and
6 the association are unwilling to accept that
7 increase in fee, where does that leave the parties?

8 A The parties can always sit down and work
9 things out, Mr. Timbes. There has been no effort in
10 the past two years by the board to sit down and work
11 out anything. We've been -- we've been proposing
12 things, trying to sit at a table and have
13 discussions, trying to have discussions by phone.
14 Most of our -- well, everything really goes
15 unanswered.

16 There's been no real effort to negotiate
17 in a reasonable manner anything whatsoever by the
18 board. All the efforts have been made by AMH
19 Management. You know, we're all businessmen. These
20 things can easily be worked out.

21 Q Let me shift gears a little bit and ask
22 you about some of the claims in the complaint that
23 has been filed in this case. The plaintiff entities
24 have alleged that the individual board members that
25 are named in the complaint have committed a civil

1 different story.

2 Q And I guess that's the question that I had
3 asked, is if the Court rules in favor of the
4 defendants in this case, then the damages you're
5 describing don't exist.

6 A That's probably correct. I like to caveat
7 that with, you know, that there still could be other
8 damages in other related ways. But, yes, basically
9 if we don't have the right to manage the marina and
10 they choose to hire somebody else in that instance,
11 different story.

12 Q Mr. Miller, is it -- you've mentioned
13 Mr. McCoy's name several times. I believe he's the
14 only board member that you've mentioned by name in
15 our deposition today.

16 A Well, that's because you -- I think you
17 mentioned him first.

18 Q And that may be correct. Is it your
19 position that all of the board members that are
20 named in the complaint have conspired against you?

21 A Yes, sir.

22 Q If we can look at Exhibit 17.

23 A Yes, sir.

24 Q Do you recognize this e-mail from Bruce?

25 A No, sir. I mean, I don't think I was

1 copied on it, was I?

2 Q It does not appear, at least in this
3 string. I didn't know if the substance of this
4 e-mail had been discussed with you or not.

5 A That's not what you asked me. Do you want
6 me to read it?

7 Q Sure, I want you to be comfortable with
8 it.

9 A Okay, I've read it.

10 Q Okay. Do you agree with the
11 communications that Mr. Wallace circulated around?

12 A What do you mean, do I agree with it?

13 Q Well, this appears to be an e-mail that
14 was circulated on behalf of AMH-Ashley Marina, LLC.

15 A Are you asking do I agree that it was
16 circulated, or I do agree with the content?

17 Q Do you agree with the content?

18 A Again, I don't know what you're asking me,
19 do I agree with the content. Yes. Was it sent out?
20 Yes.

21 Q Okay. And that's fair enough. When you
22 say sent out, sent it means it went to the members.

23 A Yes, sir.

24 Q Mr. Miller, I wanted to ask you about this
25 Exhibit No. 11 that was -- I received a copy from --

1 Give me just a minute. I think I may have
2 covered everything, but I got a stack of exhibits in
3 front of me if we can just relax for five and let me
4 flip through stuff and make sure that I dotted my
5 I's and crossed my T's, we'll go wrap up.

6 A Sounds good.

7

8 (Brief discussion off the record)

9

10 BY MR. TIMBES:

11 Q Mr. Miller, as I understand it, I haven't
12 received written responses to interrogatories yet
13 that we had served. So, let me ask you just a
14 couple quick questions.

15 As far as witnesses from the plaintiff's
16 side of the case, I would understand that obviously
17 you would be a witness, Ms. McMenemy, Chris, and
18 Bruce, all of those would be witnesses as to the
19 facts related to AMH-Ashley Marina and AMH
20 Management?

21 A I would assume so.

22 Q Okay. Is there anybody else that can
23 speak on behalf of those entities?

24 A No, sir, that's probably it. You know,
25 the only other person may be Davis Rackley is -- I

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO. 11-CP-10-9513

AMH-ASHLEY MARINA, LLC and AMH)
MANAGEMENT, LLC,)
)
) PLAINTIFFS,)
)

-VS-)

THE HARBORAGE AT ASHLEY MARINA)
HORIZONTAL PROPERTY REGIME,)
THE HARBORAGE AT ASHLEY MARINA)
CONDOMINIUM ASSOCIATION and)
EDDIE McCOY, STUART REEVES,)
BRIAN SWAN, RICH CONE and)
ED MISKOTTEN, individually,)
)
) DEFENDANTS.)
)

30(b)(6)

DEPOSITION OF:

AMH-ASHLEY MARINA, LLC
AND
AMH MANAGEMENT, LLC

BRUCE WALLACE

JULY 23, 2013

1:19 p.m.

McCarn Court Reporting, Inc.
P.O. Box 778
Folly Beach, SC 29439

A-P-P-E-A-R-A-N-C-E-S

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1 BRUCE WALLACE,

2 having been duly sworn, testified as follows:

3 EXAMINATION

4 BY MR. TIMBES:

5 Q Mr. Wallace, good afternoon. I'm Michael
6 Timbes. We met before. Good to see you again. I
7 appreciate you coming down today. Is it okay if I
8 call your Bruce during the deposition?

9 A Sure.

10 Q Have you ever given a deposition before?

11 A I have.

12 Q So you know the drill. If I ask a poor
13 question, certainly let me know. Something you don't
14 understand, I'll change it around. If you need a
15 break or anything, just holler at me. I don't think
16 we're going to be here too terribly long. We are
17 taking the continuation of the, I guess, 30(b)(6), as
18 we call them, depositions. So I'm deposing not Bruce
19 Wallace today, I'm deposing AMH Management and AMH-
20 Ashley, those entities.

21 You've been brought in to speak on behalf of
22 those entities in regards to matters that you are
23 knowledgeable about. We've covered some ground
24 already with Rebecca and with Chris. So I'm going to
25 assume, and you let me know if I should not, that the

1 Q You were the existing manager for the company
2 that had been in place?

3 A Yes.

4 Q And was that the only marina you were working
5 for at the time?

6 A Yes.

7 Q How long have you been in that type of work?

8 A Since 1990.

9 Q 1990? Okay. Where else have you worked?

10 A In the past?

11 Q Yes, sir.

12 A I worked for Homestead Finance, and then I
13 worked for myself in a former business that I owned.

14 Q Oh, okay. All right. How long had you been
15 at Ripley when Mr. Miller purchased it?

16 A Since 1990.

17 Q Okay. All right. I understand that you are
18 still -- I guess your title is Senior Dockmaster; is
19 that right?

20 A That's correct.

21 Q Okay. Is that a, I'm just not familiar, is
22 that a term in the industry?

23 A Some people use it, yeah, if you have more
24 than one facility.

25 Q Does that make you, at least in the food

1 chain, does that make you the big fish next to Mr.
2 Miller, I guess?

3 A I guess so, yeah.

4 Q Okay. All right. It is my understanding
5 that in addition to the services that you provide over
6 at The Harborage at Ashley Marina that you work for
7 Ripley and also for Shem Creek; is that right?

8 A Correct.

9 Q How long have you been providing services
10 over at Shem Creek?

11 A Since 2007.

12 Q 2007?

13 A January of 2007.

14 Q And was that an existing facility, or is that
15 a newly constructed?

16 A Existing.

17 Q Did Mr. Miller purchase that one as well?

18 A He did.

19 Q Okay. And how long have you been providing
20 services over at The Harborage at Ashley Marina?

21 A Since January of 2007.

22 Q Did you start those two basically at the same
23 time?

24 A I did.

25 Q Okay. And let me ask this, just generally:

1 Do you have familiarity with kind of the history of
2 Mr. Miller getting in over at The Harborage at Ashley
3 Marina, creating the master deed, moving forward in
4 that process? I mean --

5 A Do you mean was I involved with it?

6 Q Yeah.

7 A No.

8 Q Not involved. Do you have any knowledge upon
9 reflection of any of that stuff?

10 A Prior to 2007?

11 Q Yes, sir.

12 A No, sir.

13 Q Okay.

14 A I mean, other than I knew he was buying and
15 selling, a condo-type deal.

16 Q You have a blank slate that starts getting
17 filled up as of 2007, when you came on board?

18 A Right.

19 Q It's my understanding, at least just based on
20 the data, that the first Management Services Agreement
21 relative to The Harborage at Ashley Marina predated
22 you coming on board; is that right? And I have a copy
23 here as Exhibit 7.

24 A Yes, it was.

25 Q So you would not have had any involvement in

1 occurred?

2 A He worked for the company prior to the
3 turnover, so I think he would have been involved with
4 any documents during the turnover.

5 Q Right. And I agree with you on that. I
6 guess what I'm trying to ask is: The fact that Mr.
7 Otis is signing on behalf of The Association after
8 turnover to the board of directors, was Mr. Otis on
9 the board?

10 A No.

11 Q Okay. So this --

12 A No, I would -- my speculation is he would not
13 have signed anything on behalf of The Association
14 after it was turned over, I wouldn't think.

15 Q Okay, okay. And you don't have an idea, do
16 you, as to when that turnover actually occurred?

17 A No. It would be a guess.

18 Q I got you. But presumably, it would have
19 been sometime after October of 2007, based on Mr. Otis
20 signing this document?

21 A I would think so, yes.

22 Q Okay.

23 A I don't think he would be signing after it
24 had been turned over.

25 Q I got you. So at least at the time, if those

1 dates hold true, then at least at the time this first
2 Management Services Agreement was entered into back in
3 2006, that would have been when Mr. Miller was still
4 in control of The Association?

5 A As a declarant, yes, sir.

6 Q Okay.

7 A And for your knowledge, Ms. Nelson, she's
8 deceased now. So you can't get any information from
9 her.

10 Q Yeah, unfortunately. This is one of those
11 topics where I want to lead into by first asking if
12 you're the right guy or not to talk about it. Insofar
13 as the workings of this document, how it was actually
14 performed on the pavement out there, can you testify
15 about that, or should I ask --

16 A As far as the day-to-day operations of the
17 marina?

18 Q I want to ask about the day-to-day operations
19 of the marina, and I also want to ask about the
20 payment that was due to AMH from The Association under
21 it.

22 A I could probably answer some of it.

23 Q Okay. Let's explore it a little bit then.
24 I'm going to let you look at this one, and maybe I can
25 dig out a copy myself. That way, we don't have to

1 look over each other. Okay. If you look in Paragraph
2 1, Bruce, about midway down, and I'll kind of direct
3 you, it starts with AMH shall be solely -- can you
4 find it?

5 A Okay, fine.

6 Q It says, AMH shall be solely responsible for
7 all expenses incurred, including but not limited to
8 expendable supplies, salaries of daytime staff and
9 dock hands, et cetera. And so as I understand, at
10 least Paragraph 1 and we'll talk about some other
11 provisions, but Paragraph 1 was indicated that it was
12 AMH Management's responsibility to pay for all of the
13 expenses in providing the services; is that right?

14 A As of January 2007, that's what it was.

15 Q Yeah, and I just want to talk about this time
16 frame, so we're on the same page.

17 A Yeah. When I came on board, that's the way
18 it was done, yes.

19 Q And then if we turn the page on Paragraph 2,
20 it talks about fees that The Association would pay to
21 AMH Management. Of course, there was the monthly
22 \$5,000 fee for management services, under Paragraph
23 4(a); is that right?

24 A That was the way it was done. I don't know
25 if the 5,000 is the exact dollar amount.

1 Q Okay. And then Paragraph 4(b) was a salary
2 reimbursement, whereby The Association would pay AMH
3 an amount equal to 3/4ths of the salary of its
4 employees?

5 A I know that they did make contributions to
6 us. I don't know if it was 3/4ths or not.

7 Q Okay. And what I wanted to just make sure I
8 understood was, at least the concept under this 2006
9 agreement was is that AMH Management was responsible
10 for the costs and then, at least according to the
11 text, that cost would be paid back to AMH by The
12 Association on a 3/4 fraction?

13 A That was my understanding when I came on in
14 2007, yes.

15 Q Sometime after that, it was done differently;
16 is that your understanding?

17 A It was.

18 Q Okay. And we'll talk more about that, the
19 2009 agreement, in a little bit. Let me get a sense,
20 if I can, let's start today, and we'll work backwards
21 as we need to. On site at The Harborage at Ashley
22 Marina, there's yourself and then who else?

23 A As far as management employees?

24 Q Yes, sir. I guess that's a poor question,
25 thank you. What I'm interested to find out is, I know

1 Q Okay. Anything else?

2 A No.

3 Q Okay. Are there any -- if I'm one of your
4 dock hands and I punch a time clock at 8:00 and I'm
5 going to be there until my shift's up, I don't log the
6 time I spend doing each task, do I?

7 A No, sir.

8 Q Okay. So I'm just there for the day?

9 A Correct.

10 Q How is it allocated as to how much time is
11 spent whether it be Marine Fuels or Slip Management or
12 The Association? Is there anywhere to view that?

13 A No.

14 Q Okay. This is one of those rare exceptions
15 where I'm going to ask Bruce the question, rather than
16 AMH or the entity the question. Does Bruce have any
17 involvement in projecting the costs that would be to
18 The Association for the amount of labor that would be
19 necessary for marina management that it's going to
20 have to reimburse for?

21 A Yes.

22 Q Okay. How do we do that?

23 A What we did in our first bid in 2009 is that
24 my historical data we tried to estimate the hours that
25 we would need to staff the marina in the summer,

1 winter, and fall. We then set up a time frame for
2 what we call in season.

3 Q Yes, sir.

4 A And then we have one for what we call off
5 season, and one, of course, is higher hours, and the
6 other one is less. And it was set up purely on hours
7 of operation.

8 Q Okay. In terms of fixing the salaries of
9 Davis and Philip or the folks on the docks out there,
10 who decides those salaries?

11 A That would be me and Joe.

12 Q You and Joe?

13 A Uh-huh.

14 Q Dock hands are paid what?

15 A 8 bucks an hour. That can vary a little bit,
16 not enough to where it matters or anything.

17 Q And absent minimum wage going up next year or
18 something to that effect, next year is it going to be
19 an \$8 an hour position?

20 A Yeah, 8 or 9 bucks an hour. It depends, like
21 if I have some returning kids or something.

22 Q I got you. It's an entry-level position
23 though?

24 A It is.

25 Q Okay. And how about Davis and Philip, how

1 A Him and I had discussed that that would work
2 better if we delayed that and did an audit at the end
3 of the year and trued everything up in an effort to
4 try to save the regime more dollars on payroll.

5 Q Okay. Exhibit No. 9 is kind of a document
6 we've been talking a little bit about. And aside from
7 assisting Mr. Miller with coming up with kind of the
8 ballpark cost that you're going to need to incorporate
9 in order to submit a bid to go to The Association for
10 consideration, did you have any other input in this
11 document?

12 A And this is the one in 2009, our first
13 contract with the board after they turned it over to
14 the regime, right?

15 Q As I understand it, yes, but I don't know
16 when the turnover date was. We'll assume that that is
17 correct. Is that the right one?

18 A Oh, I'm sorry, yes.

19 Q I thought you were still reviewing it. All
20 right. So recognizing this as the first document that
21 was entered into with the board after turnover, I
22 would ask what participation did you have in the kind
23 of creation of this document?

24 A I was involved in most of it.

25 Q Okay.

1 A I was in all the negotiations and that kind
2 of stuff.

3 Q All right. Tell me about these negotiations.
4 Were these meetings?

5 A They were.

6 Q Who was there?

7 A Joe was there. I was there. Nick McGinty
8 was there. I think, at the first of them, there were
9 probably a few other people that I don't remember.
10 And then as we kind of got down to the nitty-gritty,
11 it kind of broke off to Nick and Joe and myself.

12 Q Was there somebody who was in charge of
13 writing this?

14 A You know, I don't think there was really one
15 person. You know, we made some additions, and then
16 we'd send it back to Nick. He would make some
17 additions, then it would go to the board. They would
18 make some subtractions and additions, you know. I
19 don't know if anyone necessarily wrote, sat down and
20 wrote the whole thing, other than the final person who
21 typed it.

22 Q In this day and age, I would imagine a lot of
23 that went back and forth in e-mail?

24 A Oh, I would imagine, yes, sir.

25 Q Do you know if those e-mails still exist that

1 would show the dialogue with the draft?

2 A There may be some in my e-mail. My computer
3 was stolen, along with my flash drive that happened to
4 be in the same bag with it. I transferred a lot of my
5 e-mails to my computer so I would have them all on
6 there. There are a few. Yes, there would have been
7 e-mails. I think, somewhere, there would be. Of all
8 the people involved, somebody would have a copy of it,
9 absolutely.

10 (Off-the-record discussion.)

11 BY MR. TIMBES:

12 Q The exhibit that is Number 9 in front of you,
13 the 2009 agreement, is that -- this document embodies
14 the culmination of those discussions, and this is what
15 everybody agreed to?

16 A Yes. This is the same as the one that was
17 signed by everybody, it is. I looked to see, but
18 there's not a signature page on it.

19 Q There is. It's just actually in the middle
20 of it.

21 A Then it would be, yes, sir.

22 Q Yeah. If you look about four or five pages
23 in?

24 A Okay.

25 Q Does that look to be right?

1 A It does. It appears to be Joe's signature
2 and Eddie McCoy's signature.

3 Q Okay. That is Eddie's?

4 A Yeah.

5 Q Okay. Then, let me ask a little bit about
6 this document. And the same rule is true that if
7 there's somebody else I need to ask, let me know. If
8 it is something you can't answer, let me know as well.
9 It appeared to me that this was the first document
10 where there was a shift from the language we saw in
11 2006 that AMH would be responsible for the cost and
12 there would be the 3/4 split, but this was The
13 Association was going to be fully responsible for the
14 cost. And then it provides for, in Paragraph 8, how
15 that's going to be accomplished; is that your
16 understanding?

17 A Yes.

18 Q Do you remember why there was that change?

19 A During the negotiations, there was a pretty
20 substantial decrease in fees from this contract to
21 this contract, if I'm remembering correctly. I think,
22 back here, this was \$5,000 a month just for regime
23 management, where this contract is like 60,000 for
24 regime and marine management, if I am remembering
25 correctly.

1 So in negotiating down those fees, we went
2 back and negotiated that, you know, they needed to
3 help incur some of the costs, such as part of, you
4 know, the telephone expense that they were incurring
5 and things like that.

6 Q And if I understand what you're saying,
7 because the 2006 agreement there was a \$5,000 fee and
8 that was just management services for the marina?

9 A Yes, because we didn't manage the regime at
10 that time.

11 Q And then, in 2009, the scope of the services
12 that AMH Management was providing increased --

13 A That's correct.

14 Q -- to change from just the marina management
15 into managing all aspects, both the regime and the
16 marina management, correct?

17 A I believe so, that that took place at that
18 time.

19 Q Still a \$5,000 fee, but 2,500 to the regime,
20 2,500 for marina management?

21 A Yes.

22 Q You took on additional work, so that's the
23 reduction?

24 A Pretty much, yes.

25 Q Okay. In Paragraph 2, there was a term that

1 was fixed for this agreement. Do you remember any
2 dialogue about that?

3 A I'm aware of what you're talking about, but I
4 don't remember the actual dialogue of doing it at the
5 time, but I know it was there, yes.

6 Q And the reason I ask about any particular
7 dialogue is: If you compare the term language in
8 Exhibit 7, which is the 2006 agreement, it's different
9 language altogether from the term language in the 2009
10 agreement. Would you agree with that?

11 A Seems to be, yes.

12 Q So given that the language changed, I'm
13 assuming there must have been some discussion about
14 it. Do you have any recollection of it?

15 A You mean why they changed the language
16 itself?

17 Q Yes, sir.

18 A No offense, I just always thought it was
19 legal-eagle stuff.

20 Q And let me ask this: According to the 2009
21 agreement, it was an 18-month term expiring December
22 31, 2010, but it provided for a 12-month extension.
23 And it is my understanding that extension was granted.
24 Do you agree with that? In other words, this --

25 A No, I do not.

1 A I'm sorry, I didn't know.

2 Q That's okay.

3 A They actually never had anybody that was
4 coming to replace us. So they asked us to continue on
5 under the old contract until we could work it out.
6 And I'm saying all this from memory now.

7 Q I understand. All right. So let me ask this
8 way, because this predates my existence. So I'm
9 trying to work backwards, if you will indulge me.
10 During the calendar year 2011, AMH Management remained
11 the manager on site?

12 A That's correct.

13 Q Okay. And I'm assuming that AMH Management
14 was paid for those services by The Association?

15 A We have been.

16 Q All right. So whatever may come of the
17 dialogues and disagreements at the tail end of 2010
18 about whether it's going to be renewed or not, if we
19 sort through the mayhem, the management services
20 continued all the way through to the end of 2011?

21 A Yes.

22 Q Okay. Okay. And under at least the terms of
23 this 2009 agreement, it was set to expire either on
24 December 31, 2010 or at the expiration of the extended
25 term once granted; would you agree?

1 A Yes.

2 Q What was to happen after that, if AMH was to
3 remain on board?

4 A They would put it out for rebid.

5 Q Okay. And assume for me that AMH was the
6 successful bidder and was afforded the opportunity to
7 continue from 2012 to however long, what would have
8 been done to, I guess, document that?

9 A I would imagine, we would have entered into
10 another agreement.

11 Q Okay. And what would have been the terms of
12 that agreement?

13 A I have no idea. I guess, they would have
14 negotiated like they did this one.

15 Q Okay. The attachments to this agreement, the
16 2009, there are several that exist, a Scope of
17 Services and several more. I want to ask you about
18 those. I think it's probably towards the end. The
19 first one I want to ask about is Exhibit "A".

20 A Okay.

21 Q It indicates, Exhibit "A" Scope of Services.
22 This scope, how was it determined?

23 A We basically just sat down and made up a list
24 of things we had done in the past.

25 Q Okay. And I guess, this was -- there are no

1 under the Management Agreement or both?

2 A I would think it would be under both.

3 Q Okay. Are you familiar with this? If you
4 are, we'll talk about it. If you're not, we won't.
5 It is a draft of a document that was submitted as a
6 proposal for services starting in 2011.

7 A I'm sure I've seen it.

8 Q Did you have any involvement in it?

9 A I'm sure I did, yeah.

10 Q Tell me what you know about that document and
11 how it came to exist and what some of the changes were
12 intended to accomplish.

13 A This, from what it seems to be, is when they
14 did the request for bid, they sent it to us, and we
15 gave them a proposal on our cost to continue our
16 services.

17 Q Okay. So let me say that in reverse and make
18 sure I heard you right.. The document that you're
19 looking at now is AMH Management's response back to
20 the board proposing new services or a continuation of
21 the services, for lack of a better term; is that
22 right?

23 A Uh-huh.

24 (Exhibit No. 14 marked.)

25 BY MR. TIMBES:

1 Q Do you remember who was involved in the
2 negotiations of whatever changes were made to this
3 document?

4 A I think it would have been me and Joe.

5 Q Was there any changes made to this document
6 back from the board, or is this changes that, in other
7 words, any changes that are on this document were ones
8 that were made by you and Joe, not by joint
9 negotiations?

10 A To the best of my memory, no, they weren't
11 involved in this.

12 Q Okay. And Exhibit 12, which is already
13 marked, is another proposal also unsigned, but it's
14 dated more recent. This is a 2012 proposal. Did you
15 have involvement in that document?

16 A Oh, yeah.

17 Q Is that just a continuation of further
18 changes made from Exhibit 14?

19 A Yeah, I believe that this one was the first
20 year where they hired Legendary Marine.

21 Q Exhibit 14 was the first of the proposals
22 that AMH exchanged?

23 A I believe so, yes.

24 Q Okay. And then --

25 A This is where the counsel hired them. 2012,

1 they had hired Legendary here. And then Legendary,
2 through whatever, through litigation, whatever reason,
3 they did not come. We were asked to continue to
4 manage the marina and the regime. We did that for, I
5 don't know, about a year or close to it, I guess. And
6 I think this is the last one that we submitted. I'd
7 have to look at the fees and stuff to see. I think
8 there may have been one more bid in there somewhere.
9 I'm not sure.

10 Q Would it be between those two, or would it be
11 more recent than the Exhibit 12?

12 A I would have thought it would have been more
13 recent, but I could be wrong. I mean, there have been
14 so many, I can't keep track of all of them.

15 Q In terms of your involvement, and let me ask
16 you what you can and can't tell me, as far as the
17 figures that are represented in Paragraph 4 of the
18 agreement you have there, Exhibit 12, did you come up
19 with those figures?

20 A Oh, no, that would have been Joe.

21 Q Okay. Do you know what they represent, or
22 would I have to ask him?

23 A Probably, for a clear definition, you would
24 have to ask him.

25 Q All right. As far as if you compare Exhibit

1 9 to Exhibit 12, and there's obviously a very big
2 distinction between the term language, as far as when
3 it terminates and how it expires and things of that
4 nature, who incorporated the changes to the term in
5 Exhibit 12?

6 A What page is the terms on?

7 Q I believe it's on Page 2, sir. Yes.
8 (Points.)

9 A That would have been Joe that wrote that.

10 Q And if we look at Paragraph 16, and it may
11 help if you look at both Exhibit 12 and Exhibit 14 for
12 this, according to the remedy section under this
13 proposed agreement, as I understand it, the only way
14 that AMH could be terminated was if, under the terms
15 of this proposal, was if a court actually adjudicated
16 AMH grossly negligent; is that your understanding?

17 A My understanding was, yes, it had to be
18 grossly negligent.

19 Q Okay. Well, and that's what I'm trying to
20 find out: Was it just that they, AMH, had to be
21 grossly negligent, or was it that AMH couldn't be
22 terminated until the court -- until they went to court
23 and were found to be grossly negligent?

