

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 5416 (S.C. Ct. App. filed June 15, 2016)

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

v.

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

APPENDIX – VOLUME I

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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OCT 30 2014

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

ORIGINAL

Appellant Case No. 2014-000963

Allen Patterson, Steve Tilton, Richard Sendler,
Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis,
Michel Nieri, Allen Patterson Residential LLC, Tilton
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In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellant Case No. 2014-000963

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STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,)

vs.)

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

Defendants.)

C/A No. 2012-CP-40-041

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

**ORDER DISMISSING MATTER
WITHOUT PREJUDICE**

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

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

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

ROA-000001

APP000007

SCANNED

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

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

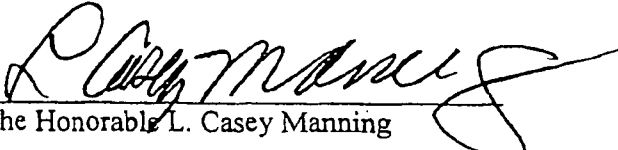
It is clear from the documents submitted to the Court that this dispute concerns a trust. It is also clear that the South Carolina Code at least implies that trust actions should originate in Probate Court.

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

AND IT IS SO ORDERED.

Columbia, South Carolina

March 4, 2013


The Honorable L. Casey Manning

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

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

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

Plaintiffs,)

vs.)

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

Defendants.)

ORDER GRANTING MOTION
FOR REMOVAL

AMY W. MCCULLOCH
PROBATE JUDGE
RICHLAND COUNTY, S.C.

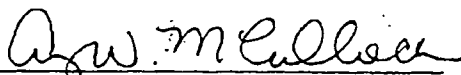
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THIS MATTER CAME BEFORE THE COURT by way of a Motion to Remove the Trust Action to Circuit Court filed with the Richland County Probate Court of April 9, 2013 by S. Jahue Moore and James Edward Bradley, attorneys for the Plaintiffs, pursuant to SC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

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

IT IS SO ORDERED.


Amy W. McCulloch
Richland County Probate Judge

April 22, 2013
Columbia, South Carolina

ROA-000003

APP000009

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,)

vs.)

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

Defendants.)

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

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS

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2013 NOV 8 PM 12:50
CLERK OF COURT
J. L. & G.S.

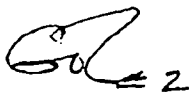
INTRODUCTION

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

DISCUSSION

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

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

A handwritten signature in black ink, appearing to be "GAL" followed by a subscript "2".

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

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

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

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

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

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

 = 3

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

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

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

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

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

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

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

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

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

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

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



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

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

II. THE PLAINTIFFS HAVE STANDING TO PURSUE THIS LAWSUIT.

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

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



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

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

III. THE TRUST AGREEMENT IS A CONTRACT.

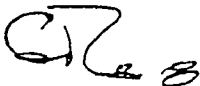
South Carolina courts refer to trust agreements as contracts. See *Klugh v. Seminole Sec. Co.*, 103 S.C. 120, 87 S.E. 644, 647 (1916) ("One of the expressed objects of the *trust contract* was to safeguard the subscribers to the capital stock.") (emphasis added); *Welling v. Crosland*, 129 S.C. 127,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



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

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

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



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

CONCLUSION

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

IT IS SO ORDERED.

Columbia, South Carolina
November 8, 2013


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

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

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

Defendants.

) IN THE COURT OF COMMON PLEAS

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

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

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

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

I.

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

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

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

II.

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

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

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

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

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

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



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

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

III.

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

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



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

IV.

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

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

Rule 23(b)(1), SCRCP.

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

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

Id.



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

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

V.

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



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

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

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

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

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

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

VI.

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

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

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



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

The Complaint is hereby dismissed without prejudice.

IT IS SO ORDERED.



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

February 11, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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

Plaintiffs,)

vs.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

Case No. 2013-CP-40-02655

**ORDER DENYING PLAINTIFFS'
MOTION TO RECONSIDER**

FILED
2014 MAR 28 PM 2:27
JEROME A. HENRI
C.C.P. & G.S.

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

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

IT IS SO ORDERED.

Columbia, South Carolina
March 28, 2014


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

COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

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

Plaintiffs,

vs.

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

Defendants.

FILED

IN THE COURT OF COMMON PLEAS

2012 FEB 15 7 4:20

C/A No.

2012 C/P 3200757

COMPLAINT

2012CP3200757

The Plaintiffs complain of the Defendants as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

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

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

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

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

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

FOR A FIFTH CAUSE OF ACTION
(Accounting)

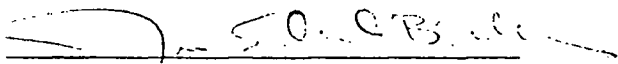
54. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

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

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

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

MOORE, TAYLOR & THOMAS, P.A.

By: 

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

West Columbia, South Carolina

February 16, 2012

FILED
2012 FEB 16 2 42 20

ROA-000030

APP000036

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs.

vs.

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

Defendants.

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

AMENDED COMPLAINT

The Plaintiffs complain of the Defendants as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

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

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

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

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

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

FOR A FIFTH CAUSE OF ACTION
(Accounting)

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

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

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

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

MOORE, TAYLOR & THOMAS, P.A.

By: 

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

West Columbia, South Carolina

April 16, 2012

ROA-000038

APP000044

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,)

vs.)

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

Defendants.)

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

SECOND AMENDED COMPLAINT

The Plaintiffs complain of the Defendants as follows:

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

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

1
ROA-000039

APP000045

FILED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

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

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

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

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

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

FOR A FIFTH CAUSE OF ACTION
(Accounting)

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

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

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

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

MOORE, TAYLOR & THOMAS, P.A.

By: 

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Attorney for Plaintiffs

West Columbia, South Carolina

June 1, 2012

FILED
JUN 11 2012
CLERK OF COURT
WEST COLUMBIA, SC

FILED

ROA-000046

APP000052

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE PROBATE COURT

ACTION No. _____

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

Plaintiffs,)

vs.)

COMPLAINT

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

Defendants.)

The Plaintiffs complain of the Defendants as follows:

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

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

2013 APR -9 PM 1
AMY M. MCCULLOUGH
PROBATE JUDGE
RICHLAND COUNTY, S.C.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

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

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

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

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

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

FOR A FIFTH CAUSE OF ACTION
(Accounting)

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

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

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

FOR A SIXTH CAUSE OF ACTION

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

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

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

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

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

FOR A SEVENTH CAUSE OF ACTION

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

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

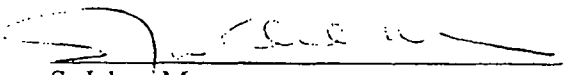
FOR AN EIGHTH CAUSE OF ACTION

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

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

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

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



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803-796-9160

Frederick A. Gertz, Esquire
Gertz & Moore
P.O. Box 456
Columbia, SC 29202

Attorneys for Plaintiffs

West Columbia, South Carolina

April 5, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE PROBATE COURT

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

Plaintiffs,)

vs.)

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

Defendants.)

ACTION No. 2013-GP-40-69

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

REMOVAL TO CIRCUIT COURT

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

Respectfully submitted,

By: 

S. Jahue Moore
James Edward Bradley
Moore, Taylor & Thomas, P.A.
P.O. Box 5709
West Columbia, SC 29171
803-796-9160
Attorney for Plaintiffs

West Columbia, South Carolina

April 5, 2013

ROA-000056
APP000062

State of South Carolina

Court of Common Pleas

County of Richland

2013-CP-40-02655

Allen Patterson, et al.

:

-VS-

:

TRANSCRIPT OF RECORD

:

Herb Witter, et al.

:

October 9, 2013

Columbia, South Carolina

B E F O R E:

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

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

Ward Bradley, Esquire
Attorney for the Plaintiffs

Pope D. Johnson, III, Esquire
William W. Wilkins, Esquire
Lawrence M. Hershon, Esquire
Attorneys for the Defendant

Daphne D. Helms
Circuit Court Reporter

ROA-000057

APP000063

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

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

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

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

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

9 **The Court:** All right.

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

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

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

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

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

23 **Mr. Johnson:** Richardson.

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

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

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

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

4 **Mr. Johnson:** Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 trust.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 **The Court:** Plaintiffs.

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

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

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

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

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

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

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

20 **The Court:** No standing.

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

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

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

8 **The Court:** All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 **Mr. Bradley:** Sir?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 **The Court:** Sure.

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

17 **The Court:** All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 **Mr. Bradley:** No.

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

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

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

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

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

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

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

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

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

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

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

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

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

18 **The Court:** I understand.

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

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

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

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

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

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

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

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

8 **The Court:** Anything else?

9 **Mr. Johnson:** No.

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

11 (Whereupon, the proceedings were concluded. There were
12 no exhibits introduced.)
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STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	2013-CP-40-0265
	)	
	)	
	)	
Allen Patterson, et. al.	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Herb Witter, et. al.	)	)
DEFENDANT	)	January 14, 2014
		Florence, SC

B E F O R E:

THE HONORABLE G. THOMAS COOPER, JUDGE.

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

MR. BRADLEY, ESQ.
Attorney for the Plaintiff

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

KESHIA REED
Official Court Reporter

ROA-000088

APP000094

I N D E X

(WHEREUPON, there were no witnesses called.)

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ROA-000089

APP000095

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 dealing with derivative requirements.

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

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

25 Number two, if the injury to the shareholder is

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

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

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

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

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

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

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

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

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

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

20 THE COURT: Thank you, Mr. Wilkins.

21 Mr. Bradley.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 THE COURT: Mr. Johnson.

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

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

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

19 THE COURT: You may proceed.

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

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

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

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

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

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

6 THE COURT: How do you deal with that?

7 MR. JOHNSON: Sir.

8 THE COURT: How do you deal with that?

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

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

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

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

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

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

11 MR. WILKINS: Judge, if I may.

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

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

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

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

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

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

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

8 THE COURT: What are you suggesting?

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

14 THE COURT: I understand.

15 MR. WILKINS: Thank you, Judge.

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

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

20 THE COURT: The previous what?

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

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

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

1 didn't attach it formally to the complaint.

2 THE COURT: You did?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 THE COURT: Did they not reply to it?

19 MR. BRADLEY: They replied and said no.

20 THE COURT: Okay.

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

25 THE COURT: All right. Mr. Wilkins.

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

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

12 MR. BRADLEY: That's fine.

13 MR. WILKINS: That's fine.

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

16 MR. WILKINS: Thank you, Judge.

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

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,)

vs.)

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

Defendants.)

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

AFFIDAVIT OF DAVID GULLY

The affiant being duly sworn testifies as follows:

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

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

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

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

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

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

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

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

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

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

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

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

- f. Under the trustees' management, the beneficiary membership has decreased such that the risk undertaken by the trust and its beneficiaries is not sufficiently spread.
- g. In order to increase membership in the trust, the trustees have written new policies with high risk that expand past their experience in new construction which will further deplete the assets of the trust and convey no benefit on the beneficiaries of the trust.
- h. The trustees have used trust funds to hire attorneys, consultants, and other employees for the purpose of setting up a competing insurance company which will convey no benefit on the members of the trust.

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

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

claims and defenses for all members of the class.

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

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

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

FURTHER AFFIANT SAYETH NAUGHT.

D-2B-Gully
David Gully

SWORN to before me this
9 day of August, 2012

Peter J. Hawley
Notary Public for South Carolina

My Commission Expires: 7/18/2017

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

vs.)

Affidavit of Jeffrey M. Ranew

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

Defendants.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SWORN TO AND SUBSCRIBED BEFORE ME

this 15 day of March, 2012

[Signature]
Notary Public for South Carolina

My Commission Expires: 7/5/15

[Signature]
Jeffrey M. Ranew

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2013-CP-40-02655

Plaintiffs,)

vs.)

Affidavit of Jeffrey M. Ranew

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

Defendants.)

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

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

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

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

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

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

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

SWORN TO AND SUBSCRIBED BEFORE ME

this 9th day of July, 2013

Susan J. Mondillo
Notary Public for South Carolina

My Commission Expires: 6/15/2016

Jeffrey M. Ranew
Jeffrey M. Ranew

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

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

vs.)

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

Defendants.)

TO: THE PLAINTIFFS and their attorneys

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

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

#1 WKK

ROA-000132

APP000138

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

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

#2 WNN

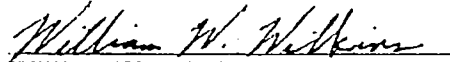
ROA-000133

APP000139

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

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

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



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

Columbia, South Carolina
March 15, 2012

3

ROA-000134

APP000140

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

vs.)

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

Defendants.)

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

TO: THE PLAINTIFFS and their attorneys

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

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

ROA-000135

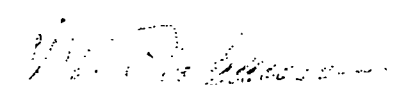
APP000141

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

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

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

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


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

Columbia, South Carolina
March 15, 2012

FILED

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS II: 52

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

Plaintiffs,)

vs.)

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

Defendants.)

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

MOTION FOR CLASS CERTIFICATION

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

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

ROA-000138

APP000144

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

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

6. The class consists of all beneficiaries past and present under the South Carolina Home Builders Self Insurers Fund.

MOORE, TAYLOR & THOMAS, P.A.

By: 

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

West Columbia, South Carolina

June 1, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,)

vs.)

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

Defendants.)

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

JEANE LEE M. MURPHY
C.C.P. & G.S.

2012 JUL 19 AM 11:31

FILED

MOTION FOR CLASS CERTIFICATION

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

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

ROA-000140

APP000146

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

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

6. The class consists of all beneficiaries past and present under the South Carolina Home Builders Self Insurers Fund.

MOORE, TAYLOR & THOMAS, P.A.

By:  _____

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

West Columbia, South Carolina

July 9, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

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

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

Plaintiffs,

vs.

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

Defendants.

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

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

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

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

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

ROA-000142

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

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

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

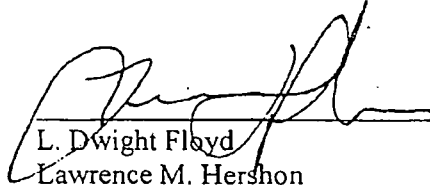
6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated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

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

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

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

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



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bwilliams@nexsenpruet.com

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

July 3, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

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

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

Plaintiffs,

vs.

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

Defendants.

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

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

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

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

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

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ROA-000145

APP000151

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

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

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

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

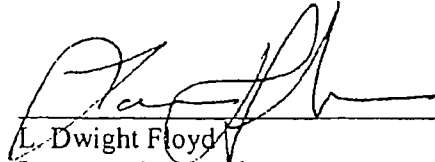
7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied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

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

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

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

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



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

July 3, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Civil Action No. 2013-CP-40-02655

Plaintiffs,)

vs.)

Notice of Motions and Motions

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

Defendants.)

TO: THE PLAINTIFFS and their attorneys

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

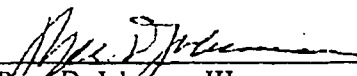
1. The claims by the individual plaintiffs should be dismissed upon the grounds that they are not members of the South Carolina Home Builders Self Insurers Fund ("SIF") and have no valid claims against the defendants.
2. The claims of the former corporate members, Ellis Construction Company, Inc., Barry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

#1
ROA-000148

APP000154

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

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


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**Attorney for Defendants Herb Witter,
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#2
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Columbia, South Carolina
July 8, 2013

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

PLEASE TAKE NOTICE that the Defendants hereby move the Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an Order altering, amending, or vacating the Court's Order Denying Defendants' Motion to Dismiss entered on November 12, 2013 and received by the attorneys for the Defendants on November 19, 2013.

Respectfully, the grounds for this motion to reconsider, in addition to the reasons supplied in the memorandum of law and proposed order previously submitted to the Court, are as follows:

1. Joint and Several Liability is a Hallmark of an Unincorporated Association.

- a. S.C. Code Ann. § 15-35-170, entitled "Judgments against unincorporated associations," provides that members of an unincorporated association are

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individually and jointly and severally liable for its actions: "On judgment being obtained against an unincorporated association . . . , the individual property of any copartner or **member** thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment." *See also Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729 (1955); *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 186 S.E.2d 651 (1936).

- b. The Court's apparent reliance upon the fact that shareholders of a corporation cannot be liable for the losses or actions of a corporation, Order p. 3, as a basis to conclude that this is not a derivative action is inconsistent with Rule 23's application to both corporations and unincorporated associations.
- c. The affidavit submitted by the Plaintiffs confirms that the South Carolina Home Builders Self Insurance Fund ("SIF") is an unincorporated association, as the affidavit asserts the existence of individual joint and several liability for the members of the SIF.
- d. Joint and several liability on the part of the members is inconsistent with their being beneficiaries. Beneficiaries receive benefits from trusts and are not jointly and severally liable for actions of the trustees.

2. The SIF is an unincorporated association.

- a. Because it is not incorporated or otherwise organized as a corporate entity under the laws of this state, the SIF is an unincorporated association. The cited South Carolina Code sections (§§12-37-3160(c), 27-29-10(3), and 37-25-10(2)), Order p. 4, are not relevant to the determination that the SIF is an unincorporated association and the applicability of Rule 23. Moreover, the definitions of those statutes apply only to the respective statutes cited.

3. Members of the SIF are not “beneficiaries.”

- a. The homebuilders/members of the SIF are described as “beneficiaries” in the Order. The Court erred in labeling these individuals as beneficiaries; the SIF document refers to the homebuilders as members and never as a beneficiary.

4. The Court erred by concluding this is not a derivative action.

- a. Each case cited by the Defendants regarding shareholder derivative litigation applies to this case as binding precedent. Rule 23 applies to corporations and **unincorporated** associations. That the body of South Carolina case law addresses corporations, as opposed to unincorporated associations, has zero significance. The case law is binding precedent for unincorporated associations.
- b. The Complaint alleges improper conduct by the Trustees that caused harm to the SIF. The Complaint does not allege any harm flowing solely to the named plaintiffs. These allegations present classic derivative claims. Allegations of “corporate malfeasance that resulted in identical harm to all shareholders . . . gives rise to a classic shareholder’s derivative suit.” *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006).
- c. Since as early as 1928, in *Gary v. Matthews*, 148 S.C. 125, 145 S.E. 702 (1928), the South Carolina Supreme Court has described derivative actions in the following regards:

- i. Discussing the allegations of the complaint the Court stated that:

1. “The basis of the demurrers is that the losses alleged to have been sustained by the mismanagement and negligence of the defendant directors, and by the willful appropriation of assets of the bank by certain officers, constitute assets which belong to the corporation, or to its representative, the receiver, for the benefit of general creditors, depositors, and stockholders, and that damages on account thereof cannot be recovered in an action by the stockholders solely for their benefit.”

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ii. Describing the applicable law, the Court stated:

1. “The law is thoroughly settled that such damages, if recoverable, constitute assets which belong to the corporation, or to its representative, the receiver, and that any action therefor must be brought in the right of the corporation, for the benefit of all persons entitled to participate in the distribution of its assets.”

d. In 1928, the South Carolina Supreme Court described the law regarding what a derivative action is as, “thoroughly settled.”

e. This Court has erred by failing to follow binding precedent that has been thoroughly settled for over 80 years.

5. The Trust cases cited by the Court are not controlling.

- a. Each case regarding litigation between a trust beneficiary and a trustee cited in the Order at p.4 (*e.g.*, *Cartee v. Lesley, etc.*) pertains to a trust in the traditional sense, *i.e.*, a trust set up with named beneficiaries relating to issues concerning the disbursement of assets. These cases are irrelevant to the case at bar. The subject case addresses a workers compensation insurance fund that has been set up as an unincorporated association. A lawsuit of this nature necessitates that the requirements of Rule 23(b)(1) be followed.

6. The Court misapplied the standard for determining whether Rule 23 has been met.

- a. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2001) sets forth an exacting standard for compliance with Rule 23.
- b. By concluding that the general language of Paragraph 8 of the Plaintiffs’ complaint met the Rule 23 heightened pleading requirement, the Court failed to apply binding precedent. The Complaint must set forth in detail the pre-filing actions of the named plaintiffs. “At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm

caused to the corporation, and request remedial relief.” *Whittle*, 346 S.C. at 189, 539 S.E.2d at 409. “Such a pre-suit demand must be alleged not in a conclusory fashion, but through particularized allegations.” *Id.* at 189, 539 S.E.2d at 409-10.

c. The “[d]emand is required in order to assure compliance with the most fundamental principles of corporate governance—directors are answerable to the shareholders and are charged with the duty and responsibility to manage all aspects of corporate affairs.” *Id.* at 188, 539 S.E.2d at 409. The Court erred in determining that the Complaint complied with Rule 23.

d. The Court’s conclusion that a letter sent to defense counsel during the pendency of the first lawsuit and before the filing of the second lawsuit, complied with Rule 23 was in error.

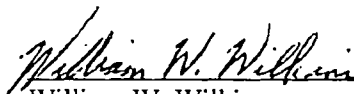
i. Page 5 of the Order sets forth the language of the subject letter; the language of that letter is not found anywhere in the Plaintiffs’ complaint; accordingly, the Court disregarded binding precedent and thus erred by relying upon the letter. “[E]vidence of a demand outside the well pleaded facts contained in the Third Amended Complaint should not have been considered by the trial court and is not properly before us on appeal.” *Id.* at 191, 539 S.E.2d at 410 (rejecting the plaintiff’s submissions of “letters purporting to meet the pre-suit demand requirement . . . , in response to the motion to dismiss”).