24 A I mean, you'd -- Joe wrote this. I don't
25 know what was his intent. But it seems to me like the

1 only way we could be replaced was for gross
2 negligence.

3 (Short break.)

4 BY MR. TIMBES:

5 Q Bruce, I want to ask a few questions before
6 we wrap up this afternoon. Insofar as the lawsuit is
7 concerned, would you be the -- let me start this
8 question over, because what I'm not looking for is, "I
9 can comment on it". I want to know if you're the best
10 person to comment on it. Insofar as what remedies
11 this lawsuit is seeking, do I ask you about that, or
12 do I ask Mr. Miller about that?

13 A Mr. Miller.

14 Q Okay. And as far as the factual basis
15 underlying the claims that have been made in the
16 complaints that have been filed, do I ask Mr. Miller
17 about that, or do I ask you about that?

18 A I would say, Mr. Miller.

19 Q Okay.

20 A I mean, I do know the claims exists.

21 Q Right. And really, what I'm interested in
22 are the claims for breach of contract and the claims
23 for civil conspiracy. I wanted to ask you --

24 A That would definitely be him. That doesn't
25 sound like something I'd even say.

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO. 11-CP-10-9513

AMH-ASHLEY MARINA, LLC and AMH)
MANAGEMENT, LLC,)
)
) PLAINTIFFS,)
)

-VS-)

THE HARBORAGE AT ASHLEY MARINA)
HORIZONTAL PROPERTY REGIME,)
THE HARBORAGE AT ASHLEY MARINA)
CONDOMINIUM ASSOCIATION and)
EDDIE McCOY, STUART REEVES,)
BRIAN SWAN, RICH CONE and)
ED MISKOTTEN, individually,)
) DEFENDANTS.)

)

30 (b) (6)

DEPOSITION OF:

AMH-ASHLEY MARINA, LLC
AND
AMH MANAGEMENT, LLC

REBECCA McMENEMY

JULY 23, 2013

10:20 a.m.

McCarn Court Reporting, Inc.

P.O. Box 778

Folly Beach, SC 29439

A-P-P-E-A-R-A-N-C-E-S

Court Reporter: Lisa A. McCarn

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1 REBECCA McMENEMY,
2 having been duly sworn, testified as follows:

3 EXAMINATION

4 BY MR. TIMBES:

5 Q Good morning, Rebecca. My name is Michael
6 Timbes. We have met before in the course of this
7 litigation, and we're here to take the deposition of
8 the entities, that being AMH Management and AMH-Ashley
9 Marina.

10 Those two LLCs can't speak for themselves
11 obviously, but they're just paperwork at the Secretary
12 of State. We provide a list of topics to the lawyer
13 for the companies who have brought a designee to speak
14 on behave of those companies. And I understand that
15 are you the designee for certain topics that we have
16 identified; is that right?

17 A Yes.

18 Q Okay. Before we get into kind of the
19 deposition, I need to lay the ground rules a little
20 bit. Have you ever given a deposition before?

21 A No.

22 Q Okay, first time. There are a few things
23 that I'm required to make sure you understand before
24 we start, and it's so that everybody knows the rules
25 that we're operating under. First and foremost,

1 It's my understanding you're going to be
2 speaking on numbers -- from the topic list that are as
3 follows: Number 1, 2, 3, 4, 5, 6, 7, 8, 10, 13, 14,
4 15, 16, 18, 21, and 22?

5 A Yes.

6 Q That's correct? Okay. Here's what I want to
7 do: Before we get into all of these topics, I want to
8 know a little bit just about you and your history with
9 the companies, et cetera. And since we've got two
10 different companies, we have AMH-Ashley Marina, LLC
11 and then we have AMH Management, LLC, I'm going to be
12 ask you questions that may pertain to both and might
13 pertain to just one or the other. You and I need to
14 keep each other on track. So if it does relate to
15 only one, let's be sure we're talking about just that
16 one. Okay?

17 A Okay.

18 Q Why don't we start with just a little bit of
19 background. I'm assuming you're not related to Judge
20 Scarborough, correct?

21 A No.

22 Q Okay. We don't have jurors, so we don't have
23 to worry about all of your relatives here in
24 Charleston. How long have you worked for -- well, let
25 me ask this: Which entity do you work for?

1 A I currently work for AMH Management.

2 Q Okay. Does that mean historically you have
3 worked for a different entity?

4 A Yes.

5 Q Okay. Walk me through that.

6 A So I think, when I was hired, I was working
7 for Miller Development.

8 Q Okay.

9 A And paid by Miller Development. And then I
10 think maybe a year ago, maybe something, just the
11 payroll changed. So then we were on AMH Management,
12 but I've always worked for AMH Management.

13 Q Okay. And when did you first start working
14 for any entity that was involved in some way with The
15 Harborage at Ashley Marina?

16 A I guess, August of 2006.

17 Q Okay. And at that time, you were working for
18 Miller Development?

19 A Yes.

20 Q Okay. And were there any other employees of
21 Miller Development?

22 A Yes.

23 Q Okay. Do you know who they are?

24 A I think, at the time, it was a much bigger
25 company, and everybody was working for Miller

1 Development, even though we were all doing stuff for
2 The Harborage.

3 Q Yeah, and that would really be all I would be
4 interested in is anybody who was working at The
5 Harborage in 2006. You know, if Miller Development
6 had a project up in Mount Pleasant, I'm not interested
7 in matters about that.

8 A You want me to list?

9 Q If you can.

10 A Okay. I'm not sure I remember. There was
11 Deas Manning, Sam Moore, Patrick Marshal, Katie
12 Howard, Landon Bridges, Joe Miller. There's so many
13 people. There were some other employees, but I'm not
14 100 percent sure that they were working, you know, for
15 The Harborage or doing stuff with The Harborage.

16 Q And just in terms of bases for operations,
17 were y'all over at 33 Lockwood?

18 A Yes, we were.

19 Q And did you -- were you ever an employee of
20 AMH-Ashley Marina, LLC?

21 A No.

22 Q Do you know of any employees that AMH-Ashley
23 Marina has?

24 A As far as I know, they don't have any
25 employees.

1 Q What is your understanding of AMH-Ashley
2 Marina, LLC's involvement with The Harborage at Ashley
3 Marina?

4 A AMH-Ashley Marina is basically the building,
5 C Dock, and I'm pretty sure the dock house are owned
6 under one company. So they own, you know, property
7 within the regime or that set of specific property
8 within the regime.

9 Q Okay. In other words, AMH-Ashley Marina is
10 the entity that is basically the owner of record for
11 those facilities?

12 A Yes.

13 Q Okay. Does AMH-Ashley Marina do anything,
14 other than own those facilities? I mean, does it
15 perform any services or anything of that nature?

16 A No.

17 Q Are you -- do you know of any contracts that
18 AMH-Ashley Marina has with The Association or anything
19 that relates to The Harborage at Ashley Marina?

20 A I think the Use and Access Agreement for the
21 bathrooms is with AMH-Ashley Marina.

22 Q Okay. And that would make sense, because
23 Ashley Marina would be the owner -- AMH-Ashley would
24 be the owner of those facilities?

25 A Yes.

1 AMH-Ashley Marina, and I assist Bruce and Chris with
2 anything they need or any research or anything of that
3 nature. I'm Joe's assistant. We do marketing things.
4 I don't know. I just -- basically, I know how to do
5 like some accounts payable and receivables for
6 different companies that we have, but basically just
7 anything that ever comes up that's needed.

8 Q I got you. And as far as property management
9 goes, tell me what that means.

10 A For our -- for the AMH-Ashley Marina
11 building, we lease out our offices, and so I manage
12 that.

13 Q So it's 33 Lockwood, in other words?

14 A Yes.

15 Q Okay. So y'all have tenants that are
16 unaffiliated with Mr. Miller that rent from you?

17 A Yes.

18 Q And so you do that property management?

19 A Yes.

20 Q And do you do any property management as it
21 relates to The Harborage Marina?

22 A Not really, that's mostly Bruce.

23 Q Okay.

24 A As far as like the dock, like doing things on
25 the docks and then --

1 Q No. Well, I want to ask this question
2 carefully, so we're on the same page. As far as, do
3 you do anything in connection with managing the regime
4 itself, dealing with collection of HOA fees, things of
5 that nature?

6 A I have, but Chris mostly does that.

7 Q And you say that you assist Bruce and Chris.
8 Is that just whatever Bruce and Chris are working on,
9 if they need some help with it, you can help out as
10 needed?

11 A Yes.

12 Q And then I would imagine there's no
13 particular list. It's just whatever they might need?

14 A Yes.

15 Q And then you indicated assisting Joe. What
16 does that involve?

17 A Just whatever he needs. I don't know. I
18 mean, it really changes on a day-to-day basis.

19 Q And does that include matters that are
20 unrelated to The Harborage at Ashley Marina?

21 A Yes.

22 Q And the marketing that you described, is that
23 marketing that relates to The Harborage at Ashley
24 Marina?

25 A Not really The Harborage at Ashley Marina

1 to focus on Ashley Marina, AMH-Ashley, LLC and the
2 Management entity. I'm just going to focus on those
3 two and ask separate questions. AMH-Ashley, as we sit
4 here today, who has power to sign agreements on behalf
5 of that entity?

6 A What kind of agreements?

7 Q Well, if -- let's just come up with one.
8 Like the shared-use agreement for the bathroom
9 facilities?

10 A That is Joe Miller.

11 Q Okay. Is there anyone else, absent Joe
12 saying it's okay for you to sign this?

13 A No.

14 Q What about something like the door breaks out
15 at the facility and somebody needs to have it fixed,
16 is there somebody who can sign a contract for
17 AMH-Ashley to have a contractor come out and fix it?

18 A I guess, I mean, I've signed contracts for
19 things to be fixed. Bruce has done that also, but I
20 guess Joe Miller is the -- would sign off on it, I
21 guess.

22 Q Right, and I think that's probably really the
23 question.

24 A Okay.

25 Q Is before you can sign off on something or

1 before Bruce can sign off on something, it would have
2 to be approved by Mr. Miller?

3 A Yes.

4 Q That same kind of dialogue with AMH
5 Management, is that true as well, Mr. Miller would
6 have to approve anything before someone other than him
7 could sign off on it?

8 A Yes.

9 Q And at least for the period of time that
10 you've worked with Mr. Miller and his companies, has
11 that always been your experience?

12 A Yes.

13 Q All right. What I want to kind of shift
14 gears and do a little bit of housekeeping on is: Some
15 of the documents and various proposals that have been
16 exchanged relative to the management services that are
17 provided for The Harborage at Ashley Marina, to kind
18 of give you an idea where we're going. Okay?

19 A Okay.

20 Q And so that I can have some understanding of
21 my universe that I'm getting into: It's my impression
22 that the only entity associated with Mr. Miller that
23 has ever provided management services over at The
24 Harborage at Ashley Marina has been AMH Management; is
25 that correct?

1 A Yes.

2 (Exhibits No. 2 through No. 5 marked.)

3 BY MR. TIMBES:

4 Q These are just for housekeeping. I'm handing
5 you the Articles of Organization, and what I
6 understand to be the operating agreements for both the
7 AMH Management entity and the AMH-Ashley Marina
8 entity. And what I would ask you to do -- these are
9 just numbered Exhibits 2, 3, 4, and 5 to your
10 deposition. If you recognize these as the corporate
11 documents I've described, just let me know.

12 A Yes.

13 Q Those are correct? Okay. And I think -- and
14 you had provided those to me by e-mail, right?

15 A I did, yes.

16 Q Let me shift gears then, and let's talk about
17 these contracts. And the first one that I want to
18 talk about is -- well, let me back up.

19 (Exhibit No. 6 marked.)

20 BY MR. TIMBES:

21 Q Rebecca, I'm going to hand you what has been
22 marked as Exhibit No. 6 to your deposition.
23 Certainly, it's a very large document. Take as much
24 time as you want to review it, but I'll represent to
25 you that it's a copy of the Master Deed for The

1 A Yes.

2 Q Okay. Walk me through, if you know, walk me
3 through kind of how Ashley Marina came to exist. I
4 mean, at some point, I know there was some existing
5 structure out there. And then Mr. Miller got
6 involved. This Master Deed was created. These
7 management agreements resulted. Do you have an
8 understanding how that process worked?

9 A I actually wasn't involved at the time.

10 Q Okay. What I want to be able to do is ask a
11 series of questions about how various management
12 agreements were created and put in place. Are you
13 able to answer questions about that?

14 A I don't know that I am, I guess.

15 MR. PRITCHARD: Can we go off the record?

16 (Off-the-record discussion.)

17 BY MR. TIMBES:

18 Q We were talking about the, for lack of a
19 better description, the interaction between the Master
20 Deed and some of the management agreements that have
21 some age to them. And it's my understanding that you
22 aren't familiar with that process. And, probably the
23 best way to state it, the folks who were involved in
24 that process are no longer affiliated with AMH
25 Management; is that correct?

1 A That's correct.

2 Q Okay. And I would imagine that we're not
3 lucky enough to find a file somewhere that has all of
4 their notes relative to that process?

5 A I don't think so.

6 Q Okay. Well, working with what we can, let's
7 go through them and let's make sure I've got the
8 correct documents. Okay?

9 A Okay.

10 (Exhibit No. 7 marked.)

11 BY MR. TIMBES:

12 Q Okay. Exhibit 7 to this deposition is what I
13 understand to be the Marina Management Services
14 Agreement that was first entered into relative to any
15 work to be done out at Harborage by AMH Management?

16 A Yes.

17 Q Okay. Are you aware of any contracts that
18 predate this particular Exhibit 7?

19 A No.

20 Q Okay. So the best of your understanding,
21 this would be the first instance where AMH Management
22 entered into a contract with The Association?

23 A Yes, I think so.

24 Q Okay. And it's my understanding that when
25 AMH Management first began providing services to The

1 Association under this agreement that it was for
2 marina-type management services, and there were not
3 any regime-type management services involved; is that
4 right?

5 A Yes.

6 Q Okay. And so that you and I will be on the
7 same page for some questions later on, I was talking
8 about things done on the docks, you know, making sure
9 the floaters are good and the cleats are down and all
10 that, marina-management services.

11 A Okay.

12 Q And if it deals with collecting regime fees
13 and things of that nature that are -- could be done
14 for any HOA, those are what I'm going to call regime
15 services; is that fair enough?

16 A Yes.

17 Q Okay. Do you know, looking at the back page
18 of this agreement, looks like it's a four-page
19 agreement, it was signed by AMH Management, LLC. Is
20 that Landon?

21 A Landon Bridges.

22 Q Landon Bridges. And he lists his title as
23 CFO, and he's CFO of AMH Management, LLC?

24 A I just always knew it as CFO. I'm not
25 exactly sure. I think it was just over the blanket of

1 Q Do you know who wrote this document? Would
2 it have been Bruce and Mr. Miller?

3 A I just know that they both worked on it
4 together. The writing, I'm not sure who wrote it.

5 Q And then on the back of this document,
6 actually not the very back, sorry. Several pages back
7 is the signature page.

8 A Okay.

9 Q And it looks like it was executed on April
10 20, 2009. And is that Mr. Miller's signature for AMH?

11 A Yes.

12 Q And do you know whose signature that is for
13 The Harborage?

14 A I don't.

15 Q Okay. It is my understanding that prior to
16 this 2009 agreement being executed that The
17 Association had requested proposals from others for
18 the provision of services at the marina; are you aware
19 of that?

20 A Yes.

21 Q Tell me what you know about that process.

22 A Our involvement or just?

23 Q Either way. I don't know anything about it
24 because I wasn't there.

25 A All I know is that they sent out a request, I

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO. 11-CP-10-9513

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MANAGEMENT, LLC,)

PLAINTIFFS,)

-VS-)

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HORIZONTAL PROPERTY REGIME,)
THE HARBORAGE AT ASHLEY MARINA)
CONDOMINIUM ASSOCIATION and)
EDDIE McCOY, STUART REEVES,)
BRIAN SWAN, RICH CONE and)
ED MISKOTTEN, individually,)

DEFENDANTS.)

30 (b) (6)

DEPOSITION OF:

AMH-ASHLEY MARINA, LLC
AND
AMH MANAGEMENT, LLC

CHRISTOPHER J. INGRAM

JULY 23, 2013

11:53 a.m.

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CHRISTOPHER J. INGRAM,

having been duly sworn, testified as follows:

EXAMINATION

BY MR. TIMBES:

Q Good morning, Chris.

A Good morning.

Q You and I have met before. I'm Michael Timbes, again, for the record. We're going to continue with some of the topics that we have been discussing today. Rebecca was with us earlier covering some of the exhibits and topics that we've outlined, and I think you've been chosen to testify to some other ones. So before we get into what you're going to testify about, let me ask you a few background questions --

A All right.

Q -- to make sure you and I are on the same page with how the deposition is going to work.

A Okay.

Q Have you ever given a deposition before?

A No, I haven't.

Q Well, let me make sure you're fully informed on how the process works. First off, of course, you're under oath, and you understand what that means?

A Yes.

1 A I mean, I just see this one thing here that
2 says, "On January 1, 2012 the Fee shall change to
3 \$7,793 per month." I don't -- I'd have to look back
4 to see if I calculated that number or not. I don't
5 know.

6 Q I understand. That's fine. Why don't we do
7 this: Let's take a quick break.

8 (Short break.)

9 BY MR. TIMBES:

10 Q I wanted to ask you just one limited
11 question, and so I probably need to mark this as an
12 exhibit.

13 (Exhibit No. 12 marked.)

14 BY MR. TIMBES:

15 Q Exhibit 12 to your deposition is an unsigned
16 proposal that was concerning management services at
17 The Harborage at Ashley Marina. And I understand that
18 your involvement in the creation of this document was
19 limited at very best?

20 A Correct.

21 Q But what I did want to ask you about is:
22 This document has some -- the fee structure is a
23 little different, and it may just be in amount and not
24 necessarily in concept. And that's what I want to
25 make sure I understand.

1 If we look at Paragraph 4, the Management
2 Services Fees, there's a Paragraph (c) that says,
3 "Notwithstanding anything to the contrary, retroactive
4 to March 1, 2011, the Fee for the remainder of 2011
5 was to have been \$6,534 per month." Did you have any
6 involvement in determining that figure?

7 A I may have. I would have to double-check on
8 my e-mail, because this was January 12. So, I mean, I
9 may have. I don't know for certain. I'd have to
10 look. I mean, obviously, if I did, I would have
11 the -- still have the file.

12 Q Other than, if you know, other than the 3
13 percent escalations that have been articulated in
14 previous agreements that were signed, would that
15 \$6,534 figure include any other amounts, other than
16 escalating the previous figures?

17 A Just from looking at it, I would say that
18 would be totally related to the management fee and
19 nothing else, without reviewing my file to look and
20 see how -- where and if I did come up with those
21 numbers. But I would, just as a guess, I would say,
22 yeah, those were just completely related to the marina
23 and/or the regime-management fee.

24 Q And would the jump under this proposal to
25 7,793 be just another 3-percent bump? And I know you

1 don't have a calculator with you, but conceptually?

2 A Looks about -- looks a little bit more than 3
3 percent to me. That's \$1,200 difference, but that's
4 also compounded. You know, you start in '09, in '10
5 you have a 3-percent bump.

6 Q Right.

7 A In '11, you have a 3-percent bump. And so
8 it's all -- it's compounded those years. So I would
9 have to look at my file to say definitively.

10 Q If I did that right, I multiplied the
11 previous figure, the 6,534, times .03 and that
12 produced roughly \$196; does that sound right?

13 A Yeah. But that's obviously not the 77. So
14 it's probably the escalation from prior years -- total
15 guess, I would say that that's from prior years,
16 counting in the prior escalations. So it's going to
17 be a com -- you know.

18 Q Well, that's why -- and I guess I'm trying to
19 figure out --

20 A Because it says retroactive to March 1st and
21 through the remainder of 2011 (reads). Yeah. I'd
22 have to look to see what they paid in January and
23 February of 2011. I don't -- without doing some
24 research, I really can't say one way or the other. I
25 mean, I would assume that's what it is, but I can't

1 sit here and say definitively that's what the
2 difference between the two is.

3 Q As a concept, are you aware of any other
4 increases that would be carried over from prior
5 agreements, other than a 3-percent bump?

6 A No, it should be just the one from '09.

7 Q And if we look at Paragraph 8 on the next
8 page, this document is very similar to the previous
9 version. So Paragraph 8 again is just the
10 reimbursement that The Association is going to pay to
11 AMH Management for payroll costs?

12 A Right.

13 Q And the amount of 16,230, that's a gross
14 amount, not a net amount?

15 A Uh-huh.

16 Q Is subject to the deductions for the 1,250
17 per month for slip management and then the 2,083 for
18 Marine Fuels; is that correct?

19 A I mean, I'm not sure where the 16,230 came
20 from, but the 16,230 minus the 1,250 and minus -- even
21 that number right there is not -- pretty sure that's
22 not what Marine Fuels is given each month. I mean,
23 the math looks like it works out, but I don't know how
24 the 16,230 was calculated.

25 Q If I were to -- did you calculate those

1 figures or did someone else?

2 A I don't recall calculating that 16,230 per
3 month. I mean, that's -- unless that's coming off of
4 their budget, I don't recall ever preparing
5 something for a gross payroll for them.

6 Q Okay. And then, if we look on the back of
7 this proposal, Paragraph 27, there's a provision for
8 the payment of legal fees in the amount of 10,000 and
9 then \$2,000 bonuses to you and to Bruce Wallace. Do
10 you know what those were in regards to?

11 A No.

12 Q That wasn't part of --

13 A I didn't have anything to do with that.

14 Q Did you have any other involvement, other
15 than what we talked about?

16 A No, sir.

17 Q Okay. I can probably flip through these
18 questions pretty quickly. Did you have any
19 involvement in the development or preparation of the
20 master deed?

21 A No.

22 Q Any amendments to the master deed, anything
23 of that nature?

24 A No. I was not on staff at the time.

25 Q Okay. And as far as any communications back

MANAGEMENT SERVICES AGREEMENT

This Management Services Agreement ("Agreement") shall be effective as of January 1, 2012 and is made by and between The Harborage at Ashley Marina, Horizontal Property Regime (the "Association"), AMH Management, LLC ("AMH"), and Ashley Marina Slip Management, LLC ("AMSM").

RECITALS:

- A. AMH is engaged in the business of marina and regime management.
- B. The Harborage at Ashley Marina is a marina located at 33 Lockwood Drive, Charleston, SC 29401 ("Marina").
- C. The Association seeks to hire AMH for the management of the Condominium as defined in the Master Deed of The Harborage at Ashley Marina Horizontal Property Regime, which includes management of all aspects of the Regime created by the Master Deed, including property management of the Marina and bookkeeping, billing and collections for the Association.

AGREEMENT

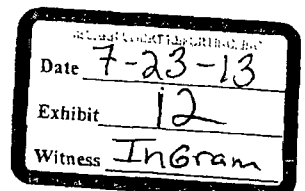
In consideration of the terms and conditions set forth in this Agreement, the Parties agree as follows:

1. Management Services.

(a) Marina. AMH agrees to provide the Association, for so long as this Agreement is in effect, full marina management support including, without limitation, making its relevant management employees available on a reasonable basis to the Association as is necessary to provide management and administrative support to the Association for the day-to-day operations of the Marina.

Such services shall include: and costs shall include, but not be limited to:

- i) Maintaining an office (the dockhouse).
- ii) Maintaining a marina staff, to include a dockmaster/manager and dockhands. AMH and the staff it oversees shall be responsible for the duties or oversight of the duties contained in the Scope of Services in Exhibit "A" attached hereto. These duties shall be carried out in good faith and all necessary decisions shall be made in the reasonable discretion of AMH and the staff.
- iii) Operation of the marina 7 days per week from 8:00 am to 6:00 pm during November through February and 8:00 am to 8:00 pm during March through October.



The Association agrees to be responsible for any and all Association/AMH costs incurred while carrying out such management services. Such costs shall include, but not be limited to, the following:

- i) Staff uniforms (visors, shirts, jackets), expendable supplies, office supplies, postage, marina payroll (as described in section 8), computer/tech support, insurance, reasonable bonuses, and any benefits. Bonuses and benefits must be approved by the Finance Committee of the Association.
- ii) Sales and other applicable taxes, city, county and state business taxes, any licenses, fees, and permits that are required to run/manage the Marina or Association.
- iii) The cost of any necessary new furnishings, new hardware, software and other equipment. Such items shall be pre-approved by the Finance Committee of the Regime Board.
- iv) All other costs reasonably incurred to manage the marina, carry out the Scope of Services, and/or to carry out the duties requested by the Association from time to time.
- v) Notwithstanding the aforementioned, all non-recurring costs which are to be paid by the Association in excess of \$200.00 per item must be approved by the finance committee in advance of the expenditure. At the Committee's sole discretion, it shall have the ability to refuse the expenditure if deemed unreasonable or not a cost of the Association. In the event of an emergency which will in AMH's reasonable opinion will cause irreparable harm to the Association or its property, AMH will attempt to get prior approval from any member of the Board of Directors by phone and e-mail before agreeing to any costs in excess of the above. However, in the instance of such an emergency, and only in this instance, if no member of the Board is available to approve such expenditure, AMH shall have the ability to act on behalf of the Association and expend such costs as necessary in order to mitigate further damages.

(b) Bookkeeping. AMH shall also manage the Association's accounting, billing, financial statements, accounts receivable, and general finances of the association. These finances shall be in segregated, insured accounts and all accounts will require the Treasurer of the association to be agents on the account and a signer on the checks. All checks processed by AMH for purposes of the Association shall require two signers, one by a designated member of AMH or the Dockmaster/manager and one a member of the Association's Board of Directors. The Scope of Services also contains a description of the Regime Management Services required of AMH. Any and all costs related to the performance of such duties shall be the responsibility of the Association, including supplies and reasonable copying/printing costs.

2. Term. This Agreement shall automatically renew on an annual basis every January 1st hereafter. This Agreement may be terminated at anytime by AMH in its sole discretion. The Association shall have no right to terminate this Agreement except in the event of uncured gross negligence or criminal activity by AMH in the discharge of its management duties.

Upon termination of this Agreement, AMH shall deliver to the Association all papers, books and records maintained by AMH for the Association, including checkbooks, passbooks, records of fees, insurance policies, existing contracts relating to the operation received or held by AMH for the account of the Association (after deducting therefrom any prorated and unpaid portion of fees or unreimbursed advances due AMH). Further, upon termination hereof, the rights and obligations of the parties hereunder shall cease, subject, however, to the indemnification provisions set forth in Paragraph 13 of the Agreement and to any reimbursement or compensation due to AMH and return of any monies due to Association held by AMH.

3. Insurance. The Association shall pay for all insurance related to the Marina (liability, property, etc.) and shall pay for all insurance related to the operation of the Marina as well, including, but not limited to, general liability, workers compensation, protection and indemnity, marina operator's, umbrella, hired but not owned, and physical damage to property owned by the Association. AMH and AMSM shall be named as an additional insured on every insurance policy. AMH shall have no insurance cost responsibility whatsoever with regard to the marina, operation thereof, or the marina staff (an affiliate shall pay casualty insurance on the office building). The Parties shall adhere to the insurance provisions in Exhibit "B".

4. Management Services Fee.

(a) In consideration for the marina and bookkeeping management services to be provided, the Association agrees to pay AMH a Management Services Fee ("Fee") on a monthly basis for the term of this Agreement. This Fee is intended to be "net" of all expenses/costs of the Association/Marina.

(b) The Fee shall be due and payable on the first of each month.

(c) Notwithstanding anything to the contrary, retroactive to March 1, 2011, the Fee for the remainder of 2011 was to have been \$6,534 per month.

(d) On January 1, 2012 the Fee shall change to \$7,793 per month.

(e) On January 1st of each year thereafter such Fee shall escalate by the greater of 3% or CPI (CPI-W as measured by U.S. Bureau of Labor Statistics for the preceding year).

5. Facilities. During the term of this Agreement, the Association shall have use of the dockhouse and marina storage within the onsite office building in consideration of paying \$100 per month as an offset for regime fees associated with the dockhouse and office building. The Association shall be responsible for the costs of any maintenance to the dockhouse or marina storage, with such expenses to be pre-approved by the Finance Committee. The owner of the office building may relocate and/or resize the marina storage at its discretion and its cost. Additionally, the Association agrees to pay AMH \$62.50 per month in consideration of the existing infrastructure in the dockhouse.

6. Reimbursement for Use of Common Employees. AMH agrees to reimburse the Association \$15,000 per year toward costs of a shared employee, via payroll reimbursement credit/offset, with such credits to be applied on a monthly basis in equal installments as

provided in Paragraph 8 below. This reimbursement shall discontinue if AMH or AMSM shall cease leasing activities.

7. Marine Fuels Agreement. AMH has an agreement with Marine Fuels (MF) whereby it receives monthly payments in consideration of the shared employees utilized to assist in fueling vessels within the marina. AMH agrees to pass through 100% of MF's payments to the Association on a monthly basis.

8. Payroll. The Association agrees to pay to AMH a flat amount for monthly payroll, payroll taxes, administration of payroll, and staffing services. The Gross Amount of such payroll cost to the Association on a monthly basis shall be \$16,230; provided however, that from this Gross Amount will be deductions of (1) \$1,250.00 per month in consideration of a shared employee by AMH or an affiliate thereof and (2) \$2,083.33 in consideration of an agreement between AMH and Marine Fuels, LLC, as referenced in Paragraph 7 above, which provides for shared employees to perform duties required to carry out the fueling operations. Therefore, the 2012 Net Amount due by the Association to AMH on a monthly basis shall be \$12,897. This payment shall be made prior to the last day in the month of which service is being provided. The Gross Amount, as specified above, shall increase by 3% per annum on January 1, 2013 and on the first day of each January thereafter. This amount may increase at an amount greater than 3% upon written approval by the Board of Directors.

In consideration of the payroll payment, AMH agrees to provide the labor necessary to perform the Scope of Services attached hereto as Exhibit "A" during the operational hours described in 1(a)(i).

In the event of an emergency event to the Association and its property which is outside of the Scope of Services and which may cause additional labor hours to be expended, AMH shall attempt to notify the Board of Directors by phone and e-mail of such a need with an estimate of additional labor hours and cost of such labor. The Board, in its sole discretion, may accept or decline this additional assistance and cost. In the event the Board cannot be notified and in AMH's reasonable opinion additional labor is needed for an emergency event, the Association shall cover the cost of such labor.

It is understood that the Association shall maintain and pay for Workers Compensation coverage, as further described in Exhibit B, Section D. At all times AMH shall be listed as an additional insured on the policy.

Due to the nature of this relationship, whereby AMH or its affiliates are also owners of Locker Units within the Association, and the desire of the Board of Directors and AMH to ensure regime fees due by AMH or its affiliates are in good standing at all times under the term of this agreement, AMH agrees to allow the Board of Directors to deduct from the Net Amount any regime fees owed by AMH or its affiliates which become 30 days or greater past due.

9. Phone Number, Page Listing, Advertising. Heretofore, AMH has paid for all marina marketing and advertising, including yellow pages ads, waterway guide ads, etc and shall continue to pay for these costs at its discretion. It is acknowledged that AMH owns the phone numbers for Ashley Marina, which the Association shall have the right to use during the term of

this Agreement. The Association agrees to pay the cost to maintain one phone line with basic business service.

10. Maintenance of Records; Right to Inspect. AMH agrees to maintain such records as are required to evidence its compliance with the terms of this Agreement. AMH shall permit one or more representatives of the Association to inspect, at any reasonable time and upon reasonable terms, the records of AMH.

11. Indemnification. AMH shall indemnify the Association against all actions, proceedings, claims, demands, costs, liabilities, damages or losses of any kind or nature whatsoever that may be brought, commenced or prosecuted against or incurred by AMH due to the uncured gross negligence or willful misconduct of AMH. The Association shall indemnify AMH against all actions, proceedings, claims, demands, costs, liabilities, damages or losses of any kind or nature whatsoever that may be brought, commenced or prosecuted against or incurred by the Association due to the gross negligence or willful misconduct of the Association. The Association shall pay for any cost of legal representation for AMH related to any action brought against AMH in connection with its Management Services (unless AMH is judged to be grossly negligent, in which case AMH would have a duty to reimburse the Association for such costs).

12. Representations of AMH and the Association. Both AMH and the Association represent and warrant to the other that:

- (a) That the Association is a corporation duly organized and validly existing under the laws of the State of South Carolina;
- (b) That AMH is a limited liability company organized and validly existing under the laws of the state of South Carolina;
- (c) Each Party has full power, authority and legal right to perform the provisions of this Agreement;
- (d) This Agreement constitutes a valid and binding obligation of the Party enforceable in accordance with its terms, and does not constitute a breach of or default under any other agreement to which the Party is a party or by which any of its assets are bound or affected; and
- (e) The parties have entered into an arms-length transaction.

13. AMH Business/Non-Compete.

The Association recognizes that AMH (and/or affiliates) is in the business of owning, operating and managing marinas for its own account and others. The Association agrees not to compete for slip leasing/management as long as this contract remains in effect. The Association will not take any steps to offer slip leasing and/or management directly or indirectly to slip owners or to facilitate slip leasing by slip owners or to help in any way third parties to compete for this business. The Association will actively refer all slip owners to AMSM or an affiliate to be designated for slip leasing and management purposes (this will include the website, newsletters and any other communications).

Currently the Senior Dockmaster and Dockmasters are under non-competes due to their value to AMH and its business. The Association agrees not to instigate any discussions to hire any employee who works at the Marina or under the supervision of AMH.

14. Electrical. Should the Board elect to have AMH bill and collect for electrical charges there would be an additional quarterly charge of \$1900. This amount would increase by 3% annually.

15. Expenses. Each Party shall pay its own expenses incident to the negotiation and execution of this Agreement. The Association will keep a petty cash account of approximately \$500 available. At no time will AMH advance funds to the Marina or pay Marina obligations from AMH funds. The Association is responsible for all costs required to operate the marina in a first class manner and shall pay its obligations according to the terms of this Agreement. Provisions and procedures will be put in place so that AMH does not advance funds for Association costs. The chair of the Finance Committee of the Association shall have approval, in advance, of any expense in excess of \$200.00. Should the Finance Committee at any time feel as though funds are being spent without merit, the committee at its sole discretion shall have the ability to close the petty cash account and require preapproval of all expenditures.

16. Notices. Any notice or other communication required or permitted under this Agreement shall be in writing and shall be sent by registered or certified mail, or alternatively, by email, but the latter shall only be a valid form if a return email is received acknowledging receipt. Until further notice, communications shall be sent to:

(a) If to AMH, to the following address:

AMH Management, LLC
C/o Atlantic Marina Holdings, LLC
33 Lockwood Drive
Charleston, SC 29401
Fax: (843) 853-8857
Attention: Katie Howard
kh@atlanticmarinaholdings.com
jm@atlanticmarinaholdings.com

(b) If to the Association, to the following address:

The Harborage at Ashley Marina, Horizontal Property Regime
Attn: Board of Directors
33 Lockwood Drive
Charleston, SC 29401
Board@MyAshleyMarina.com
Finance@MyAshleyMarina.com

Unless otherwise provided in this Agreement, all notices and communications shall be deemed to have been duly given or made five (5) business days after being deposited in the mail, postage prepaid, as registered or certified mail, return receipt requested, and upon receipt of a return email confirmation from either/or both the email address recipients listed herein to the Board of Directors. The address to which notices or other communication shall be directed may be changed from time to time by any Party by giving notice to the other Party of the substituted address.

16. Remedies. Should the Association believe AMH has been grossly negligent in performance of its duties in accordance with the Scope of Services, the Association shall provide notice of same and AMH will have a period of 10 days to cure or attempt to cure the situation. If AMH fails to do so and a court of final adjudication ultimately finds that AMH has truly been grossly negligent and that AMH has not cured same or made a good faith attempt to cure same, the Association shall have the right to terminate this Agreement. In the event the Association fails to act in accordance with this agreement, AMH shall provide written notice to the Association, which will take steps to comply.

17. Choice of Law. This Agreement will be governed by, and all disputes arising under this Agreement will be resolved in accordance with, the laws of the State of South Carolina.

18. Severability. If any provision of this Agreement is adjudged to be invalid or unenforceable to any extent, the remainder of this Agreement will not be affected thereby and will be valid and enforceable to the fullest extent permitted by law.

19. Binding Effect. This Agreement will be binding upon and inure to the benefit of AMH and the Association and any assigns or successors in interest.

20. Amendment and Waiver. No supplement, modification or amendment of, or waiver with respect to, this Agreement shall be binding unless executed in writing. This Agreement may be modified, amended or terminated upon the written agreement of each Party hereto.

21. Entire Agreement. This Agreement constitutes the entire agreement pertaining to the subject matter hereof and supersedes all prior oral and written agreements and understandings in connection herewith. No covenant, representation or condition not expressed in this Agreement will affect or be effective to interpret, change or restrict the express provisions of this Agreement.

22. Counterparts. This Agreement may be executed in counterparts, each of which will be considered an original, but all of which together will constitute the same instrument.

23. Litigation Expenses. Should either party bring an action under this Agreement, the non-prevailing party shall pay the prevailing party's attorney's fees and expenses incurred in such action.

24. Marina Office. During the term of this Agreement the Association shall not plan, provide for or build a separate dock house or marina office of any kind.

25. Delinquent Association Fees. AMSM shall use commercially reasonable efforts to collect and pay to the Association delinquent Association fees from slip owners whose slips are managed by AMSM. A 25% collection fee shall be charged by AMSM (retroactive on any previously withheld amounts) and shall be billed by the Association Board per 4.1 of the Master Deed and collected from the delinquent member by AMSM (with such collection fee to be retroactive to January 1, 2010). AMSM joins this Agreement for purposes of this paragraph only and for no other purpose and shall owe no other duty to the Association.

26. Board Liason. The Association Board shall appoint and maintain at all times one member of the Board to serve as a liason with AMH and its staff ("Board Liason"). The Board Liason shall be subject to the approval of AMH and shall be charged with all day to day communications with AMH and its staff.

27. Attorney's Fees; One Time Bonus. Upon execution of this Agreement, the Association shall pay to Pritchard & Elliott, LLC the sum of \$10,000 and shall pay to Bruce Wallace and Chris Ingram a one time bonus of \$2,000 each.

28. Public Statements Regarding AMH or an Affiliate. Any statements (emails to regime or regime members, newsletters, etc.) to be made by the Association Board regarding AMH or an affiliate shall be subject to pre-approval by AMH.

29. Retroactive Payments. Any amounts due AMH or AMSM retroactively shall be paid in full on or before January 6, 2012.

IN WITNESS WHEREOF, each Party has executed this Management Services Agreement as of the date indicated below.

AMH MANAGEMENT, LLC

By: _____

Its: _____

Date: _____

THE HARBORAGE AT ASHLEY MARINA, HORIZONTAL PROPERTY REGIME

By: _____

Its: _____

Date: _____

ASHLEY MARINA SLIP MANAGEMENT, LLC

By: _____

EXHIBIT "A"

SCOPE OF SERVICES

A. MAINTENANCE AND/OR OVERSIGHT OF MAINTENANCE

1. Maintain all docks, boardwalks and access ramps in good repair, including replacement of any portion of these improvements as approved by the Board of Directors.
2. Maintain all utilities in good working order to include repair, replacement and upgrading as necessary to insure continued electrical, water, cable and wireless service or other utilities to the individual slips and common areas.
3. Maintain and replace all lighting fixtures and bulbs as necessary to insure uninterrupted service to the individual slips and common areas.
4. Maintain power pedestals in good working condition, including replacement as necessary.
5. Maintain parking lot, including replacement of parking lot surface materials as needed, and ensuring that parking spaces are divided and clearly marked.
6. Ensure that all grassed areas, flower beds and planted areas are in good condition, including replacement of flowers and plants on a seasonal basis or as needed. Contractually, this service will be handled through the property management company.
7. Maintain laundry room and insure that all laundry equipment is in good working condition and area is clean and in good repair.
8. Maintain restrooms to insure area is clean and all fixtures are in good working condition.
9. Maintain security gate
10. Obtain approval from the Board of Directors for all expenditures in excess of \$150 or \$500 in aggregate per month
11. Maintain all signs and plaques in good condition and replace as necessary
12. Maintain and replace as needed all equipment owned by the Regime to include dock carts, hoses, lines, electrical cords and any other equipment which is or may be acquired by the Regime

It is understood that staff shall oversee the above maintenance. Staff will do what is reasonable and within its ability, with all other maintenance to be performed by third parties at the Association's sole expense.

B. PERSONNEL

1. Interview, hire and train all employees (including performance of background checks and drug testing if so directed by the Board of Directors).
2. Maintain employee files to include resumes, performance reviews, W-4s and other items normally maintained in such files
3. Health and benefit plans will not be provided.
4. Perform annual reviews of every employee to include a written summary of the review in each employee's personal file. Submit employee evaluation reports to the Board of Directors annually.
5. Establish employee manual outlining employee duties, responsibilities, benefits,

vacation policy, sick leave policy, holidays and other information normally included in such a manual.

6. Supervise personnel directly and indirectly through senior personnel to insure top quality services are provided to owners and their guests.
7. Complete and file or have ADP or accountants complete and file all quarterly and annual payroll tax returns to include Federal forms W-4, W-2, 941, W-3 and state forms W-2, UCE 101, 1605 and 1606 and any and all other required payroll tax returns as required by the Internal Revenue Service and the State of South Carolina to report employee payroll.
8. Help Association maintain in full force and effect workers compensation insurance. Complete and file any and all workman compensation claims forms on a timely basis.
9. Maintain a written system of all time worked by staff on a daily basis.
10. Prepare and distribute or have ADP prepare and distribute all employee payroll checks on a weekly basis, bi-weekly or semi-monthly basis.
11. Withhold or have ADP withhold the proper Federal and State payroll taxes from all employees. Prepare and remit, or have ADP do same, all payroll taxes including the Employer's share on a timely basis

C. OTHER RESPONSIBILITIES AND DUTIES

1. Help Association maintain proper insurance coverage as provided in this Agreement.
2. Maintain a system to monitor that every vessel in the Marina has adequate insurance coverage with the Regime named as a loss payee.
3. Insure that any business operation on or within the Common area of the Regime has adequate insurance coverage with the Regime named as a loss payee as well as an up to date premises agreement on file. The premises agreement will be supplied by the Board
4. Maintain all vendor contracts, including solicitation of bids annually from at least three vendors for each type of contracted service.
5. Maintain all information required by any regulatory agencies having governance over the Marina, including, but not limited to, an updated operations and maintenance manual as required by OCRM, a copy of which will be supplied to the Board of Directors.
6. Establish and maintain an Emergency Spill Response manual and insure that there are adequate equipment and supplies MF to respond to a fuel spill.
7. Maintain all safety equipment necessary to safeguard the assets of the Regime. Maintain a written response plan to be followed by the marina staff and any emergency responders.
8. Establish and maintain a hurricane response plan.
9. Establish and maintain an incident reporting system for any incident involving an accident, altercation, event involving property damage, any issue which may be covered by insurance or any event requiring a response by any regulatory agency.
10. Report to the Board of Directors at least monthly as to the status of the Regime Operations, including a prospective analysis of major areas requiring the Boards attention.
11. Maintain all books, records, bank accounts, payroll records, insurance reports, incident reports and other documentation required to operate the Regime in a businesslike manner.

12. Maintain a record of all electric usage by slip on a monthly basis.
13. Establish, maintain and enforce marina rules and regulations (including a live-aboard policy and associated fees) and a parking policy regulating parking by owners, guests, service personnel and vendors.
14. Establish a system of controls to regulate admission of service personnel and vendors to the Marina, including confirmation of insurance coverage before admission to the Marina.
15. Establish and maintain a list of all slip owners to include full names, addresses, telephone numbers and email addresses.
16. Coordinate so as to insure the flow of information between AMH, marina staff, and the Board so as to allow each party to render the highest level of management services possible to the Regime.
17. Ensure that every boater, at all times within the hours of operation, is assisted in a manner consistent with a first class marina.
18. Prevent any actions which would be in violation of the existing permit or OCRM regulations.

D. FUELING OPERATIONS

Marine Fuels, LLC ("MF") owns and is ultimately responsible for fueling operations. To assist in such operations, the Association, AMH and marina staff will:

1. Provide needed staff to fuel any boats requesting diesel or gasoline during normal operating hours.
2. Process payments for the fuel sales. All credit card transactional costs will be paid by MF.
3. Reconcile fuel sold against payments collected daily to ensure accurate billing. Detail and resolve any discrepancies in a timely manner.
4. Provide a reconciled report daily no later than 12:00PM for the prior day.
5. All costs associated with the above work, including the cost of any employee training or certification shall be the responsibility of the Association and/or MF.

ITEMS SPECIFICALLY NOT INCLUDED IN THE SCOPE OF SERVICES

The following list, while not inclusive, lists certain responsibilities which are outside the scope of service provided above:

- Reading of electric meters and calculation, billing and collection of electric charges (unless so elected as provided in the Agreement)
- Any financial Audits or third party accounting
- Tax preparation or any accounting work related thereto
- Legal representation
- Public relations, advertising and marketing
- Website design, maintenance and support

EXHIBIT "B"

INSURANCE

1. Coverage and Amounts. AMH in conjunction with the Association shall, at all times during the term of this contract and at the Association's sole cost and expense, obtain and keep in force the insurance coverage and amounts set forth in Paragraph 3 of the Agreement and in this Exhibit.
 - (a) Association shall maintain and AMH shall administer commercial general liability insurance, including contractual liability, broad form property damage liability, fire legal liability, premises and completed operations, and medical payments, with limits not less than Two Million Dollars (\$2,000,000) per occurrence and in the annual aggregate, insuring against claims for bodily injury, personal injury and property damage arising from the use, occupancy or maintenance of the Premises and/or any other portion of the Project that AMH is granted any right to use under this Contract.
 - (b) Association shall maintain and AMH shall administer insurance for, hired but non-owned vehicles used by marina staff.
 - (c) Association shall maintain and AMH shall administer umbrella excess liability insurance on a broad form basis in excess of the required commercial general liability, business and employers liability insurance with limits not less than two million Dollars (\$2,000,000) per occurrence and in the aggregate.
 - (d) The Association shall carry workers' compensation insurance for all of the staff in statutory limits for SC and employer's liability insurance which affords not less than Five Hundred Thousand Dollars (\$500,000) for each coverage.
 - (e) Association shall maintain and AMH shall administer insurance against loss or damage to the dockhouse and all personal property located therein for loss by fire and "All-Risk" perils in an amount not less than the 100% physical replacement cost value of thereof.
 - (f) Such other insurance as provided for in paragraph 3 of the Agreement, as Association may reasonably request or as provided by the master deed for the marina.
2. Deductibles. Any deductibles selected by Association shall be the sole responsibility of

Association.

3. Insurance Companies. All insurance and all renewals thereof shall be issued by companies with a rating of at least A- or better in the current edition of Best's Insurance Reports and be licensed to do business in South Carolina.
4. Notice of Cancellation. Each policy shall expressly provide that the policy shall not be cancelled or materially altered without thirty (30) days' prior written notice to Association and shall remain in effect notwithstanding any such cancellation or alteration until such notice shall have been given to Association and such period of thirty (30) days shall have expired.
5. Named Insured. All liability insurance (except employer's liability) shall name Association, AMH, and any other parties designated by Association (such as regime manager) as an additional insureds, shall be primary and noncontributing with any insurance which may be carried by Association, shall afford coverage for all claims based on any act, omission, event or condition that occurred or arose (or the onset of which occurred or arose) during the policy period.
6. Certificates of Insurance. Association shall deliver to AMH Certificates of insurance acceptable at least ten (10) days before the date of commencement of the Term and renewals thereof at least fifteen (15) days before expiration of each policy.
7. Mutual Waiver of Subrogation Rights. Whenever (i) any loss, cost, damage or expense resulting from fire, explosion or any other casualty or occurrence is incurred by either of the parties to this Agreement, or anyone claiming by, through or under it in connection with the marina, and (ii) such party is then covered in whole or in part by insurance with respect to such loss, cost, damage or expense or required under this Agreement to be so insured, then the parties so insured (or so required) hereby release the other party from any liability such other party may have on account of such loss, cost, damage or expense to the extent of any amount recovered by reason of such insurance (or which could have been recovered had such insurance been carried as so required) and waives any right of subrogation which might otherwise exist in or accrue to any person on account thereof; provided that such release of liability and waiver of the right of subrogation shall not be operative in any case where the effect thereof is to invalidate such insurance coverage or increase the cost thereof; and provided further that in the case of increased cost, the other party shall have the right, within thirty (30) days following written notice, to pay such increased cost thereupon keeping such release and waiver in full force and effect.
8. AMH's Right to Insure. If Association fails to insure or fails to furnish insurance certificates, AMH shall have the right from time to time to affect such insurance for the benefit of AMH or Association or both of them and Association shall pay all premiums.

AMH MANAGEMENT, LLC



Dear Ashley Regime Members:

Mr. Crandall sent us some questions a while back. We felt it was best to answer these questions near the time of the special meeting. Our answers are as follows (with the questions attached below for reference):

PERPETUAL RIGHTS

Management was preserved in the Master Deed. This right was preserved as an economic interest, as a means of insuring that slip purchasers always received professional management, as a means to prevent absentee management (eg, Legendary), and as a means to preserve continuity and employment of our staff and management personnel.

MODIFICATION OF MANAGEMENT RIGHT

The right granted in the Master Deed runs with the land and has not been waived or modified. AMH has contractually indicated its willingness to revisit terms every few years, but it has not relinquished its right to manage.

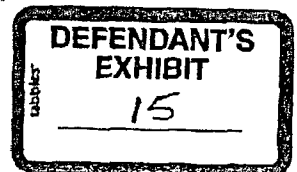
AMENDMENT OF BYLAWS

The Master Deed cannot be amended to the detriment of the Declarant without the Declarant's consent.

MANAGEMENT BIDS

The two management bids presented to the membership by the board in 2011 were from Legendary Marine at \$178,000 and AMH Management at \$273,000 - both as total yearly cost to the regime. The board presented these bids as if they were "apples to apples" and claimed that by hiring Legendary Marine the membership would save \$100,000 per year. This was a blatant and purposeful misrepresentation by the board.

Legendary greatly underbid the staffing and payroll needed to adequately run the marina. Legendary Marine's proposal would provide for 1.5 employees on site in the high season and 1 employee on site during the off season. This is clearly not sufficient to run the marina. AMH quoted staffing and payroll to meet the required labor hours necessary to adequately run the marina. This is what you were promised when you purchased your slips.



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The marina staffing and payroll should not differ from one management company to another, but rather should be exactly the same. The board knew the two quotes differed due to the fact that Legendary had underbid the job, but purposely neglected to explain this to the membership.