7. The Court erred by concluding that a case involving a Trust can never be subject to Rule 23.

a. Assuming in the alternative that the SIF is a Trust, the Court erred by determining that a lawsuit involving a Trust can never be subject to the Rule 23 pleading requirements, as that finding is contrary to the case law cited by the Defendants.

The Order submitted by the plaintiffs, and signed by the Court, is seriously flawed. It considers matters outside of the record, disregards binding precedent, and cites cases that are not applicable to this matter. The purpose of this motion is to bring these flaws to the Court's attention so the Court can consider whether and how to correct them. If an issue is presented to the trial Court but not ruled upon, the omission must be brought to the Court's attention by a Rule 59(e) motion for the issue to be addressed and preserved for review. *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000). Accordingly, the Defendants move and request that the Court rule specifically on each of these issues set forth above and determine, based upon each and all grounds and issues raised thereby, whether the Court should alter and amend its Order and grant the Defendants' motion to dismiss. Furthermore, the Defendants request that the Court allow oral argument on the issues raised by this motion.

Respectfully submitted,



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November 27, 2013
Columbia, South Carolina

ROA-000157

APP000163

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,)

vs.)

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

Defendants.)

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

PLAINTIFFS' MOTION TO RECONSIDER

This motion concerns the Court's Order of February 11, 2014, which was served upon the Plaintiffs on February 20, 2014. The Plaintiffs move for the Court to reconsider that Order on the following grounds:

A. The Defendants acknowledge they received the Plaintiffs' letters of January 2013 making the required demands in this matter. There is no question this letter was served upon the Defendants before this lawsuit was brought and that the Defendants already have responded to it. It is not in the interest of justice to require a second response to a letter which was sent over a year ago. Requiring that this action be dismissed so that the

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Defendants can respond to the letter again elevates form over substance and impedes the judicial systems' mandate of providing speedy resolutions to disagreements among citizens.

B. The better remedy in this case, if the Court believes a second response is necessary to the Plaintiffs' January 2013 letter, is to allow the Defendants to respond while leaving the lawsuit in place. Then, in the event the Defendants require more detailed pleadings, the Plaintiffs can supplement or amend the pleadings such that the action remains pending. This eliminates additional procedural delays and expenses which do not advance the ends of justice or speedy resolutions of disputes.

C. In the event that the Court still believes the matter should be dismissed without prejudice, the Plaintiffs believe the finding of fact in the Court's Order regarding whether or not the document in issue is a trust should be removed so as not to create problems upon refilling. In the Court's Order, the Court indicates that this matter is not to be treated as a trust under the Probate Code, but rather as a business trust or an unincorporated association.

In fact, the trust cannot be a business trust because it is not incorporated and filed as a business trust is required to be. By definition, a business trust requires the assets of the trust to be held on behalf of holders of transferable certificates which show the interest in the trust estate. See S.C. Code § 33-53-10. No such certificates exist in this case. In addition, a business trust must be registered with the Register of Deeds and the Secretary of State. *Id.* This trust has not been registered. Finally, the trust does have beneficiaries which are its members. The trust indicates that when the trust terminates, its proceeds shall be distributed to its members. (See page 13 of Trust, attached). Indeed,

this case is about to whom those proceeds belong because the trustees intend to use the proceeds to set up a competing insurance company. The Court's Order appears to rely upon the belief that the trust does not have beneficiaries and, therefore, is an unincorporated association. In fact, the trust provides that upon its dissolution, its proceeds will be distributed to the members. (See page 13 of Trust Agreement attached).

Furthermore, as defined in the Probate Code, a trust is:

[I]ncludes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article 6 (Sections 62-6-101 et seq.), custodial arrangements pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63, business trusts providing for certificates to be issued to beneficiaries, common trust funds¹, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

S.C. Code Ann. §33-21-210(49).

The Probate Code includes "any express trust," and does not make an exclusion for trusts created to maintain worker's compensation insurance for member/beneficiaries. In fact, the code section does remove some sorts of trust type agreements from its definition. But, it does not contain the exception that the Court has created in this case.

D. The Court did not address the issue raised by the Plaintiffs of judicial estoppel. In fact, Judge Manning found that the operative document was a trust in a previous order which required the lawsuit to be filed in Probate Court. The Defendants moved to dismiss on the basis that the matter was a trust and had to be filed in Probate Court.

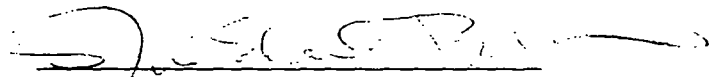
¹ A common trust fund is a fund held by a bank. See S.C. Code §34-21-210(3).

Judge Manning granted their motion. As a result, the Plaintiffs filed the matter in Probate Court and removed it to Circuit Court.

When the matter was removed to Circuit Court, the Defendants alleged that the matter had to be pursued under South Carolina Rule of Civil Procedure 23. The Court's ruling now is in direct opposition to Judge Manning's ruling earlier that the document at issue is a trust.

As a result of the Court's Order now, there is an order holding the document is a trust, and there is an order holding the document is not a trust. As a result, the Plaintiffs do not know which court this matter should be filed in. It has been filed now in Probate Court and in Circuit Court. There is a finding that it should be filed in Probate Court by Judge Manning. Now there is a finding by this Court that it is not a trust subject to be filed in Probate Court. As a result, this Court should reconsider its ruling and follow the previous ruling from Judge Manning that the document is in fact a trust.

Respectfully submitted,



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March 3, 2014

Trustees shall not be liable therefor.

ARTICLE VI

MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Settlor. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by a concurrence of all of the parties to this Agreement, including the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule ~~against perpetuities: in which case, the Trust may continue in perpetuity unless otherwise~~ terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) Civil Action No. 2012-CP-40-04311

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

Plaintiffs,

vs.

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

Defendants.

**CONSOLIDATED MEMORANDUM OF
LAW IN SUPPORT OF MOTIONS TO
DISMISS AMENDED COMPLAINT BY
DEFENDANTS**

This matter is before the Court on separate Motions to Dismiss the Second Amended Complaint (the "Amended Complaint") pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure filed by (1) the South Carolina Home Builders Self Insurers Fund ("SIF") and (2) Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund (the "Trustees," and collectively with SIF, the "Defendants"). The Defendants have moved to dismiss the Amended Complaint in its entirety against all Defendants, as a matter of law, for the reasons stated in the respective Motions and for the reasons set forth below:

BACKGROUND

The Plaintiffs, in their Amended Complaint, allege that they are beneficiaries of an Agreement and Declaration of Trust created in the SIF. Established in 1995, SIF is an organization of South Carolina homebuilders who have joined together to provide a secure source for workers' compensation coverage. SIF is operated by a Board of Trustees. The Plaintiffs are all homebuilders who purport to represent themselves and others similarly situated. The Plaintiffs allege that the Trustees have engaged in the following misconduct:

1. The Trustees voted to remove approximately \$5,000,000.00 from the trust in order to incorporate a new member-owned insurance company.
2. The Trustees did not advise the beneficiaries that the funds could be returned to them and failed to advise them of the potential tax consequences.
3. The Trustees, using trust funds, purchased a building as well as expensive software for the purpose of creating the member-owned insurance company.
4. The Trustees have used trust funds and assets to hire attorneys, consultants and other employees for the purpose of setting up a member-owned insurance company.
5. The Trustees have taken significant amounts of money out of the trust for their own benefit by virtue of payments to them for unnecessary meetings and other unnecessary payments.

The Plaintiffs have alleged that they are entitled to the following relief:

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

The Amended Complaint alleges causes of action for: (1) breach of fiduciary duty; (2) breach of contract and trust agreement; (3) breach of contract accompanied by a fraudulent act; (4) declaratory judgment; and (5) accounting.

DEFENDANTS' MOTION

The Amended Complaint is deficient and fails on several grounds: (1) the Amended Complaint is a derivative action and fails to meet the pleading requirements of Rule 23(b)(1), (2) Plaintiffs fail to plead a cause of action for breach of contract, (3) Plaintiffs fail to plead a cause of action for breach of contract accompanied by a fraudulent act, (4) alternatively, this Court lacks subject matter jurisdiction over the internal affairs of SIF, (5) alternatively, the South Carolina Workers' Compensation Commission has exclusive jurisdiction over the affairs of a self insurance fund such as SIF, (6) the business judgment rule protects the Trustees and bars all claims, and (7) Plaintiffs fail to allege a lack of good faith on the part of the Trustees,

The Defendants filed the Affidavit of Jeffrey M. Ranew, the SIF Administrator, in support of their motion. His affidavit contains a description of SIF and the relationship between SIF and the Plaintiff members, stating as follows:

2. The administration of the SIF is regulated and controlled by the South Carolina Workers' Compensation Commission. The SIF is not an insurance company and the South Carolina Department of Insurance has no control over the administration of the SIF. The SIF does not issue policies of insurance. If a home builder wants to become a member of the SIF in order to satisfy his employer's obligation under the South Carolina Workers' Compensation Act, he completes a workers' compensation application, completes a WCC Form 6a, and pays a \$25.00 non-refundable fee to the South Carolina Workers' Compensation Commission. Attached as Exhibit A is a copy of the workers' compensation application. Attached as Exhibit B is the WCC Form 6a. The WCC Form 6a and the check is then submitted to the Commission for approval. Upon approval, the home builder receives a certificate confirming that he is a member of the SIF. The SIF then provides the new member with a new member package with information about the SIF and the management of the SIF. Attached as Exhibit C is a new member package. After five weeks and a report

on his operation, the new member is billed for the premium relating to his business.

His affidavit also addresses specifically the allegations of misconduct and confirms that:

1. The establishment of a separate mutual insurance company had been studied and under consideration by SIF since 2003;
2. Approximately \$5,000,000.00 was removed from the trust corpus for the purpose of establishing a separate insurance company after a 96.5% vote of the members of SIF, including favorable votes from plaintiffs Carter, Ellis, Davis, Patterson, Sendler, Nier, and Tilton, but the funds were returned to the SIF when an agreement could not be reached with the HBASC on the formation of a mutual insurance company;
3. The Trustees did not advise the beneficiaries that the funds could be returned to the membership because there was no right to do so;
4. Trust funds were used to purchase a building, which purchase was approved by the South Carolina Workers' Compensation Commission;
5. The Trustees received no compensation for time/travel to regularly scheduled meetings from 1995 to 2008 and only then began to receive \$250.00 per meeting for time/travel expense for each board meeting attended; and
6. The SIF had hired a consulting firm to select the new software computer program and based thereon voted to purchase a new software computer program on December 19, 2008.

Mr. Ranew's affidavit also states that the Plaintiffs have: (1) filed no petitions with the South Carolina Workers' Compensation Commission seeking relief, (2) never participated in any mediation regarding the establishment of a mutual company, and (3) never contacted SIF or sought to appear before the board to address and/or resolve the claims set forth in the Amended Complaint.

The Defendants' motions seek the dismissal of the Amended Complaint as a matter of law, pursuant to Rule 12(b)(6), SCRCPP. For the arguments that are supported by the Ranew affidavit, the Defendants also request that the motion be converted to a motion for summary judgment and determined pursuant to Rule 56, SCRCPP.

STANDARD FOR RULE 12(b)(6)

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

STANDARD FOR RULE 56

Defendants have supported portions of their motion with the Affidavit of Jeffrey M. Ranew. Pursuant to Rule 12(b), SCRPC, Defendants ask that their motion be treated as a motion for summary judgment for select arguments made herein. Summary judgment is appropriate where there is no genuine issue of material facts and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC; *See Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by 'showing' – that is, pointing out to the trial court – that there is an absence of evidence to support

the nonmoving party's case." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party makes this demonstration, the opposing party "must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*." *Id.* (emphasis in original); *Midland Mutual Life Ins. Co. v. Harrell*, 331 S.C. 394, 397, 503 S.E.2d 189, 190 (Ct. App. 1998) (emphasis in original).

ARGUMENT

As outlined in each of the Motions to Dismiss, Plaintiffs' Amended Complaint must be dismissed as a matter of law for several reasons, pursuant to Rule 12(b)(6), SCRPC, for the reasons discussed in Sections 1 - 5:

1. Plaintiffs Bring a Derivative Action That Fails to Meet the Pleading Requirements of Rule 23(b)(1), SCRPC.

Summary of Argument

As a general rule, trust beneficiaries may not bring an action at law for conduct damaging the assets of a trust. However, trust beneficiaries can generally bring a *derivative* action. Because Plaintiffs, as SIF beneficiaries, do not allege that their loss is separate and distinct from that of the trust, they cannot bring this action individually at law, their claims are of a derivative nature and their lawsuit constitutes a derivative action.

Because derivative actions intrude upon the governance of an entity, they are subject to special pleading standards set forth at Rule 23(b)(1), SCRPC. The Plaintiffs in this case have not even attempted to comply with the proper pleading standards. Plaintiffs' Amended Complaint is not verified, and Plaintiffs fail to allege that they made or attempted to make a demand on the Trustees. Plaintiffs also fail to allege the reasons for not making such a demand on the Trustees. In sum, Plaintiffs bring a derivative action that fails to comply with the requirements of Rule

23(b)(1). Thus, the Amended Complaint must be dismissed. In the alternative, if the Amended Complaint is not dismissed on the above grounds, in a derivative action any damages or other benefits derived from the action belong to the trust. As a result, Plaintiffs, contrary to their claim, cannot individually recover any damages from the Trustees.

A. Plaintiffs as SIF Beneficiaries Can Only Bring a Derivative Action.

As a general common law rule, a trust beneficiary may not bring an action at law for conduct damaging the assets of a trust, and the right to bring such an action belongs to the trustee. See, e.g., *Int'l Ass'n of Fire Fighters, Local 2665 v. City of Clayton*, 320 F.3d 849, 851 (8th Cir. 2003) (holding that fire fighters, as beneficiaries of pension plan, could not bring suit on behalf of trust); *Ex parte Callan Assocs., Inc.*, No. 1081683, 2011 WL 3963007, at *3 (Ala. Sept. 9, 2011) (“any cause of action initiated on behalf of a trust for conduct damaging the assets of the trust belongs to the trustee of that trust”); Restatement (Second) of Trusts §§ 281(1), 282(1) (1959).

Trust beneficiaries must bring such an action as a derivative action. See *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 184, 64 S.E.2d 524, 528 (1951) (holding that hospital corporation's trustees were analogous to directors and shareholders of corporation and were entitled to bring a derivative action). A derivative action is one in equity. *Straight v. Goss*, 380 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009). While there do not appear to be any South Carolina reported cases recognizing the right of alleged trust beneficiaries similar to Plaintiffs to bring a derivative action, many jurisdictions permit trust beneficiaries to sue through a derivative action, as long as the beneficiaries show that the trustee failed to bring suit. See, e.g., *Ex parte Callan Assocs., Inc.*, 2011 WL 3963007, at *5 (“a beneficiary may initiate a derivative action on behalf of the trust if the beneficiary shows the trustee failed to bring suit, the trustee colluded

with the third party, or the trustee occupied an antagonistic position to the beneficiary”); *Saunders v. Muratori*, 251 P.3d 550, 553 (Colo. Ct. App. 2010) (“In equity, trust beneficiaries may bring a suit for the benefit of a trust when the trustees refuse to do so. . . . Such a suit is analogous to a shareholder derivative suit on behalf of a corporation.”). Similarly, in a wrongful death action, the South Carolina Supreme Court stated that the “rule, which is frequently cited in . . . instances of trusteeship,” is that the beneficiary may himself bring an action “[i]f a trustee refuse[s], after demand, to bring an action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust.” *Bailes v. S. Ry. Co.*, 227 S.C. 176, 182-83, 87 S.E.2d 481, 484 (1955) (“[T]he beneficiary is *not enforcing his own cause of action*, but is acting as a *temporary representative of the trust*.” (emphasis added)).

In the case at bar, Plaintiffs are the alleged beneficiaries of SIF bringing suit against SIF and its Trustees. Much like a shareholder lawsuit against a corporation and its directors, a trust beneficiary can only bring a derivative action on behalf of a trust and cannot sue individually.

B. Plaintiffs' Claims Are of a Derivative Nature.

Plaintiffs bring claims that are of a derivative nature, which makes their lawsuit a derivative action. Their allegations regarding the damages prove that:

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

Plaintiffs cannot maintain an individual action because they did not allege or show that any trust beneficiary's loss is separate and distinct from that of the trust itself. The Amended Complaint identifies no personal damage to any plaintiff.

In the corporate setting, a shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. See *Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 362, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995); *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012). “A shareholder’s suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder.” *Id.* Allegations of corporate malfeasance that result in identical harm to all shareholders are a “breach of fiduciary duty claim that [give] rise to a classic shareholders’ derivative suit.” *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006). Where the alleged injury falls directly on a corporation or a trust and only secondarily on shareholders or trust beneficiaries, the plaintiff’s claim is necessarily derivative. See *Ex parte Morgan Asset Mgmt., Inc.*, 86 So. 3d 309 (Ala. 2011) (holding that plaintiffs, who were beneficiaries of trusts that held shares of investment funds, and who claimed they were injured by diminution in value of funds, were alleging injury that fell directly on funds and only secondarily on plaintiffs, making their claim derivative).

Plaintiffs fail to allege an injury that is separate and distinct from the injury to the other SIF beneficiaries or the injury to SIF itself. The Amended Complaint makes it clear that it was the SIF that was allegedly directly injured, and only through that harm to the SIF were the beneficiaries allegedly (and derivatively) injured. As a result, Plaintiffs’ claims are of a derivative nature, Plaintiffs’ lawsuit constitutes a derivative action, and the Plaintiffs must adhere to the requirements necessary to file a derivative action.

C. *Plaintiffs Fail to Meet the Pleading Requirements of Rule 23(b)(1).*

Under Rule 23(b)(1), SCRCP, a plaintiff must meet certain pleading requirements in order to maintain a derivative action against a corporation or an unincorporated association. This Rule seeks to prevent the unrestrained use of derivative actions. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2001).

Plaintiffs fail to meet the pleading requirements of Rule 23(b)(1) that are required in order to maintain their derivative action. Plaintiffs' Complaint is not verified, and Plaintiffs fail to allege that they made or attempted to make a demand on the Trustees prior to filing suit. Plaintiffs also fail to allege the reasons for not making such a demand on the Trustees.

First, a complaint must be "verified." Rule 23(b)(1), SCRCP. Without any doubt, Plaintiffs' Amended Complaint is clearly not verified.

Secondly, a complaint must allege with particularity the pre-suit efforts taken by the plaintiff to obtain the action he desires from the board (i.e., the "pre-suit demand"), as well as the reasons for his failure to obtain the action or for not making the effort. Rule 23(b)(1), SCRCP. Such a pre-suit demand is required so that the board is notified and can use its business judgment to pursue the litigation or waive such right and allow the beneficiaries to pursue the action. *Whittle*, 343 S.C. at 188, 539 S.E.2d at 409. If the plaintiff's pre-suit demand fails to correct the alleged improper conduct, then in a later filed lawsuit, the plaintiff must affirmatively plead the factual basis of its pre-suit demand (i.e., its complaint must contain the facts constituting the substance of the pre-suit demand), and the pleading must provide evidence of an earnest effort to induce remedial action on the part of the board. *Id.* at 189-90, 539 S.E.2d at 410. At a minimum, the pleading surrounding the pre-suit demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused, and the requested remedial

relief. *Id.* at 189, 539 S.E.2d at 409. Such a pre-suit demand must be alleged, not in conclusory fashion, but through particularized allegations. *Id.* at 189, 539 S.E.2d at 409-410. A derivative action that does not meet the pleading requirements of Rule 23(b)(1) is properly dismissed pursuant to Rule 12(b)(6). *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339 (citing *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)).

The same demand requirements apply to derivative actions in the context of a trust. *See, e.g., Ex parte Callan*, 2011 WL 3963007, at *6 (action by mother of designated beneficiary of Prepaid Affordable College Tuition Trust Fund on behalf of beneficiary and Fund was premature, where mother failed to make a demand on trustees prior to bringing suit); *Ex parte Morgan*, 86 So. 3d 309 (holding that circuit court did not have subject matter jurisdiction over trust beneficiaries' derivative claims where beneficiaries had not complied with requirements of Rule 23.1 of Alabama Rules of Civil Procedure).

Plaintiffs fail to meet any of these requirements, and, therefore, the Amended Complaint is deficient and must be dismissed as a matter of law. Plaintiffs fail to make any allegations that they made or attempted to make any pre-suit demand on the Trustees, let alone do so with particularity. Plaintiffs also fail to allege the reasons for not making such efforts. As a result, Plaintiffs fail to meet the requirements for what must be contained in the pre-suit demand.¹ In sum, Plaintiffs bring a derivative action that fails to comply with the requirements of Rule 23(b)(1) and, thus, must be dismissed. *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339 (citing *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)).

¹ Moreover, if the Court is inclined to review any facts in its determination of this motion, as stated in Mr. Ranew's affidavit filed with the original motions to dismiss, Plaintiffs never sought to appear before the Trustees or contact SIF to address or resolve the claims set forth in their Amended Complaint. Ranew Aff. ¶ 9.

D. In the Alternative, Damages Belong to SIF and Not the SIF Beneficiaries.

In the alternative, to the extent that the Amended Complaint is not dismissed on the above grounds, Plaintiffs have not suffered any damages and the claims must be dismissed. In a derivative action, any damages or other benefits derived from the action belong to SIF. Plaintiffs cannot individually recover actual or punitive damages from the Trustees.

A shareholder may not collect any money directly from the wrongdoer because it belongs to the corporation. See, e.g., *Rivers v. Wachovia Corp.*, 665 F.3d 610, 615-16 (4th Cir. 2011) (holding that “any recovery in a derivative suit rebounds to the benefit of the corporation” because “any recovered damages constitute assets which belong to the corporation”); *Molever v. Levenson*, 539 F.2d 996 (4th Cir. 1976) (holding that award of damages to stockholders, instead of bank, was erroneous because real party in interest in a derivative action was the bank).

Plaintiffs’ claim that Plaintiffs themselves are entitled to a direct award of actual and punitive damages. Am. Compl. ¶ 40. However, as shown above, Plaintiffs’ lawsuit constitutes a derivative action. Therefore, in this derivative action, any alleged damages belong to SIF. Plaintiffs can neither seek nor individually recover any actual or punitive damages directly from the Trustees. As a result, Plaintiffs’ claims to an award of such damages directly to them is improper and must be dismissed.²

2. Plaintiffs Fail to Plead a Cause of Action for Breach of Contract.

In their Amended Complaint, Plaintiffs fail to state facts sufficient to support the cause of action for breach of contract. Plaintiffs face a glaring deficiency in their pleadings: they fail to even allege the existence of a contract between Plaintiffs and SIF or between Plaintiffs and the Trustees. This simple allegation cannot be made because there is no such contract. Plaintiffs

² To the extent, if any, that the case at bar is not dismissed, the Defendants request that the claim for punitive damages be stricken from the Amended Complaint because punitive damages cannot be sought in an equity suit. *Dibble v. Sumter Ice and Fuel Co.*, 283 S.C. 278, 286, 322 S.E.2d 674, 679 (Ct. App. 1984).

further fail to allege how such a contract was created, and they fail to allege how the contract was breached.

The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). While the pleading standards under Rule 8, SCRPC are relaxed, there still must be some allegation of the existence of the contract, of how the contract was created, and of how the contract was breached. The failure to meet any of these elements constitutes a deficiency in the pleadings and cause for dismissal; Plaintiffs fail to meet each of these elements.

The Restatement (Second) of Trusts³ confirms that a trustee who fails to perform his duties is not liable to the beneficiary for breach of contract. Restatement (Second) of Trusts § 197 cmt. b (1959). "The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract." *Id.* Moreover, all parties must be obligated under a contract for it to be enforceable; that is, a contract must involve mutuality of obligation. See *Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 167, 355 S.E.2d 286, 290 (Ct. App. 1987) ("all parties must be obligated under a contract in order for it to be enforceable").

First, Plaintiffs fail to allege the existence of a contract between Plaintiffs and SIF. The Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund (the "Trust Agreement") is not a *contract* between Plaintiffs and SIF. In fact, as established by the exhibits to the Amended Complaint, there have been no written contracts signed by the members and SIF or by the members and the Trustees. As a result, Plaintiffs are

³ The South Carolina Supreme Court has cited the Restatement (Second) of Trusts positively. See, e.g., *Ex parte Guar. Bank & Trust Co.*, 255 S.C. 106, 113-14, 177 S.E.2d 358, 361-62 (1970) (citing and referring to the Restatement (Second) of Trusts as "convincing text authority" that has been "cited with approval" by the court in previous decisions); *S.C. Dep't of Mental Health v. McMaster*, 372 S.C. 175, 180-81, 642 S.E.2d 552, 555 (2007). Other South Carolina courts have also cited the Restatement (Second) of Trusts positively or with approval. See, e.g., *Doe v. Roe*, 323 S.C. 445, 453, 475 S.E.2d 783, 787 (Ct. App. 1996).

not parties to the Trust Agreement. The Trust Agreement, in essence, creates SIF, and there are no parties to the Trust Agreement in the traditional sense of how a contract is formed. The Trust Agreement creates no mutuality of obligation and no reciprocal rights between Plaintiffs and SIF or the Trustees. As a result, the Trust Agreement is not a contract that can be enforced. Hence, Plaintiffs fail to allege the existence of a contract between Plaintiffs and the Defendants.

Second, Plaintiffs' Amended Complaint is void of any allegation of how a contract was created.

Third, while Plaintiffs make allegations as to wrongdoing by the Trustees, they fail to make allegation as to which, if any, of these actions constituted a breach of contract.

Finally, Plaintiffs fail to allege what kind of damages the breach of contract specifically caused.

As a result, Plaintiffs fail to state facts sufficient to support their cause of action for breach of contract, and this cause of action must be dismissed.

3. Plaintiffs Fail to Plead a Cause of Action for Breach of Contract Accompanied by a Fraudulent Act.

A. The Elements of the Breach of Contract Accompanied by a Fraudulent Act Cause of Action.

To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). Mere speculation by a party as to fraudulent intent is not sufficient to produce a question of fact. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 471, 597 S.E.2d 881, 883 (Ct. App. 2004).

Plaintiffs fail to establish all three elements of the breach of contract accompanied by a fraudulent act cause of action.

B. *Plaintiffs Fail to Establish the Breach of Contract Element.*

Under South Carolina law, a claim for breach of contract accompanied by a fraudulent act requires that Plaintiffs first establish a breach of contract. *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 495 (4th Cir. 2007) (citing *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606, 612 (2002)). Having a contract is a prerequisite to proving breach of contract accompanied by a fraudulent act. *Armstrong v. Collins*, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005).

As established in Section 2, *supra*, Plaintiffs fail to allege or show the existence of a contract between Plaintiffs and the Defendants or a breach of contract by the Defendants. As a result, Plaintiffs fail to establish the breach of contract element necessary for establishing a claim for breach of contract accompanied by a fraudulent act.

C. *Plaintiffs Fail to Establish the Fraudulent Intent Element.*

Fraudulent intent is the second necessary element of the breach of contract accompanied by a fraudulent act cause of action. The fraudulent intent must relate to the breaching of the contract and not merely to its making. *Conner v. City of Forest Acres*, 348 S.C. at 465-66, 560 S.E.2d at 612.

Plaintiffs fail to allege any particularized fraudulent intent relating to the alleged breaching of the contract by the Trustees. As a result, Plaintiffs fail to establish the fraudulent intent element of this claim.

D. Plaintiffs Fail to Establish the Fraudulent Act Element.⁴

Plaintiffs fail to show dishonesty in fact on the part of the Trustees, and they fail to allege any unfair dealing by the Trustees.

A “fraudulent act” is broadly defined as “any act characterized by dishonesty in fact or unfair dealing.” *Conner v. City of Forest Acres*, 348 S.C. at 466, 560 S.E.2d at 612. A showing of acts characterized by dishonesty or unfair dealing is required to meet the fraudulent act element of the breach of contract accompanied by a fraudulent act cause of action. *Maro v. Lewis*, 389 S.C. 216, 223-24, 697 S.E.2d 684, 688 (Ct. App. 2010).

As established in Section 6B(ii), *infra*, contrary to Plaintiffs’ allegations, Plaintiffs fail to show that the Trustees engaged in any acts characterized by dishonesty. Moreover, Plaintiffs make no allegations that the Trustees engaged in unfair dealing. As a result, Plaintiffs fail to establish the fraudulent act element of the breach of contract accompanied by a fraudulent act cause of action.

E. Conclusion – Plaintiffs’ Breach of Contract Accompanied by a Fraudulent Act Cause of Action Fails.

Plaintiffs fail to establish the breach of contract element, the fraudulent intent element, and the fraudulent act element of the breach of contract accompanied by a fraudulent act cause of action. Because the failure to establish any single element of a cause of action creates a deficiency in the allegations, Plaintiffs fail to state facts sufficient to support their cause of action for breach of contract accompanied by a fraudulent act, and, thus, the cause of action must be dismissed.

⁴ The argument for dismissal under this element require analysis under the summary judgment standard explained below. However, this claim should be dismissed under Rule 12(b)(6) for the reasons stated in subsection B and C, *supra*, as the failure of any single elements makes the claim defective.

4. The Probate Court Has Exclusive Jurisdiction Over the Internal Affairs of SIF.

In the alternative to the arguments made above, the Amended Complaint must be dismissed in its entirety because this Court lacks subject matter jurisdiction over this action as it involves the internal affairs of a trust. Proceedings initiated by interested parties concerning the internal affairs of trusts are subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. § 62-7-201 (1976).

The Probate Court has exclusive jurisdiction over matters concerning the internal affairs of trust administration. *All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S. C.*, 358 S.C. 209, 239, 595 S.E.2d 253, 269 (Ct. App. 2004); *Mayer v. M.S. Bailey & Son*, 347 S.C. 353, 359, 555 S.E.2d 406, 409 (Ct. App. 2001). Plaintiffs' Amended Complaint only involves matters concerning the internal affairs of the SIF. In the Amended Complaint, Plaintiffs challenge the Trustees' administration and distribution of the SIF and the propriety of the Trustees hiring and paying attorneys, consultants, and other employees for the purpose of setting up a member owned insurance company. Am. Compl. ¶¶ 19, 20, 21, 22, 23, 24, 25, 26, 27. As a result, this Court lacks subject matter jurisdiction over this action. The Probate Court has exclusive jurisdiction over all of the matters raised by Plaintiffs' in the Amended Complaint because they concern the internal affairs of the SIF. Thus, the Amended Complaint must be dismissed.

5. The South Carolina Workers' Compensation Commission Has Exclusive Jurisdiction Over the Affairs of a Self Insurance Fund.

In the alternative to the arguments made above, the Complaint must be dismissed in its entirety because this Court lacks subject matter jurisdiction over this action. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over the affairs of a self insurance fund such as SIF.

SIF was established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto. *See* S.C. Code Ann. § 42-5-20 (1976) ("The commission may, under such rules and regulations as it may prescribe, permit . . . employers in businesses of a similar nature to enter into agreements to pool their liabilities . . . for the purpose of qualifying as self-insurers.") Pursuant to S.C. Code Ann. § 42-5-20, the South Carolina Workers' Compensation Commission has "exclusive jurisdiction of group self-insurers under this section." Therefore, the South Carolina Workers' Compensation Commission has exclusive jurisdiction over the affairs of SIF.

Plaintiffs' Amended Complaint only involves matters concerning the affairs of SIF and the actions of SIF as carried out by its Trustees. Plaintiffs have filed no petitions with the South Carolina Workers' Compensation Commission seeking relief regarding the actions of the Trustees. *Renew Aff.* ¶ 9. As a result, this Court lacks subject matter jurisdiction over this action and the Amended Complaint must be dismissed.

ARGUMENT ON ISSUES ADDRESSED UNDER RULE 56

As outlined in each of the Motions to Dismiss, Plaintiffs' Amended Complaint must be dismissed pursuant to Rule 56, SCRCP, for the reasons discussed in Sections 6 and 7:

6. The Business Judgment Rule Protects the Trustees and Bars All Claims.

Summary of Argument

South Carolina courts have described and interpreted the standards that apply to directors and trustees in identical terms. Therefore, in South Carolina, the business judgment rule is the standard that applies to the Trustees in the case at bar. As a result, the Trustees' decisions and actions cannot be judicially reviewed unless Plaintiffs overcome the business judgment rule. However, Plaintiffs fail to overcome the business judgment rule: Plaintiffs fail to sufficiently

allege or show a lack of good faith, dishonesty, self-dealing, fraud, or unconscionable conduct on the part of the Trustees. Each Trustee acted with the care of an ordinarily prudent person in similar circumstances and reasonably believed to serve the best interests of the SIF and its beneficiaries. The Trustees exercised their good faith business judgment in their decisions to pursue the above actions. Therefore, the Trustees' business judgment cannot be judicially reviewed and the Amended Complaint must be dismissed.

A. The Business Judgment Rule Applies to Trustees.

The business judgment rule applies to trustees in the same manner that it applies to directors of a corporation. The business judgment rule is a key factor in the operation of a corporation or an unincorporated association. Under the rule, "a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." *Dockside Ass'n, Inc. v. Detyens*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987), *aff'd*, 294 S.C. 86, 362 S.E.2d 874 (1987).

The business judgment rule precludes judicial review of actions taken by a corporation's directors absent a showing of a lack of good faith, fraud, self-dealing, or unconscionable conduct. *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987). The judgment of the directors will not be set aside by judicial action absent a showing of bad faith, dishonesty, or incompetence. *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). The same standard applies to trustees. *Hargrave v. Canadian Valley Elec. Coop., Inc.*, 792 P.2d 50, 57 (Okla. 1990).

As a fiduciary, much like a director, a trustee is under a duty of loyalty to act solely in the best interests of the beneficiary. *Compare Yates v. Yates*, 292 S.C. 49, 51, 354 S.E. 2d 800, 801 (Ct. App. 1987) *with Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 603, 538 S.E.2d 15, 27 (Ct.

App. 2000) (a director must show he acted in good faith, with the care of an ordinarily prudent person in similar circumstances, and in a manner he reasonably believes to be in the best interests of the corporation.). A trustee must exercise reasonable care, prudence, and diligence in the management of trust assets as a reasonably prudent person would do in his own affairs. *Cartee v. Lesley*, 290 S.C. 333, 336, 350 S.E.2d 388, 390 (1986).

Furthermore, a number of jurisdictions have applied the business judgment rule to trustees as well as directors. For example, the Oklahoma Supreme Court recognizes that liability cannot be imposed on a trustee if he acted with "the care and diligence of an ordinarily prudent man under similar circumstances." *Hargrave v. Canadian Valley Elec. Coop., Inc.*, 792 P.2d at 57 (Okla. 1990) (The "business judgment rule shields a director or trustee from liability in the case of an honest error in judgment."). See also *Wood Prince v. Lynch*, 2005 WL 373805, at *5 (R.I. Super. 2005) (The fiduciary duties of trustees and directors are substantially similar, and that, therefore, the business judgment rule applied to trustees unless the objecting beneficiaries showed that the trustees abused their discretion or contravened the provisions of the trust); *Pederzani v. Guerriere*, 1995 WL 1146832, at *1 (Mass. Super. 1995) (Finding the business judgment rule as the appropriate standard to be applied to claims against trustees, the court held that trustees were "not liable for actions taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of the interests of the unit owners.").

As a result, the business judgment rule is the standard that applies to the Trustees. Therefore, there must be no judicial review of the Trustees' decisions and actions unless Plaintiffs can overcome the business judgment rule.

B. *Plaintiffs Fail to Overcome the Business Judgment Rule That Applies to the Trustees.*

Plaintiffs fail to overcome the business judgment rule that applies to the Trustees. Plaintiffs have failed to allege that the Trustees acted in bad faith. Furthermore, all of the alleged actions by the Trustees were permissible and within their authority under the Trust Agreement and do not create any breach of the Trustees' obligations to SIF and its beneficiaries. The burden is on Plaintiffs to show a lack of good faith on the part of the Trustees. However, Plaintiffs cannot show that the Trustees engaged in self-dealing or dishonesty. Plaintiffs also cannot show that the Trustees did not act in the best interests of SIF and its beneficiaries. The Trustees collectively acted with the care of an ordinarily prudent person and, therefore, their good faith business judgment must not be judicially reviewed.

The business judgment rule eliminates judicial review of business decisions of a corporation or a trust if they are made in good faith and with the care of an ordinarily prudent person. *Kuznik*, 342 S.C. at 603, 538 S.E.2d at 28. When a plaintiff challenges the actions and decisions of directors or trustees, the burden is on the plaintiff to show a lack of good faith on the part of the trustees. *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. at 87, 362 S.E.2d at 874 ("the burden of proving a lack of good faith is borne . . . by those challenging the board's actions").

i. *The Trustees Did Not Engage in Self-Dealing.*

Plaintiffs fail to show that the Trustees engaged in any self-dealing. The Trustees did not remove SIF funds and assets in order to use them for their own purposes. On the contrary, the Trustees only transferred the money from the SIF and held it in an account for the purpose of establishing a separate mutual insurance company. *Ranew Aff.* ¶ 4. In fact, Plaintiffs do not even allege that the transferred SIF money was used by the Trustees to their own benefit and admit that the money was to be used for the purpose of establishing a member owned insurance

company. Am. Compl. ¶ 20. Moreover, when an agreement could not be reached with the Home Builders Association of South Carolina regarding the establishment and operation of the proposed mutual insurance company, the application for a mutual insurance company was withdrawn, and the transferred SIF money was returned to SIF. Ranew Aff. ¶ 4.

While Plaintiffs allege that the Trustees have taken “significant amounts of money” out of the SIF for their own benefit as payments to themselves for allegedly “unnecessary” meetings (Am. Compl. ¶ 27), contrary to these allegations, from 1995 to 2008, the Trustees received no compensation for time and travel to regularly scheduled board meetings. Ranew Aff. ¶ 7. It was only beginning in 2008 that the Trustees began to receive a mere sum of \$250.00 for time and travel expense for each board meeting attended. Ranew Aff. ¶ 7. If a Trustee attended all twelve board meetings per year, he would receive a maximum of only \$3,000.00 per year. Ranew Aff. ¶ 7. As a result, contrary to Plaintiffs’ allegations, the Trustees did not take out *significant* amounts of money from the SIF for *unnecessary* meetings. Instead, the Trustees only began to be minimally reimbursed for time and travel expense since 2008 to attend board meetings, with some Trustees having to travel rather long distances, and with board meetings frequently taking as long as a full day. Ranew Aff. ¶ 7.

ii. *The Trustees Did Not Engage in Dishonesty.*

Plaintiffs fail to show that there was any dishonesty on the part of the Trustees. On the contrary, the Trustees only transferred the SIF’s funds after 96.5% of the SIF membership voted to approve this transfer, with most Plaintiffs approving it at the time. Ranew Aff. ¶ 4. Plaintiffs also allege that the Trustees did not advise the beneficiaries that the funds being transferred to establish the mutual insurance company could have been returned to the membership. Am. Compl. ¶ 21. However, it is clear that the beneficiaries were aware of this before they voted to

approve the transfer of the funds because returns of member contributions were made to them in 2009 and 2010. Ranew Aff. ¶ 5.

iii. The Trustees Acted in the Best Interests of SIF and Its Beneficiaries.

Plaintiffs fail to show that the Trustees did not act in the best interests of SIF and its beneficiaries. Plaintiffs allege that certain acts of the Trustees conferred no benefit upon the beneficiaries of the SIF. These alleged acts include the removal of assets from SIF in order to incorporate a new member owned insurance company, and the use of SIF funds and assets to purchase a building and a software program, as well as to hire attorneys, consultants, and other employees, for the purpose of creating and setting up the member owned insurance company. All of the acts that Plaintiffs allege were contrary to the best interests of the beneficiaries are related to the creation and setup of the new member owned insurance company.

Plaintiffs fail to allege or show a lack of good faith on the part of the Trustees in taking the above actions. In fact, the Trustees exercised their business judgment with the care of an ordinarily prudent person in similar circumstances, reasonably believing that the above decisions and actions were in the best interests of SIF and its beneficiaries. The establishment of a separate mutual insurance company has been studied and under consideration by SIF and the Trustees since 2003, when it began to be regularly addressed at board meetings. Ranew Aff. ¶ 5, Ex. H. The decision to transition from a self insured fund to a mutual insurance company was made in good faith as the Trustees were pursuing the best interests of SIF and its beneficiaries. Contrary to Plaintiffs' allegations, there are real and substantial benefits to this transition. Ranew Aff. ¶ 5. Members of a mutual insurance company are not jointly and severally liable for claims as members of a self insured fund such as the SIF are, and the formation of a mutual insurance company would start the process leading to the eventual end of exposure for joint and

several liability. Ranew Aff. ¶ 5. Due to the negative impact of the recession on the home building industry, the number of members of the SIF has been reduced. Ranew Aff. ¶ 5. However, a mutual insurance company could offer other types of insurance to a broader customer base, which would help insure the viability and availability of insurance coverage for the homebuilder members. Ranew Aff. ¶ 5.

Moreover, all of the Trustees actions were approved by the South Carolina Workers' Compensation Commission. Ranew Aff. ¶¶ 3, 4, 5. Regardless, these benefits are inconsequential to the legal argument at issue, as these decisions are protected by the business judgment rule.

iv. Conclusion – the Business Judgment Rule Protects the Trustees.

Plaintiffs do not sufficiently allege or show a lack of good faith, dishonesty, self-dealing, fraud, or unconscionable conduct on the part of the Trustees. Plaintiffs also fail to allege that the Trustees violated the Agreement and Declaration of Trust, and the Trustees in fact acted with authority for all the action they took. The Trustees acted with the care of an ordinarily prudent person in similar circumstances. The Trustees reasonably believed their actions served the best interests of SIF and its beneficiaries. The Trustees exercised their good faith business judgment in their decisions to pursue the above actions, accompanied by no corrupt motives, self-dealing, dishonest, fraud, or unconscionable conduct. As a result, Plaintiffs fail to overcome the business judgment rule that applies to the Trustees. Therefore, the Trustees' business judgment cannot be judicially reviewed, and all of Plaintiffs' claims are barred. Thus, the Amended Complaint must be dismissed.

7. Plaintiffs Fail to Allege a Lack of Good Faith on the Part of the Trustees.

Under the Trust Agreement, the Trustees are not liable for any action taken in good faith. Ranew Aff., Ex. K § 12.

The section above details how Plaintiffs fail to allege or show a lack of good faith on the part of the Trustees with regard to their decisions and actions. In fact, as set forth above, the Trustees were acting in good faith and in the best interests of SIF and its beneficiaries with regard to the decision to transition to a mutual insurance company, as well as with regard to the actions taken by them toward the creation and setup of such a mutual insurance company. The failure to make such an allegation of lack of good faith is a pleading deficiency, and, as such, the Amended Complaint must be dismissed.