At Ashley three functions are performed – marina management, slip leasing, and fuel sales. The board asked that these functions be separated and marina management be quoted in a vacuum. This makes no sense, as the confusion caused by having three separate companies operating on the docks at Ashley would be extremely detrimental to the marina.

The board wanted us to bid in a manner which would separate all of these functions. We informed the board of the problems inherent with this plan and AMH therefore did not quote as such, but rather quoted assuming shared labor. The board would have the membership believe that the sharing of labor increases costs. This is not true. In fact, the opposite is the case, as required staffing and payroll is not any greater due to the sharing of labor and the membership's effective labor costs are actually lower due to the resulting reimbursements which the regime receives as a result of the shared labor.

AMH reimburses the regime \$15,000 each year for shared slip leasing labor and passes through a second reimbursement of \$23,500 from the fuel owner, for a combined payroll expense reduction of \$38,500. This brings the difference between AMH and Legendary Marine's bids to \$56,500. Additionally at the end of each year an audit of payroll dollars is performed with a member of the board and AMH, and a refund is given to the regime on average of \$8,000 per year. That brings the difference to about \$48,500. Note that this refund could have been greater if the board had given AMH a free hand in making staffing decisions. AMH had repeatedly requested that board allow them to use their judgment and have only the necessary amount of employees during inclement weather and time periods with slower activity, but this was not allowed.

AMH's bid was higher primarily because it included more payroll hours to adequately staff the marina to meet the needs the owners and tenants. AMH's bid was also higher due to a management fee increase included to cover the inordinate amount of time and effort required of its management team because of Mr. McCoy's involvement on the board for the past several years.

Under AMH's existing contract, which we are willing to maintain if certain criteria are met, the total cost to the regime is roughly \$203,500 (after pass-throughs and refunded payroll dollars). This is \$23,500 more than Legendary Marine's bid. Again, this remaining difference is merely due to a difference in staffing levels. As was stated earlier, the marina cannot be sufficiently run with the staffing payroll that Legendary Marine proposed.

There are other considerations in addition to costs. As mentioned, the marina does not need three separate companies operating on the docks. Additionally, AMH is on site and will always be on site. Legendary Marine does not and would not have a physical location from which to manage the marina. Finally, the board is wasting your money on needless litigation and passing their personal legal costs onto the regime.

Were Mr. McCoy to agree to step down from the board and agree not participate in any way in the future operation of the marina, AMH would agree to continue to manage for the current management fee. The management agreement would need to be amended to comply with the

Master Deed and AMH would then immediately drop the lawsuit. The current "dispute" truly is simple to solve if Mr. McCoy will acknowledge that the marina is not his to run as he sees fit, and he will step aside and let someone else take his place. We do not care who this person might be. We merely want to be left alone to do our job.

Here is a cost comparison for your review:

	2011 AMH BID	LEGENDARY		AMH CURRENT	LEGENDARY
TOTAL QUOTE	\$ 273,000	\$ 178,000		\$ 250,000	\$ 178,000
LABOR SHARING REIMBURSEMENT	\$ (15,000)			\$ (15,000)	
FUEL LABOR PASS THROUGH	\$ (23,500)			\$ (23,500)	
AVG AUDITED PAYROLL REFUND	\$ (8,000)			\$ (8,000)	
NET COST TO REGIME	\$ 226,500	\$ 178,000		\$ 203,500	\$ 178,000
DIFFERENCE IN BIDS	\$ 48,500			\$ 25,500	

DOCK HOUSE

No, AMH is not going to allow a 3rd party management company to operate out of its facilities. AMH's affiliate developed the marina and obviously greatly appreciates and values the regime members. The Master Deed was drafted to insure perpetual and professional management and the Use Agreement was drafted to insure use of the common facilities (eg, restrooms/shower/laundry) by the members. However, if the regime chooses to breach the Master Deed, the regime cannot possibly then expect AMH to honor the Use Agreement or turn over its owned facilities (eg, the dock house) to the regime or a 3rd party.

In closing, Mr. McCoy recently sent you several communications. These contained purposeful misrepresentations. We are not going to address all, but we would like to note that the members who have come forward to run for the board were not put forth by AMH.

AMH Management

Mr. Crandall's questions:

AMH. Why would perpetual rights to manage the marina and regime be good for the marina owners? I understand why it would be good for your business, but not necessarily the marina as a whole....ie all the owners. Where would the checks and balances be so that we as owners know we were being treated fairly and charged appropriately?

Board. This came from the newsletter. The Board's position on any right was formed by Mr. Rob Robertson's legal opinion which was: "having now looked at the 7/11/06 and the 4/20/09 Management Agreements, it is my preliminary opinion that the right, if any, of perpetual entitlement to management of the Marina by a Miller "affiliate", supported if at all by paragraph 2.3 of the Master Deed, was modified by both agreements, and that the Miller contention that their exclusive rights in this regard are perpetual and secure is a losing legal argument."
Is this still the opinion of Mr Robertson? It said "preliminary" and I was wondering if he has had any other information for the board regarding this situation.

AMH and Board. If something is in the bylaws or Master Deed, can't the membership change it with a vote anyways?

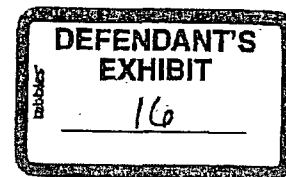
AMH and Board. In looking at the top three proposals did the board ask why AMH was almost \$100K more than the middle one, Legendary MM, that was chosen? AMH. Why do you think you were almost \$100K more than the Legendary bid? Board. Do we have good, solid information on Legendary MM? Trust and faith that they will perform as well as AMH, only less expensive?

AMH. If you end up not having perpetual rights to manage the marina, are you still going to let the marina use the dock house for the management of the marina? I truly believe the answer to this question will show the marina owners how AMH values them as a whole. And I really hope it is a positive answer.

AMH Management, Inc



November 4, 2008



To the Ashley Marina Regime Board:

First, as requested, here is suggested language regarding live-aboards and parking:

Live-Aboard Policy

Beginning January 1, 2009, all live-aboards (other than slip owners living on their own boats) shall be charged a fee of \$75 per month. It is intended that this cost be absorbed by the live-aboards, but slip owners will be billed for this cost and shall have the responsibility of collecting this fee from their tenants. This fee is intended to regulate, minimize and cover the cost of the strain on marina resources, including parking, by live-aboards. The amount of the fee shall be subject to change from time to time at the Board's discretion.

Clarification of Current Parking Policy

Marina parking is for the use of slip owners and their tenants only while they are using their boats. A slip owner shall have no more than one active parking tag at any time and if a slip owner's slip is leased to a tenant the owner's tag shall be given to the tenant for use. Marina management will not issue a second tag to tenants.

Parking is not for storage of cars or for use during the day while an owner or tenant is at work. Cars will be towed if parked at the marina during the day while the tag holder is working offsite or if a car is left at the marina long-term (even if in different spaces). If someone intends to use their boat for a multi-day trip, they should check in with the dock office to get a special permit.

We would recommend that we wait and see the effect of this language and the electric charges on live-aboards. If this combination does not lower the number to 10 to 15, then we would propose increasing the fee until that level is reached.

With regard to the marina, we have put together a very rough scope of services. Included are services for the regime management. We agree that both should be brought under the same management. AMH Management can manage both, and in fact, has just purchased and is in the process of installing new state of the art marina management and accounting software which greatly enhances our capabilities.

AMH Management, Inc



Page Two

The scope of services includes the following:

Marina Office/Record Keeping

- Maintain a marina office with specified hours of operation.
- Supply point of contact via VHF and Phone for owners and tenants.
- Fulfill the regulatory requirement that marina be staffed by competent staff and supply agencies with 24 hour contact information.
- Submit yearly reporting requirements to regulatory agencies.
- Maintain sufficient staff to respond to marina tenants and owners request for docking and any other assistance deemed appropriate.
- Prepare and request contractor bids for maintenance and repairs by outside contractors for approval of regime board.
- Maintain a data base of all owners and tenants- list to include copy of vessel insurance e-mail phone numbers along with emergency contact info.
- Perform dock audits on a bi-weekly basis to maintain an up to date data base of vessels coming and going in the marina. This also gives the staff an opportunity to visually check water lines and general safety of vessels.
- Monitor vendors working in the marina make sure the proper insurance and city business license are maintained to protect the marina and it owners.

Parking

- Help dictate and enforce parking policies.
- Distribute and keep a record of tags.
- Contract for the removal of illegally parked vehicles
- Police the parking areas.

Common Area of Main Building

- Will perform minor maintenance such as painting, replacement of light bulbs, sweeping of all common walkway areas of the main building.

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AMH Management, Inc



Page Three

- Clean laundry room and restrooms and showers as needed.
- Maintain restroom supplies and stock as needed.
- Supply and maintain waste oil and filter collection area.
- Contract with DEHC certified waste hauler to remove waste.
- Maintain records for the proper disposal of hazardous waste.

Docks/Boats/Fuel

- Maintain docks.
- Assist boaters in all ways necessary.
- Pump fuel.
- Perform minor repairs, to include, but not be limited to, repair of loose planks, screws and cleats. Also to include minor repair of power pedestal and replacement of burned out light fixtures.
- Operate, maintain and perform minor maintenance and repair of both sewage pump out stations and associated equipment.
- Occasional scraping of pilings and pressure washing of docks.
- Collection of refuse from docks twice a day
- Policing of all docks and finger piers for improper items such as fuel cans, paint and thinners, coolers kayaks, dingies, etc. (and if needed, remove and dispose of said items).
- Police marina for any activity that could cause possible fines by regulatory agencies, such as spray painting, fuel and/or oil discharge.
- Police marina for Improper disposal of waste tanks

Regime Management

- Oversee the collection of regime fees, to include billing, collections, accounting.
- Maintain and process all regime/marina payables and receivables.

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AMH Management, Inc



Page Four

- Provide monthly financial statements, along with a detailed statement of marina accounts receivable and accounts payable activity.
- Oversee and negotiate all contracts for services.
- Present all contracts to the marina board for their approval and execution.
- Set up quarterly board meetings.
- Set up and preside over yearly owners meeting.

Our marina management fee is currently \$60,000 per year. It is our understanding that Southeastern's intent was to raise its fee to \$32,000 per year. This would amount to total fees of \$92,000 per year.

We would be willing to perform all described services for \$82,000, which amounts to a savings of \$10,000 in year one. We would also agree to contribute \$15,000 toward marina payroll to reimburse the regime for any management activities performed by marina staff. The marina/regime management fee would be net of all marina/regime expenses (such as the insurance costs which we have been absorbing). At our discretion we will continue to absorb van expenses.

We would be willing to lease the dock house to the regime for \$1.00 per year as long as AMH Management is manager of the marina and regime. The foregoing is based on a three year contract. The fee would increase by 3.5% at the beginning of years 2 and 3.

Very truly yours,

Joe H. Miller, IV

Michael Timbes

From: Eddie McCoy, For The Board <Administration@myashleymarina.com>
Sent: Wednesday, May 29, 2013 8:39 AM
To: Michael Timbes
Subject: FW: Ashley Marina Special Meeting

Michael..... a member forwarded this to me late last week....fyi

From: Bruce Wallace [mailto:bw@atlanticmarinaholdings.com]
Sent: Friday, May 24, 2013 11:03 AM
To: Bruce Wallace
Subject: Ashley Marina Special Meeting

Dear Fellow Ashley Marina Regime Members:

As you may already know, the Board has called a Special Meeting scheduled for June 6th at 6:30pm. You should be receiving the proxy and ballot forms in the mail soon, if you have not already. The purpose of the meeting is to elect new board members. Several of the board members who are currently serving were not properly elected, as a quorum was not met at last year's annual meeting.

AMH - Ashley Marina would like to ask you to extend your support to the following regime members who have stepped forward and offered to serve on the board: Pat Welch, Caroline Robinson and Gary Davis. Each of these individuals is a knowledgeable business person with backgrounds in either the marine and or regime management field. In addition, we feel that Bret Johnson and Rick Cone, who were elected without a quorum present at the annual meeting, would be sensible board members and are worthy of re-election.

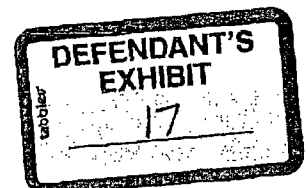
AMH - Ashley Marina believes that these owners would best represent the membership as a whole and will help to bring closure to the recent problems that have plagued the marina. We are ready to see a new board elected and get the current conflict behind us. If you are not planning to attend the meeting, we would ask for your proxy in order to vote for the five members noted above.

Please sign the enclosed proxy or ballot and return as follows:

AMH-Ashley Marina, LLC

33 Lockwood Dr.

Charleston, SC 29401



You can also scan and email to rm@atlanticmarinaholdings.com or fax to Rebecca at 843-853-8857.

We will file your proxy with Solomon and Hardwick upon receipt. Please return signed forms to our office by June 4, 2013.

Thank you.

AMH - Ashley Marina, LLC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

BEFORE THE MASTER IN EQUITY
CASE NO. 2011-CP-10-9513

AMH-ASHLEY MARINA, LLC and AMH)
MANAGEMENT, LLC,)
Plaintiffs,)

**PLAINTIFFS' AND DEFENDANTS' JOINT
STIPULATION OF FACTS**

vs.)

THE HARBORAGE AT ASHLEY)
MARINA HORIZONTAL PROPERTY)
REGIME, THE HARBORAGE AT)
ASHLEY MARINA CONDOMINIUM)
ASSOCIATION, and EDDIE MCCOY,)
STUART REEVES, BRIAN SWAN, RICH)
CONE, and ED MISKOTTEN, individually)
Defendants.)

COME NOW the parties to the above-captioned action, by and through their undersigned counsel, and hereby stipulate and agree in good faith to the following relevant facts:

THE PARTIES, VENUE, AND JURISDICTION

1. Defendant The Harborage at Ashley Marina Real Property Regime (the "Ashley Marina") is an unincorporated horizontal property regime existing under the South Carolina Horizontal Property Regime Act. The Ashley Marina is situated in Charleston County, at 33 Lockwood Boulevard, Charleston, South Carolina.

2. Defendant The Harborage at Ashley Marina Condominium Association, Inc. (the "Association"), is a South Carolina nonprofit corporation with its principle place of business at 33 Lockwood Boulevard, Charleston, South Carolina.

3. Plaintiff AMH Ashley Marina, LLC ("AMH Ashley"), is a South Carolina Corporation with its principal place of business in Charleston County, South Carolina. AMH

Ashley is a member of the Association and the developer of the Ashley Marina in its current form.

4. Plaintiff AMH Management, LLC ("AMH Management") is a South Carolina Corporation with its principal place of business in Charleston County, South Carolina.

5. AMH Management is an affiliate of AMH Ashley.

6. Individual Defendants Eddie McCoy, Stuart Reeves, Brian Swan, and Rich Cone are members of the Association and are elected to serve on the Board of Directors (the "Board of Directors") for the Association at times relevant to the subject matter of this action. Defendant Ed Miskotten is a member of the Association and formerly served on the Board of Directors at times relevant to the subject matter of this action.

7. Plaintiffs and Defendants agree this court has jurisdiction over the parties and subject matter of this action, and venue is proper in Charleston County. The parties have consented to a trial before the Charleston County Master In Equity.

BACKGROUND, THE MASTER DEED, AND RELEVANT CONTRACTS

8. The Ashley Marina was developed pursuant to The Master Deed of The Harborage at Ashley Marina Real Property Regime (the "Master Deed"). The Master Deed was recorded in the Charleston County RMC on April 29, 2005, beginning at Deed Book V534 Page 308. There have been five (5) recorded amendments to the Master Deed since its original recording, but none of those amendments are at issue in this action.

9. A true and correct copy of the Master Deed is jointly submitted to the Court as Joint Exhibit "1" for admission into evidence without objection from any party.

10. AMH Ashley is the Declarant under the Master Deed and controlled the Association for a period of time after the Master Deed was recorded.

11. On or about April 30, 2006, the Association, under the control of AMH Ashley as the Declarant, entered into a Marina Management Services Agreement with AMH Management (the "2006 Marina Management Agreement").

12. The 2006 Marina Management Agreement provided for various services to be rendered by AMH Management concerning the day to day operations of the Ashley Marina insofar as the marina operations were concerned.

13. A true and correct copy of the 2006 Marina Management Agreement is jointly submitted to the Court as **Joint Exhibit "2"** for admission into evidence without objection from any party.

14. On or about October 2, 2007, the Association, under the control of AMH Ashley as the Declarant, entered into a contract with Southeastern Management Group, Inc. (the "Southeastern Agreement") to manage the affairs of the Association, such as payment of Association expenses, collection of regime fees, etc.

15. A true and correct copy of the Southeastern Agreement is jointly submitted to the Court as **Joint Exhibit "3"** for admission into evidence without objection from any party.

16. AMH Ashley turned over control of the Association to a Board of Directors representing the members of the Association at the annual meeting held in December of 2007.

17. The Bylaws of the Association are recorded along with the Master Deed, as Exhibit E, thereof. (See **Joint Exhibit "1"**).

18. On or about April 20, 2009, the Board of Directors for the Association entered into a Marina Management Services Agreement with AMH Management (the "2009 Management Agreement").

19. A true and correct copy of the 2009 Management Agreement is jointly submitted to the Court as **Joint Exhibit "4"** for admission into evidence without objection from any party.

THE CRUX OF THE DISPUTE

20. In December, 2008, the Board of Directors sent a letter to AMH Management regarding the 2006 Marina Management Agreement indicating it intended to request proposals from AMH Management and others for management services beginning May 1, 2009. A true and correct copy of the December 2008 letter is jointly submitted as **Joint Exhibit "5"** for admission into evidence without objection from any party.

21. AMH Management submitted a proposal to the Board of Directors, and in April of 2009, the Board of Directors entered into the 2009 Management Agreement with AMH Management.

22. The Board of Directors thereafter granted the 12-Month extension provided for in Paragraph 2 of the 2009 Management Agreement to AMH Management, which continued to manage from December 31, 2010 to December 31, 2011.

23. The Board of Directors asserts the 2009 Management Agreement with AMH Management expired per its terms on December 31, 2011, and the Board of Directors began to solicit bids from AMH Management and others to provide management services.

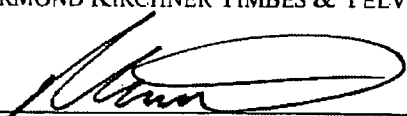
24. AMH Management asserts the Master Deed prohibits the Association from entering into a new contract for management services with a third party without the Declarant's consent.

25. Since January 1, 2012, AMH Management and the Association have mutually agreed that AMH Management would continue to provide services to the Association and the

Ashley Marina while the parties' rights are adjudicated, without prejudice to any claims, defenses, or remedies in the above-captioned action.

26. The Parties stipulate to the above facts. None of the Parties waives the right to submit additional evidence for consideration by the Court along with their respective legal memoranda and arguments to the Court.

JOINTLY SUBMITTED BY:

THURMOND KIRCHNER TIMBES & YELVERTON By:  MICHAEL A. TIMBES THOMAS J. RODE 15 Middle Atlantic Wharf, Suite 101 Charleston, SC 29401 Phone: (843) 937-8000 Fax: (843) 937-4200 mtimbess@tktylawfirm.com trode@tktylawfirm.com	PRITCHARD LAW GROUP By:  EDWARD K. PRITCHARD, III 129 Broad Street Charleston, South Carolina 29402 Phone: (843) 722.3300 Fax: (843) 722.3379 epritchard@pritchardlawgroup.com
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PORTIONS OF THIS AGREEMENT ARE SUBJECT TO ARBITRATION
PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, § 15-48-
10, S.C. CODE OF LAWS OF 1976, AS AMENDED.

**MASTER DEED
OF
THE HARBORAGE AT ASHLEY MARINA
HORIZONTAL PROPERTY REGIME**

NOTICE

ALL ACTIVITIES ON OR OVER, AND ALL USES OF THE SUBMERGED LAND SUBJECT TO THIS MASTER DEED ARE SUBJECT TO THE JURISDICTION OF U.S. ARMY CORPS OF ENGINEERS AND THE OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT ("OCRM") OF THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, INCLUDING, BUT NOT LIMITED TO, THE REQUIREMENT THAT ANY ACTIVITY OR USE MUST BE AUTHORIZED BY OCRM. THE DOCKS DESCRIBED IN THIS MASTER DEED ARE BUILT, MAINTAINED AND USED PURSUANT TO THE AUTHORITY SET FORTH IN A PERMIT ISSUED BY OCRM, FOR ITSELF AND ON BEHALF OF THE U.S. ARMY CORPS OF ENGINEERS, WHICH MAY BE REVOKED, SUSPENDED OR MODIFIED AT ANY TIME IN ACCORDANCE WITH THE TERMS AND CONDITIONS CONTAINED IN THE PERMIT AND IN ACCORDANCE WITH APPLICABLE LAW.

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company authorized to do trust business in the State of South Carolina and appointed therefor by the Board of Directors.

"Unit" means that part of the Project set aside for individual ownership and measured by Unit boundaries described herein and further shown in the Plans attached to and made a part of Exhibit "B" hereto, as amended from time to time in accordance with the provisions of this Master Deed and constituting an "apartment" as defined in the Condominium Act. Units are broken down at the date hereof into the two (2) categories of Commercial Unit and Locker Unit for identification purposes only. "Unit," whether a Commercial Unit or a Locker Unit, will also mean all the components of ownership held by an Owner thereof, including not only the rights and interests of the Owner in and to such Unit, but also the rights of use of and the undivided interest in the Common Elements, and the exclusive use of the Limited Common Element assigned and appurtenant to it hereunder.

"Use and Access Agreement" means that certain agreement by and between the Declarant, as the initial Owner of Commercial Unit 1 and the Association for the use of and access to the bathrooms and shower facilities located within the Building of the Commercial Unit.

2. Administration.

2.1 The Association.

The administration of the Condominium and maintenance, repair, and replacement of the Common Elements will be the responsibility of the Association, which will be made up of all the Owners of Units in the Condominium. The Condominium Documents, as the same may be amended from time to time, will govern the Association and the Owners.

2.2 Membership.

Each Owner of a Unit, including the Declarant, will be a Member of the Association. Membership will be appurtenant to and may not be separated from ownership of a Unit and ownership of a Unit will be the sole qualification for such membership. In the event that fee title to a Unit is transferred or otherwise conveyed, the membership in the Association that is appurtenant thereto will automatically pass to such transferee, notwithstanding any failure of the transferor to endorse to his transferee any certificates or other evidences of such membership. The foregoing is not intended to include any Mortgagee or any other person who holds an interest merely as security for the performance of an obligation, and the giving of a security interest will not terminate or otherwise affect an Owner's membership in the Association.

2.3 Agreements.

The Association will be and hereby is authorized to enter into such contractual arrangements, including without limitation, management contracts, as it may deem necessary or desirable for the administration and operation of the Condominium and maintenance, repair, and replacement of the Common Elements, subject, however, to the following limitations:

(a) Property Manager; Agreement With Declarant Or Affiliate; Termination Only For Cause.

On or before the date of recording this Master Deed, the Declarant shall cause the Articles of Incorporation of the Association to be filed with the Secretary of State of South Carolina, the appointment of a Board of Directors and Officers of the Association to be made, the Bylaws to be ratified, confirmed and adopted, and an initial budget for the Association to be adopted. Additionally, the

Association shall enter into an agreement for the management of the Condominium with the Declarant or an affiliate of the Declarant, which management agreement shall provide that it may be extended in the sole discretion of the "Manager" under said agreement and may not be terminated by the Association except in the event it is terminated by the Association for cause as a result of the Manager's gross negligence or criminal activity in the discharge of such management duties assigned to it under the management agreement.

2.4 Books and Records.

The Association will keep full and accurate books of account and financial records showing all receipts and disbursements. In particular, the books will be maintained with a detailed account, in chronological order, of the receipts and expenditures affecting the Project and its administration, and specifying the maintenance and repair expenses of the Common Elements as well as other expenditures incurred. Vouchers accrediting the entries made thereupon will also be maintained in chronological order.

2.5 Financial Statements.

No later than 120 days after the close of any fiscal year of the Association, the Association will cause financial statements for such fiscal year to be prepared (but not necessarily certified) by a licensed public accountant. Copies of the financial statements will be available to any Owner or Mortgagee upon written request to the Association. The Association may charge a reasonable fee for copying such statements.

2.6 Access to Information.

The Association will make available to Owners of any Unit and to any Mortgagee current copies of the Condominium Documents and the books, records, vouchers, contractual arrangements and financial statements of the Association. "Available" means available for reasonable inspection upon request during normal business hours or under other reasonable circumstances. The Association may charge reasonable copying costs for any requested copies or extracts. Any party entitled to the benefits of this Section 2.6 will be permitted to designate one or more agents who will be permitted to represent said party in connection with any and all reviews of the Condominium Documents and books, records, contractual arrangements and financial statements of the Association.