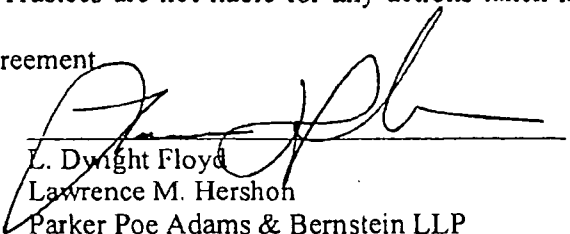
Moreover, because 96.5% of the SIF membership voted to approve the transfer of the SIF money for the purpose of establishing a mutual insurance company, the Trustees acted with the reasonable belief that their actions complied with the desires of the SIF's beneficiaries. Such belief relieves the Trustees from personal liability for these actions. *Rembert v. Gressette*, 318 S.C. 519, 525, 458 S.E.2d 552, 555-56 (Ct. App. 1995) (holding that the finding that trustee was not personally liable for alleged mismanagement of trust assets was supported by evidence that trustee believed stock transfer complied with desires of beneficiaries).

Thus, the Amended Complaint must be dismissed.

CONCLUSION

As detailed in each section above, Plaintiffs' Amended Complaint must be dismissed as a matter of law for several reasons: (1) the Complaint is a derivative action and fails to meet the pleading requirements of Rule 23(b)(1) because the Amended Complaint is not verified, Plaintiffs fail to allege that they made or attempted to make a pre-suit demand on the Trustees,

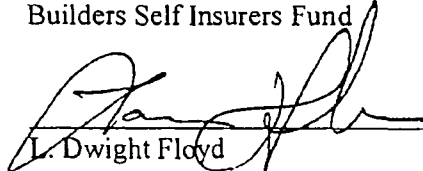
and Plaintiffs fail to allege the reasons for not making such a pre-suit demand on the Trustees; (2) Plaintiffs fail to plead a cause of action for breach of contract because a trustee who fails to perform any duties cannot be liable for breach of contract; (3) Plaintiffs fail to plead a cause of action for breach of contract accompanied by a fraudulent act, as Plaintiffs fail to meet each element of the cause of action; (4) alternatively, this Court lacks subject matter jurisdiction over the internal affairs of the SIF; (5) alternatively, the South Carolina Workers' Compensation Commission has exclusive jurisdiction over the affairs of a self insurance fund such as SIF; (6) the business judgment rule protects the Trustees and bars all claims because Plaintiffs fail to sufficiently allege or show a lack of good faith, dishonesty, self-dealing, fraud, or unconscionable conduct on the part of the Trustees; and (7) Plaintiffs fail to allege a lack of good faith on the part of the Trustees, and the Trustees are not liable for any actions taken in good faith, pursuant to the terms of the Trust Agreement



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August 28, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

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

Defendants.

) IN THE COURT OF COMMON PLEAS

)

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

**CONSOLIDATED MEMORANDUM OF
LAW IN SUPPORT OF MOTIONS TO
DISMISS COMPLAINT BY DEFENDANTS**

This matter is before the Court on Defendants' Motions to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The Complaint, in its entirety, should be dismissed against all Defendants, as a matter of law.¹

BACKGROUND

This is a derivative action against the South Carolina Home Builders Self Insurers Fund (the "Fund") and its Board of Trustees. The Fund was created by an Agreement and Declaration of Trust dated September 27, 1995. Its purpose, according to the trust agreement, is to provide a fund to meet and fulfill the homebuilder/member's obligations and liabilities under the South

¹ The subject complaint is the second action brought by the Plaintiffs. The first action, C/A No. 2012-CP-40-4311, was not initially filed in the probate court and was therefore dismissed for lack of subject matter jurisdiction. The instant action was initially filed in the probate court and later removed to this Court.

Carolina Workers' Compensation Act. The Fund is not an insurance company and is not regulated by the South Carolina Department of Insurance. Instead, the Fund is regulated by the South Carolina Workers' Compensation Commission.

If a homebuilder wants to become a member of the Fund, the homebuilder must complete a WCC Form 6A and pay a \$25.00 non-refundable fee to the South Carolina Workers' Compensation Commission. Upon Commission approval, the homebuilder receives a certificate confirming membership in the Fund, the Fund provides the new member with a new member packet and bills the new member the amount due for providing workers compensation benefits to the homebuilder/member's business. The Fund issues a certificate that sets forth the responsibilities of the Fund and the member. There are no written contracts signed by the member and the Fund or by the member and the trustees. The Fund is managed by a Board of Trustees.

Plaintiffs have brought this lawsuit with myriad allegations, claiming that alleged misconduct by the Trustees has harmed SIF. Some Plaintiffs are corporate homebuilders, and other are individuals who are merely members/owners of the corporate homebuilders. The Plaintiffs purport to represent themselves and others similarly situated. The Plaintiffs allege, among other things, that the Trustees removed assets without any benefit to the beneficiaries and misused assets of SIF.

ARGUMENT

1. Plaintiffs Bring a Derivative Action That Fails to Meet the Pleading Requirements of Rule 23(b)(1), SCRPC.

A. The Complaint is a derivative action

Plaintiffs improperly seek to prosecute this lawsuit as a class action. The pertinent case law dictates that Plaintiffs can only proceed in the form of a derivative action under Rule 23(b). See Rule 23(b)(1), SCRPC; *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 184, 64 S.E.2d 524, 528

(1951) (holding that hospital corporation's trustees were analogous to directors and shareholders of corporation and were entitled to bring a derivative action); *Bailes v. S. Ry. Co.*, 227 S.C. 176, 182-83, 87 S.E.2d 481, 484 (1955) ("[T]he beneficiary is *not enforcing his own cause of action*, but is acting as a *temporary representative of the trust*." (emphasis added)). Where the alleged injury falls directly on a trust and only secondarily on trust beneficiaries, the plaintiff's claim is necessarily derivative. See *Ex parte Morgan Asset Mgmt., Inc.*, 86 So. 3d 309, 321 (Ala. 2011) (holding that beneficiaries were alleging injury that fell directly on funds held by the trust and only secondarily on plaintiffs, making their claim derivative).

Plaintiffs cannot maintain an individual action because they did not allege that any trust beneficiary's loss is separate and distinct from that of the trust itself. The Complaint identifies no personal or distinct damage to any plaintiff. See *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012) ("A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder."); *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (Allegations of corporate malfeasance that result in identical harm to all shareholders are a "breach of fiduciary duty claim that [gives] rise to a classic shareholders' derivative suit."); *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991) ("It is firmly established by our decisions that individual shareholders may not sue corporate directors or officers directly for losses suffered by the corporation.").

Therefore, Plaintiffs' claims are of a derivative nature. As alleged beneficiaries of SIF, they can only bring a derivative action on behalf of a trust and cannot sue individually.

B. Plaintiffs Fail to Satisfy the Pleading Requirements of Rule 23(b)(1)

Under Rule 23(b)(1), SCRCF, a plaintiff must meet certain pleading requirements in order to maintain a derivative action.² "A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCF, is properly dismissed pursuant to Rule 12(b)(6)." *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339. This Rule seeks to prevent the unrestrained use of derivative actions. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2001). The subject Complaint challenges the decisions of the SIF Board of Trustees; therefore, it is analogous to a complaint challenging the decisions of a Board of Directors of a corporation.³

The pleading requirements of Rule 23 require particularized, heightened allegations, and are a departure from the liberal pleading requirements of Rule 8. *Id.* at 188, 539 S.E.2d at 409. "The protective principles underlying the pleading requirements of Rule 23(b)(1) have long been recognized as important gatekeepers in South Carolina corporate jurisprudence." *Id.* at 185, 539 S.E.2d at 407.

Plaintiffs fail to satisfy the following requirements:

- Plaintiffs fail to allege "with particularity" the efforts they made to satisfy the proper pre-suit demand requirements of Rule 23(b)(1).

² Rule 23(b)(1) requires that "the complaint shall also allege with particularity the efforts made by the plaintiff to obtain the action he desires from the directors...and the reason for his failure to obtain the action or for not making the effort."

³ While the undersigned have been unable to locate a South Carolina case addressing a derivative action on behalf of a trust, other jurisdictions have made clear that trust beneficiaries may only pursue a derivative action after a showing that the trustee failed to act properly and to pursue the necessary action. *See, e.g., Ex parte Callan Assocs., Inc.*, 87 So.3d 1161, 1167 (Ala. 2011) ("a beneficiary may initiate a derivative action on behalf of the trust if the beneficiary shows the trustee failed to bring suit, the trustee colluded with the third party, or the trustee occupied an antagonistic position to the beneficiary"); *Saunders v. Muratori*, 251 P.3d 550, 553 (Colo. Ct. App. 2010) ("In equity, trust beneficiaries may bring a suit for the benefit of a trust when the trustees refuse to do so. . . . Such a suit is analogous to a shareholder derivative suit on behalf of a corporation.").

- At a minimum, the pleading surrounding the pre-suit demand must specifically identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused, and the requested remedial relief. *Whittle*, 343 S.C. at 189, 539 S.E.2d at 409.
- Plaintiffs make a general allegation in Paragraph 8 of the Complaint that they “made efforts to obtain the action they desire” by way of correspondence, meetings, and a previous lawsuit. Our courts have deemed such general allegations insufficient. *Whittle*, 343 S.C. at 189, 539 S.E.2d at 402 (plaintiffs alleged they demanded “certain information” and “certain actions” in their derivative action; court deemed these allegations conclusory and insufficient).
- Plaintiffs also fail to allege any reasons for not making an appropriate pre-suit demand on the Trustees.
- Plaintiffs’ Complaint is not properly verified.
 - Under Rule 11(c), SCRCP, in a verification, an affiant must have personal knowledge of the information being verified and attest to its truth, unless an allegation is made upon information and belief. No allegation in the Complaint is made upon information and belief. The verification of each plaintiff states that “the allegations in the Complaint are true and accurate to the best of my knowledge.” This form of verification is insufficient under the Rules, as it fails to establish personal knowledge as to any allegation. Thus it appears that none of the verifiers have first hand knowledge of any allegation. There are no allegations alleged upon information and belief. The qualification of “best of my knowledge” essentially renders the verification meaningless and is counter to the purpose of the verification.

Plaintiffs bring a derivative action that fails to comply with the requirements of Rule 23(b)(1) and, thus, must be dismissed. *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339 (citing *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)). See also *Ex parte Morgan*, 86 So.3d at 321 (holding that circuit court did not have subject matter jurisdiction over trust beneficiaries’ derivative claims where beneficiaries had not complied with requirements of Rule 23.1 of the Alabama Rules of Civil Procedure).

2. Certain Plaintiffs Lack Standing and Cannot Pursue this Lawsuit.

A. Individual Plaintiffs

While the individual plaintiffs may have an interest in SIF through their ownership of the corporate plaintiffs, none of the individuals are actual members or beneficiaries of SIF. See

attached Affidavit of Jeffrey Ranew, the Administrator of SIF (also submitted with the Motion). Therefore, each of the individual plaintiffs lack standing to pursue the alleged causes of action against the Defendants, and they must be dismissed from this action.

B. Certain Corporate Plaintiffs

Certain corporate plaintiffs -- Ellis Construction Company, Inc., Barry Davis Company, Inc., Sandler Construction, Inc., and Tilton Group, Inc. -- are former members of, but no longer belong to SIF, nor were they members when this lawsuit was brought. See attached Affidavit of Jeffrey Ranew. Therefore, each of these parties lack standing to assert the alleged causes of action against the Defendants, and they must be dismissed from this action.

3. The Trust Agreement is not a Contract; Breach of Contract Claim Fails.

A trust agreement is not a contract, and a trustee who fails to perform his duties is not liable to a beneficiary for breach of contract. *Restatement (Second) of Trusts* § 197 cmt. b (1959) ("The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract.").

Furthermore, a glaring deficiency in the Complaint is Plaintiffs' failure to even allege the existence of a contract between Plaintiffs and SIF, or between Plaintiffs and the Trustees. This simple allegation cannot be made because there is no such contract, nor has there ever been one. Plaintiffs further fail to allege how such a non-existent contract was created, and they fail to allege how it was breached. The Trust Agreement, in essence, creates SIF, and there are no parties to the Trust Agreement in the traditional sense of how a contract is formed. The Trust Agreement creates no mutuality of obligation and no reciprocal rights between Plaintiffs and SIF or the Trustees. As a result, the Trust Agreement is not a contract.

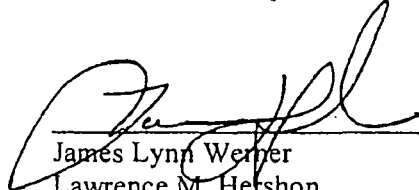
4. Breach of Contract Accompanied by a Fraudulent Act Fails.

Because the Trust Agreement is not a contract, the cause of action for breach of contract accompanied by a fraudulent act cannot survive. *Armstrong v. Collins*, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005) (having a contract is a prerequisite to proving breach of contract accompanied by a fraudulent act).

In addition, Plaintiffs fail to allege any particularized fraudulent intent relating to the alleged breaching of the contract by the Trustees.

CONCLUSION

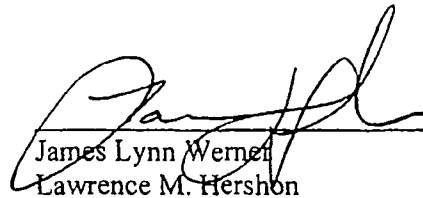
As detailed in each section above, Plaintiffs' Complaint is deficient and must be dismissed as a matter of law.



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October 2, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2013-CP-40-02655

**MEMORANDUM IN OPPOSITION
TO DEFENDANTS'
MOTION TO DISMISS**

INTRODUCTION

The Plaintiffs are beneficiaries of a trust and sued the Defendants for breach of their duties as trustees. The matter was originally brought in February 2012 as case number 2012-CP-32-00757. In that case, the Trustees moved for dismissal on the basis that the Trustees must be sued in Probate Court. Judge Manning granted that motion. The Plaintiffs then sued in Probate Court on April 9, 2013, and the case was removed to Circuit Court. The Defendants have now moved to dismiss on the basis that the new lawsuit is a shareholder derivative action and does not comply with Rule 23(b)(1) of the Rules of Civil Procedure governing stockholder actions.

ROA-000198

APP000204

STATEMENT OF FACTS

In September 1995, the South Carolina Home Builders Association created a trust to administer worker's compensation benefits for members of the South Carolina Home Builders Association. That trust is referred to as the South Carolina Home Builders Self Insurers Fund. (Attached as Exhibit A). The fund had several members of the South Carolina Home Builders Association on its board and worked in conjunction with the South Carolina Home Builders Association to sell worker's compensation insurance policies and administer the policies.

The Trustees have made significant actions towards dissolving the trust and creating a new insurance company with the proceeds. The new insurance company would be a mutual insurance company of which the Trustees would all be board members. The insurance company would not have any particular benefit to the beneficiaries of the trust. The assets of the trust would be used to set up a company competing with the trust. The Trustees transferred approximately five million dollars out of the trust to do this. At some point, they transferred the money back into the trust. There is approximately \$20,000,000 remaining in the trust to fund its liabilities. However, the Trustees intend to use these funds to set up a separate insurance company which will convey no benefit to the beneficiaries of the trust.

The Trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit to the beneficiaries of the trust. The Trustees have used these assets to begin setting up a separate insurance company which will convey no benefit to the beneficiaries of the trust and have not reimbursed the trust for these costs including the use of facilities, the software programs, and the employees of the trust. If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk. (Affidavit of

David Gully, attached as Exhibit B). All beneficiaries of the trust are subject to personal liability for any shortfall in trust assets.

ARGUMENT

I. THIS TRUST ACTION IS NOT A DERIVATIVE ACTION, THEREFORE ALL PLEADING REQUIREMENTS HAVE BEEN MET.

A. THE PLEADING REQUIREMENTS OF SCRCP 23(B) DO NOT APPLY BECAUSE PLAINTIFFS ARE NOT SHAREHOLDERS AND THE TRUST IS NOT A CORPORATION OR AN UNINCORPORATED ASSOCIATION.

The Defendants are incorrect in their assertion that Plaintiffs' claims are a derivative action. Under South Carolina law, "derivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure." S.C. Code Ann. § 33-7-400 (2013). The applicable rule is South Carolina Rule of Civil Procedure 23(b)(1), Derivative Actions by Shareholders., which states:

In a derivative action brought by one or more *shareholders or members to enforce a right of a corporation or of an unincorporated association*, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law.

SCRCP Rule 23 (b)(1) (emphasis added). To bring a derivative action, a corporation must suffer an injury because of wrongs committed by the officers or directors. Either the corporation or its shareholders can bring the action. Any relief goes to the corporation, not the shareholders. *In re Greenwood Supply Co.*, 295 B.R. 787, 795 (Bankr. D.S.C. 2002).

The Defendants have attempted to re-classify this breach of trust suit as a shareholder derivative action by labeling the Plaintiffs as shareholders. The case law cited by the Defendants

regarding shareholder suits does not apply because the Plaintiffs are not shareholders.¹ Instead, they are beneficiaries of the trust. A shareholder is a “person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent rights granted by a nominee certificate are on file with a corporation.” S.C. Code Ann. § 33-1-400. The Plaintiffs are beneficiaries of the Home Builders Trust. In addition, each beneficiary of the trust is jointly and severally liable for underfunded losses of the Self Insurers Fund. (Affidavit of David Gully, ¶ 13, attached as Exhibit B). Under South Carolina law, a shareholder cannot be liable for corporate losses. S.C. Code Ann. § 33-6-220(b). The Trustees must operate the trust for the beneficiaries’ benefit, not for their own benefit or the benefit of a corporation or association.

In addition, the rule only applies to “derivative actions brought by one or more shareholders or members to enforce a right *of a corporation or of an unincorporated association*.” SCRCP Rule 23 (b)(1) (emphasis added). The trust is not a corporation, and it is not an unincorporated association. It is a trust. Under South Carolina law, trusts are treated separately from unincorporated associations. South Carolina Code Section 12-37-3160(c) defines a legal entity as a “corporation, partnership, limited liability company, unincorporated association, or trust.” *See also* S.C. Code Ann. §§ 27-29-10(3), 37-25-10(2). This illustrates that a trust and an unincorporated association are separate legal entities.

The Defendants cite *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 184, 64 S.E.2d 524, 528 (1951), to support their claim that the trust beneficiaries may only bring stockholder derivative actions to address trustee misconduct. In that case, the Plaintiffs sued an eleemosynary

¹ Defendants cite *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012), *Clearwater Trust v. Bunting*, 367 S.C. 340, 626 S.E.2d 334 (2006), *Babb v. Rothrock*, 303 S.C. 462, 401 S.E.2d 418 (1991), and *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), all of which involve shareholders, not beneficiaries, bringing actions against directors of corporations.

corporation, not the trustees of a trust. The court held that the “ability to sue for vindication of a right in the *corporation* is universally recognized when the *corporation*, through its executives, fails and refuses to so proceed.” *Id.* at 191, 64 S.E.2d at 531 (emphasis added). In fact, the court allowed the lawsuit without a presuit request for action. And, the defendant was a corporation, not a trust.

The second case cited by Defendants involves the administration of an estate, not a trust. *Bailes v. S. Ry. Co.*, 227 S.C. 176, 87 S.E.2d 481 (1955). In that case, the administrator, acting as the representative of the statutory beneficiaries, refused to bring an action for wrongful death as requested by the beneficiaries. *Id.* at 178, 87 S.E.2d at 482. The court held that since the action could only be brought by the administrator, and he refused to do so, the beneficiaries had a cause of action against the administrator. *Id.* Under those circumstances, the beneficiaries were acting on behalf of the trust, since a wrongful death action can only be brought by the estate administrator. *Id.* at 183, 87 S.E.2d at 184.

Ex parte Morgan Asset Mgmt., Inc., 86 So. 3d 309 (Ala. 2011), reh'g denied (Dec. 16, 2011), involved an action brought by shareholders of investment funds against their investment management corporation based on the lowering of share values. This was an action against a corporation by shareholders. It was not an action by beneficiaries against a trustee.

The action brought by the Plaintiffs is not a derivative action. The Plaintiffs are not shareholders, and the trust is not a corporation or an unincorporated association. The Plaintiffs are beneficiaries of a trust. Therefore, the Plaintiffs are not bound by the additional pleading requirements of SCRPC 23(b)(1).

II. BENEFICIARIES OF A TRUST MAY SUE TRUSTEES FOR WRONGDOING IN ADMINISTERING THE TRUST.

Many South Carolina cases involve actions brought by beneficiaries against trustees in which a derivative action was *not* required: *E.g. Cartee v. Lesley*, 290 S.C. 333, 335, 350 S.E.2d 388, 389 (1986) ("Petitioners are the beneficiaries of a trust administered by [the trustees]. The beneficiaries brought suit against the trustees for negligence and breach of fiduciary duty alleging the estate had been mismanaged."); *Epworth Orphanage v. Long*, 199 S.C. 385, 19 S.E.2d 481 (1942) ("The complaint alleges a cause of action in equity against the executors and trustees of a testamentary trust, all the beneficiaries of said trust being made parties."); *Mayer v. M.S. Bailey & Son*, 347 S.C. 353, 359-60, 555 S.E.2d 406, 409 (Ct. App. 2001) ("we hold that as a minimum the [beneficiaries] had both standing and justiciable rights that a court of equity could protect."); *Rembert v. Gressette*, 318 S.C. 519, 520, 458 S.E.2d 552, 553 (Ct. App. 1995) ("Three beneficiaries . . . opposed the planned distribution of the trust assets and counterclaimed against the trustees...."); *Ramage v. Ramage*, 283 S.C. 239, 243, 322 S.E.2d 22, 25 (Ct. App. 1984) ("[The beneficiaries] brought this action to have the quitclaim deed set aside and to enforce the terms of the trust.). South Carolina courts allow trust beneficiaries to bring actions against trustees. There is no South Carolina rule, statute or case which treats an action by trust beneficiaries as a derivative stockholder action.

III. EVEN THOUGH THE TRUST BENEFICIARIES ARE NOT SUBJECT TO RULE 23(b)(1), THEY HAVE COMPLIED WITH IT.

The beneficiaries have complied with the requirements of Rule 23(b)(1). This rule requires a verification of the complaint. Each plaintiff has verified the complaint under oath. These verifications were served on the Defendants.

Rule 23(b)(1) also requires that the Plaintiff set forth "the efforts, if any, made" to obtain the action desired. The complaint sets this out as follows:

8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:
 - a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.
 - b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

Plaintiffs' counsel also sent a letter to defense counsel setting forth the relief requested before bringing the suit. A copy of this letter is attached as Exhibit C. It sets out the relief sought in detail as follows:

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.
2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

As a result, the Plaintiffs have complied with Rule 23(b)(1) by stating in detail their request for relief and verifying their complaint.

IV. THE BREACH OF CONTRACT CLAIMS ARE VALID.

A. TRUSTS MAY BE TREATED AS CONTRACTS.

South Carolina courts have referred to trust agreements as contracts. *See Klugh v. Seminole Sec. Co.*, 103 S.C. 120, 87 S.E. 644, 647 (1916) (“One of the expressed objects of the *trust contract* was to safeguard the subscribers to the capital stock.”) (emphasis added); *Welling v. Crosland*, 129 S.C. 127, 123 S.E. 776, 777 (1924) (“a *contract, called a “Trust Agreement,”* was entered into by and between the subscribers to the syndicate” (emphasis added); *V.P. Randolph & Co. v. Walker*, 78 S.C. 157, 59 S.E. 856 (1907) (“A complaint alleging that money was deposited with defendant in *trust* for plaintiff, subject to his order, and that defendant refused to pay the same, *states a cause of action in contract.*”) (emphasis added). The Fourth Circuit Court of Appeals was more direct when it simply stated “all express trusts [are] contractual relationship[s].” *In re Dameron*, 155 F.3d 718, 723 (4th Cir. 1998).

Other courts also agree that trusts fall under contract law principles, and are increasingly referring to trusts and contracts interchangeably. *See Williams v. Interpublic Severance Pay Plan*, 523 F.3d 819, 821 (7th Cir. 2008) (“Trust law honors rather than overrides express contractual language specifying a trustee's powers vis-à-vis a beneficiary.”); *Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir. 2000) (calling an ERISA plan a “contract”); *Herdrich v. Pegram*, 170 F.3d 683, 686 (7th Cir. 1999) (“[E]ven a full-fledged trustee need not (indeed, must not) depart from the contractual provisions that the settlor established.”), *rev'd*, 530 U.S. 211 (2000); *Gilbert v. Atl. Trust Co.*, No. 04-CV-327-PB, 2006 WL 1049707, at *4 n.6 (D.N.H., Apr. 19, 2006) (“I assume for the purpose of analysis that

the revocable trust agreement is in fact a contract.”); *In re Vebeliunas*, 252 B.R. 878, 887 (Bankr. S.D.N.Y. 2000) (“It follows that a trust, being a relationship, cannot have an alter ego, which would be akin to saying that someone is the ‘alter ego’ of a contract.”); *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83, 86 (1938) (“In such instances the breach of the trust is in effect and, usually, in fact a breach of contract, express or implied. Actions thereon are necessarily based on the contract and the breach thereof.”); *Wachovia Bank & Trust Co. v. Steele's Mills*, 225 N.C. 302, 309-10, 34 S.E.2d 425, 429 (1945) (“This agreement, [a trust], has the status of a contract.”)

The Home Builders Trust was a contract between the settler, the trustees and the beneficiaries. Because the Trustees have breached that trust, the breach of contract claims are valid.

B. EVEN IF THE TRUST IS NOT A CONTRACT, THERE WAS AN AGREEMENT BETWEEN THE TRUSTEES AND BENEFICIARIES THAT THE TRUST WOULD BE MANAGED ONLY FOR THE BENEFIT OF THE BENEFICIARIES.

An agreement, or contract, “is nothing more than a manifestation of mutual assent by two or more legally competent persons to one another.” 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 1:3, at 13–14 (4th ed. 1990). A trust is a “prevalingly contractarian institution.” John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 628, 637-43 (1995). “The settlor-trustee relationship is indeed contractual, as settlors and trustees are free to dicker over the terms of the trust ... even if in fact they do not.” Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 643-44 (2004); see also Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434, 469-72 (1998) (“trusts are contracts”).

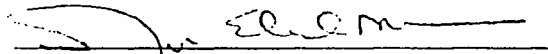
Under South Carolina law, a contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. *Gaskins v. Blue Cross-Blue*

Shield of South Carolina, 271 S.C. 101, 245 S.E.2d 598 (1978). The necessary elements of a contract are an offer, acceptance, and consideration. *Carolina Amusement Co., Inc. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993). This trust agreement necessarily falls under this category. There was an agreement by the Trustees of the Home Builders Trust to operate the trust in a prescribed manner. The Trustees receive consideration for this operation. Therefore, a contract was made between the beneficiaries of the trust and the trustees, and the breach of contract claims are valid.

CONCLUSION

For the reasons stated above, the court should deny the Defendants' Motion to Dismiss.

Respectfully submitted,



James Edward Bradley
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
803-796-9160
Attorney for the Plaintiffs

West Columbia, South Carolina

October 8, 2013

AGREEMENT AND DECLARATION OF TRUST
CREATING THE
SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

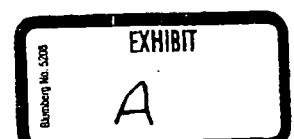
THIS AGREEMENT, made and entered into this 27 day of September, 1995 by and between the Home Builders Association of South Carolina, Inc., a corporation not for profit, organized and existing under and by virtue of the laws of the State of South Carolina, hereinafter referred to as the "Settlor", and a Board of Trustees, hereinafter referred to as the "Trustees", has been designated for the purposes, among others, of directing the affairs of the Fund.

WITNESSETH:

WHEREAS, the Settlor and the Trustees intend to apply to the South Carolina Workers' Compensation Commission for the establishment of a group self insurers fund pursuant to South Carolina statutes for the benefit of the members of the Home Builders Association of South Carolina, Inc.; and

WHEREAS, the establishment of a group self insurers fund for the purpose of satisfying an employers' obligation under the South Carolina Workers' Compensation Act would be in the best interest of the members of the Home Builders Association of South Carolina, Inc.; and

WHEREAS, it is considered to be in the best interest of the members of the Home Builders Association of South Carolina, Inc. that an Agreement and Declaration of Trust fully setting forth the duties and responsibilities of the Trustees be entered into;



NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND is hereby established as follows:

ARTICLE I

DEFINITIONS

Fund - The group self insurers fund or funds which are hereby created for the purposes set forth herein.

Indemnity Agreement - The Indemnity Agreement which shall be filed by the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND pursuant to the Rules for Self Insurers as issued by the South Carolina Workers' Compensation Commission.

Member - A company, firm, corporation, individual, partnership or other legal entity involved in on-site home construction which is a participating member in good standing of the Home Builders Association of South Carolina, Inc.

Rules for Self-Insurers - The Rules for Self Insurers under the South Carolina Workers' Compensation Act as amended from time to time and administered by the South Carolina Workers' Compensation Commission.

Service Agent - Any individual, co-partnership, corporation, firm or other legal entity engaged in the business of servicing approved workers' compensation self-insurance programs which has made application to, and been approved by, the South Carolina Workers' Compensation Commission.

Trustees - The Trustees appointed to serve on the Board of Trustees of this Fund as provided herein.

ARTICLE II

CREATION OF THE TRUST

There is hereby established and created a Trust Fund which shall be known as the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND and the Trustees thereof may hold property, enter into contracts and in all matters as hereinafter set forth act in behalf of the Trust Fund in that name. This Trust Fund shall be used for the purposes as hereinafter set forth.

ARTICLE III

PURPOSE

This Trust Agreement is made and executed for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; to form an overall self insurers fund pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building industry.

ARTICLE IV

DESIGNATION OF TRUSTEES

SECTION 1 NUMBER AND ELIGIBILITY OF TRUSTEES

The operation and administration of the Trust Fund shall be the joint responsibility of a Board of Trustees consisting of a number of Trustees of not less than five (5) nor more than nine (9). The Board of Trustees shall consist of at least one representative from each of the five Home Builders Association of South Carolina, Inc. districts. The President and Vice President of the Home Builders Association of South Carolina, Inc. shall serve as Ex-Officio Trustees; they shall have voting privileges if and only if they are Members of the Fund. Except for the two Ex-Officio Trustees, Trustees shall be elected by the participating Members by a mail ballot.

*Trustee elections shall be held by mail ballot to all members of the Fund. Trustees receiving a vote of 51% of returned ballots shall be declared duly elected. The Trustees shall elect from one of their number, one Trustee to serve as Chairman. Except for the two Ex-Officio Trustees, only members of the Home Builders Association of South Carolina, Inc. whose businesses participate in the Trust, or their employees, may serve as Trustees. If the Trust wants to change the makeup of the Board of Trustees or requirements for being a Trustee, it must first be approved by the Home Builders Association of South Carolina Board of Directors.

SECTION 2 RESIGNATION OR REMOVAL OF TRUSTEES

Any Trustee herein named, or any successor Trustee, may resign at any time, with or without cause, by giving not less than sixty (60) days written notice of the intention to so resign to the Board of Trustees and to the Board of Directors of the Home Builders Association of South Carolina, Inc. The Board of Directors of the Home Builders

*By-Law change approved by The SCHBSIF Board of Trustees on November 13, 1997.

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Association of South Carolina, Inc. may remove a Trustee now serving or any successor Trustee with or without cause, by giving not less than ten (10) days written notice to the Trustee being removed and to the Board of Trustees. Prior to the effective date of such resignation or removal, the Board of Trustees shall nominate a successor Trustee to complete the term of the removed Trustee, subject to the approval of the Executive Committee of the Board of Directors of the Home Builders Association of South Carolina, Inc. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee or subsequent to his resignation or removal as Trustee. A successor Trustee shall not be required to inquire into or take any notice of the prior administration of the Trust Fund. Any successor Trustee, immediately upon his acceptance in writing to the Trust, shall become vested with all the estate, rights, powers, discretion and duties of his predecessor Trustee with like effect as if originally named as Trustee herein.

No Trustee may be appointed who is, or continues to serve as a Trustee after becoming an owner, officer or employee of a service agent.

SECTION 3. TRUSTEES' TITLE.

In case of death, resignation, refusal or inability to act by any one or more of the Trustees, the remaining Trustees shall have all of the powers, rights, estates and interest of this Trust and shall be charged with its duties, provided that in such cases, no action may be taken unless it is concurred in by not less than a majority of the remaining Trustees, which shall be not less than two (2) in number.

SECTION 4. TRUSTEE OFFICERS.

The Trustees shall meet as promptly as possible after execution of this Trust Agreement and elect from among the Trustees a Chairman and a Secretary of the Board of Trustees. The term of such offices shall commence on the date of their election and continue to the end of the fiscal year. Thereafter, such officers shall be elected annually.

ARTICLE V

ADMINISTRATION OF FUND

SECTION 1. MEETINGS.

The Trustees shall meet at least quarterly, and more often if required, at the principal office of the Fund or at such other location as may be acceptable to a majority of the Trustees. The Chairman of the Trustees shall set the date, time and location of each meeting, and notice thereof shall be furnished to each Trustee by the Secretary or Administrator not less than ten (10) days prior to the date of such meeting. Such notice shall specify the date, time and location of such meeting and may specify the purpose thereof and any action proposed to be taken thereat. Whenever any notice is required to be given to any Trustee hereunder, such notice shall be directed to the said Trustee by certified mail, return receipt requested, to the address of such Trustee as recorded in the office of the Fund.

Special meetings of the Trustees may be held at any time and place without notice provided all Trustees execute a waiver of notice and consent to the said meeting.

For the purposes of a duly called and noticed meeting of the Board of Trustees a quorum shall consist of four (4) members of the Board of Trustees, unless the Board of

Trustees consists of less than four (4) Trustees in which case all Trustees shall be required to constitute a quorum. Meetings, including votes, may be conducted by telephone conference. The Secretary, acting Secretary, or his designee shall keep minutes of all meetings, proceedings and acts of the Board of Trustees, but such minutes need not be verbatim. Copies of all minutes of the meetings of the Board of Trustees shall be sent by the Secretary, acting Secretary or a designee to all Trustees.

SECTION 2. VOTING.

All actions by, and decisions of, the Board of Trustees shall be by the vote of a majority of the number of Trustees attending a duly called meeting of the Trustees at which a quorum is present; provided, however, that actions by, and decisions of, the Board of Trustees may be taken by a vote of a majority of the number of Trustees attending a special meeting without notice when a proper waiver and consent has been obtained as provided in Section I above.

SECTION 3. OFFICE OF THE FUND.

The Trustees shall establish and maintain an office of the Fund, the exact location of which is to be made known to the parties interested in or participating in the said Fund and to the appropriate governmental agencies and departments of state. The books and records pertaining to the Fund and its administration shall be kept and maintained at the office of the Trust.

SECTION 4. EXECUTION OF DOCUMENTS.

A certificate signed by the chairman and secretary of the Fund shall be evidence of the action of the Board of Trustees and any such certificate or other instrument so signed shall

conclusively be presumed to be authentic, and all facts and matters stated therein shall conclusively be presumed to be true.

SECTION 5. APPOINTMENT OF ADMINISTRATOR.

The Trustees shall designate a fiscal agent and/or an Administrator to administer the financial affairs of the Fund; provided, however, such fiscal agent or Administrator shall not be an owner, officer, or employee of a service agent.

Any fiscal agent and/or Administrator so appointed shall furnish a fidelity bond with the Trust as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities held by or in the name of the Fund. The amount of the bond shall be determined by the Trustees and evidence of such bond shall be filed with the appropriate governmental agencies and departments.

SECTION 6. APPROVAL OF NEW MEMBERS.

The Trustees, after the inception date of the Fund, shall receive applications for membership from prospective new members to the Fund and shall approve such application for membership in accordance with the Rules for Self-Insurers, the terms of the Indemnity Agreement, and the rules and regulations established and promulgated by the Trustees for the admission of new members to the Fund. The Board of Trustees may delegate the ministerial authority for membership approval to the Administrator or such other person as they select; provided that such Administrator or person designated is not an owner, officer, or employee of a service agent. Membership in the Fund is also contingent on the regulations of the state of South Carolina and approval by the South Carolina Workers' Compensation Commission.

SECTION 7. ESTABLISHMENT OF FUNDS.

The Trustees shall be responsible for establishing such Trustee funds, loss funds, or other funds which may be required from time to time by South Carolina Statutes, or the Rules for Self-Insurers or the Rules of Conduct and Administration of this Fund as may be established by the Trustees from time to time.

SECTION 8. POSTING OF SECURITY.

The Trustees shall be responsible for and shall undertake the posting of such security deposit and/or security bonds as may be required to be posted with the South Carolina Workers Compensation Commission pursuant to South Carolina Statutes, or the Rules for Self-Insurers or such other legislative enactments or administrative regulations which may be established from time to time.

SECTION 9. REPORTS BY TRUSTEES.

The Trustees shall be responsible for and shall cause to be filed such annual or other periodic audits, reports, and disclosures as may be required from time to time pursuant to applicable federal or state statutes or governmental regulations.

SECTION 10. FISCAL MANAGEMENT AND AUTHORITY.

The Trustees shall have said authority and take all necessary precautions to safeguard the assets of the Fund including, but not limited, to the following:

- a. The designation of a fiscal agent and/or Administrator to administer the financial affairs of the Fund, who shall furnish a fidelity bond with the Trustees as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Trustees, and

evidence of such bond shall be filed with the Commission, said bond being one of the conditions required for approval of the establishment and continued operation of a self insurers fund. Such fiscal agent or Administrator shall be an owner, officer, or employee of the service organization.

b. Retaining control of all monies collected or disbursed for the Fund. All loss funds or funds of any type shall remain in the custody of the Trustees or the authorized Administrator. Provided, however, that a revolving fund for payment of compensation benefits due and other related expenses may be established for the use of the authorized service company. The service company shall furnish a fidelity bond covering its employees, with the Trustees as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Provided, however, that should the bond required of the fiscal agent and/or Administrator also cover the monies in the revolving fund, separate bond shall not be required.

c. Having the accounts and records of the Fund audited annually or at any other time as may be necessary to determine the financial stability of the Fund or the adequacy of the monetary reserves, such audits to be made by Certified Public Accountants.

d. The Trustees shall make active efforts to collect delinquent accounts resulting from any unpaid premiums by members.

e. The Trustees or fiscal agent or Administrator shall not utilize any of the monies collected as premium for any purpose unrelated to workers' compensation insurance.

f. The Trustees shall be authorized to invest Trustees' funds, claims funds and unappropriated surplus in the following types of investments only:

1. Savings accounts or certificates of deposit in a duly chartered commercial bank located within the State of South Carolina and insured through the Federal Deposit Insurance Corporation.

2. Share accounts or savings certificates in a duly chartered savings and loan association located within the State of South Carolina and insured through the Federal Savings and Loan Insurance Corporation.

3. Direct obligations of the United States Treasury, such as notes, bonds or bills which are backed by the full faith and credit of the United States Government.

g. The safety of any investment of surplus monies or claims reserves shall be the responsibility of the Trustees.

h. The Trustees shall be prohibited from making any type of investment as authorized by these rules with the intent to trade, dispose or sell the security in any manner other than redeeming it at maturity. Therefore, it shall be the responsibility of the Trustee to purchase securities in such denominations and with dates of maturity to insure that these securities shall be redeemable at the same time and in the same amounts as the Fund's current and long-term liabilities.

i. The Trustees shall report annually, as part of the financial statement of the Fund, a schedule showing the disposition of all investment income earned during the Fund year just ended.

j. The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act which is incorporated herein by

reference as permitted by statute 62-7-703 (b) as if fully set out herein.

SECTION 11. RULES AND REGULATIONS.

The Trustees may prescribe such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided the rules and regulations shall not be inconsistent with the provisions of this Declaration of Trust, the Indemnity Agreement, the Rules for Self Insurers, applicable federal and/or state statutes and applicable governmental regulations.

SECTION 12. TRUSTEES' LIABILITIES.

No Trustees shall be liable for any action taken pursuant to this Trust Agreement in good faith or for an omission, by any other Trustee or by any employee of Trustee.

The Trustees are hereby authorized and empowered to obtain, at the expense of the Fund, liability insurance fully protecting the Trustees and the Fund from any loss or expense incurred, including reasonable attorney's fees, for all acts of the Trustees except bad faith and gross negligence on the part of the Trustees. The Fund hereby agrees to save, hold harmless and indemnify the Trustees while acting in the capacity of Trustees excepting bad faith and gross negligence.

SECTION 13. RELIANCE ON COUNSEL'S OPINION.

The Trustees may consult with legal counsel concerning any questions which may arise with reference to the duties and powers or with reference to any other matter pertaining to this Agreement or the Trust created hereby; and the opinion of such counsel shall be full and complete authorization and protection in respect to any action taken or suffered by the Trustees hereunder in good faith in accordance with the opinion of such counsel, and the

Trustees shall not be liable therefor.

ARTICLE VI
MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Settlor. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by a concurrence of all of the parties to this Agreement, including the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule ~~against perpetuities; in which case, the Trust may continue in perpetuity unless otherwise~~ terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

SECTION 3. SITUS OF THE TRUST.

This Trust Agreement is executed by the parties hereto and accepted by the Trustees in the State of South Carolina, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of South Carolina.

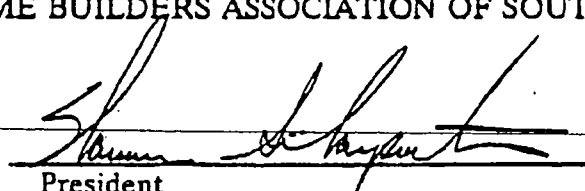
SECTION 4. CONSTRUCTION.

Whenever any words are used in this Agreement in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and whenever any words are used in this Agreement in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and whenever any words were used in the Agreement in the plural form, they shall be construed as though they were also in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, this Agreement and Declaration of Trust has been executed the day and year first above written.

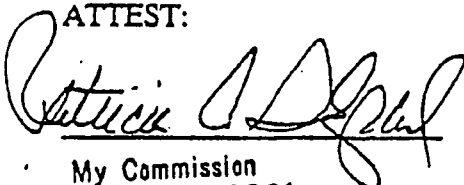
SETTLOR:

HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA, INC.

By: 

President

ATTEST:



My Commission
expires 5-2-2001

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2012-CP-32-00757

AFFIDAVIT OF DAVID GULLY

The affiant being duly sworn testifies as follows:

1. I am over the age of 18 and otherwise qualified to give sworn testimony in court.
2. I am a residential home builder and owner of Central Contracting. I have a residential homebuilder's license.
3. I am the current president of the Home Builders Association of South Carolina for the year 2012. In 2011, I served as vice president of that organization, and in 2010, I served as treasurer. I have been involved with the Home Builders Association of South Carolina for a significant amount of time.