2.7 Rules and Regulations.

The Board of Directors will be entitled to promulgate reasonable Rules and Regulations which are consistent with the terms of this Master Deed from time to time, which will be binding on the Association and all Owners and lessees of Owners, their families, invitees and guests, regarding the use and enjoyment of Units and Common Elements. Copies of the current Rules and Regulations will be furnished to Owners and lessees of Owners upon request. All such Rules and Regulations shall be consistent with the terms and conditions of this Master Deed, permits issued by OCRM, and the rights and obligations of other Owners within the Condominium. Such Rules and Regulation shall, at all times, include the terms and conditions of the then existing Operations and Maintenance Manual required by OCRM. In the event the Manager determines, in its reasonable judgment, that circumstances require, the Manager to adopt any Rule or Regulation, or to modify any Rule or Regulation, the Manager may publish the same, which shall remain in effect until revoked by the Board of Directors in accordance with this Master Deed. In the event the Manager adopts or modifies any Rule or Regulation regarding the use of a Unit or Common Element in accordance with the foregoing, the Board of Directors shall either ratify or revoke the same at its next regularly scheduled Board meeting. In the event the Association adopts any Rule or Regulation or ratifies any Rule or Regulation adopted or modified by the Manager which is not

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MARINA MANAGEMENT SERVICES AGREEMENT

This Marina Management Services Agreement (the "Agreement") effective as of the 30th day of April, 2006, is made by and between **The Harborage at Ashley Marina, Horizontal Property Regime** (the "Association") and **AMH Management, LLC** ("AMH"). (The Association and AMH may also be referred to collectively hereinafter as the "Party").

RECITALS:

- A. AMH is engaged in the business of marina management.
- B. The Association, acting on behalf of The Harborage at Ashley Marina (the "Marina"), seeks to hire AMH for the management of the Marina.
- C. AMH and the Association expect to share a variety of services as set forth in this Agreement.
- D. AMH and the Association desire to share services and to enter into this Agreement to provide an arms-length basis for determining either AMH's or the Association's reimbursement obligations for the use of such services.

AGREEMENT

In consideration of the terms and conditions set forth in this Agreement, the Parties agree as follows:

1. Management Services. AMH agrees to provide the Association, for so long as this Agreement is in effect, full marina management support including, without limitation, making its relevant employees available to the Association as is necessary to provide management and administrative support to the Association for the day-to-day operations of the Marina. Such services shall include maintaining an office and other appropriate facilities at the Marina to be used as an administrative center. AMH shall be solely responsible for expenses incurred, including, but not limited to, expendable supplies, salaries of daytime staff and dockhands, salaries, payroll taxes and benefits of the manager, sales and other applicable taxes, city, county and state business taxes, and the manager's fax, telephone and computer charges and other related services, which may be requested by the Association from time to time (the "Management Services"). It is expressly understood and acknowledged that the Association and/or the regime are responsible for any and all other costs associated with operation and maintenance of the Marina.

2. Term. The term of this Agreement shall be for a period of one (1) year beginning as of the 30th day of April, 2006 and ending on the 29th day of April, 2007 and shall then automatically extend from year to year. Either Party may terminate the Agreement by giving to the other party written notice at least sixty (60) days prior to the end of the then current term, which termination shall take affect at the end of the then current one (1) year term.

Upon termination of this Agreement, AMH shall deliver to the Association all papers, books and records of the Marina theretofore maintained by AMH for the account of the Marina including checkbooks, passbooks, records of fees, insurance policies, existing contracts relating to the operation received or held by AMH for the account of the Marina (after deducting therefrom any prorated and

Date	7-23-13
Exhibit	7
Witness	Mc Menemy

unpaid portion of the agreed management fees or unreimbursed advances by AMH). Further, upon termination hereof, the rights and obligations of the parties hereunder shall cease subject, however, to the indemnification provisions set forth in Paragraph 7 of the Agreement and to any reimbursement or compensation due to AMH and return of any monies due to Association held by AMH.

3. Insurance. Each Party agrees to pay its respective prorated portions of premiums for any common liability and property insurance policies. AMH and the Association shall each be responsible for any life, health and disability insurance plans, if any, of its respective employees.

4. Fees.

(a) Management Services Fee. Beginning January 1, 2007, the Association agrees to pay AMH a fee of Five Thousand dollars (\$5,000.00) per month for its Management Services. AMH reserves the right to review this amount on an annual basis and may adjust the fee by providing notice to the Association not less than ninety (90) days prior to the end of the then current one-year term.

(b) Salary Reimbursement. The Association agrees to pay AMH an amount equal to three fourths (3/4) of the salary of the employees of AMH, which at this time is Thirteen Thousand Seven Hundred Twenty-Five Dollars (\$13,725.00) per month. AMH shall notify the Association of any salary adjustments not less than ninety (90) days prior to the end of the then current one-year term.

(c) Adjustments. The adjustment of any amount to be paid by the Association to AMH as provided for in this Section of the Agreement shall not take effect until the next one-year term following the required ninety (90) day notice period.

(d) Payment of Fees. AMH shall invoice the Association for the Salary Reimbursement and the Management Services Fees on the first of each month. The invoice is payable by the Association within five (5) days of receipt of the invoice.

5. Other Transactions. Each Party agrees that all future transactions or other arrangements, if any, with the other Party (other than the transactions and arrangements specifically addressed in this Agreement) will be on an arms-length basis, containing terms no less favorable to AMH or the Association, respectively, than could have been obtained from an unrelated third party.

6. Maintenance of Records; Right to Inspect. AMH agrees to maintain such records as are required to evidence its compliance with the terms of this Agreement. AMH shall permit one or more representatives of the Association to inspect, at any reasonable time and upon reasonable terms, the records of AMH.

7. Indemnification. AMH shall indemnify the Association against all actions, proceedings, claims, demands, costs, liabilities, damages or losses of any kind or nature whatsoever that may be brought, commenced or prosecuted against or incurred by AMH due to the gross negligence or willful misconduct of AMH. The Association shall indemnify AMH against all actions, proceedings, claims, demands, costs, liabilities, damages or losses of any kind or nature whatsoever that may be brought, commenced or prosecuted against or incurred by the Association due to the gross negligence or willful misconduct of the Association.

8. Representations of AMH and the Association. Both AMH and the Association represent and warrant to the other that:

- (a) That the Association is a corporation duly organized and validly existing under the laws of the State of South Carolina;
- (b) That AMH is a limited liability company organized and validly existing under the laws of the state of South Carolina;
- (c) Each Party has full power, authority and legal right to perform the provisions of this Agreement;
- (d) This Agreement constitutes a valid and binding obligation of the Party enforceable in accordance with its terms, and does not constitute a breach of or default under any other agreement to which the Party is a party or by which any of its assets are bound or affected; and
- (e) The fee arrangements set forth in Section 4 are no less favorable to each Party than such Party could obtain in an arms-length transaction with an unrelated third party.

9. Confidentiality. Both AMH and the Association agree to hold in trust and to maintain confidential all non-public information, oral or written, which the other considers to be secret, sensitive or confidential, and will not disclose such confidential information to any third party without the prior written consent of the other party.

10. Expenses. Each Party shall pay its own expenses incident to the negotiation and execution of this Agreement.

11. Notices. Any notice or other communication required or permitted under this Agreement shall be in writing (which may take the form of a telecopy communication) and shall be sent by registered or certified mail, return receipt requested, telecopier or hand delivery:

(a) If to AMH, to the following address:

AMH Management, LLC
c/o Atlantic Marina Holdings, LLC
33 Lockwood Drive
Charleston, SC 29401
Fax: (843) 853-8857
Attention: Jack Powell

(b) If to the Association, to the following address:

The Harborage at Ashley Marina, Horizontal Property Regime
c/o Southeastern Management Group, Inc.
P.O. Box 21878
Charleston, SC 29413
Fax: (843) 577-8595
Attention: ~~Laura Frey~~ Jessica Nelson

Unless otherwise provided in this Agreement, all notices communications shall be deemed to have been duly given or made (i) when delivered by hand, (ii) five (5) business days after being deposited in the mail, postage prepaid, as registered or certified mail, return receipt requested, or (iii) when

telecopied. The address or telecopy numbers to which notices or other communication shall be directed may be changed from time to time by any Party by giving notice to the other Party of the substituted address or telecopy number.

12. Choice of Law. This Agreement will be governed by, and all disputes arising under this Agreement will be resolved in accordance with, the laws of the State of South Carolina.

13. Severability. If any provision of this Agreement is adjudged to be invalid or unenforceable to any extent, the remainder of this Agreement will not be affected thereby and will be valid and enforceable to the fullest extent permitted by law.

14. Binding Effect. This Agreement will be binding upon and inure to the benefit of AMH and the Association and any successors and assigns; provided that no Party may assign its rights under this Agreement without the prior written consent of the other Party.

15. Amendment and Waiver. No supplement, modification or amendment of, or waiver with respect to, this Agreement shall be binding unless executed in writing. This Agreement may be modified, amended or terminated upon the written agreement of each Party hereto.

16. Entire Agreement. This Agreement constitutes the entire agreement pertaining to the subject matter hereof and supersedes all prior oral and written agreements and understandings in connection herewith. No covenant, representation or condition not expressed in this Agreement will affect or be effective to interpret, change or restrict the express provisions of this Agreement.

17. Counterparts. This Agreement may be executed in counterparts, each of which will be considered an original, but all of which together will constitute the same instrument.

IN WITNESS WHEREOF, each Party has executed this Marina Management Services Agreement as of the date first above written.

AMH MANAGEMENT, LLC

By: J. Randon Budjas

Its: CFO

Date: 8/3/06

THE HARBORAGE AT ASHLEY MARINA, HORIZONTAL PROPERTY REGIME

By: J. Nelson

Its: Association manager

Date: 7/11/06

Southeastern Management Group, Inc 2008 Management Agreement

Please Note: If both parties do not ratify this agreement within 30 days from the date of this contract, the Agreement will automatically renew and become binding for both parties for a period of twelve (12) months beginning 1/1/08.

IN CONSIDERATION of the covenants herein contained, the Harborage at Ashley Marina, HPR (hereinafter called "ASSOCIATION"), and Southeastern Management Group, Inc. (hereinafter called "AGENT"), agree as follows:

I.

EMPLOYMENT

Association hereby employs and appoints Agent, and Agent hereby accepts employment and appointment on the terms and conditions hereinafter provided, as exclusive managing agent for Association in connection with the property known as the Harborage at Ashley Marina, HPR located in Charleston, SC.

The term of employment and appointment of Agent by Association shall be subject to the provisions of Article II herein below.

II.

TERM

The term of Agent's employment shall be from January 1, 2008 through December 31, 2008.

III.

COMPENSATION

Association shall pay the Agent a management fee in the amount of \$ 2,411.73 per month. The management fee shall be paid monthly in advance. No further charge shall be made by the Agent for services of Association management pursuant to Article V (B), its services pursuant to the sub-paragraphs of Article IV and the other services of the Agent's professional staff, except as otherwise expressly provided in this agreement. It is understood; however, circulation of notices, newsletters and general correspondence of the Association or the Board shall be at the expense of the Association. The cost of these services will be at the current 1st class stamp rate, plus \$0.10 handling, and \$0.10 per black and white copy / \$0.25 per color copy. Association shall also pay the Agent \$5 per year to cover the costs of all long distance communication and faxes relating to the property. It shall also be the financial responsibility of the Association to pay, once a year, for notifications to be sent to all owners regarding their association dues.

TPA Association President and AM Agent have read this page

DATE	7-23-13
EXHIBIT	8
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IV.

ADMINISTRATIVE AND MAINTENANCE DUTIES

Agent shall perform for Association certain services in connection with maintenance of the property and in connection with the Association's duties regarding the assessment of the individual unit owners in the Association property and the maintenance of said property. It being understood that in all such matters the Association has the full and final authority and that Agent will not become involved in any matters of policy except on an advisory basis. The service which Agent agrees to perform in this connection, and the expense of the Association, are as follows:

(A) Agent shall collect and, as necessary, receipt all annual assessments and other charges due to the Association for operation of the Association, provided that the Agent shall have responsibility for collection of delinquent assessments. The Association agrees to pay Agent fifty percent (50%) of all late fees collected from delinquent assessments. The Association agrees to pay Agent at the rate of \$100.00 per hour for all time spent working with the Association's appointed attorney. All such fees paid to Agent shall be charged back to the delinquent owner as per the Master Deed, By-Laws, and Covenants/Restrictions of the Association.

(B) Agent shall maintain records showing all its receipts and expenditures relating to the Association and shall promptly submit to the Association cash receipts and disbursement statement for the preceding month, and a statement indicating the balance or deficit in the Agent's account for the Association on or before the 20th day of the following month.

V.

MISCELLANEOUS

It is further agreed between the parties that:

(A) All expenses of operation and management may be paid from the Association's funds held by Agent. The Agent shall have no obligation to advance funds to the Association for any purpose whatsoever.

(B) An employee of the Agent shall, upon no less than twenty-four (24) hour's notice, attend meetings of the Association quarterly for a total of one (1) hour in duration between the hours of 9:00 AM to 5:00 PM, Monday through Friday, excluding holidays. For any additional meetings over the allotted one (1) meeting or for longer than one (1) hour in duration, or after the normal business hours of 9:00 AM to 5:00 PM, Monday through Friday, Agent shall be compensated at a rate of \$100.00 per hour per employee of Agent that is present. An employee of the Agent shall inspect the common areas of the Association not less than 3 time(s) per month between the hours of 9:00 AM to 5:00 PM, Monday through Friday, excluding holidays. For any

10 Association President and 10 Agent have read this page

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additional inspections and site visits, Agent shall be compensated for mileage at a rate equal to the IRS prescribed rate for mileage. The Agent shall be custodian of the official records of the Association, but shall not be required to record or transcribe the minutes of any meetings of the Association. If agent types minutes on behalf of Association, agent will be compensated at rate of \$100.00 per hour.

(C) The Association agrees to pay Southeastern Management Group, Inc ten percent (10%) of any and all insurance claims and proceeds negotiated or handled through the Agent. The Association agrees to pay Southeastern Management Group, Inc. ten percent (10%) of the total cost of any and all construction, repairs, maintenance, and capital improvements made to the premises on behalf of Association during the term of this agreement if requested in writing to take such supervisory responsibility by the Association's Board of Directors. Any such construction, repair, maintenance, or capital improvement shall be scheduled, coordinated, and supervised by Agent on behalf of the Association. No fee shall be charged for contracted services that follow a set schedule such as landscaping, pool maintenance, etc.

(D) Association shall designate a single individual who shall be authorized to deal with the Agent on any matter relating to the management of the Association. The Agent is directed to not accept directions or instructions with regard to the management of the Association from anyone else. In the absence of any other person designated, the Association shall have this authority.

(E) The Association shall indemnify and save Agent harmless from all liability, damage, and the cost and expense of any suits in connection with the management of the property and from liability, from injury of damages to person or property suffered by any employee, owner, or any other person or entity whatsoever, and the Association will carry, at its expense, necessary public liability, workman's compensation (except on Agent's own employees or sub-contractor's employees) and other insurance adequate to protect the interest of the parties hereto, which policies shall be so written as to protect the Agent in the same manner and to the same extent they protect the Association and will name the Agent a co-insured as to liability insurance. This paragraph is not intended to apply to any action between the Agent and the Association relating to mismanagement, gross negligence or criminal acts.

(F) The Association shall pay all expenses incurred by the Agent, including, without limitation: attorney's fee for counsel employed to represent the Agent or the Association in any proceeding or suit brought by the Agent against any homeowner or homeowners or others or against the Agent by any homeowners or other necessarily brought or defended to further the duties of the Agent as described herein, including the collection of homeowners assessments. This paragraph is not intended to apply to any action between the Agent and the Association.

(G) The Association shall pay Agent at a rate of \$100.00 per hour for all "mass mailings" to all property owners, newsletter mail-outs, etc.

JPL Association President and [Signature] Agent have read this page

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"Mass mailings", for the purpose of this section, shall be defined as mailing to all association members. The Agent shall provide four (4) "mass mailings" during the year at no additional hourly charge.

(H) Agent and/or employee of Agent will be available during normal office hours Monday - Friday, excluding holidays, from 9:00 AM to 5:00 PM for the agreed upon monthly management fee; the hourly rate for after-hour emergencies will be \$200.00 per hour.

(I) The Association agrees to pay the Agent, at a rate of \$125 per hour, for time spent relating to assistance with tax return preparation, tax planning, loan issuance, budgets and cash flow analysis during the term of this agreement. Any financial services shall be provided at the request of the Association.

(J) Upon the termination of services provided herein, Agent shall make copies of all files relating to the management of the Association; the cost of which shall be paid by the Association.

VI.

Notices

Any notices now or hereafter required to given to this agreement shall be to the following address or to such other address as may be from time to time provided in writing by one party to the other:

Association: The Harborage at Ashley Marina
c / o Sam Moore
33 Lockwood Drive
Charleston, SC 29401

Agent: Southeastern Management Group, Inc.
P.O. Box 21878
Charleston, SC 29413

VII.

COMPLIANCE WITH STATUTES AND REGULATIONS

The Association, the Agent each agree to comply with all applicable statutes, regulations and guidelines governing the conduct of the business herein described. Further, the Agent specifically agrees to comply with all applicable regulations and guidelines set down by FNMA governing this project or similar projects, including its requirement for the terms, amount and conditions of Fidelity Bonds.

SPD Association President and RM Agent have read this page

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THIS MANAGEMENT AGREEMENT

CONTRACT shall be binding upon and shall inure to the benefit of the heirs, successors and assigns of the Agent and of the Association, and shall be construed in accordance with the laws of the State of South Carolina.

(A) Agent shall prepare and submit to the Association or the Board, on or before thirty (30) days preceding the annual property owners meeting, a recommended budget for the next year showing anticipated receipts and expenditures for such year.

(B) Within thirty (30) days after the end of each calendar year, the Agent shall submit to the Association a summary of all receipts and expenditures relating to the Association for the preceding year, provided that this service shall not be construed to require the Agent to supply an audit. Any audit required by the Association shall be prepared at its expense by accountants of its selection. All time spent by Agent in connection with an audit on behalf of the Association shall be billed at a rate of \$125.00 per hour and paid to Agent by the Association.

(C) Subject to the direction and the expense of the Association, the Agent shall cause the common elements of the Association to be maintained according to appropriate standards of maintenance consistent with the character of the Association, including cleaning, painting, landscaping and such other maintenance and repair work as may be necessary.

(D) On the basis of the budget, job standards and wage rates previously approved by the Association, the Agent shall hire, pay, maintain and operate the Association properly. All such personnel shall be employees of the Association and not of the Agent. All salaries, taxes and other expenses payable on account of such employees shall be operating expenses of the Association.

(E) At the Association's expense, the Agent shall execute and file all returns and other instruments and do and perform all acts required of the Association as an employer under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, Subtitle C of the Internal Revenue Code of 1954 and the requirements of the South Carolina Tax Commission with respect to wages paid by the Agent on behalf of the Association and under any similar Federal, State or Municipal Law now or hereafter in force (and in connection therewith the Association agrees upon request to execute and deliver promptly to the Agent all necessary powers of attorney, notices of appointment and the like).

(F) Subject to the direction of the Association, the Agent shall negotiate and execute, on behalf of the Association, contract for water, sewer, electricity, pool, landscaping and such other services for the common elements of the Association as may be necessary or advisable. The Agent shall also purchase, on behalf of the Association, such equipment, tools, appliances, materials and supplies as are

W Association President and AK Agent have read this page

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necessary for the proper operation and maintenance of the Association. All such purchases and contracts shall be in the name at the expense of the Association.

(G) Agent shall pay, from the funds of the Association, all taxes, insurance premiums, water and sewer rates and other governmental charges, and all other charges or obligations incurred by the Association with respect to the maintenance or operation of the Association or incurred by the Agent on behalf of the Association pursuant to the terms of this agreement or pursuant to other authority granted by the Association.

(H) In discharging its responsibilities under the foregoing paragraphs, the Agent shall not make any expenditure nor incur any non-recurring contractual obligation exceeding \$ 5,000.00 without the prior consent of the Association or the Board, provided that no such consent shall be required to repay any advances made by the Agent. Notwithstanding the limitations imposed by the preceding sentence, the agent may, on behalf of the Association, without prior consent, expend any amount of incur a contractual obligation in any amount required to deal with emergency conditions which may involve a danger to life or property or may threaten the suspension of any necessary service to the Association.

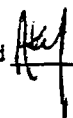
(I) Agent agrees that all monies collected by it on behalf of the Association shall be deposited in an account in a national bank where deposits are insured by the Federal Deposit Insurance Cooperation separate and apart from Agent's own funds. It is understood that such account may include monies received by Agent in a representative capacity on behalf of the Association and that the balance in such account may exceed the insurance limits of the Federal Deposit Insurance Cooperation for a single account. The Association shall have the right to reserve monies collected by the Agent on behalf of the Association in an interest-bearing account and to account to the Association for any interest earned.

VIII.

AGENCY EMPLOYEE

For the purposes of this paragraph, "Agency Employee" means any employee of the Agent who will be employed by the Agent during any portion of the term of this Agreement, and who assists with the provision of the services which the Agent has contracted to provide the Association pursuant to this Management Agreement.

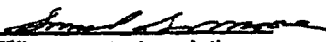
During the term of this Management Agreement and for a one (1) year term thereafter, the Association shall not solicit, employ, or contract with any Agency Employee for the purpose of obtaining for the Association at the property identified in paragraph II of this Agreement the provision of any services of the type which the Agent has contracted to provide the Association pursuant to this Management Agreement.

 Association President and  Agent have read this page

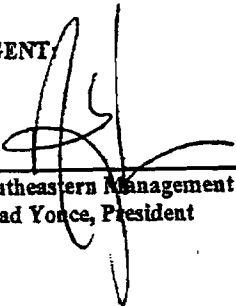
IN WITNESS WHEREOF, the parties hereto have
subscribed their names on this 5 day of October, 2007.

ASSOCIATION:


Harborage at Ashley Marina 10/2/07
Date


Witness as to Association

AGENT:


Southeastern Management Group, Inc. 10/12/07
Date
Chad Yonce, President


Witness as to Agent

 Association President and  Agent have read this page

MARINA MANAGEMENT SERVICES AGREEMENT

This Marina Management Services Agreement (the "Agreement") effective as of the 30th day of April, 2009, is made by and between The Harborage at Ashley Marina, Horizontal Property Regime (the "Association") and AMH Management, LLC ("AMH"), hereinafter referred to collectively as the "the Parties".

RECITALS:

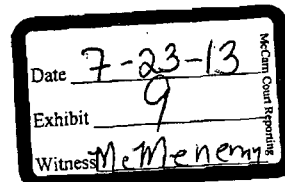
- A. AMH is engaged in the business of marina management.
- B. The Association seeks to hire AMH for the management of The Harborage at Ashley Marina ("Marina").

AGREEMENT

In consideration of the terms and conditions set forth in this Agreement, the Parties agree as follows:

1. Management Services. AMH agrees to provide the Association, for so long as this Agreement is in effect, full marina management support including, without limitation, making its relevant management employees available to the Association as is necessary to provide management and administrative support to the Association for the day-to-day operations of the Marina. Such services shall include:

- A. Maintaining an office (the dockhouse).
- B. The marina staff, to include a senior dockmaster and dockhands, will be employed by and work directly for the Association. AMH will oversee this staff. AMH and the staff it oversees shall be responsible for the duties or oversight of the duties contained in the scope of services in Exhibit "A" attached hereto. These duties shall be carried out in good faith and all necessary decisions shall be made in the reasonable discretion of AMH and the staff. The Association shall be solely responsible for all Association expenses incurred in carrying out the scope of services, including, but not limited to, expendable supplies, office supplies, postage, marina payroll (as described in section 8), reasonable bonuses, and any benefits. Bonuses and benefits must be approved by the Finance Committee of the Association.
- C. Taxes & Licenses: The Association is also responsible for sales and other applicable taxes, city, county and state business taxes, any licenses, fees, and permits that are exclusive to the Association.
- D. Miscellaneous: The Association is responsible for the cost of its share of any necessary new furnishings, new hardware, software and other equipment as pre-approved by the Finance Committee of the Regime Board..
- E. General expenses: all other costs reasonably incurred to manage the marina and/or carry out the duties requested by the Association from time to time



(the "Management Services"). It is expressly understood and acknowledged that the Association shall be responsible for all Association costs that are incurred through carrying out the scope of services.

- F. Notwithstanding the aforementioned, all costs associated that are to be paid by the association in excess of \$50.00 per item or \$150.00 in monthly aggregate must be approved by the finance committee in advance of the expenditure. At the Committee's sole discretion, it shall have the ability to refuse the expenditure if deemed unreasonable or not a cost of the Association.
- G. In the event of an emergency that will cause irreparable harm to the Association or its property, AMH will attempt to get prior approval from any member of the Board of Directors by phone and e-mail before agreeing to any costs in excess of the above. However, in the instance of such an emergency, and only in this instance, if no member of the Board is available to approve such expenditure, AMH shall have the ability to act on behalf of the Association and expend such costs as necessary in order to mitigate further damages.

2. Term. The initial term shall be for a period of 18 months effective on April 30, 2009 and expiring on December 31, 2010. This Agreement shall provide one (1) additional 12 month extension. This extension shall be at the discretion of the Board, acting on behalf of the association, and shall not be unreasonably withheld so long as the marina has been properly managed in accordance with the scope of services attached hereto and all of the duties outlined in this agreement have been satisfactorily carried out. In the event the Board believes that such management or performance of any such duties are not being carried out in a satisfactory manner at any time during the Term, per Paragraph 16 below, the Board shall notify AMH and AMH shall have the right to cure and if cured the same shall not be grounds for disallowance of the extension. In the event the Board exercises their option to disallow the extension, according to the terms specified above, it must provide AMH notice of intent, in writing, at least 30 days in advance of the contract expiration.