4. I am also a member of the South Carolina Home Builders Self Insurers Fund through my company Central Contracting.

5. My company has been involved with the South Carolina Home Builders Self Insurers Fund for a significant amount of time. The South Carolina Home Builders Self Insurers Fund provides workers compensation coverage for my company.

6. I have been an ex-officio of the South Carolina Home Builders Self Insurers Fund when I was vice president of the Home Builders Association of South Carolina in 2011. I was a voting ex-officio member.

7. The South Carolina Home Builders Self Insurers Fund Trustees voted to remove the ex-officio members or I would still be an ex-officio member of the Self Insurers Fund.

8. The Home Builders Association of South Carolina has approximately 3400 members. The South Carolina Home Builders Self Insurers Fund has approximately 600 members.

9. As recently as several years ago, there were approximately 1700 members of the South Carolina Home Builders Self Insurers Fund. Since that time, membership has been reduced to approximately 600 members.

10. The South Carolina Home Builders Self Insurers Fund is a trust which was created by the Home Builders Association of South Carolina as settlor. A copy of the trust agreement is attached as Exhibit A to my affidavit.

11. As originally set up, the trust was created to serve the members of the Home Builders Association. Originally, in order to be a beneficiary of the Self Insurers Fund trust, the insured had to be owned or controlled by a member of the Home Builders Association of South Carolina.

12. The trustees have recently voted to remove that requirement for beneficiaries.
13. Under this arrangement, each beneficiary of the trust is jointly and severally liable for underfunded losses of the Self Insurers Fund.
14. As such, the trust is to be administered in the best interest of the beneficiaries, and the trustees have a fiduciary duty to the beneficiaries of the trust.
15. The trustees have not fulfilled this fiduciary duty including, but not limited to, the following ways:
 - a. The trustees have voted to remove assets from the trust in order to incorporate a new member owned insurance company which will confer no benefit upon the beneficiaries of the trust.
 - b. The trustees have removed approximately \$5,000,000 from the trust corpus for the purpose of establishing a separate insurance company which will not provide any benefits to the beneficiaries of the trust and will increase the personal risk to the beneficiaries of the trust.
 - c. There is approximately \$20,000,000 remaining in the trust to fund its liabilities which upon information and belief the trustees intend to use to set up a separate insurance company which will convey no benefit to the beneficiaries of the trust.
 - d. The trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit on the beneficiaries of the trust.
 - e. The trustees have used these assets to begin setting up a separate insurance company which will convey no benefit to the beneficiaries of the trust and

have not reimbursed the trust for these costs including the use of facilities, the software computer programs, and the employees of the trust.

- f. Under the trustees' management, the beneficiary membership has decreased such that the risk undertaken by the trust and its beneficiaries is not sufficiently spread.
- g. In order to increase membership in the trust, the trustees have written new policies with high risk that expand past their experience in new construction which will further deplete the assets of the trust and convey no benefit on the beneficiaries of the trust.
- h. The trustees have used trust funds to hire attorneys, consultants, and other employees for the purpose of setting up a competing insurance company which will convey no benefit on the members of the trust.

16. The representative parties in this matter will fairly and adequately protect the interests of the class which consists of the beneficiaries of the trust as they are beneficiaries of the trust and members of the Home Builders Association of South Carolina.

17. The amounts of money sought in this matter are more than \$100 for each beneficiary of the trust as this matter concerns millions of dollars in significant workers compensation insurance payments. The trust beneficiaries will have typical claims with the same claims and defenses for all members of the class.

18. The class consists of all current and former beneficiaries of the trust.

19. It would be in the best interests of the beneficiaries to dissolve the trust holding sufficient funds to cover all losses and distribute the remaining assets to the beneficiaries.

20. If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk. I attach a letter sent by the trustees to beneficiaries of the trust indicating that excess funds held by the trust are not the property of the beneficiaries or intended to be used for the benefit of the beneficiaries. This letter along with other conduct as indicated above in this affidavit forms the basis for this lawsuit.

FURTHER AFFLIANT SAYETH NAUGHT.

D-2B-GU
David Gully

SWORN to before me this
9 day of August, 2012

Peter A. Hawley
Notary Public for South Carolina

My Commission Expires: 7/18/2017

AGREEMENT AND DECLARATION OF TRUST
CREATING THE
SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

THIS AGREEMENT, made and entered into this 27 day of September, 1995
by and between the Home Builders Association of South Carolina, Inc., a corporation not
for profit, organized and existing under and by virtue of the laws of the State of South
Carolina, hereinafter referred to as the "Sencior", and a Board of Trustees, hereinafter
referred to as the "Trustees", has been designated for the purposes, among others, of
directing the affairs of the Fund.

WITNESSETH:

WHEREAS, the Sencior and the Trustees intend to apply to the South Carolina
Workers' Compensation Commission for the establishment of a group self insurers fund
pursuant to South Carolina statutes for the benefit of the members of the Home Builders
Association of South Carolina, Inc.; and

WHEREAS, the establishment of a group self insurers fund for the purpose of
satisfying an employers' obligation under the South Carolina Workers' Compensation Act
would be in the best interest of the members of the Home Builders Association of South
Carolina, Inc.; and

WHEREAS, it is considered to be in the best interest of the members of the Home
Builders Association of South Carolina, Inc. that an Agreement and Declaration of Trust
fully setting forth the duties and responsibilities of the Trustees be entered into:

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND is hereby established as follows:

ARTICLE I

DEFINITIONS

Fund - The group self insurers fund or funds which are hereby created for the purposes set forth herein.

Indemnity Agreement - The Indemnity Agreement which shall be filed by the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND pursuant to the Rules for Self Insurers as issued by the South Carolina Workers' Compensation Commission.

Member - A company, firm, corporation, individual, partnership or other legal entity involved in on-site home construction which is a participating member in good standing of the Home Builders Association of South Carolina, Inc.

Rules for Self-Insurers - The Rules for Self Insurers under the South Carolina Workers' Compensation Act as amended from time to time and administered by the South Carolina Workers' Compensation Commission.

Service Agent - Any individual, co-partnership, corporation, firm or other legal entity engaged in the business of servicing approved workers' compensation self-insurance programs which has made application to, and been approved by, the South Carolina Workers' Compensation Commission.

Trustees - The Trustees appointed to serve on the Board of Trustees of this Fund as provided herein.

ARTICLE II

CREATION OF THE TRUST

There is hereby established and created a Trust Fund which shall be known as the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND and the Trustees thereof may hold property, enter into contracts and in all matters as hereinafter set forth act in behalf of the Trust Fund in that name. This Trust Fund shall be used for the purposes as hereinafter set forth.

ARTICLE III

PURPOSE

This Trust Agreement is made and executed for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act, to form an overall self insurers fund pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building Industry.

ARTICLE IV

DESIGNATION OF TRUSTEES

SECTION 1 NUMBER AND ELIGIBILITY OF TRUSTEES

The operation and administration of the Trust Fund shall be the joint responsibility of a Board of Trustees consisting of a number of Trustees of not less than five (5) nor more than nine (9). The Board of Trustees shall consist of at least one representative from each of the five Home Builders Association of South Carolina, Inc. districts. The President and Vice President of the Home Builders Association of South Carolina, Inc. shall serve as Ex-Officio Trustees; they shall have voting privileges if and only if they are Members of the Fund. Except for the two Ex-Officio Trustees, Trustees shall be elected by the participating Members by a mail ballot.

*Trustee elections shall be held by mail ballot to all members of the Fund. Trustees receiving a vote of 51% of returned ballots shall be declared duly elected. The Trustees shall elect from one of their number, one Trustee to serve as Chairman. Except for the two Ex-Officio Trustees, only members of the Home Builders Association of South Carolina, Inc. whose businesses participate in the Trust, or their employees, may serve as Trustees. If the Trust wants to change the makeup of the Board of Trustees or requirements for being a Trustee, it must first be approved by the Home Builders Association of South Carolina Board of Directors.

SECTION 2 RESIGNATION OR REMOVAL OF TRUSTEES

Any Trustee herein named, or any successor Trustee, may resign at any time, with or without cause, by giving not less than sixty (60) days written notice of the intention to so resign to the Board of Trustees and to the Board of Directors of the Home Builders Association of South Carolina, Inc. The Board of Directors of the Home Builders

*By-Law change approved by The SCHBSIF Board of Trustees on November 13, 1997.

Association of South Carolina, Inc. may remove a Trustee now serving or any successor Trustee with or without cause, by giving not less than ten (10) days written notice to the Trustee being removed and to the Board of Trustees. Prior to the effective date of such resignation or removal, the Board of Trustees shall nominate a successor Trustee to complete the term of the removed Trustee, subject to the approval of the Executive Committee of the Board of Directors of the Home Builders Association of South Carolina, Inc. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee or subsequent to his resignation or removal as Trustee. A successor Trustee shall not be required to inquire into or take any notice of the prior administration of the Trust Fund. Any successor Trustee, immediately upon his acceptance in writing to the Trust, shall become vested with all the estate, rights, powers, discretion and duties of his predecessor Trustee with like effect as if originally named as Trustee herein.

No Trustee may be appointed who is, or continues to serve as a Trustee after becoming an owner, officer or employee of a service agent.

SECTION 3. TRUSTEES' TITLE.

In case of death, resignation, refusal or inability to act by any one or more of the Trustees, the remaining Trustees shall have all of the powers, rights, estates and interest of this Trust and shall be charged with its duties, provided that in such cases, no action may be taken unless it is concurred in by not less than a majority of the remaining Trustees, which shall be not less than two (2) in number.

SECTION 4. TRUSTEE OFFICERS:

The Trustees shall meet as promptly as possible after execution of this Trust Agreement and elect from among the Trustees a Chairman and a Secretary of the Board of Trustees. The term of such offices shall commence on the date of their election and continue to the end of the fiscal year. Thereafter, such officers shall be elected annually.

ARTICLE V

ADMINISTRATION OF FUND

SECTION 1. MEETINGS.

The Trustees shall meet at least quarterly, and more often if required, at the principal office of the Fund or at such other location as may be acceptable to a majority of the Trustees. The Chairman of the Trustees shall set the date, time and location of each meeting, and notice thereof shall be furnished to each Trustee by the Secretary or Administrator not less than ten (10) days prior to the date of such meeting. Such notice shall specify the date, time and location of such meeting and may specify the purpose thereof and any action proposed to be taken thereat. Whenever any notice is required to be given to any Trustee hereunder, such notice shall be directed to the said Trustee by certified mail, return receipt requested, to the address of such Trustee as recorded in the office of the Fund.

Special meetings of the Trustees may be held at any time and place without notice provided all Trustees execute a waiver of notice and consent to the said meeting.

For the purposes of a duly called and noticed meeting of the Board of Trustees a quorum shall consist of four (4) members of the Board of Trustees, unless the Board of

Trustees consists of less than four (4) Trustees in which case all Trustees shall be required to constitute a quorum. Meetings, including votes, may be conducted by telephone conference. The Secretary, acting Secretary, or his designee shall keep minutes of all meetings, proceedings and acts of the Board of Trustees, but such minutes need not be verbatim. Copies of all minutes of the meetings of the Board of Trustees shall be sent by the Secretary, acting Secretary or a designee to all Trustees.

SECTION 2. VOTING.

All actions by, and decisions of the Board of Trustees shall be by the vote of a majority of the number of Trustees attending a duly called meeting of the Trustees at which a quorum is present; provided, however, that actions by, and decisions of the Board of Trustees may be taken by a vote of a majority of the number of Trustees attending a special meeting without notice when a proper waiver and consent has been obtained as provided in Section I above.

SECTION 3. OFFICE OF THE FUND.

The Trustees shall establish and maintain an office of the Fund, the exact location of which is to be made known to the parties interested in or participating in the said Fund and to the appropriate governmental agencies and departments of state. The books and records pertaining to the Fund and its administration shall be kept and maintained at the office of the Trust.

SECTION 4. EXECUTION OF DOCUMENTS.

A certificate signed by the chairman and secretary of the Fund shall be evidence of the action of the Board of Trustees and any such certificate or other instrument so signed shall

conclusively be presumed to be authentic, and all facts and matters stated therein shall conclusively be presumed to be true.

SECTION 5. APPOINTMENT OF ADMINISTRATOR.

The Trustees shall designate a fiscal agent and/or an Administrator to administer the financial affairs of the Fund; provided, however, such fiscal agent or Administrator shall not be an owner, officer, or employee of a service agent.

Any fiscal agent and/or Administrator so appointed shall furnish a fidelity bond with the Trust as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities held by or in the name of the Fund. The amount of the bond shall be determined by the Trustees and evidence of such bond shall be filed with the appropriate governmental agencies and departments.

SECTION 6. APPROVAL OF NEW MEMBERS.

The Trustees, after the inception date of the Fund, shall receive applications for membership from prospective new members to the Fund and shall approve such application for membership in accordance with the Rules for Self-Insurers, the terms of the Indemnity Agreement, and the rules and regulations established and promulgated by the Trustees for the admission of new members to the Fund. The Board of Trustees may delegate the ministerial authority for membership approval to the Administrator or such other person as they select; provided that such Administrator or person designated is not an owner, officer, or employee of a service agent. Membership in the Fund is also contingent on the regulations of the state of South Carolina and approval by the South Carolina Workers' Compensation Commission.

SECTION 7. ESTABLISHMENT OF FUNDS.

The Trustees shall be responsible for establishing such Trustee funds, loss funds, or other funds which may be required from time to time by South Carolina Statutes, or the Rules for Self-Insurers or the Rules of Conduct and Administration of this Fund as may be established by the Trustees from time to time.

SECTION 8. POSTING OF SECURITY.

The Trustees shall be responsible for and shall undertake the posting of such security deposit and/or security bonds as may be required to be posted with the South Carolina Workers Compensation Commission pursuant to South Carolina Statutes, or the Rules for Self-Insurers or such other legislative enactments or administrative regulations which may be established from time to time.

SECTION 9. REPORTS BY TRUSTEES.

The Trustees shall be responsible for and shall cause to be filed such annual or other periodic audits, reports, and disclosures as may be required from time to time pursuant to applicable federal or state statutes or governmental regulations.

SECTION 10. FISCAL MANAGEMENT AND AUTHORITY.

The Trustees shall have said authority and take all necessary precautions to safeguard the assets of the Fund including, but not limited, to the following:

- a. The designation of a fiscal agent and/or Administrator to administer the financial affairs of the Fund, who shall furnish a fidelity bond with the Trustees as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Trustees, and

evidence of such bond shall be filed with the Commission, said bond being one of the conditions required for approval of the establishment and continued operation of a self insurers fund. Such fiscal agent or Administrator shall be an owner, officer, or employee of the service organization.

b. Retaining control of all monies collected or disbursed for the Fund. All loss funds or funds of any type shall remain in the custody of the Trustees or the authorized Administrator. Provided, however, that a revolving fund for payment of compensation benefits due and other related expenses may be established for the use of the authorized service company. The service company shall furnish a fidelity bond covering its employees, with the Trustees as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Provided, however, that should the bond required of the fiscal agent and/or Administrator also cover the monies in the revolving fund, separate bond shall not be required.

c. Having the accounts and records of the Fund audited annually or at any other time as may be necessary to determine the financial stability of the Fund or the adequacy of the monetary reserves, such audits to be made by Certified Public Accountants.

d. The Trustees shall make active efforts to collect delinquent accounts resulting from any unpaid premiums by members.

e. The Trustees or fiscal agent or Administrator shall not utilize any of the monies collected as premium for any purpose unrelated to workers' compensation insurance.

f. The Trustees shall be authorized to invest Trustees' funds, claims funds and unappropriated surplus in the following types of investments only:

1. Savings accounts or certificates of deposit in a duly chartered commercial bank located within the State of South Carolina and insured through the Federal Deposit Insurance Corporation.

2. Share accounts or savings certificates in a duly chartered savings and loan association located within the State of South Carolina and insured through the Federal Savings and Loan Insurance Corporation.

3. Direct obligations of the United States Treasury, such as notes, bonds or bills which are backed by the full faith and credit of the United States Government.

g. The safety of any investment of surplus monies or claims reserves shall be the responsibility of the Trustees.

h. The Trustees shall be prohibited from making any type of investment as authorized by these rules with the intent to trade, dispose or sell the security in any manner other than redeeming it at maturity. Therefore, it shall be the responsibility of the Trustee to purchase securities in such denominations and with dates of maturity to insure that these securities shall be redeemable at the same time and in the same amounts as the Fund's current and long-term liabilities.

i. The Trustees shall report annually, as part of the financial statement of the Fund, a schedule showing the disposition of all investment income earned during the Fund year just ended.

j. The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act which is incorporated herein by

reference as permitted by statute 62-7-703 (b) as if fully set out herein.

SECTION 11. RULES AND REGULATIONS.

The Trustees may prescribe such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided the rules and regulations shall not be inconsistent with the provisions of this Declaration of Trust, the Indemnity Agreement, the Rules for Self Insurers, applicable federal and/or state statutes and applicable governmental regulations.

SECTION 12. TRUSTEES' LIABILITIES.

No Trustees shall be liable for any action taken pursuant to this Trust Agreement in good faith or for an omission, by any other Trustee or by any employee of Trustee.

The Trustees are hereby authorized and empowered to obtain, at the expense of the Fund, liability insurance fully protecting the Trustees and the Fund from any loss or expense incurred, including reasonable attorney's fees, for all acts of the Trustees except bad faith and gross negligence on the part of the Trustees. The Fund hereby agrees to save, hold harmless and indemnify the Trustees while acting in the capacity of Trustees excepting bad faith and gross negligence.

SECTION 13. RELIANCE ON COUNSEL'S OPINION.

The Trustees may consult with legal counsel concerning any questions which may arise with reference to the duties and powers or with reference to any other matter pertaining to this Agreement or the Trust created hereby; and the opinion of such counsel shall be full and complete authorization and protection in respect to any action taken or suffered by the Trustees hereunder in good faith in accordance with the opinion of such counsel, and the

Trustees shall not be liable therefor.

ARTICLE VI MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Senator. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by a concurrence of all of the parties to this Agreement, including the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities; in which case, the Trust may continue in perpetuity unless otherwise terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

SECTION 3. SITUS OF THE TRUST.

This Trust Agreement is executed by the parties hereto and accepted by the Trustees in the State of South Carolina, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of South Carolina.

SECTION 4. CONSTRUCTION.

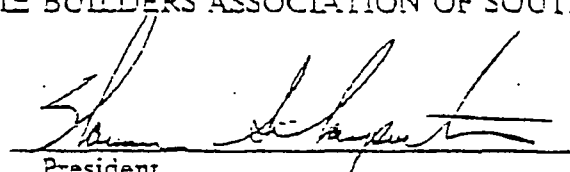
Whenever any words are used in this Agreement in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and whenever any words are used in this Agreement in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and whenever any words were used in the Agreement in the plural form, they shall be construed as though they were also in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, this Agreement and Declaration of Trust has been executed the day and year first above written.

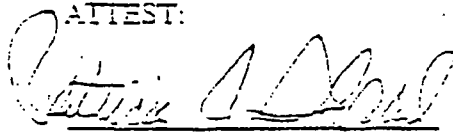
SETTLOR:

HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA, INC.

By:


President

ATTEST:


My Commission
expires 5-1-2001

ROA-000240

APP000246



March 28, 2012

Mr. Tony Thompson
President, HBA of Greater Columbia
PO Box 725
Columbia, SC 29202

Dear Mr. Thompson:

This is in response to your letter dated March 1, 2012.

As you may know, a civil action titled Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, and Michael Nierl, on behalf of themselves and others similarly situated v. Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Civil Action No. 2012-CP-32-00757, has been filed in Lexington County, South Carolina. A copy of the Complaint is attached for your information.

The SIF, its Board of Trustees and their attorneys believe the suit to be without merit and expect to defend the action vigorously. Strangely, most of the plaintiffs voted to approve the actions about which they now complain in their Complaint. Our attorneys have advised the Board and the staff not to discuss the details of the lawsuit. As a result, I will not address the issues in the lawsuit. However, I do want to address some questions that have been raised.

Before answering the questions, I do want to point out that the SIF operates pursuant to a Trust Agreement. Attached is a copy of the Trust Agreement for your ready reference. As you can see from the Trust Agreement, the Board of Trustees has the right to amend the Trust Agreement with the exception of certain limited matters. The Workers' Compensation Commission oversees the administration of the trust and approves or disapproves any amendments. The Trust Agreement has been amended, as the attached agreement reflects. Each amendment has been approved by the Workers' Compensation Commission.

It appears that there is a fair amount of misinformation floating around. Your questions reflect this. Answers to most of these questions have been previously provided. Nevertheless, it is important to the SIF that you, as a member, have accurate information and have your questions answered. Therefore, I address the questions as follows:

P.O. Box 7727 • Columbia, SC 29202 • 800/678-8178 • 803/771-0566
Claims Fax 803/771-1598 • Policy Services/Admin. Fax 803/252-8581

ROA-000241

APP000247



1. How long have you served as Trustee?
ANSWER: See Exhibit A that shows the length of service of each current trustee.
2. When was the last time you all held elections for trustees and why?
ANSWER: The Trust Agreement does not require that elections be held. However, the SIF has historically held elections every year. The last election was held during November of 2006. Elections were thereafter suspended while the effort was made to establish the mutual insurance company so there would be continuity of management.
3. Do you think the trustees for this Fund are a good representation of the Image the SCHBSIF would like to portray? This would include business and personal reputation?
ANSWER: Yes, all have been elected by the membership. Most have served in responsible positions in their local and statewide HBA.
4. Do you receive any compensation or perks as a Trustee?
ANSWER: Until 2008, trustees were not compensated at all. However, since then, the trustees receive \$250 for attending monthly board meetings, subject to a maximum of 12 annually. In addition, the trustees' expenses and those of their spouses and guests are paid for attendance at semi-annual meetings with other SIF's held in various locations throughout the country.
5. When will we have an opportunity to elect new members of the Board of Trustees?
ANSWER: Upon advice of counsel, no elections will be held while the lawsuit is pending.
6. Are there still plans to form a mutual Insurance company?
ANSWER: Yes. The formation of a mutual insurance company has been studied and worked on since 2003. It is the consensus of the Board that the formation of a mutual insurance company would benefit the members of the SIF who could then obtain insurance coverage from the mutual company, while claims liabilities of the SIF continue to decline over time resulting in the eventual elimination of joint and several liability for claims which exists with the SIF. The SIF membership voted by a margin of 96.5% to proceed with forming a mutual insurance company. The Home Builders Association of South Carolina has agreed that formation of the mutual company would serve the best interest of the members of the SIF.
7. Who owns the SIF? Who do the excess funds of the SIF belong to?
ANSWER: The SIF is a self-insured fund who administers the fund pursuant to the trust agreement, as regulated by the South Carolina Workers' Compensation Commission, legal title is held by the trustees. The assets of the SIF are owned by the SIF until such time as it may close, at which point any surplus assets may be distributed to policyholders with the approval of the South Carolina Workers' Compensation Commission. See attached letter dated August 4, 2011 from the South Carolina Workers' Compensation Commission.



8. Who owns the office building for the SIF?
ANSWER: The Building is owned by Center Point V, LLC, a single member LLC which is owned by the SIF. Ken Ormand, a member of the HBASC, handled the real estate transaction for the SIF. The SIF only occupies a part of the building and the remainder of the building is leased or offered for lease. The building is an asset of the SIF and was purchased with the approval of the South Carolina Workers' Compensation Commission. See the attached email copy dated August 9, 2010 from the South Carolina Workers' Compensation Commission.
9. How many people work for the SIF and what are the salaries of the employees? Are any present or past Trustees employed by the SIF?
ANSWER: The SIF currently employs 18 full time staff members. Salary information of individual employees is confidential. Salaries are within industry norms. No Trustees, past or present, have been employed by the SIF.
10. What is the impact of the joint and several liability issues to me as a member of the SIF?
ANSWER: I am pleased to report that the SIF is financially sound. No assessment is anticipated. It is not anticipated that any member would have exposure with regard to joint and several liability. See the attached letter dated August 4, 2011 from the South Carolina Workers' Compensation Commission.
11. Now that policyholders from the AGC's fund have been assessed, do you still feel that the HBA policyholders are completely safe from a future assessment?
ANSWER: The financial condition of the AGC Fund is entirely unrelated to the financial condition of the SIF. While we cannot predict future financial performance of the SIF with complete certainty, the SIF is in very sound financial condition and no assessment is anticipated.
12. How will the class action lawsuit against the Trustees affect the fund?
ANSWER: Upon information and belief, not at all other than payment of the cost of defense.
13. Was the SIF profitable for 2011? If not, how much of the excess funds was used?
ANSWER: The 2011 policy year audit will not be completed until June 2012; however, preliminary analysis indicates an operating gain will be recorded when the audit is completed.
14. How much of the policyholders money have been used to hire attorneys to take the actions against the HBA or used since January 1, 2011 outside the normal scope of the SIF?
ANSWER: None.



15. Why was the requirement for HBA membership removed by the SIF Board of Trustees?
ANSWER: This change in the Trust Agreement was made because of the many complaints from members who had no interest in being involved in the HBA but had to join the HBA in order to get their workers' compensation insurance coverage from the SIF. Since the HBA has provided no support, financial or otherwise, to the SIF, the Board made a decision to eliminate the requirement of HBA membership. The premiums will not be reduced but the prospective member will not have the additional cost of membership in the HBA in order to acquire insurance from the SIF. This will therefore reduce the cost to obtain workers' compensation insurance from the SIF. See the attached letters to SIF members dated February 14, 2012, and February 27, 2012.
16. Will my premiums be reduced now that I am not required to be a HBA member?
ANSWER: The calculation of premiums is completed independent of any factors not directly related to the SIF's revenues, and claims and operating expenses. HBASC membership is entirely unrelated to these calculations. See also answer to question #15.
17. Why were the HBA of South Carolina President and Vice President removed as SIF Trustees?
ANSWER: The President and Vice President of the HBA of South Carolina were ex-officio trustees pursuant to the Trust Agreement. Since the decision was made to sever the relationship with the HBASC and devote more financial resources to the local level, a decision was made to eliminate these two ex-officio trustee positions. See the attached letter to Michael Lowman dated September 15, 2011.
18. Does the SIF have a written standard for trustees regarding their own financial stability?
ANSWER: No.
19. Do any of the trustees owe money to any creditors for which they cannot pay?
ANSWER: The SIF does not investigate such matters.
20. Who founded the South Carolina Home Builders Self Insurers Fund and why has "founded by the Home Builders Association of South Carolina" been deleted from your recent description of the South Carolina Home Builders Self Insurers Fund?
ANSWER: Please refer to the enclosed Trust Agreement.



21. When the Trustees removed \$5 million from the SIF to form the mutual company why was the HBASC not informed? Did moving the money to the mutual company incur any liabilities on the policyholders?
ANSWER: Funds were transferred in response to the ratification of the ballot by SIF policyholders and with the approval of the South Carolina Workers' Compensation Commission. There was no requirement to give notice of this action to the HBASC. However, the HBASC had two ex-officio members on the SIF Board. Therefore, the HBASC had notice. The transfer did not cause any member to incur any liability.
22. Has the \$5 million been placed back into the SIF accounts?
ANSWER: Yes. See the attached email copy dated May 23, 2011 from the South Carolina Workers' Compensation Commission.
23. If those who caused you to be appointed or elected as a trustee requested that you resign as a trustee would you do so?
ANSWER: No.
24. It would seem that it is very abnormal for the trustees to meet monthly especially since none of the trustees have insurance experience. If the Trustees are compensated is it based on a per meeting basis?
ANSWER: The trustees have extensive experience in the leadership and operation of the SIF as evidenced by its strong financial condition. In addition to individual study of risk management and insurance conducted by each trustee, the board of trustees as a group has for many years participated in semi-annual meetings with other home builders' SIF's domiciled in other states that provide training and information about industry changes. It is normal and customary for the leadership of most financial institutions such as banks and insurance companies to meet monthly. The SIF trustees have held monthly meetings year in and year out since 1995. See also answer to question #4.
25. If you agree that the trustees should meet monthly then please explain to us why?
ANSWER: Meetings have been held monthly and are necessary for the proper management and oversight of the Fund.



In closing I would like to assure you and other SIF members that the SIF remains financially sound and in full compliance with Title 42 of the South Carolina Code of Laws, and with Regulation 67-1501 contained therein. The SIF is off to a great year, with 833 renewals (96%) and 29 new members. The Board of Trustees remains committed to serving the SIF and its members, providing a reliable, cost effective source of Workers' Compensation coverage to South Carolina's building community as we have since 1995.

Sincerely,

Herb Witter
Chairman

ROA-000246

APP000252

S. JAHUE MOORE
J. MARK TAYLOR*
DAVID L. THOMAS†
C. VANCE STRICKLIN, JR.
JAMES EDWARD BRADLEY
SHEILA McNAIR ROBINSON
ROBERT D. HAZEL
CHRISTIAN G. SPRADLEY††
C. DAVID SAWYER, JR.††
WILLIAM H. EDWARDS
STANLEY L. MYERS
JANE H. DOWNEY**
S. JAHUE MOORE, JR.
JOHN C. BRADLEY, JR.



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MELISSA K. MOORE
WILLIAM B. FORTINO
R. NICHOLS "NICK" RILEY, JR.
M. BROOKS BIEDIGER
AMBER L. FULMER
SARAH TAYLOR CASSIDY
MARGARET "MEG" HAZEL

RETIRED:
BILLY C. COLEMAN††

††SALUDA OFFICE:
(864) 445-4544 OR (866) 604-4544
†GREENVILLE OFFICE:
(864) 271-6371

January 30, 2013

Pope D. Johnson, III, Esquire
P.O. Drawer 11209
Columbia, SC 29211-1209

Re: Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michel Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, vs. Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund
C/A No. 2012-CP-40-04311

Dear Pope:

It is our understanding that you represent Defendant Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund. In that capacity, please take this letter as a request for action as follows on behalf of your clients. This letter is written to reaffirm previous actions taken and obtain actions from the Trustees of the South Carolina Home Builders Self Insurers Fund.

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

ROA-000247

*Fellow of the American Academy of Matrimonial Lawyers
**Certified by the American Academy of Matrimonial Lawyers



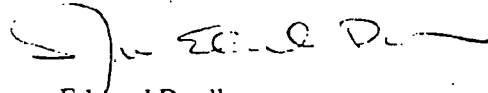
Pope D. Johnson, III, Esquire
January 17, 2013
Page 2

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

I believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. I believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

If your clients' position is any different, please let me know so we can discuss this matter. If I do not hear from you regarding this, I will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Sincerely,



James Edward Bradley

/lgi
cc: Allen Patterson
Stephen Tilton
Richard Sandler
Lincoln Privette
Marc Ellis
Joey Carter
Barry Davis
Michael Nieri
Mark Nix

ROA-000248

APP000254

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2013-CP-40-02655

**MEMORANDUM IN OPPOSITION
TO DEFENDANTS'
MOTION TO RECONSIDER
THE ORDER DENYING DEFENDANTS'
MOTION TO DISMISS**

INTRODUCTION

The Plaintiffs are beneficiaries of a trust and sued the Defendants for breach of their duties as trustees. The matter was originally brought in February 2012 as case number 2012-CP-32-00757. In that case, the Trustees moved for dismissal on the basis that the Trustees must be sued in Probate Court. Judge Manning granted that motion. The Plaintiffs then sued in Probate Court on April 9, 2013, and the case was removed to Circuit Court. The Defendants have now moved to dismiss on the basis that the new lawsuit is a shareholder derivative action and does not comply with Rule 23(b)(1) of the Rules of Civil Procedure governing stockholder actions.

ROA-000249

APP000255

STATEMENT OF FACTS

In September 1995, the South Carolina Home Builders Association created a trust to administer worker's compensation benefits for members of the South Carolina Home Builders Association. That trust is referred to as the South Carolina Home Builders Self Insurers Fund. (Attached as Exhibit A). The fund had several members of the South Carolina Home Builders Association on its board and worked in conjunction with the South Carolina Home Builders Association to sell worker's compensation insurance policies and administer the policies.

The Trustees have made significant actions towards dissolving the trust and creating a new insurance company with the proceeds. The new insurance company would be a mutual insurance company of which the Trustees would all be board members. The insurance company would not have any particular benefit to the beneficiaries of the trust. The assets of the trust would be used to set up a company competing with the trust. The Trustees transferred approximately five million dollars out of the trust to do this. At some point, they transferred the money back into the trust. There is approximately \$20,000,000 remaining in the trust to fund its liabilities. However, the Trustees intend to use these funds to set up a separate insurance company which will convey no benefit to the beneficiaries of the trust.

The Trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit to the beneficiaries of the trust. The Trustees have used these assets to begin setting up a separate insurance company which will convey no benefit to the beneficiaries of the trust and have not reimbursed the trust for these costs including the use of facilities, the software programs, and the employees of the trust. If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk. (Affidavit of

David Gully, attached as Exhibit B). All beneficiaries of the trust are subject to personal liability for any shortfall in trust assets.

ARGUMENT

I. THE HOME BUILDER'S TRUST IS A TRUST, NOT AN UNINCORPORATED ASSOCIATION.

A trust may be created by "written declaration signed by the owner of property that the owner holds identifiable property as trustee." S.C. Code Ann. § 62-7-401(a)(2) (2013). In order for a trust to be created, there must be "a declaration of the trust, property to which the trust pertained, a Trustee, and named beneficiaries." *Johnson v. Thornton*, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975). A beneficiary is defined as a "person that has a present or future beneficial interest in a trust, vested or contingent." S.C. Code Ann. § 62-7-103 (2)(A).

The Home Builder's Trust is a trust. It meets all requirements of a trust in South Carolina. The trust was created by a written declaration. There is identifiable property, named trustees, and the beneficiaries are named or identified. (Home Builder's Trust, p. 1-9, attached as Exhibit A). A trust is not an unincorporated association.

The United States Supreme Court had the opportunity to consider whether a trust should be treated as an unincorporated association for diversity jurisdiction purposes. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 458-59 (1980).¹ In that case, the Respondents asserted that the "trust form masks an unincorporated association." *Id.* at 461. The Respondents also contended that because the trust's operations were characteristic of an association, including "centralized management, continuity of enterprise, and unlimited duration," that the trust was "in substance an association." *Id.* at 461-62.

¹ South Carolina courts rely on federal precedent in derivative actions: "Rule 23(b)(1) of the South Carolina Rules of Civil Procedure adopts the federal derivative suit provision, Fed. R. Civ. P. 23.1...." S.C. Code Ann. § 33-7-400.

The 5th Circuit Court of Appeals and the Supreme Court disagreed. The Supreme Court stated that while certain attributes of the trust were shared by associations, having business-like practices was not dispositive evidence that a trust was an unincorporated association. *Id.* at 462. Even though shareholder beneficiaries had the power to elect and remove trustees, to terminate the trust, and to amend the Declaration or approve a majority disposition of the estate, this was insufficient to classify the trust as an unincorporated association. The Court concluded that despite these association-like characteristics, the trust was indeed a trust because the Trustees had real and substantial control over the property of the trust and the trustees' power was free from any control by the shareholder beneficiaries. *Id.* at 465 n. 14. "That the trust may depart from conventional forms in other respects has not bearing on this determination." *Id.* at 465. "We need not reject the argument that [the trust] shares some attribute of an association. In certain respects, a business trust also resembles a corporation. But this case involved neither an association nor a corporation. [The trust] is an express trust..." *Id.* at 462.

Like the trust in *Navarro*, the Home Builder's Trust may have some unconventional attributes. For example, the beneficiaries in the Home Builder's Trust are jointly and severably liable for underfunded losses. This is allowed under the South Carolina Trust Code. *See* S.C. Code Ann. § 62-7-105.² The Trustees assert that because the beneficiaries are jointly and

² The following items cannot be overridden by the trust code:

- (1) the requirements for creating a trust;
- (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful and possible to achieve;
- (4) the power of the court to modify or terminate a trust under Sections 62-7-410 through 62-7-416;
- (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Part 5;
- (6) the limitations on the ability of a settlor's agent under a power of attorney to revoke, amend, or make distributions from a revocable trust pursuant to Section 62-7-602(e);
- (7) the power of the court under Section 62-7-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (8) the effect of an exculpatory term under Section 62-7-1008;
- (9) the rights under Sections 62-7-1010 through 62-7-1013 of a person other than a trustee or beneficiary;

severally liable, this automatically makes them an unincorporated association. This assertion is illogical. By this reasoning, any joint tortfeasors would automatically qualify as an unincorporated association. Although the beneficiaries of the Homebuilder's Trust share in liability for shortfalls in trust assets, this alone does not make the trust an unincorporated association.

The Trustees also assert that the statutes cited by the court demonstrating that a trust is not an unincorporated association are not relevant. They contend that the statutes cited apply only to the respective categories in which they are located. This reasoning is in error. The statutes cited pose a listing of enterprises recognized in South Carolina. Each listing distinguishes a trust as a separate entity from all other enterprises, including unincorporated associations. S.C. Code Ann. §§12-34-3160(c), 27-29-10(3), 37-25-10(2). While the statutes cited may not fall under Corporations, Partnerships and Associations Title 33, the statutes do list a recognized listing of separate entities in South Carolina. Therefore, the statutes are relevant.

As stated by the United States Supreme Court *supra*, a trust is a separate entity from an unincorporated association. A trust does not become another type of enterprise because it may share some characteristics of that enterprise. The Home Builder's Trust calls itself a trust, calls its board members trustees, and meets the definition of a trust. Trusts are not treated as unincorporated associations in South Carolina, as shown by the statutes cited by the court. There is no authority to the contrary. Therefore, the Home Builder's Trust does not need to meet the derivative action requirements of unincorporated associations.

(10) periods of limitation for commencing a judicial proceeding;

(11) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and

(12) the subject matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 62-7-201 and 62-7-204.

S.C. Code Ann. 62-7-105(a). Therefore, having joint and several liability on the part of the beneficiaries is allowed under the code.

II. THE MEMBERS OF THE HOME BUILDER'S TRUST ARE BENEFICIARIES, NOT MEMBERS OF AN UNINCORPORATED ASSOCIATION.

Defendants assert that since the word "member" is used in place of "beneficiary," the members are not beneficiaries of the trust, but are members of an unincorporated association. This argument fails.

In *Navarro*, the United States Supreme Court referred to the beneficiaries as shareholders: "The respondents ... hold title to real estate investments in trust for the benefit of Fidelity's **shareholders**. The declaration of trust gives the respondents exclusive authority over this property free from any power and control of the **Shareholders** . . ." *Navarro*, 446 U.S. at 459 (internal citations omitted)(emphasis added). Because the trustees had the power to control the trust for the benefit of the shareholders, an express trust was created. *Id.* The Court did not quibble with semantics and used the substance of the written trust to come to its conclusion that the shareholders were beneficiaries. *Id.*

The creators of the Home Builder's Trust used the word "member" as a way to identify the beneficiaries. Just as in *Navarro*, it is clear from the content of the express trust that these members were to benefit from the trust's operations. (Home Builder's Trust, p. 1, 3, attached as Exhibit A). The members of the trust were beneficiaries, not members of an unincorporated association.

III. THE DERIVATIVE STATUTE DOES NOT APPLY TO TRUSTS.

In interpreting a statute, "a court should always turn first to one, cardinal canon [of construction] before all others": the plain meaning rule. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). The courts must presume that "Congress says in a statute what it means and means in a statute what it says...." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)(internal quotation marks omitted). When the words of a statute are

unambiguous “this first canon is also the last: ‘judicial inquiry is complete.’ ” *Conn. Nat’l Bank*, 503 U.S. at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). “Where a statute uses a word having a well-recognized meaning in law, the presumption is that the Legislature intended to use the word in that sense.” *Coakley v. Tidewater Construction Corp.*, 194 S.C. 284, 9 S.E.2d 724 (1940). “[L]egislative intent must prevail if it can reasonably be discovered in the language used construed in light of the intended purpose.” *Beaufort County v. Jasper County*, 220 S.C. 469, 68 S.E.2d 421 (1951).

The Defendants assert that SCRCP 23 applies to the Home Builder’s Trust. The Rule reads:

In a derivative action brought by one or more *shareholders or members to enforce a right of a corporation or of an unincorporated association*, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law.

SCRCP Rule 23 (b)(1) (emphasis added). According to the plain meaning of the rule, it applies to corporations and unincorporated associations, not to trusts. If the legislature had intended for the rule to apply to trusts, it would have included trusts in the language of the rule. All case law involving derivative actions in South Carolina involves corporations and unincorporated associations, including partnerships. No South Carolina court has ever applied this rule to trusts. The harm from the mismanagement of the trust flows directly to the beneficiaries, who are liable for any shortfalls in trust assets. The harm does not flow to a corporation. “[A] shareholder’s suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder.” *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (S.C. Ct. App. 2001). Here, the injury is to each beneficiary who must, *individually*, make up for

any shortfall in trust assets. The shortfall will not be made by the trustees or by any corporation. The burden stands on the shoulders of the beneficiaries. Therefore, according to the plain meaning of the rule and the case law on derivative suits, the court was correct in holding that SCRCP 23 does not apply to the action brought by the beneficiaries of the Home Builder's Trust.

IV. DEFENDANTS HAVE ALREADY ASSERTED THAT THE HOME BUILDER'S TRUST IS A TRUST, NOT AN ASSOCIATION OR CORPORATION.

The Plaintiffs are beneficiaries of a trust and sued the Defendants for breach of their duties as trustees. The matter was originally brought in February 2012 as case number 2012-CP-32-00757. In that case, the Trustees moved for dismissal on the basis that the Trustees must be sued in Probate Court. The Trustees stated: "this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust." (Notices of Motion and Motions to Dismiss by Defendants, p. 2, attached as Exhibit C). In support of this motion, the Trustees submitted the affidavit of Jeffrey Ranew. He continually refers to the South Carolina Home Builders Self Insurers Fund as a trust and the funds as a trust corpus. (Affidavit of Jeffrey Ranew, attached as Exhibit D).

Judge Manning granted the motion to dismiss, stating:

In particular, the Defendants have moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involved the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201.... It is clear from the documents submitted to the Court that this dispute concerns a trust.... With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

(Order by Judge Manning, Attached as Exhibit E). The Plaintiffs then sued in Probate Court on April 9, 2013, and the case was removed to Circuit Court.

Now, the Defendants are taking the position that the trust is not a trust, but an unincorporated association. Under the doctrine of judicial estoppel, the Trustees cannot now claim that the trust is not a trust when they previously maintained that it was a trust.

Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997) (citing *Colleton Regional Hosp. v. MRS Med. Rev. Sys.*, 866 F.Supp. 896 (D.S.C. 1994)). Judicial estoppel applies to inconsistent statements of fact. *Id.* “Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.” *Id.*

In *Hayne Federal Credit Union v. Bailey*, Mr. Bailey claimed ownership of a house through a resulting trust. In his divorce, he had disavowed any interest in the property and maintained that the property belonged to his son. The Supreme Court held Mr. Bailey was estopped from later claiming an interest in the property because in his divorce he attributed ownership to his son.