Beginning January 1, 2010; for an initial term of twelve months, expiring on December 31, 2010; AMH shall manage the associations accounting, billing, financial statements, accounts receivable, and general finances of the association. These finances shall be in segregated, insured accounts and all accounts will require the Treasurer and President of the association to be agents on the account and a signer on the Checks. All checks processed by AMH for purposes of the Association shall require two signers, one by a designated member of AMH or the Dockmaster and one a member of the Associations Board of Directors. The scope of services outlining, in more detail, the responsibilities of AMH under the regime accounting can be found attached to this agreement. All costs associated with the conduct of such duties shall be the responsibility of the Association and shall be approved by the Finance Committee in advance. Additionally, a one year extension will be provided under the same conditions as stated in the paragraph above.

In the event either the Marina or Association Management extensions are not exercised for approved reasons specified above, this will constitute a termination of this agreement in its entirety.

Upon termination of this Agreement, AMH shall deliver to the Association all papers, books and records of the Marina theretofore maintained by AMH for the account of the Marina including checkbooks, passbooks, records of fees, insurance policies, existing contracts relating to the operation received or held by AMH for the account of the Association (after deducting there from any prorated and unpaid portion of the agreed Management Services fee or unreimbursed advances by AMH). Further, upon termination hereof, the rights and obligations of the parties hereunder shall cease, subject, however, to the indemnification provisions set forth in Paragraph 13 of the Agreement and to any reimbursement or compensation due to AMH and return of any monies due to Association held by AMH.

3. Insurance. The Association shall pay for all insurance related to the marina (liability, property, etc.) and shall pay for all insurance related to the operation of the marina as well, including, but not limited to, general liability, workers compensation, protection and indemnity, marina operator's, umbrella, hired but not owned, and physical damage to property owned by the Association. AMH shall have no insurance cost responsibility whatsoever with regard to the marina, operation thereof, or the marina staff (an affiliate shall pay casualty insurance on the office building). The Parties shall adhere to the insurance provisions in Exhibit "D".

4. Management Services Fee.

(a) Management Services Fee. In consideration for the management services to be provided, the Association agrees to pay AMH a Management Services Fee of \$2,500.00 per month for the term of the Marina Management portion of this agreement. On January 1, 2010 and for the term of this agreement as it relates to the Regime or Association Management, an additional fee of \$2,500.00 per month will be paid to AMH by the association. These fees are intended to be "net" of all expenses/costs of the Association/marina.

(b) Payment of Fees. The Management Services Fees shall be due and payable on the first of each month.

(c) Escalations. Marina Management Service Fees and Regime Management Fees shall adjust on January 1st of each year of the Term (Regime Management Fee shall not adjust until 2011) by 3%.

5. Facilities. During the term of this Agreement, the Association shall have use of the dockhouse and marina storage within the onsite office building in consideration of paying 50% of the regime fees associated with LU234 (dockhouse)(currently \$50.48 per month). The Association shall be responsible for the costs of any maintenance to the dockhouse or marina storage, with such expenses to be preapproved by the Finance Committee. The owner of the office building may relocate and/or resize the marina storage at its discretion and its cost. Additionally, the Association agrees to pay AMH \$62.50 per month in consideration of the existing infrastructure in the dockhouse.

6. Reimbursement for Use of Common Employees. AMH agrees to reimburse the Association \$15,000 per year toward costs of shared employees, via payroll reimbursement

credit/offset such credits to be applied on a monthly basis in equal installments. This reimbursement shall discontinue if AMH or its affiliate's leasing activities cease to exist.

7. Marine Fuels Agreement. AMH has an agreement with Marine Fuels (MF), whereby it receives monthly payments in consideration of the shared employees utilized to assist in fueling vessels within the marina. AMH agrees to pass through 100% of MF's payments to the Association on a monthly basis, at an amount not less than is currently being paid.

8. Payroll/Staffing/Sample Schedules.

The Association agrees to pay a flat amount for monthly payroll, payroll taxes, administration of payroll, and staffing services as described in Exhibit A and Exhibit B. The gross amount of such payroll cost to the association, per month, shall be \$14,999.50; provided however, that from this gross amount will be deductions of (1) \$1,250.00 per month in consideration of a shared employee by AMH or an affiliate thereof and (2) \$2,083.33 in consideration of a subsequent agreement between AMH and Marine Fuels, LLC that utilizes shared employees to perform duties required to carry out the fueling operations. Therefore, the Net Amount due by the Association to AMH on a monthly basis shall be \$11,666.17. This payment shall be made prior to the last day in the month of which service is being provided. The Net Amount, as specified above, shall increase by 2% per on January 1, 2010 and 3% per annum on the first day of January thereafter. This amount may increase at an amount greater than 3% upon written approval by the Board of Directors.

In the event of an Emergency Event to the Association and its property, that is outside of the scope of services, which may cause additional labor hours to be expended by AMH; then AMH shall notify the Board of Directors by phone and e-mail of such a need and an estimate of additional labor hours and cost of such labor. The Board, at their sole discretion, may accept or decline this additional assistance and cost.

In consideration of this payment, AMH agrees to provide the labor necessary to perform the scope of services attached hereto. Additionally, it is agreed that at a minimum, AMH will provide 125 Man Hours per week in the off-season (November 1st through February 28th) and 272 Man Hours during the in-season (March 1st – October 31st). Additionally, off-season hours of operation shall be from 8AM to 6PM, seven days a week and in-season hours shall be from 8AM to 8PM, seven days a week.

It is understood that the Association shall maintain and pay for Workers Compensation coverage, further described in Exhibit D, Section D under this agreement. At all times AMH shall be listed as an additional insured on the policy.

Time cards used to determine payroll will be delivered to the Association detailing the actual hours worked, by employee, as well as the actual hours of operation on a monthly basis. Such cards shall be delivered to the Association no later than the 10th day of the month following.

Due to the nature of this relationship, whereby, AMH or its affiliates are also owners of Locker Units within the Association; the Board of Directors and AMH desire to ensure Regime Fees due

by AMH or its affiliates are in good standing at all times under the term of this agreement. Therefore, AMH agrees to allow the Board of Directors to deduct from the Net Amount stated in paragraph one under this section any regime fees owed by AMH or its affiliates that become 30 days or greater past due.

9. Phone Number, Page Listing, Advertising. Heretofore, AMH has paid for all marina marketing and advertising, including yellow pages ads, waterway guide ads, etc and shall continue to pay for these costs at their discretion. It is acknowledged that AMH owns the phone numbers for Ashley Marina, which the Association shall have the right to use during the term of this Agreement. The Association agrees to pay the cost to maintain one phone line with basic business service.

10. Maintenance of Records; Right to Inspect. AMH agrees to maintain such records as are required to evidence its compliance with the terms of this Agreement. AMH shall permit one or more representatives of the Association to inspect, at any reasonable time and upon reasonable terms, the records of AMH.

11. Indemnification. AMH shall indemnify the Association against all actions, proceedings, claims, demands, costs, liabilities, damages or losses of any kind or nature whatsoever that may be brought, commenced or prosecuted against or incurred by AMH due to the gross negligence or willful misconduct of AMH. The Association shall indemnify AMH against all actions, proceedings, claims, demands, costs, liabilities, damages or losses of any kind or nature whatsoever that may be brought, commenced or prosecuted against or incurred by the Association due to the gross negligence or willful misconduct of the Association.

12. Representations of AMH and the Association. Both AMH and the Association represent and warrant to the other that:

- (a) That the Association is a corporation duly organized and validly existing under the laws of the State of South Carolina;
- (b) That AMH is a limited liability company organized and validly existing under the laws of the state of South Carolina;
- (c) Each Party has full power, authority and legal right to perform the provisions of this Agreement;
- (d) This Agreement constitutes a valid and binding obligation of the Party enforceable in accordance with its terms, and does not constitute a breach of or default under any other agreement to which the Party is a party or by which any of its assets are bound or affected; and
- (e) The parties have entered into an arms-length transaction.

13. AMH Business.

The Association recognizes that AMH (and/or affiliates) is in the business of owning, operating and managing marinas for its own account and others. The Association agrees not to compete for slip management as long as this contract remains in effect.

Currently the Senior Dockmaster and Dockmasters are under non-competes due to their value to AMH and its business. The association agrees not to instigate discussions to directly hire any employee who works at the Marina or under the supervision of AMH while this contract is in effect.

14. Expenses. Each Party shall pay its own expenses incident to the negotiation and execution of this Agreement. The Association will keep a petty cash account of approximately \$500 available. At no time will AMH advance funds to the marina or pay marina obligations from AMH funds. The Association is responsible for all costs required to operate the marina in a first class manner and shall pay its obligations according to the terms. Provisions and procedures will be put in place so that AMH does not advance funds for Association costs. The chair of the finance committee of the Association shall have approval, in advance, of any expense in excess of \$150.00. Should the Finance committee at any time feel as though funds are being spent without merit, the committee at its sole discretion shall have the ability to close the petty cash account and require preapproval of all expenditures.

15. Notices. Any notice or other communication required or permitted under this Agreement shall be in writing and shall be sent by registered or certified mail, or alternatively, by email, but the latter shall only be a valid form if a return email is received acknowledging receipt. Until further notice, communications shall be sent to:

(a) If to AMH, to the following address:

AMH Management, LLC
C/o Atlantic Marina Holdings, LLC
33 Lockwood Drive
Charleston, SC 29401
Fax: (843) 853-8857
Attention: Katie Howard

(b) If to the Association, to the following address:

The Harborage at Ashley Marina, Horizontal Property Regime
Attn: Board of Directors
33 Lockwood Drive
Charleston, SC 29401
Board@MyAshleyMarina.com
Finance@MyAshleyMarina.com

Unless otherwise provided in this Agreement, all notices communications shall be deemed to have been duly given or made five (5) business days after being deposited in the mail, postage prepaid, as registered or certified mail, return receipt requested, and upon receipt of a return email confirmation from either/or both the email address recipients listed herein to the Board of Directors. The address to which notices or other communication shall be directed may be changed from time to time by any Party by giving notice to the other Party of the substituted address.

16. Remedies. Should AMH fail to perform duties in accordance with the scope of services attached to this agreement then the Association shall provide notice of such non-compliance and AMH will have a period of 10 days to cure the situation. If AMH fails to do so; the Association shall have the sole remedy of cancelling this agreement effective immediately, by providing written notice to AMH, with no further action, obligations, or liabilities required by either party. In the event the Association fails to act in accordance with this agreement, AMH shall provide written notice to the Association, who will have a period of 10 days to cure the situation. If the association fails to cure the situation, AMH shall have the ability to terminate this agreement and reserves the rights under law to collect any outstanding Management Fees that would have been owed through the remainder of this agreement.

17. Choice of Law. This Agreement will be governed by, and all disputes arising under this Agreement will be resolved in accordance with, the laws of the State of South Carolina.

18. Severability. If any provision of this Agreement is adjudged to be invalid or unenforceable to any extent, the remainder of this Agreement will not be affected thereby and will be valid and enforceable to the fullest extent permitted by law.

19. Binding Effect. This Agreement will be binding upon and inure to the benefit of AMH and the Association. This contract may not be assigned, sold, transferred, leased, or in any way transferred in whole or part to any party other than AMH. If AMH wishes to transfer this agreement to a related or affiliated party it must make this request to the Association. The request maybe withheld at the sole discretion of the Association.

20. Amendment and Waiver. No supplement, modification or amendment of, or waiver with respect to, this Agreement shall be binding unless executed in writing. This Agreement may be modified, amended or terminated upon the written agreement of each Party hereto.

21. Entire Agreement. This Agreement constitutes the entire agreement pertaining to the subject matter hereof and supersedes all prior oral and written agreements and understandings in connection herewith. No covenant, representation or condition not expressed in this Agreement will affect or be effective to interpret, change or restrict the express provisions of this Agreement.

22. Counterparts. This Agreement may be executed in counterparts, each of which will be considered an original, but all of which together will constitute the same instrument.

23. Litigation Expenses. Should either party bring an action under this Agreement, the non-prevailing party shall pay the prevailing party's attorney's fees and expenses incurred in such action.

IN WITNESS WHEREOF, each Party has executed this Marina Management Services Agreement as of the date first above written.

AMH MANAGEMENT, LLC

By: [Signature]

Its: Manager

Date: 4/20/09

THE HARBORAGE AT ASHLEY MARINA, HORIZONTAL PROPERTY REGIME

By: [Signature]

Its: Owner

Date: 4/20/2009

EXHIBIT "A"

SCOPE OF SERVICES

A. MAINTENANCE AND/OR OVERSIGHT OF MAINTENANCE

1. Maintain all docks, boardwalks and access ramps in good repair, including replacement of any portion of these improvements as approved by the Board of Directors.
2. Maintain all utilities in good working order to include repair, replacement and upgrading as necessary to insure continued electrical, water, cable and wireless service or other utilities to the individual slips and common areas.
3. Maintain and replace all lighting fixtures and bulbs as necessary to insure uninterrupted service to the individual slips and common areas.
4. Maintain power pedestals in good working condition, including replacement as necessary.
5. Maintain parking lot, including replacement of parking lot surface materials as needed, and ensuring that parking spaces are divided and clearly marked.
6. Ensure that all grassed areas, flower beds and planted areas are in good condition, including replacement of flowers and plants on a seasonal basis or as needed. Contractually, this service will be handled through the property management company.
7. Maintain laundry room and insure that all laundry equipment is in good working condition and area is clean and in good repair.
8. Maintain restrooms to insure area is clean and all fixtures are in good working condition.
9. Maintain security gate
10. Obtain approval from the Board of Directors for all expenditures in excess of \$ 500.00
11. Maintain all signs and plaques in good condition and replace as necessary

It is understood that staff shall oversee the above maintenance. Staff will do what is reasonable and within its ability, with all other maintenance to be performed by third parties at the Association's sole expense.

B. PERSONNEL

1. Interview, hire and train all employees (including performance of background checks and drug testing if so directed by the Board of Directors).
2. Maintain employee files to include resumes, performance reviews, W-4s and other items normally maintained in such files
3. Health and benefit plans will not be provided.
4. Perform annual reviews of every employee to include a written summary of the review in each employee's personal file. Submit employee evaluation reports to the Board of Directors annually.
5. Establish employee manual outlining employee duties, responsibilities, benefits, vacation policy, sick leave policy, holidays and other information normally included in such a manual.
6. Supervise personnel directly and indirectly through senior personnel to insure top quality services are provided to owners and their guests.

7. Complete and file or have ADP or accountants complete and file all quarterly and annual payroll tax returns to include Federal forms W-4, W-2, 941, W-3 and state forms W-2, UCE 101, 1605 and 1606 and any and all other required payroll tax returns as required by the Internal Revenue Service and the State of South Carolina to report employee payroll.
8. Help Association maintain in full force and effect workers compensation insurance. Complete and file any and all workman compensation claims forms on a timely basis.
9. Maintain a written system of all time worked by staff on a daily basis.
10. Prepare and distribute or have ADP prepare and distribute all employee payroll checks on a weekly basis, bi-weekly or semi-monthly basis.
11. Withhold or have ADP withhold the proper Federal and State payroll taxes from all employees. Prepare and remit, or have ADP do same, all payroll taxes including the Employer's share on a timely basis.
12. Maintain and replace as needed all equipment owned by the Regime to include dock carts, hoses, lines, electrical cords and any other equipment which is or may be acquired by the Regime.

C. OTHER RESPONSIBILITIES AND DUTIES

1. Help Association maintain proper insurance coverage as provided in this Agreement.
2. Maintain a system to monitor that every vessel in the Marina has adequate insurance coverage with the Regime named as a loss payee.
3. Insure that any business operation on or within the Common area of the Regime has adequate Insurance coverage with the Regime named as a loss payee as well as an up to date premises agreement on file. The premises agreement will be supplied by the Board.
4. Maintain all vendor contracts, including solicitation of bids annually from at least three vendors for each type of contracted service.
5. Maintain all information required by any regulatory agencies having governance over the Marina, including, but not limited to, an updated operations and maintenance manual as required by OCRM, a copy of which will be supplied to the Board of Directors.
6. Establish and maintain an Emergency Spill Response manual and insure that there are adequate equipment and supplies MF to respond to a fuel spill.
7. Maintain all safety equipment necessary to safeguard the assets of the Regime. Maintain a written response plan to be followed by the marina staff and any emergency responders.
8. Establish and maintain a hurricane response plan.
9. Establish and maintain an incident reporting system for any incident involving an accident, altercation, event involving property damage, any issue which may be covered by insurance or any event requiring a response by any regulatory agency.
10. Report to the Board of Directors at least monthly as to the status of the Regime Operations, including a prospective analysis of major areas requiring the Board's attention.
11. Maintain all books, records, bank accounts, payroll records, insurance reports, incident reports and other documentation required to operate the Regime in a businesslike manner.
12. Maintain a record of all electric usage by slip on a monthly basis and report such

usage to Southeastern Management Group, Inc. in a format approved by the Board of Directors.

13. Establish, maintain and enforce marina rules and regulations (including a live-aboard policy and associated fees) and a parking policy regulating parking by owners, guests, service personnel and vendors.

14. Establish a system of controls to regulate admission of service personnel and vendors to the Marina, including confirmation of insurance coverage before admission to the Marina.

15. Establish and maintain a list of all slip owners to include full names, addresses, telephone numbers and email addresses.

16. Coordinate with Southeastern Management Group, Inc. to insure the flow of information between AMH, marina staff, and Southeastern so as to allow each party to render the highest level of management services possible to the Regime.

17. Ensure that every boater, at all times within the hours of operation, is assisted in a manner consistent with a first class marina.

18. Prevent any actions which would be in violation of the existing permit or OCRM regulations.

D. FUELING OPERATIONS

Marine Fuels, LLC ("MF") owns and is ultimately responsible for fueling operations. To assist in such operations, the Association, AMH and marina staff will:

1. Provide needed staff to fuel any boats requesting diesel or gasoline during normal operating hours.

2. Process payments for the fuel sales. All credit card transactional costs will be paid by MF.

3. Reconcile fuel sold against payments collected daily to ensure accurate billing. Detail and resolve any discrepancies in a timely manner.

4. Provide a reconciled report daily no later than 12:00PM for the prior day.

5. All costs associated with the above work, including the cost of any employee training or certification shall be the responsibility of the Association and/or MF.

ITEMS SPECIFICALLY NOT INCLUDED IN THE SCOPE OF SERVICES

The following list, while not inclusive, lists certain responsibilities which are outside the scope of service provided above:

- Any financial Audits or third party accounting
- Tax preparation or any accounting work related thereto
- Legal representation
- Public relations, advertising and marketing
- Website design, maintenance and support

EXHIBIT "B"

ESTIMATED PAYROLL BUDGET

Payroll Budget – Scope of Services ABCD

This bid includes the cost of operating the fuel docks and related areas. This bid is for labor cost only

Employee cost

Off season employees - Off season hours are comprised of November - February or 16.8 weeks

1.5 employees for each hour the marina is open- Off season hours are 8 am to 6 pm Monday-Sunday

70 hours open x 1.5 = 105 man hrs at \$18.00 = \$1,890.00 per week x 16.8 off season hrs = \$31,752

In season employees - In season hours are comprised of March-October or 35.2 weeks

3.0 employees for each hour the marina is open - In season hours are 8 am to 8 pm Monday-Sunday

84 hours open x 3 = 252 man hrs at 13.33 = \$3,359.16 per week x 35.2 = \$118,242

Senior Dockmaster- \$30,000

Total Payroll \$179,994

Less ASM Contribution (\$15,000)

Less MF Contribution \$25,000)

Net Association Cost \$139,994

EXHIBIT "D"

INSURANCE

1. Coverage and Amounts. AMH in conjunction with the Association shall, at all times during the term of this contract and at the Association's sole cost and expense, obtain and keep in force the insurance coverage and amounts set forth in Paragraph 3 of the Agreement and in this Exhibit.
 - (a) Association shall maintain and AMH shall administer commercial general liability insurance, including contractual liability, broad form property damage liability, fire legal liability, premises and completed operations, and medical payments, with limits not less than Two Million Dollars (\$2,000,000) per occurrence and in the annual aggregate, insuring against claims for bodily injury, personal injury and property damage arising from the use, occupancy or maintenance of the Premises and/or any other portion of the Project that AMH is granted any right to use under this Contract.
 - (b) Association shall maintain and AMH shall administer insurance for, hired but non-owned vehicles used by marina staff.
 - (c) Association shall maintain and AMH shall administer umbrella excess liability insurance on a broad form basis in excess of the required commercial general liability, business and employers liability insurance with limits not less than two million Dollars (\$2,000,000) per occurrence and in the aggregate.
 - (d) The Association shall carry workers' compensation insurance for all of the staff in statutory limits for SC and employer's liability insurance which affords not less than Five Hundred Thousand Dollars (\$500,000) for each coverage.
 - (e) Association shall maintain and AMH shall administer insurance against loss or damage to the dockhouse and all personal property located therein for loss by fire and "All-Risk" perils in an amount not less than the 100% physical replacement cost value of thereof.
 - (f) Such other insurance as provided for in paragraph 3 of the Agreement, as Association may reasonably request or as provided by the master deed for the marina.
2. Deductibles. Any deductibles selected by Association shall be the sole responsibility of Association.
3. Insurance Companies. All insurance and all renewals thereof shall be issued by companies with a rating of at least A- or better in the current edition of Best's Insurance Reports and be licensed to do business in South Carolina.
4. Notice of Cancellation. Each policy shall expressly provide that the policy shall not be cancelled or materially altered without thirty (30) days' prior written notice to Association and shall remain in effect notwithstanding any such cancellation or alteration until such notice shall have been given to Association and such period of

thirty (30) days shall have expired.

5. Named Insured. All liability insurance (except employer's liability) shall name Association, AMH, and any other parties designated by Association (such as regime manager) as an additional insureds, shall be primary and noncontributing with any insurance which may be carried by Association, shall afford coverage for all claims based on any act, omission, event or condition that occurred or arose (or the onset of which occurred or arose) during the policy period.
6. Certificates of Insurance. Association shall deliver to AMH Certificates of insurance acceptable at least ten (10) days before the date of commencement of the Term and renewals thereof at least fifteen (15) days before expiration of each policy.
7. Mutual Waiver of Subrogation Rights. Whenever (i) any loss, cost, damage or expense resulting from fire, explosion or any other casualty or occurrence is incurred by either of the parties to this Agreement, or anyone claiming by, through or under it in connection with the marina, and (ii) such party is then covered in whole or in part by insurance with respect to such loss, cost, damage or expense or required under this Agreement to be so insured, then the parties so insured (or so required) hereby release the other party from any liability such other party may have on account of such loss, cost, damage or expense to the extent of any amount recovered by reason of such insurance (or which could have been recovered had such insurance been carried as so required) and waives any right of subrogation which might otherwise exist in or accrue to any person on account thereof; provided that such release of liability and waiver of the right of subrogation shall not be operative in any case where the effect thereof is to invalidate such insurance coverage or increase the cost thereof; and provided further that in the case of increased cost, the other party shall have the right, within thirty (30) days following written notice, to pay such increased cost thereupon keeping such release and waiver in full force and effect.
8. AMH's Right to Insure. If Association fails to insure or fails to furnish insurance certificates, AMH shall have the right from time to time to affect such insurance for the benefit of AMH or Association or both of them and Association shall pay all premiums.

THE HARBORAGE AT ASHLEY MARINA HPR

December 24, 2008

AMH Management, LLC
c/o Atlantic Marina Holdings, LLC
Attention: Jack Powell
33 Lockwood Drive
Charleston, SC 29401

VIA Fax # 843-853-8857 and Certified Mail

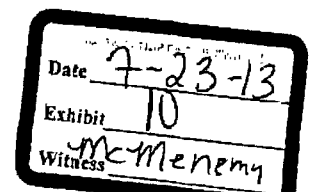
Dear Mr. Powell,

Please accept this letter as formal notice that AMH Management, LLC's Marina Management Services Agreement with The Harborage at Ashley Marina HPR expires on April 29, 2009 and will not be automatically renewed as allowed under the provisions of the agreement.

Within the next 10 days the Board of Directors will prepare a Request for Proposal (the "RFP") to manage the Regime Association for the year beginning May 1, 2009 through April 30, 2010. The RFP will include a scope of services which must be included in your proposal. Your company will be included in the field of prospective management companies to receive the RFP. We would appreciate your response to this proposal in a timely manor and remain available if you have any questions or comments that pertain to the proposal.

The Board of Directors
The Harborage at Ashley Marina HPR

Joint Exhibit 1210



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

AMH-ASHLEY MARINA, LLC, and)
AMH MANAGEMENT, LLC,)

Civil Action No. 2011-CP-10-9513

Plaintiffs,)

v.)

**PLAINTIFFS' RULE 59(e) BY
MOTION TO ALTER
OR AMEND**

THE HARBORAGE AT ASHLEY)
MARINA HORIZONTAL PROPERTY)
REGIME, THE HARBORAGE AT)
ASHLEY MARINA CONDOMINIUM)
ASSOCIATION, and EDDIE MCCOY,)
STUART REEVES, BRIAN SWAN,)
RICH CONE, and ED MISKOTTEN,)
individually,)

Defendants.)

2014 OCT -2 PM 1:10
JULIE J. ANASTROM
CLERK OF COURT

FILED

**TO: MICHAEL A. TIMBES, ESQUIRE, COUNSEL FOR DEFENDANTS, AND TO
DEFENDANTS**

PLEASE TAKE NOTICE that Plaintiffs' AMH-Ashley Marina, LLC (hereinafter referred to as "AMH") and AMH Management, LLC, (hereinafter referred to as "Management") will move before the Court immediately, and do hereby so move, for an Order altering or amending

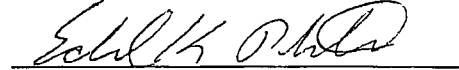
the Court's Final Order entering Judgment in favor of Defendants, dated September 18, 2014, filed with the Charleston County Clerk of Court on September 19, 2014, and served on Plaintiffs on September 22, 2014 (attached hereto as Exhibit A). Specifically, the Plaintiffs' respectfully move the Court under Rule 59(e), SCRPC, to withdraw its erroneous issued Order and enter an Order affirming Plaintiffs the perpetual right to manage The Harborage at Ashley Marina Horizontal Property Regime (hereinafter referred to as "The Harborage") and The Harborage at Ashley Marina Condominium Association (hereinafter referred to as the "Association") as provided in

Section 2.3, found on pages 6 and 7 of the Master Deed of The Harborage at Ashley Marina Horizontal Property Regime, and recorded the same in the Office of the Register of Mesne Conveyance for Charleston County, South Carolina, on May 17, 2005, in Deed Book V-534, at page 308, a copy of which Master Deed is attached hereto as Exhibit I and incorporated herein by reference (hereinafter referred to as the "Master Deed").

This motion is based on the evidence in the record, arguments of counsel and on such law as is appropriate and is based on the clear language of the Master Deed and the evidence in the record which make clear that Plaintiffs have the perpetual right to manage The Harborage and the Association.

Respectfully submitted,

PRITCHARD LAW GROUP, LLC



Edward K. Pritchard, III, Esq.

129 Broad Street

Charleston, SC 29401

Phone: (843) 722-3300;

Fax: (843) 722-3379

Attorneys for Plaintiffs

September 30, 2014

Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a complete and accurate copy of the foregoing *Plaintiffs' Rule 59(e) Motion to Amend, Alter or Correct* was served upon all known counsel of record listed below on September 30, 2014, by mailing the same via postage paid U.S. First Class Mail as follows:

Michael A. Timbes, Esq.

Thurmond Kirchner Timbes & Yelverton, PA

15 Middle Atlantic Wharf, Suite 101

Charleston, SC 29401

Attorney for Defendants

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2011-CP-10-9513

AMH-ASHLEY MARINA, LLC and AMH
MANAGEMENT, LLC,

Plaintiffs,

vs.

) DEFENDANTS' RESPONSE IN OPPOSITION
) TO PLAINTIFFS' RULE 59(e) MOTION TO
) ALTER OR AMEND

THE HARBORAGE AT ASHLEY
MARINA HORIZONTAL PROPERTY
REGIME, THE HARBORAGE AT
ASHLEY MARINA CONDOMINIUM
ASSOCIATION, and EDDIE MCCOY,
STUART REEVES, BRIAN SWAN, RICH
CONE, and ED MISKOTTEN, individually

Defendants.

FILED
2014 OCT -7 AM 10:42
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

TO: THE PLAINTIFFS AND THEIR ATTORNEY, EDWARD K. PRITCHARD, III,
ESQUIRE:

COME NOW, the above named Defendants and submit this memorandum in opposition
to the Plaintiffs' Rule 59(e) Motion to Alter or Amend, respectfully showing as follows:

Initially, it is notable that Plaintiffs have not sought a new trial, and instead have limited
their motion to the remedy provided in Rule 59(e), SCRCP. Plaintiffs' motion has no merit.

Despite the fact that the Complaint in this action was filed in December of 2011,
Plaintiffs have made no substantive arguments whatsoever to this Court in support of any claim
alleged by them. At no time have the Plaintiffs offered a pre-trial brief or other legal memoranda
citing any authority to support their claims, nor have Plaintiffs made a single argument to the
Court as to why they should prevail. They have provided no analysis at any point. In fact, prior
to the issuance of this Court's Order, Plaintiffs were given additional time (which they

requested) to prepare and submit a proposed order explaining their desired result. Despite the extra time, Plaintiffs submitted no proposed order.

Plaintiffs' Rule 59(e) Motion is nothing more than a conclusory statement claiming they have a perpetual management right. No argument or legal authority is cited. Although they have the burden of proof and have had every opportunity to present arguments and points of authority to support their accusations, Plaintiffs have provided none.

It is well-settled that, "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994)(emphasis added). Here, Plaintiffs have never made a single argument to the Court. In this way, every argument Plaintiffs might have attempted at this late stage would be untimely and improper. But, considering Plaintiffs still did not attempt an argument in their Rule 59(e) Motion, we are left to wonder what they were. Considering the utter lack of any argument now and at any time prior to judgment, it appears for this reason only that Plaintiffs' post-trial motion is intended for purposes of delay.

WHEREFORE, Defendants respectfully request that Plaintiffs' defective Rule 59(e) Motion be denied.

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

By: 

MICHAEL A. TIMBES
THOMAS J. RODE
15 Middle Atlantic Wharf, Suite 101
Charleston, SC 29401
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Fax: 843-937-4200
Email: mtimbess@tktylawfirm.com
Attorneys for Defendants

October 7, 2014
Charleston, South Carolina

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
ATTORNEYS & COUNSELORS AT LAW

**15 MIDDLE ATLANTIC WHARF, SUITE 101
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* Also admitted in Georgia
** Also admitted in North Carolina

September 9, 2014

VIA US MAIL & E-MAIL

The Honorable Mikell R. Scarborough
Charleston County Master In Equity
100 Broad Street, Suite 266
Charleston, SC 29401
master@charlestoncounty.org
scraig@charlestoncounty.org

Re: AMH-Ashley Marina, LLC, et al. v. The Harborage at Ashley Marina HPR, et al.;
Case No.: 2011-CP-10-9513

Dear Judge Scarborough:

This matter came before you for a hearing on the merits on June 23, 2014. You may recall that instead of conducting a formal hearing, the parties mutually agreed to provide the Court with a Joint Stipulation of Facts, related Exhibits, and full copies of the depositions taken in the case. In addition, the Defendants presented the Court with their Trial Brief outlining the issues and the arguments from their perspective. It was agreed at the hearing that the parties would submit proposed orders for your consideration by August 1, 2014.

The Defendants, whom I represent, timely submitted their proposed order by the Court's August 1st deadline (See Attachment "A" - e-mail submitting Defendants' Proposed Order). On August 6, 2014, the Plaintiffs requested additional time to submit their proposed order in light of Mr. Pritchard's schedule. Specifically, Plaintiffs requested until the end of August to submit their proposed order. (See Attachment "B" - Plaintiffs' e-mail requesting additional time).

It is now September 9th, and Plaintiffs have not submitted a proposed order nor requested further additional time to do so. Respectfully, I would request that the Court consider and execute the Defendants' proposed order at this time. I previously submitted a copy in Microsoft Word® for your convenient use in making any modifications you desire.

Letter to Judge Scarborough
September 9, 2014

With kindest regards, I remain

Very truly yours,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.



Michael A. Timbes
mtimbess@tktylawfirm.com

/mwk

cc: Edward K. Pritchard, III, Esquire (via U.S. Mail & e-mail)
Clients (via e-mail only)

ATTACHMENT "A"

From: Spencer Craig
To: Michael Timbes; Moira Kerrigan; Thomas Rode; Mikell Scarborough; Edward Pritchard
Subject: RE: AMH Ashley Marina v. The Harborage at Ashley Marina - Case No. 2011-CP-10-9513
Date: Friday, August 01, 2014 3:56:20 PM

Thank you.

Have a nice weekend.

Spencer Craig, Esquire
Law Clerk to the Honorable Mikell R. Scarborough
100 Broad Street, Suite 266
Charleston, SC 29401
Tel: (843) 958-5053
Fax: (843) 958-5077
scraig@charlestoncounty.org

From: Michael Timbes [mailto:MTimb@tktylawfirm.com]
Sent: Friday, August 01, 2014 1:38 PM
To: Moira Kerrigan; Thomas Rode; Spencer Craig; Mikell Scarborough; Edward Pritchard
Subject: AMH Ashley Marina v. The Harborage at Ashley Marina - Case No. 2011-CP-10-9513

Judge Scarborough:

In accordance with your prior request that the parties submit proposed orders in this matter by today, August 1, 2014, I have attached an order finding in favor of the Defendants for your review and consideration. I've copied Mr. Pritchard with the same. A hard copy is also being sent to your chambers, and I've attached a copy in Microsoft Word® for your use. Also, for convenience I've included citations to the record (i.e., the Joint Stipulation of Facts, Depositions, etc.) submitted by the parties.

Should Your Honor have any questions or desire to hear arguments from counsel on any issue that has been submitted for your determination, we are gladly available.

Have a nice weekend,
Michael

Michael A. Timbes
THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
15 Mid-Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Phone: 843.937.8000
Fax: 843.937.4200
Email: mtimb@tktylawfirm.com
Web: www.tktylawfirm.com

CONFIDENTIALITY NOTICE: This electronic mail transmission has been sent by an attorney. It

ATTACHMENT "B"

From: Edward Pritchard
To: Michael Timbes; Moira Kerrigan; Thomas Rode; scraig@charlestoncounty.org; Mikell Scarborough
Subject: RE: AMH Ashley Marina v. The Harborage at Ashley Marina - Case No. 2011-CP-10-9513
Date: Wednesday, August 06, 2014 10:34:04 PM

Jude Scarborough,

I just saw this. As you know, I have been in trial and am currently in El Paso, Texas, in depositions. Accordingly, I would ask to have until the end of the month to submit a proposed order. I have not opened Mr. Timbs attachments and shall not until my proposed order is submitted.

Edward

From: Michael Timbes [mailto:MTimbes@tktylawfirm.com]
Sent: Friday, August 01, 2014 1:38 PM
To: Moira Kerrigan; Thomas Rode; scraig@charlestoncounty.org; Mikell Scarborough; Edward Pritchard
Subject: AMH Ashley Marina v. The Harborage at Ashley Marina - Case No. 2011-CP-10-9513

Judge Scarborough:

In accordance with your prior request that the parties submit proposed orders in this matter by today, August 1, 2014, I have attached an order finding in favor of the Defendants for your review and consideration. I've copied Mr. Pritchard with the same. A hard copy is also being sent to your chambers, and I've attached a copy in Microsoft Word® for your use. Also, for convenience I've included citations to the record (i.e., the Joint Stipulation of Facts, Depositions, etc.) submitted by the parties.

Should Your Honor have any questions or desire to hear arguments from counsel on any issue that has been submitted for your determination, we are gladly available.

Have a nice weekend,
Michael

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

AMH-ASHLEY MARINA, LLC and AMH
MANAGEMENT, LLC,

Plaintiffs,

vs.

THE HARBORAGE AT ASHLEY
MARINA HORIZONTAL PROPERTY
REGIME, THE HARBORAGE AT
ASHLEY MARINA CONDOMINIUM
ASSOCIATION, and EDDIE MCCOY,
STUART REEVES, BRIAN SWAN, RICH
CONE, and ED MISKOTTEN, individually

Defendants.

BEFORE THE MASTER IN EQUITY
CASE NO. 2011-CP-10-9513

**DEFENDANT'S TRIAL BRIEF AND
MEMORANDUM OF LAW**

FILED
JUL 14 JUN 23 AM 9:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

COME NOW the above-named Defendants and hereby submit their Defendants' Trial Brief and Memorandum of Law, asking this Court to find the Plaintiffs' claims lack merit and must be dismissed.

THE STIPULATED FACTS AND OTHER EVIDENCE

Plaintiffs and Defendants have stipulated to certain relevant facts, which are filed with the Court as "Plaintiffs' and Defendants' Joint Stipulation of Facts", containing Joint Exhibits 1-5. Page citations herein to the "Jt. Stipulation" or "Jt. Exhibits" reference these materials. Also, the parties agreed to submit complete copies of the depositions¹ taken in this case. Cites herein to "Depo. Exhibits" shall mean the exhibits used therein. In accordance with Rule 30(j)(2), SCRCP, all objections during the depositions, except those required under the Rules, are preserved.

¹ Joe Miller, Bruce Wallace, Rebecca McMenemy, and Christopher Ingram testified as 30(b)(6) designees for the Plaintiffs. These transcripts and exhibits have been provided to the Court.

THE FUNDAMENTAL QUESTION BEFORE THE COURT

In this action, the Court is asked to determine whether a covenant contained in a condominium master deed reserves an enforceable, perpetual right in favor of the Plaintiffs to manage the condominium association's affairs forever. In consideration of the stipulated facts, depositions, exhibits, and well-settled legal premises discussed herein, this court should find that no such enforceable right exists under any theory advanced by Plaintiffs.

THE PARTIES AND RELEVANT BACKGROUND

1. The Ashley Marina Condominium, the Declarant, and the Association

The Harborage at Ashley Marina Real Property Regime (the "Ashley Marina") is a marina formed as an unincorporated horizontal property regime and developed pursuant to The Master Deed of The Harborage at Ashley Marina Real Property Regime, recorded on April 29, 2005 (the "Master Deed"). (Jt. Exhibit 1, p. 2). The marina is located at 33 Lockwood Boulevard, in downtown Charleston, South Carolina. (Jt. Stipulation, ¶¶ 1, 8, and 9).

Plaintiff AMH Ashley Marina, LLC ("AMH Ashley") developed the marina and is the Declarant under the Master Deed. AMH Ashley also formed The Harborage at Ashley Marina Condominium Association, Inc. (the "Association"), to serve as the owners' association for the Ashley Marina. AMH Ashley is a member of the Association.² (Jt. Stipulation, ¶¶ 2, 3, 10).

Section 2.3(a) of the Master Deed contains a provision relating to management of the Association. It states in relevant part:

... Additionally, the Association shall enter into an agreement for the management of the Condominium with the Declarant or an affiliate of the Declarant, which management agreement shall provide that it may be extended in the sole discretion of the "Manager" under said agreement and may not be terminated by the

² AMH Ashley is a member of the Association by virtue of its ownership interest in certain slips, but it does not perform any services for the marina. (McMenemy Depo., p. 11).

Association except in the event it is terminated by the Association for cause as a result of the Manager's gross negligence or criminal activity in the discharge of such management duties assigned to it under the management agreement.

(Jt. Exhibit 1, p. 12-13). This language lies at the heart of this case.

2. Control of the Association by AMH Ashley as the Declarant, and the initial management agreements it caused to be executed

For a period after the Ashley Marina was formed in 2005, AHM Ashley controlled the Association as the Declarant. (Jt. Stipulation, ¶ 10). While in control, AMH Ashley caused the Association to enter in a contract for management services with its affiliate, Plaintiff AMH Management, LLC ("AMH Management"). (Jt. Stipulation, ¶¶ 4, 5). This "2006 Marina Management Agreement" was effective April 30, 2006, and set forth a scope of services relative to the marina operations only. (Jt. Stipulation, ¶¶ 11, 12, 13; Jt. Exhibit 2, pp. 180-183) (McMenemy Depo., p. 25-26). With regard to term and termination, the 2006 Marina Management Agreement provided:

Term. The term of this Agreement shall be for a period of one (1) year beginning as of the 30th day of April, 2006 and ending on the 29th day of April, 2007 and shall then automatically extend from year to year. Either Party may terminate this Agreement by giving to the other party written notice at least sixty (60) days prior to the end of the then current term, which termination shall take affect (sic) at the end of the then current one (1) year term.

(Jt. Exhibit 2, p. 180).

Because the Ashley Marina is formed as a condominium regime, there are additional responsibilities of operating the Association separate and apart from the functions of the marina. Thus, AHM Ashley also caused the Association to enter into a regime management agreement with Southeastern Management Group, Inc., dated October 2, 2007 (the "Southeastern Agreement"). The Southeastern Agreement provided for the management of the affairs of the

Association, such as payment of Association expenses, collection of regime fees, etc. (Jt. Stipulation, ¶¶ 14,15; Jt. Exhibit 3, pp. 185-191)(Miller Depo. p. 30).

3. Turnover of the Association to the Board of Directors, the subsequent bidding for management services, and the 2009 Management Agreement

AMH Ashley turned over control of the Association to a Board of Directors³ representing the members of the Association at the annual meeting in December 2007. (Jt. Stipulation, ¶ 16). At the time, AMH Management continued to manage the marina and Southeastern Management continued to manage the Association.

In December 2008, the Board sent timely notice to AMH Management that the 2006 Marina Management Agreement would not be renewed after April 29, 2009. The notice indicated the Board intended to request proposals from AMH Management and other potential providers for management services to begin May 1, 2009. (Jt. Stipulation, ¶ 20; Jt. Exhibit 5, p. 210) (McMenemy Depo., p. 34). In response to the Board's request, AMH Management submitted a proposal for services. The Board accepted AMH's proposal on behalf of the Association, and in April 2009 entered into the "2009 Management Agreement" with AMH Management following bilateral negotiations between the parties. (Jt. Stipulation, ¶ 21; Jt. Exhibit 4, p. 193-207) (Miller Depo. pp. 15-16; Wallace Depo. pp. 23-25).

4. The expiration of the 2009 Management Agreement and Plaintiffs' claim of perpetual management rights

The provision defining the term of the 2009 Management Agreement differs from the 2006 Marina Management Agreement. (Wallace Depo., p. 28). Instead of automatically extending unless terminated (as was the case under the 2006 agreement), the 2009 agreement had a predetermined expiration date. Specifically, it had a term of 18 months, expiring December 31,

³ The individual defendants named in the lawsuit are members of the Association who served on the Board of Directors at relevant times. (Jt. Stipulation, ¶ 6).

2010. A single 12-month extension was allowed. (Wallace Depo., p. 30-31). The particular text reads:

Term. The initial term shall be for a period of 18 months effective on April 30, 2009 and expiring on December 31, 2010. This Agreement shall provide one (1) additional 12 month extension. This extension shall be at the discretion of the Board, acting on behalf of the association, and shall not be unreasonably withheld so long as the marina has been properly managed in accordance with the scope of services attached hereto and all of the duties outlined in this agreement have been satisfactorily carried out. ...

(Jt. Exhibit 4, p. 194).

The scope of work under the 2009 Management Agreement also differs from that of the 2006 Marina Management Agreement. Under the 2009 Management Agreement, AMH Management expanded its services to include management of the Association in addition to the marina services it previously provided.⁴ (Miller Depo., pp. 30, 40-41, Depo. Exhibit 16). In this way, the services provided by AMH Management under the 2009 Management Agreement were broader in scope than in prior years.

The Board extended the 2009 Management Agreement with AMH Management through December 31, 2011. (Jt. Stipulation ¶¶ 21, 22; Jt. Exhibit 4, p. 194). The agreement does not provide for any additional extensions.

With the agreement set to expire, the Board once again initiated a request for proposals from potential managers. (Jt. Stipulation, ¶ 23; Complaint, ¶¶ 26, 27). Just as in 2008, the Board invited AMH Management to participate in the bid process. (Jt. Stipulation, ¶ 23). This time, however, AMH Management challenged the Association's right to contract with a manager of its choosing, asserting it has a perpetual right to manage the Ashley Marina under the Master Deed.

⁴ The Southeastern Agreement did not expire until December 31, 2009. Thus, AMH did not commence the regime management services until January 1, 2010. (Jt. Exhibit 4, p. 194).

(Miller Depo., p. 29). This dispute erupted, and Plaintiffs commenced this action just days before the 2009 Management Agreement expired. (Complaint, *generally*).

5. Plaintiffs' and Defendants' claims in the lawsuit

Plaintiffs seek a declaration that Section 2.3(a) of the Master Deed granted AMH Ashley a perpetual management right, and they ask that the Court reform the already expired 2009 Management Agreement so that it comports with Section 2.3(a). (Complaint, prayer for relief part "A"; Depo. Ex. 15). Defendants denied the material allegations of the Complaint and asserted counterclaims seeking a declaration from the Court that: (i) the 2009 Management Agreement has expired and Plaintiffs have no rights arising thereunder, and (ii) the Plaintiffs have no perpetual right to manage the marina. In addition, the Defendants requested an injunction barring Plaintiffs from interfering with the Association's efforts to contract with a manager of its choosing. (Answer and Counterclaims, *generally*).

THE STANDARD OF REVIEW

Plaintiffs claim the Association must enter into a contract with AMH Ashley or its affiliate for management services. In this way, Plaintiffs' claim for relief is contractual in nature. On the other hand, Plaintiffs claim its right to perpetually manage is a valuable "property" right established by an express covenant in the Master Deed.

To recover in an action for breach of contract, the Plaintiff must prove the existence of a contract. *W.E. Gilbert & Associates v. SC Nat'l Bank*, 285 S.C. 421, 423, 330 S.E.2d 307 (Ct. App. 1985). "Where, as here, the material facts concerning the formation of an alleged contract are not in dispute, the issue of contract [or not] is a question of law." *Id.*

"In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy." *Gardner v.*

Mozingo, 293 S.C. 23, 358 S.E.2d 390 (1987) (emphasis added). The intention of the grantor must be found within the four corners of the deed. *Id.* (citing *Sims v. Clayton*, 193 S.C. 98, 7 S.E.2d 724 (1940)). The construction of a clear and unambiguous deed is a question of law for the court. *Id.* To the extent Plaintiffs' claim the entitlement to perpetual management is a covenant that runs with the land, the covenant must be strictly construed against the grantor and all persons seeking to enforce it, with all doubts resolved in favor of the free use of the property. *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006); *Hoffman v. Cohen*, 262 S.C. 71, 202 S.E.2d 363 (1974).

ARGUMENT AND CITATION OF AUTHORITY

Plaintiffs had two separate agreements with the Association for various management responsibilities. (Jt. Exhibits, 2 and 4). The 2006 Marina Management agreement was not renewed, which was contemplated by its terms. Thereafter, the parties entered into the 2009 Management Agreement, which has since expired by its own terms. Because there is no current contract in place between the parties, Plaintiffs cannot state a claim unless they first establish that the Master Deed grants to them an enforceable, perpetual management right. It does not. Regardless of the particular cause of action or theory advanced, Plaintiffs' entire position is contrary to well-settled South Carolina law barring the enforceability of an "agreement to agree."

Even if this argument had any traction (which it does not), Plaintiffs have no legal basis upon which to reform the 2009 Management Agreement, which long ago expired. Accordingly, Plaintiffs' claims must fail.

I. SECTION 2.3(A) OF THE MASTER DEED IS AN UNENFORCEABLE "AGREEMENT TO AGREE" RELATIVE TO REQUIRING A CONTRACT WITH PLAINTIFFS

Section 2.3(a) itself does not create the management agreement. Instead, it attempts to require the Association to take the step of entering into a separate contract with AMH Ashley or

its affiliate. This arrangement poses the simple question: *What are to be the terms of that separate management contract?* We are left to wonder, because the Master Deed provides no useful guidance as to the essential terms. Therein lies the fatal flaw with Plaintiffs' case.

Before AMH Ashley (or its affiliate) can contract with the Association for management services, those parties must have a meeting of the minds. *W.E. Gilbert*, 285 S.C. at 423 (noting it is well settled in South Carolina that a valid and enforceable contract requires mutual assent as to all the essential elements of a contract). “[F]or a contract to be binding material terms cannot be left for future settlement.” *Aperm of South Carolina v. Roof*, 290 S.C. 442, 447 (Ct. App. 1986) (emphasis added). A contract provision leaving material terms open for future agreement is void for indefiniteness. *Ellis v. Taylor*, 316 S.C. 245, 249 (1994).

This case involves a contract for services. “In a contract for services two essential elements are the scope of the work to be performed and the amount of compensation.” *W.E. Gilbert*, 285 S.C. at 423. *See also Mosteller v. Mashburn*, 64 Ga. App. 92, 96, 12 S. E. 2d 142 (Ga. App. 1940) (“The nature and character of the services to be performed, the place of employment and the amount of compensation to be paid therefor are all essential elements of an employment contract and must be stated with sufficient definiteness to enable one to ascertain the intent of the parties as to these vital features of the contract.”).

Section 2.3(a), does not define the nature of the services to be provided by Plaintiffs or the compensation the Association must pay in return. Rather, Section 2.3 scantily provides that the managers duties are “such duties assigned to it under the management agreement.” (Jt. Exhibit 1, p. 13). Thus, assignment the duties, or scope of services, under the management agreement is left to future settlement between the parties. Because the Section 2.3(a) does not itself contain the requisite essential terms of the management contract, it does not constitute and

enforceable commitment. *W.E. Gilbert*, 285 S.C. at 423. Plaintiffs contend Section 2.3(a) obligates the Association to enter into an agreement with them.⁵ This argument violates the settled rule against enforcing “agreements to agree.” Thus, AMH Ashley’s intent under the Master Deed cannot be enforced. *Gardner*, 293 S.C. 23, 358 S.E.2d 390 (noting effect must be given to the intentions of the grantor under a deed unless that intention contravenes some well-settled rule of law....”).

South Carolina will not enforce a mere agreement to agree. In *Fici v. Koon*, 372 S.C. 341, 347, 642 S.E.2d 602 (2007), the South Carolina Supreme Court found unenforceable an agreement to convey land where the boundaries of the property were to be determined based on an agreement to a subsequent survey. The Court explained, “The signed form contract dated February 27 is nothing more than an agreement to agree which is unenforceable under the Statute of Frauds.” *Id.* (emphasis added). See also *Trident Constr. Co. v. Austin Co.*, 272 F. Supp.2d 566, 575-76 (D.S.C. 2003) (finding no oral contract when the plaintiff alleged the defendant told it if the defendant won the bid to build an airplane hangar, it would give the plaintiff the supplier subcontract, because the parties never agreed on price). The cornerstone of whether an agreement creates a binding contract or is an “agreement to agree” rests upon whether the underlying agreement itself contains the requisite terms necessary to the formation of an enforceable contract. See *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 396 S.C. 338, 346-347, 721 S.E.2d 455 (Ct. App. 2011) (“Rather than focusing on whether the MOU calls for the parties to reach future agreements, the proper inquiry is to determine whether the MOU

⁵ Whether Plaintiffs claim Section 2.3(a) requires the Association to contract with them, or, in the alternative, assert Section 2.3(a) bars the Association from contracting with anyone other than the Plaintiffs is irrelevant. The 2009 Management Contract with AMH has expired, thus no contract exists with anyone. Regardless of how the argument is couched, either the Association is obligated to contract with Plaintiffs or it is not. The effective result is the same either way.

meets the elements of a contract.”). *See also Farr v. Barnes Freight Lines, Inc.*, 97 Ga. App. 36, 37, 101 S.E.2d 906 (Ga. App. 1958)(“If any portion of the proposed terms is not settled, or no mode is agreed on by which it may be settled, there is no agreement.”).

A Michigan case applying the same legal doctrine used in South Carolina to bar agreements to agree is particularly analogous. In *Ford Motor Co. v. Kahne*, 379 F. Supp. 2d 857, 869-871 (E.D. Mich. 2005), Ford brought suit against one of its racing team members, Kasey Kahne, alleging he had breached a services contract between them. Kahne argued the agreement was unenforceable because material provisions within the executed contract were subject to future negotiations. For example, the contract provided that Ford would offer Kahne opportunities to drive in “one or more mutually acceptable racing series” and that the “series team will be determined jointly.” *Id.*, 379 F. Supp. 2d at 867. Thus, the contract required future assent on these essential terms.

Deposition testimony from a key Ford witness involved in the contract was quoted by the Court, noting in part:

Q: Okay. The second sentence says: Ford agrees to provide the driver with opportunities to participate in one or more mutually acceptable racing series with a reasonably competitive team. Do you see that?

A: Yes.

Q: Okay. Then the sentence after it says that the specific series and team would be, quote, determined jointly, close quote. Do you see that?

A: Yes.

Q: The reference to a joint determination, that refers to a joint determination between Ford and Kasey Kahne, correct?

A: Yes.

Q: Both of you had to agree, correct?

A: Yes.

Id., 379 F. Supp. 2d at 871. Another Ford witness involved in the negotiation of the contract similarly testified:

Q: Now, you understood it was possible that the opportunities that Ford would offer to Kasey would be unacceptable to Kasey, correct?

A: Yes. It's possible.

Q: And in that event Kasey was not required to accept those offers?

A: If we could not come to agreement, yes.

Id., 379 F. Supp. 2d at 870. The district court determined Ford's contract with Kahne could not be enforced in light of the material terms that were left open to subsequent agreement.⁶

The facts and testimony of the instant case are strikingly similar to those in *Ford*.

Construing the plain language of Section 2.3(a), it provides that the "Association shall enter into an agreement for the management of the Condominium with the Declarant or an affiliate of the Declarant." (Jt. Exhibit 1, p. 13). Because Section 2.3(a) does not set forth the essential terms of what that management agreement will require of the parties in terms of the scope of services to

⁶ "Under Michigan law, a 'contract to make a subsequent contract [i.e. an 'agreement to agree'] is not *per se* unenforceable; in fact it may be just as valid as any other contract.' *Heritage Broadcasting Co.*, 428 N.W.2d at 787 (citing *Opdyke Investment Co. v. Norris Grain Co.*, 413 Mich. 354, 320 N.W.2d 836 (Mich. 1982)). As the Michigan Court of Appeals reiterated in *Heritage*: **'To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations.'** *Id.* (citing *Socony-Vacuum Oil Co v. Waldo*, 289 Mich. 316, 286 N.W. 630, 632 (Mich. 1939)). 'As long as the contract to enter into a future contract specifies the material and essential terms, leaving none to be agreed as a result of future negotiations, its is legally enforceable.' *Busch*, 40 Fed. App'x at 954 (citing *Heritage* and *Socony-Vacuum*); *Hansen v. Catsman*, 371 Mich. 79, 123 N.W.2d 265, 266 (Mich. 1963) (finding no enforceable agreement when essential term of building plans for a drug store were left for future negotiations and had to be 'acceptable to both parties')." *Ford Motor Co.*, 379 F. Supp. 2d 857. (Emphasis added). This logic is the same as that applied in South Carolina as cited herein.

be provided and the compensation to paid, such terms necessarily would have to be the product of subsequent negotiations, falling squarely within *Ford Motor Co.* and the South Carolina authorities cited herein. Notably, Plaintiffs' 30(b)(6) witnesses were asked what would be the terms of the management agreement mandated by Section 2.3(a), and their responses are telling.

In the hierarchy of AMH Ashley and AMH Management, the buck stops with Joe Miller. (McMemery Depo., p. 20-21). Although Miller's intent may have been to manage the marina forever, he admitted the parties would have to reach an agreement on the essential terms of their services contract. He testified:

So, our intent was always to manage this place. **We knew we had to have contracts that detailed what we did, what we got paid, et cetera. We're certainly happy to redo those at certain intervals.** I think they probably need to be revisited at certain intervals.

(Miller Depo., p. 21) (emphasis added). Miller conceded the terms of the agreement would have to be negotiated, stating: "You know, we're glad to revisit terms and, you know, **maybe the management fee needs to go up or down, maybe we need to change the number of hours or employees, you know, insurance, scope of work,** any number of issues that, you know....

There are going to be changes." (Miller Depo., pp. 22-23)(emphasis added). Most importantly, Miller acknowledged there had to be a meeting of the minds between Plaintiffs and the Association, conceding:

... And we would certainly try and work with the Board and negotiate and discuss all the details. Anything that needed to be massaged or tweaked or changed, we would certainly have a back and forth discussion on. You know, **scope of services, levels of insurance, you know, fees, numbers of employees, hours,** you know, all those things were always subject to, you know, -- you know, the board -- **its always their duty and right to set the terms of the management agreement within reason.** And we're going to -- you know, **we work for them** [the Association]. **So, it -- this has to be a two way street."**

(Miller Depo., p. 24-25) (emphasis added). This alone is sufficient to prove Section 2.3(a) created, if anything, nothing more than an unenforceable “agreement to agree.” There is more.

In written communications circulated to the Association’s members by AMH Management after the 2009 Management Agreement expired, AMH Management tried to condition the fees it would charge on the resignation of a particular member from the Board. “Were Mr. McCoy to agree to step down from the board and agree not [to] participate in any way in the future operation of the marina, AMH [Management] would continue to manage for the current management fee.” (Depo. Exhibit 15, p. 2). In other words, here we have a third party⁷ manager threatening to escalate the fees it will charge for future services if a Board member duly chosen by the members of the Association does not surrender his leadership position. The assertion of such leverage is nothing short of outrageous and plainly demonstrates the type of unilateral dictatorship a non-member manager would have but for the safeguards imposed by settled South Carolina law, *to wit*, that: “If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking.” *Shealy v. Fowler*, 182 S.C. 81, 188 S.E. 499 (1936). *See* 1 Arthur L. Corbin, Corbin on Contracts § 2.8 (Joseph M. Perillo ed., rev. ed. 1993) (“If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called ‘contract to make a contract’ is not a contract at all.”).

In his deposition, Mr. Miller was asked about the threat to unilaterally impose greater fees to the Association if Mr. McCoy continued to serve on the Board. Specifically, he was asked what would happen if the Association refused to pay the higher amount.

⁷ AMH Management sent this communication, and AHM Management is not a member and has no vote on the Association’s business. It is merely an affiliate of AHM Ashley, which is a member.

Q: And understanding that, if the board and the association are unwilling to accept that increase in fee, where does that leave the parties?

A: The parties can always sit down and work things out, Mr. Timbes. ...

(Miller Depo., p. 45). When asked what would happen if both sides dug in their heels and could not reach an agreement, Mr. Miller responded, "Well, I don't know. I assume we would have to be reasonable and get things figured out." (Miller Depo., p. 26). That is a textbook failure to have a meeting of the minds on an essential term necessary to the making of a contract.

Bruce Wallace,⁸ who was involved in the negotiation of the 2009 Management Agreement for AMH, probably said it most aptly:

Q: Okay. Okay. And under at least the terms of this 2009 agreement, it was set to expire either on December 31, 2010 or at the expiration of the extended term once granted; would you agree?

A: Yes.

Q: What was to happen after that, if AMH was to remain on board?

A: They [the Association] would put it out for rebid.

Q: Okay. And assume for me that AMH was the successful bidder and was afforded the opportunity to continue from 2012 to however long, what would have been done to, I guess, document that?

A: I would imagine, we would have entered into another agreement.

Q: Okay. And what would have been the terms of that agreement?

A: I have no idea. I guess, they would have negotiated like they did this one [the 2009 Management Agreement].

⁸ Mr. Wallace is the Senior Dockmaster for AMH Management and is next in line of authority to Mr. Miller according to him. (Wallace Depo., p. 5-6).

(Bruce Wallace Depo., pp. 30-31) (all emphasis added). This testimony underscores the similarity between the unsettled terms in this case to the unsettled terms in *Ford Motor Co.* The result is the same: There is no enforceable mandate in Section 2.3(a). Regardless of AMH Ashley's intent when it developed the Ashley Marina, Section 2.3(a) cannot be enforced because it violates the settled rule of law that agreements to agree are unenforceable. See *Gardner*, 293 S.C. 23, 358 S.E.2d 390 (noting the intention of the grantor must be ascertained and effectuated "unless that intention contravenes some well-settled rule of law or public policy") (emphasis added).

II. THE FACT THAT SECTION 2.3(A) IS CONTAINED WITHIN THE MASTER DEED FOR THE ASHLEY MARINA CONDOMINIUM REGIME IS A DISTINCTION WITHOUT A DIFFERENCE.

Plaintiffs assert their purported right to manage the marina forever is a valuable property right reserved under the Master Deed. (Complaint ¶ 29; Depo. Exhibit 15). This argument does not change the outcome.

As an initial observation, a management contract is not a real property right. Even Joe Miller properly described the management agreement for what it truly is—an economic interest. Moreover, Mr. Miller argued AMH has the power under the Master Deed to force the Association to enter into a contract with it, yet AMH is not obligated to provide the management services if it chose not to. He testified:

We were the developer. This is an economic interest and a right we reserve for ourselves. Everybody was aware of it and put on notice when they bought their slips. But are we obligated on our side to provide it? You know, probably not.

(Miller Depo., p. 27) (emphasis added). Mutuality of obligation is plainly lacking.

Regardless, describing the management right as a "property right" because it is

referenced within the Master Deed does not change the fact that the instrument must contain all the essential terms of an agreement if it is to be binding. This is equally true of instruments affecting interest in real property just as in a standard contract. The Statute of Frauds, which likewise requires every essential term to be expressed in a writing, specifically applies to “any contract or sale of lands, tenements or hereditaments or any interest in or concerning them[.]” S.C. Code Ann. 32-2-10(4) (emphasis added). See also *Cash v. Maddox*, 265 S.C. 480, 220 S.E.2d 121 (1975); *Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588 (1948) (noting that to satisfy the Statute of Frauds, every essential element of the contract must be expressed in a writing signed by the party to be compelled).

This is especially true because “[r]estrictive covenants are **contractual in nature**.” *Hoffman*, 262 S.C. 72, 202 S.E.2d 363 (emphasis added). Thus, even if Section 2.3(a) presents a valuable property interest the Declarant desired to reserve unto itself, it must contain all the essential terms necessary to the formation of a contract for management services if the Association is to be legally bound to contract with Plaintiffs. Plainly it does not, and Plaintiffs’ claims fail accordingly.

Moreover, at best this “covenant” in the Master Deed is ambiguous as to what it obligates the Association to do, for what price, and for how long. If there is an ambiguity about what was intended in Section 2.3(a) where it states the Association shall enter into a management agreement, that ambiguity must be resolved in favor of the Association. Restrictive covenants must be strictly construed against the grantor and all persons seeking to enforce them, with all doubts resolved in favor of the free use of the property. *Hardy*, 369 S.C. 160, 631 S.E.2d 539; *Hoffman*, 262 S.C. 71, 202 S.E.2d 363.

III. PLAINTIFFS ARE NOT ENTITLED TO REFORMATION OF THE 2009 MANAGEMENT AGREEMENT

For sake of argument, if this Court finds Section 2.3(a) obligates the Association to enter into a contract with Plaintiffs for management services, the next consideration is what will be the terms of that contract, noting that Courts are not in the business of writing contracts for litigating parties. In the Complaint, Plaintiffs seek reformation of the 2009 Management Agreement so it complies with the Master Deed. (Complaint, prayer for relief part (B)). Specifically, Plaintiffs maintain reformation is proper because the 2009 Management Agreement “is in contradiction to the provisions of Section 2.3(a) of the Master Deed, which is binding on all parties to this action.” (Complaint, ¶ 33).

“Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties. It is available on the ground of [mutual] mistake or misunderstanding as well as duress and related misconduct.” *Crewe v. Blackmon*, 289 S.C. 229, 234 (Ct. App. 1986) (internal quotations and citations omitted). None of these grounds are supported here.

1. The 2009 Management Agreement is not in contradiction to Section 2.3(a).

Reformation of a contract is an appropriate remedy where the writing in question does not conform to the pre-existing agreement⁹ of the parties. *Id.* Although not specified, the Plaintiffs’ claim of contradiction seems to rest upon a purported conflict as to the duration of the 2009 Management Agreement, which has already expired by its express terms. It is clear, however, the term and expiration provision contained the 2009 Management Agreement does not contradict Section 2.3(a) of the Master Deed.

⁹ Again, Section 2.3(a) contains no essential terms relative to the provision of management services and cannot be considered a “prior agreement” for management services.

It must be remembered that Joe Miller intended that Section 2.3(a) of the Master Deed would allow AMH to continue managing the Ashley Marina, but not obligate it to do so. (Miller Depo., p. 27). Put another way, under Plaintiffs' view of things, AMH could chose to commit itself to manage the marina and regime forever, or it could elect not to commit itself forever. The term and termination provisions within the 2009 Management Agreement are entirely consistent with the latter scenario. When asked whether an inconsistency existed, even Joe Miller testified, "Well, **I don't know if I would call it inconsistent**. I think maybe some understandings were not on the same page as the board with out understanding of how all this was going to work." (Miller Depo., p. 21)(emphasis added).

The 2009 Management Agreement was the product of negotiations between the Association and Plaintiffs' representatives,¹⁰ including Messers Miller and Wallace. (Wallace Depo., pp. 23-24). Thus, the resulting 2009 Management Agreement signed by the parties contains those provisions that were mutually agreeable to them. The 18-month initial term and one 12-month extension¹¹ do not contradict Plaintiffs' claimed right to decide how long it would manage the marina, whether it is one extension or infinite extensions—Section 2.3(a) does not specify any number of extensions or minimum duration of services to be contained in the management agreement.¹² Hence, reformation is not warranted.

¹⁰ The 2006 Marina Management Agreement was formed while AHM controlled the Association. Its term and termination provision also differs from Section 2.3(a) of the Master Deed, and for all intents and purposes AMH negotiated those terms with itself at that time.

¹¹ Although the 2009 Management Agreement gave discretion to the Association in granting this extension, as opposed to leaving the extension to the sole discretion of the Plaintiffs this variance is of no consequence because the extension was granted. (Jt. Stipulation ¶ 22).

¹² The Master Deed was prepared by AMH. (Miller Depo. p. 7). If there is an ambiguity about what was intended in Section 2.3(a) where it states the management agreement shall "provide that it may be extended" that ambiguity must be resolved in favor of the Association.

2. There was no mutual mistake or duress to support a claim of reformation.

Next, reformation is available when there is a mutual mistake or misunderstanding in the formation of the agreement or that there is duress or misconduct. *Crewe*, 289 S.C. at 234.

Contradiction between the writing and the purported agreement that preceded the writing is not alone sufficient to warrant reformation, without such contradiction being the result of mistake.

Id. “Before equity will reform a contract, the existence of a mutual mistake must be shown by clear and convincing evidence.” *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 51 (S.C. 2013) (citing *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206 (Ct. App. 1987) (emphasis added). “To entitle the plaintiff to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he sought to have established and that this intention was frustrated, either from some fraud, accident, or mutual mistake of the parties.” *Jumper v. Queen Mab Lumber Co.*, 115 S.C. 452, 461-462 (S.C. 1921).

As a threshold matter, the Plaintiff has made no allegation of mutual mistake or any fraudulent conduct on the part of the Defendants that precipitated the 2009 Management Agreement. Nor does any evidence exist to support such an allegation considering the agreement was the product of bilateral negotiations. (Wallace Depo., p. 25). Regardless, the evidence is overwhelming there was no mutual mistake. In South Carolina “[w]here the contract evidences care in its preparation, it will be presumed that its words were employed

Restrictive covenants must be strictly construed against the grantor and all persons seeking to enforce them, with all doubts resolved in favor of the free use of the property. *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006); *Hoffman v. Cohen*, 262 S.C. 71, 202 S.E.2d 363 (1974). The result is the same under contract theories. “It is well settled in South Carolina that ambiguous contract terms must be “interpreted **strongly** in favor of the non-drafting party.” *S. Atl. Fin. Servs. v. Middleton*, 356 S.C. 444, 447 (2003). “After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings.” *Id.*

deliberately and with intention.” *McPherson v. J. E. Sirrine & Co.*, 206 S.C. 183, 204 (1945).

Thus, this Court must start with the presumption that the 2009 Management Agreement reflects the parties’ understanding and intention.

The 2009 Management Agreement is not the first, but the second opportunity for AMH Management to have formulated the contract’s terms. The 2006 Marina Management Agreement provided that it would automatically be extended from year to year unless terminated by either AMH Management or the Association upon proper notice. (Jt. Exhibit 2, p.180). This is closer in spirit to Plaintiffs interpretation of Section 2.3(a) in that it provided for automatic renewals, yet the agreement gave the Association the power to terminate AMH Management upon not less than sixty days prior to the end of any term. AMH and the Association followed this procedure—the 2006 Marina Management Agreement was extended until the Association sent written notice of termination in December 2008. (Jt. Exhibit 5, p. 210). Thus, there is a clear history of the parties adhering to the language used in the term and termination provision of the 2006 Marina Management Agreement, which does not support the conclusion they believed Section 2.3(a) controlled. Had there been a mutual mistake in the 2006 agreement, AMH Management and the Association ostensibly would have mutually believed they could not terminate the agreement due to Section 2.3(a). Their conduct reveals otherwise, because they followed the contract as written.

Equally as telling is that the Association did not renew AMH Management’s 2006 Marina Management Agreement and opened the management services up for competitive bidding in late 2008/early 2009. AMH Management participated in that bidding process and was ultimately selected. This course of dealing is completely contrary to the Plaintiffs’ present interpretation of what is required under Section 2.3(a), yet that is how the parties both handled

the matter prior to the 2009 Management Agreement. There was no mutual mistake in the 2006 Marina Management Agreement.¹³

Likewise, there is no mutual mistake in the 2009 Management Agreement. Its 18-month term and single extension were bargained for along with the expanded scope of services provided by AMH Management under that agreement. There is ample support for this conclusion when the 2009 Agreement is read in its entirety, because a limited-term agreement is contemplated throughout the four corners of the document. In addition to paragraph 2, paragraph 1 states: "AMH agrees to provide the Association, **for so long as this Agreement is in effect**, full marina management support...." (Jt. Exhibit 4, p. 193) (emphasis added). In other words, the services ended upon expiration of the agreement. Further, had the Board determined not to grant the 12-month extension for either the marina management or regime management services, "this will constitute a termination of this agreement in its entirety." (Jt. Exhibit 4, p. 194). Clearly, it was contemplated that the 2009 Management Agreement would come to an end. This is not the product of accidental drafting; rather, these provisions evidence a calculated purpose and deliberate drafting.

Further, considering Mr. Miller testified and informed the members of the Association that he expected to renegotiate the terms of the management agreement every so often, it is not at all unexpected that AMH Management would have imposed a limited duration to the 2009 Management Agreement. While he fully expected to renegotiate from time to time terms like the scope of services, levels of insurance, fees, numbers of employees, hours worked, and other

¹³ As a practical matter, it is hard to imagine a mutual mistake could have existed, because AMH controlled the Association when the 2006 agreement was formed. Control of the Association did not change hands until December 2007.

essential terms, Mr. Miller claimed he never intended to relinquish¹⁴ his perceived right to manage the marina forever. (Miller Depo. pp. 21-23); Depo Exhibits 13, 15).

This is precisely the fatal flaw in his reasoning—there can be no enforceable obligation upon the Association mandating that it reach an agreement in the future with AMH on these material terms, whether it is derived from Section 2.3(a) or otherwise. Such an obligation a classic agreement to agree. Either the parties have already solidified their contractual relationship or they have not. Mr. Miller makes it clear the latter is true, which bars his entire claim as a matter of law.

No matter how the facts are viewed, Plaintiffs fall far short of the clear and convincing evidence standard required for the remedy of reformation. As such, Plaintiffs have no viable claim to have the 2009 Management Agreement re-written to give AMH Management a right to infinite renewals that was not part of the negotiated agreement.¹⁵ See e.g., *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 90 (Ct. App. 2013) (“South Carolina's general principle is that it is not the function of the court to rewrite contracts for the parties.”) (internal citations and

¹⁴ For sake of completeness in discussing the various deficiencies in Plaintiffs’ case, even if the Court finds Section 2.3(a) created an enforceable right to perpetually manage the marina, Plaintiffs waived their right. “It is well established that a written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract.” *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 405-406 (2003) (internal citations and quotations omitted). It is not disputed that the 2009 Management Agreement was a valid contract during its term. By entering this agreement, the Plaintiffs, for valuable consideration, abandoned any prior rights that purported to give them infinite management rights. Thus, Plaintiffs voluntarily waived any rights – assuming one existed – to infinite extension under Section 2.3(a). See *Thomas Drug Store v. National Surety Co.*, 104 S.C. 190, 196 (1915) (“ ‘Waiver’ is the relinquishment of the rights under and the requirements of the contract as made and the substitution of a modified contract (i.e., a new contract).”).

¹⁵ Plaintiffs also claim a claim for breach of contract. However, Plaintiffs fail to designate what “contract” has been breached. If the purportedly breached contract is Section 2.3(a) of the Master Deed, such provision is not an enforceable contract as explained herein. To the extent the purported breach is of the 2009 Agreement, this argument has no merit unless and until this Court were to reform that agreement to provide that it has not expired.

quotations omitted). *See also S. Atl. Fin. Servs.*, 356 S.C. 444, 447 (“Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly.”).

IV. PLAINTIFF’S CLAIM FOR BREACH OF CONTRACT LACKS MERIT

Defendants incorporate the arguments and authorities above and, in so doing, demonstrate that Plaintiffs have no claim for breach of contract. The “contract” is not specified by Plaintiffs in their complaint, but whether they refer to the Master Deed, the 2006 Marina Management Agreement, or the 2009 Management agreement, the claim fails.

As stated herein, the Master Deed contains none of the essential terms necessary to form the actual contract for management services. It merely attempts to direct the Association to enter into a contract with AMH Ashley or its affiliate. Thus, the Master Deed cannot be the subject of claim for breach of the management contract.

Next, the Association did enter into a contract with an affiliate, AMH Management. In fact, it did so twice. The first agreement in 2006 was not renewed after April of 2009, and Plaintiffs made no claim for breach of contract then and cannot do so now under the Statute of Limitations. The 2009 Management Agreement was fully performed by all parties and expired by its own terms on December 31, 2011. An expired contract cannot lie at the heart of a claim for breach of contract where the claim is based on events occurring after expiration.¹⁶

Moreover, in a manner of speaking the Association has done exactly what was required of it under Section 2.3(a), if that section is enforceable as Plaintiffs claim. First, the Association did contract with an affiliate of the Declarant. Second, that agreement was extended in

¹⁶ The Association has continued to employ AMH Management under an informal agreement during the pendency of this case. The parties agreed to this arrangement in good faith without waiving any claims and defenses they might have. (Jt. Stipulation ¶ 25).

accordance with the term selected by AMH Management. And, third, that Agreement was not terminated by the Association; rather, it expired. The Association did what was required of it, if Section 2.3(a) is enforceable at all.

V. DEFENDANTS ARE ENTITLED TO THE RELIEF REQUESTED IN THEIR COUNTERCLAIM.

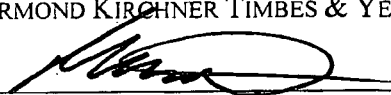
In light of the discussion and analysis herein, Defendants assert the Plaintiffs' claims must fail. The same logic discussed herein is incorporated by reference and likewise supports Defendants' counterclaims. Thus, Defendants request that this Court find and declare that Plaintiffs have no enforceable right to manage the Ashley Marina in perpetuity. Further, Defendants request that this Court find and declare that the 2009 Management Agreement has expired and the Plaintiffs have no enforceable rights arising thereunder.

CONCLUSION

For the reasons set forth herein, and as evidenced by the materials otherwise submitted to the Court, Plaintiffs claims must fail. Instead, the Defendants are entitled to the relief requested herein and in their Counterclaim. Defendants hereby request all such relief, together with any other and further relief this Court deems just, equitable and proper.

Respectfully submitted,

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This 23rd day of June, 2014
Charleston, South Carolina

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Charleston County Master- in-Equity

Case No. 2011-CP-10-9513

Appellate Case No. 2014-002742

AMH-Ashley Marina, LLC, and AMH Management, LLC Appellants,

v.

The Harborage at Ashley Marina Horizontal
Property Regime, The Harborage at Ashley
Marina Condominium Association, Eddie
McCoy, Stuart Reeves, Brian Swan, Rich
Cone, and Ed Miskotten, individually, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

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