Likewise, the Trustees cannot now claim that the trust is not a trust. The Trustees obtained an Order from the court dismissing the previous lawsuit based on their factual assertion that the SIF was a trust. Now, the Trustees take the position that it is not a trust, but an association, which changes the pleading requirements of the lawsuit. The Trustees cannot assert these two different versions of the facts. They are bound by the assertion made in the previous lawsuit and the order which resulted. Thus, the Homebuilder’s Trust is a trust, not an

unincorporated association, and does not have to comply with SCRCP 23(b)(1) for a derivative action.

V. THE COURT CORRECTLY FOUND THAT THE PLAINTIFFS HAD MET THE REQUIREMENT OF SCRCP RULE 23.

The court held that even though it was not required, the Plaintiffs complied with Rule 23. The rule states that the complaint must be verified. The complaint was verified and the verifications served on Defendants. The rule also required the Plaintiffs to set forth the efforts made to obtain relief. Paragraph 8 of the complaint set forth these efforts. Paragraph 8 also referenced correspondence with the Defendants. This correspondence was in the form of a letter, which also set forth the relief requested.

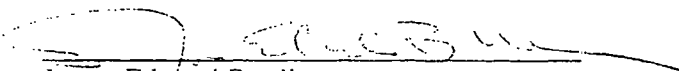
The facts of the sole case cited by Defendants to support the application of Rule 23 are not the same as the current issue. In that case, the shareholders failed to specify *any* type of effort made to resolve the issue. The court referred to language such as “certain information,” “certain actions,” “supplemental demand,” and “proposals” as too vague to comply with the rule that particularized allegations must be part of the complaint. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 189, 539 S.E.2d 402, 409 (S.C. Ct. App. 2000).

The beneficiaries of the Home Builder’s Trust did not use vague language. The court found that the language in Paragraph 8, which referred to a previous letter, was sufficient to meet the requirements of the rule. Therefore, even though it was not required, the Plaintiffs have met the burden of SCRCP 23 for derivative actions.

CONCLUSION

For these reasons, the court should deny the Defendants' Motion to Reconsider the Order Denying the Motion to Dismiss.

Respectfully submitted,



James Edward Bradley
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803-796-9160
Attorney for the Plaintiffs

West Columbia, South Carolina

January 6, 2014

AGREEMENT AND DECLARATION OF TRUST
CREATING THE
SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

THIS AGREEMENT, made and entered into this 27 day of September, 1995
by and between the Home Builders Association of South Carolina, Inc., a corporation not
for profit, organized and existing under and by virtue of the laws of the State of South
Carolina, hereinafter referred to as the "Sendor", and a Board of Trustees, hereinafter
referred to as the "Trustees", has been designated for the purposes, among others, of
directing the affairs of the Fund.

WITNESSETH:

WHEREAS, the Sendor and the Trustees intend to apply to the South Carolina
Workers' Compensation Commission for the establishment of a group self insurers fund
pursuant to South Carolina statutes for the benefit of the members of the Home Builders
Association of South Carolina, Inc.; and

WHEREAS, the establishment of a group self insurers fund for the purpose of
satisfying an employers' obligation under the South Carolina Workers' Compensation Act
would be in the best interest of the members of the Home Builders Association of South
Carolina, Inc.; and

WHEREAS, it is considered to be in the best interest of the members of the Home
Builders Association of South Carolina, Inc. that an Agreement and Declaration of Trust
fully setting forth the duties and responsibilities of the Trustees be entered into:

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EXHIBIT

A

Standard No. 1200

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND is hereby established as follows:

ARTICLE I

DEFINITIONS

Fund - The group self insurers fund or funds which are hereby created for the purposes set forth herein.

Indemnity Agreement - The Indemnity Agreement which shall be filed by the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND pursuant to the Rules for Self Insurers as issued by the South Carolina Workers' Compensation Commission.

Member - A company, firm, corporation, individual, partnership or other legal entity involved in on-site home construction which is a participating member in good standing of the Home Builders Association of South Carolina, Inc.

Rules for Self-Insurers - The Rules for Self Insurers under the South Carolina Workers' Compensation Act as amended from time to time and administered by the South Carolina Workers' Compensation Commission.

Service Agent - Any individual, co-partnership, corporation, firm or other legal entity engaged in the business of servicing approved workers' compensation self-insurance programs which has made application to, and been approved by, the South Carolina Workers' Compensation Commission.

Trustees - The Trustees appointed to serve on the Board of Trustees of this Fund as provided herein.

ARTICLE II

CREATION OF THE TRUST

There is hereby established and created a Trust Fund which shall be known as the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND and the Trustees thereof may hold property, enter into contracts and in all matters as hereinafter set forth act in behalf of the Trust Fund in that name. This Trust Fund shall be used for the purposes as hereinafter set forth.

ARTICLE III

PURPOSE

This Trust Agreement is made and executed for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; to form an overall self insurers fund pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building Industry.

ARTICLE IV

DESIGNATION OF TRUSTEES

SECTION 1 NUMBER AND ELIGIBILITY OF TRUSTEES

The operation and administration of the Trust Fund shall be the joint responsibility of a Board of Trustees consisting of a number of Trustees of not less than five (5) nor more than nine (9). The Board of Trustees shall consist of at least one representative from each of the five Home Builders Association of South Carolina, Inc. districts. The President and Vice President of the Home Builders Association of South Carolina, Inc. shall serve as Ex-Officio Trustees; they shall have voting privileges if and only if they are Members of the Fund. Except for the two Ex-Officio Trustees, Trustees shall be elected by the participating Members by a mail ballot.

*Trustee elections shall be held by mail ballot to all members of the Fund. Trustees receiving a vote of 51% of returned ballots shall be declared duly elected. The Trustees shall elect from one of their number, one Trustee to serve as Chairman. Except for the two Ex-Officio Trustees, only members of the Home Builders Association of South Carolina, Inc. whose businesses participate in the Trust, or their employees, may serve as Trustees. If the Trust wants to change the makeup of the Board of Trustees or requirements for being a Trustee, it must first be approved by the Home Builders Association of South Carolina Board of Directors.

SECTION 2 RESIGNATION OR REMOVAL OF TRUSTEES

Any Trustee herein named, or any successor Trustee, may resign at any time, with or without cause, by giving not less than sixty (60) days written notice of the intention to so resign to the Board of Trustees and to the Board of Directors of the Home Builders Association of South Carolina, Inc. The Board of Directors of the Home Builders

*By-Law change approved by The SCHBSIF Board of Trustees on November 13, 1997.

Association of South Carolina, Inc. may remove a Trustee now serving or any successor Trustee with or without cause, by giving not less than ten (10) days written notice to the Trustee being removed and to the Board of Trustees. Prior to the effective date of such resignation or removal, the Board of Trustees shall nominate a successor Trustee to complete the term of the removed Trustee, subject to the approval of the Executive Committee of the Board of Directors of the Home Builders Association of South Carolina, Inc. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee or subsequent to his resignation or removal as Trustee. A successor Trustee shall not be required to inquire into or take any notice of the prior administration of the Trust Fund. Any successor Trustee, immediately upon his acceptance in writing to the Trust, shall become vested with all the estate, rights, powers, discretion and duties of his predecessor Trustee with like effect as if originally named as Trustee herein.

No Trustee may be appointed who is, or continues to serve as a Trustee after becoming an owner, officer or employee of a service agent.

SECTION 3. TRUSTEES' TITLE.

In case of death, resignation, refusal or inability to act by any one or more of the Trustees, the remaining Trustees shall have all of the powers, rights, estates and interest of this Trust and shall be charged with its duties, provided that in such cases, no action may be taken unless it is concurred in by not less than a majority of the remaining Trustees, which shall be not less than two (2) in number.

SECTION 4. TRUSTEE OFFICERS.

The Trustees shall meet as promptly as possible after execution of this Trust Agreement and elect from among the Trustees a Chairman and a Secretary of the Board of Trustees. The term of such offices shall commence on the date of their election and continue to the end of the fiscal year. Thereafter, such officers shall be elected annually.

ARTICLE V

ADMINISTRATION OF FUND

SECTION 1. MEETINGS.

The Trustees shall meet at least quarterly, and more often if required, at the principal office of the Fund or at such other location as may be acceptable to a majority of the Trustees. The Chairman of the Trustees shall set the date, time and location of each meeting, and notice thereof shall be furnished to each Trustee by the Secretary or Administrator not less than ten (10) days prior to the date of such meeting. Such notice shall specify the date, time and location of such meeting and may specify the purpose thereof and any action proposed to be taken thereat. Whenever any notice is required to be given to any Trustee hereunder, such notice shall be directed to the said Trustee by certified mail, return receipt requested, to the address of such Trustee as recorded in the office of the Fund.

Special meetings of the Trustees may be held at any time and place without notice provided all Trustees execute a waiver of notice and consent to the said meeting.

For the purposes of a duly called and noticed meeting of the Board of Trustees a quorum shall consist of four (4) members of the Board of Trustees, unless the Board of

Trustees consist of less than four (4) Trustees in which case all Trustees shall be required to constitute a quorum. Meetings, including votes, may be conducted by telephone conference. The Secretary, acting Secretary, or his designee shall keep minutes of all meetings, proceedings and acts of the Board of Trustees, but such minutes need not be verbatim. Copies of all minutes of the meetings of the Board of Trustees shall be sent by the Secretary, acting Secretary or a designee to all Trustees.

SECTION 2. VOTING.

All actions by, and decisions of the Board of Trustees shall be by the vote of a majority of the number of Trustees attending a duly called meeting of the Trustees at which a quorum is present: provided, however, that actions by, and decisions of the Board of Trustees may be taken by a vote of a majority of the number of Trustees attending a special meeting without notice when a proper waiver and consent has been obtained as provided in Section I above.

SECTION 3. OFFICE OF THE FUND.

The Trustees shall establish and maintain an office of the Fund, the exact location of which is to be made known to the parties interested in or participating in the said Fund and to the appropriate governmental agencies and departments of state. The books and records pertaining to the Fund and its administration shall be kept and maintained at the office of the Trust.

SECTION 4. EXECUTION OF DOCUMENTS.

A certificate signed by the chairman and secretary of the Fund shall be evidence of the action of the Board of Trustees and any such certificate or other instrument so signed shall

conclusively be presumed to be authentic, and all facts and matters stated therein shall conclusively be presumed to be true.

SECTION 5. APPOINTMENT OF ADMINISTRATOR.

The Trustees shall designate a fiscal agent and/or an Administrator to administer the financial affairs of the Fund; provided, however, such fiscal agent or Administrator shall not be an owner, officer, or employee of a service agent.

Any fiscal agent and/or Administrator so appointed shall furnish a fidelity bond with the Trust as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities held by or in the name of the Fund. The amount of the bond shall be determined by the Trustees and evidence of such bond shall be filed with the appropriate governmental agencies and departments.

SECTION 6. APPROVAL OF NEW MEMBERS.

The Trustees, after the inception date of the Fund, shall receive applications for membership from prospective new members to the Fund and shall approve such application for membership in accordance with the Rules for Self-Insurers, the terms of the Indemnity Agreement, and the rules and regulations established and promulgated by the Trustees for the admission of new members to the Fund. The Board of Trustees may delegate the ministerial authority for membership approval to the Administrator or such other person as they select, provided that such Administrator or person designated is not an owner, officer, or employee of a service agent. Membership in the Fund is also contingent on the regulations of the state of South Carolina and approval by the South Carolina Workers' Compensation Commission.

SECTION 7. ESTABLISHMENT OF FUNDS.

The Trustees shall be responsible for establishing such Trustee funds, loss funds, or other funds which may be required from time to time by South Carolina Statutes, or the Rules for Self-Insurers or the Rules of Conduct and Administration of this Fund as may be established by the Trustees from time to time.

SECTION 8. POSTING OF SECURITY.

The Trustees shall be responsible for and shall undertake the posting of such security deposit and/or security bonds as may be required to be posted with the South Carolina Workers Compensation Commission pursuant to South Carolina Statutes, or the Rules for Self-Insurers or such other legislative enactments or administrative regulations which may be established from time to time.

SECTION 9. REPORTS BY TRUSTEES.

The Trustees shall be responsible for and shall cause to be filed such annual or other periodic audits, reports, and disclosures as may be required from time to time pursuant to applicable federal or state statutes or governmental regulations.

SECTION 10. FISCAL MANAGEMENT AND AUTHORITY.

The Trustees shall have said authority and take all necessary precautions to safeguard the assets of the Fund including, but not limited, to the following:

- a. The designation of a fiscal agent and/or Administrator to administer the financial affairs of the Fund, who shall furnish a fidelity bond with the Trustees as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Trustees, and

evidence of such bond shall be filed with the Commission, said bond being one of the conditions required for approval of the establishment and continued operation of a self insurers fund. Such fiscal agent or Administrator shall be an owner, officer, or employee of the service organization.

b. Retaining control of all monies collected or disbursed for the Fund. All loss funds or funds of any type shall remain in the custody of the Trustees or the authorized Administrator. Provided, however, that a revolving fund for payment of compensation benefits due and other related expenses may be established for the use of the authorized service company. The service company shall furnish a fidelity bond covering its employees, with the Trustees as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Provided, however, that should the bond required of the fiscal agent and/or Administrator also cover the monies in the revolving fund, separate bond shall not be required.

c. Having the accounts and records of the Fund audited annually or at any other time as may be necessary to determine the financial stability of the Fund or the adequacy of the monetary reserves, such audits to be made by Certified Public Accountants.

d. The Trustees shall make active efforts to collect delinquent accounts resulting from any unpaid premiums by members.

e. The Trustees or fiscal agent or Administrator shall not utilize any of the monies collected as premium for any purpose unrelated to workers' compensation insurance.

f. The Trustees shall be authorized to invest Trustees' funds, claims funds and unappropriated surplus in the following types of investments only:

1. Savings accounts or certificates of deposit in a duly chartered commercial bank located within the State of South Carolina and insured through the Federal Deposit Insurance Corporation.

2. Share accounts or savings certificates in a duly chartered savings and loan association located within the State of South Carolina and insured through the Federal Savings and Loan Insurance Corporation.

3. Direct obligations of the United States Treasury, such as notes, bonds or bills which are backed by the full faith and credit of the United States Government.

g. The safety of any investment of surplus monies or claims reserves shall be the responsibility of the Trustees.

h. The Trustees shall be prohibited from making any type of investment as authorized by these rules with the intent to trade, dispose or sell the security in any manner other than redeeming it at maturity. Therefore, it shall be the responsibility of the Trustee to purchase securities in such denominations and with dates of maturity to insure that these securities shall be redeemable at the same time and in the same amounts as the Fund's current and long-term liabilities.

i. The Trustees shall report annually, as part of the financial statement of the Fund, a schedule showing the disposition of all investment income earned during the Fund year just ended.

j. The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act which is incorporated herein by

reference as permitted by statute 62-7-703 (b) as is fully set out herein.

SECTION 11. RULES AND REGULATIONS.

The Trustees may prescribe such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided the rules and regulations shall not be inconsistent with the provisions of this Declaration of Trust, the Indemnity Agreement, the Rules for Self Insurers, applicable federal and/or state statutes and applicable governmental regulations.

SECTION 12. TRUSTEES' LIABILITIES.

No Trustees shall be liable for any action taken pursuant to this Trust Agreement in good faith or for an omission, by any other Trustee or by any employee of Trustee.

The Trustees are hereby authorized and empowered to obtain, at the expense of the Fund, liability insurance fully protecting the Trustees and the Fund from any loss or expense incurred, including reasonable attorney's fees, for all acts of the Trustees except bad faith and gross negligence on the part of the Trustees. The Fund hereby agrees to save, hold harmless and indemnify the Trustees while acting in the capacity of Trustees excepting bad faith and gross negligence.

SECTION 13. RELIANCE ON COUNSEL'S OPINION.

The Trustees may consult with legal counsel concerning any questions which may arise with reference to the duties and powers or with reference to any other matter pertaining to this Agreement or the Trust created hereby; and the opinion of such counsel shall be full and complete authorization and protection in respect to any action taken or suffered by the Trustees hereunder in good faith in accordance with the opinion of such counsel, and the

Trustees shall not be liable therefor.

ARTICLE VI

MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Senator. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by a concurrence of all of the parties to this Agreement, including the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities; in which case, the Trust may continue in perpetuity unless otherwise terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

SECTION 3. SITUS OF THE TRUST.

This Trust Agreement is executed by the parties hereto and accepted by the Trustees in the State of South Carolina, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of South Carolina.

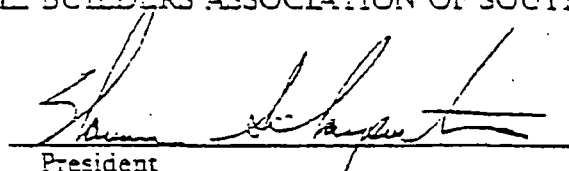
SECTION 4. CONSTRUCTION.

Whenever any words are used in this Agreement in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and whenever any words are used in this Agreement in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and whenever any words were used in the Agreement in the plural form, they shall be construed as though they were also in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, this Agreement and Declaration of Trust has been executed the day and year first above written.

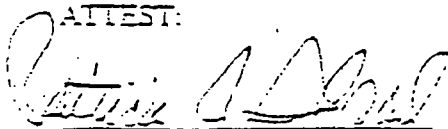
SETTLOR:

HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA, INC.

By: 

President

ATTEST:



My Commission
expires 5-2-2001

ROA-000273

APP000279

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sendler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2012-CP-32-00757

AFFIDAVIT OF DAVID GULLY

The affiant being duly sworn testifies as follows:

1. I am over the age of 18 and otherwise qualified to give sworn testimony in court.
2. I am a residential home builder and owner of Central Contracting. I have a residential homebuilder's license.
3. I am the current president of the Home Builders Association of South Carolina for the year 2012. In 2011, I served as vice president of that organization, and in 2010, I served as treasurer. I have been involved with the Home Builders Association of South Carolina for a significant amount of time.

4. I am also a member of the South Carolina Home Builders Self Insurers Fund through my company Central Contracting.

5. My company has been involved with the South Carolina Home Builders Self Insurers Fund for a significant amount of time. The South Carolina Home Builders Self Insurers Fund provides workers compensation coverage for my company.

6. I have been an ex-officio of the South Carolina Home Builders Self Insurers Fund when I was vice president of the Home Builders Association of South Carolina in 2011. I was a voting ex-officio member.

7. The South Carolina Home Builders Self Insurers Fund Trustees voted to remove the ex-officio members or I would still be an ex-officio member of the Self Insurers Fund.

8. The Home Builders Association of South Carolina has approximately 3400 members. The South Carolina Home Builders Self Insurers Fund has approximately 600 members.

9. As recently as several years ago, there were approximately 1700 members of the South Carolina Home Builders Self Insurers Fund. Since that time, membership has been reduced to approximately 600 members.

10. The South Carolina Home Builders Self Insurers Fund is a trust which was created by the Home Builders Association of South Carolina as settlor. A copy of the trust agreement is attached as Exhibit A to my affidavit.

11. As originally set up, the trust was created to serve the members of the Home Builders Association. Originally, in order to be a beneficiary of the Self Insurers Fund trust, the insured had to be owned or controlled by a member of the Home Builders Association of South Carolina.

12. The trustees have recently voted to remove that requirement for beneficiaries.
13. Under this arrangement, each beneficiary of the trust is jointly and severally liable for underfunded losses of the Self Insurers Fund.
14. As such, the trust is to be administered in the best interest of the beneficiaries, and the trustees have a fiduciary duty to the beneficiaries of the trust.
15. The trustees have not fulfilled this fiduciary duty including, but not limited to, the following ways:
 - a. The trustees have voted to remove assets from the trust in order to incorporate a new member owned insurance company which will confer no benefit upon the beneficiaries of the trust.
 - b. The trustees have removed approximately \$5,000,000 from the trust corpus for the purpose of establishing a separate insurance company which will not provide any benefits to the beneficiaries of the trust and will increase the personal risk to the beneficiaries of the trust.
 - c. There is approximately \$20,000,000 remaining in the trust to fund its liabilities which upon information and belief the trustees intend to use to set up a separate insurance company which will convey no benefit to the beneficiaries of the trust.
 - d. The trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit on the beneficiaries of the trust.
 - e. The trustees have used these assets to begin setting up a separate insurance company which will convey no benefit to the beneficiaries of the trust and

have not reimbursed the trust for these costs including the use of facilities, the software computer programs, and the employees of the trust.

- f. Under the trustees' management, the beneficiary membership has decreased such that the risk undertaken by the trust and its beneficiaries is not sufficiently spread.
- g. In order to increase membership in the trust, the trustees have written new policies with high risk that expand past their experience in new construction which will further deplete the assets of the trust and convey no benefit on the beneficiaries of the trust.
- h. The trustees have used trust funds to hire attorneys, consultants, and other employees for the purpose of setting up a competing insurance company which will convey no benefit on the members of the trust.

16. The representative parties in this matter will fairly and adequately protect the interests of the class which consists of the beneficiaries of the trust as they are beneficiaries of the trust and members of the Home Builders Association of South Carolina.

17. The amounts of money sought in this matter are more than \$100 for each beneficiary of the trust as this matter concerns millions of dollars in significant workers compensation insurance payments. The trust beneficiaries will have typical claims with the same claims and defenses for all members of the class.

18. The class consists of all current and former beneficiaries of the trust.

19. It would be in the best interests of the beneficiaries to dissolve the trust holding sufficient funds to cover all losses and distribute the remaining assets to the beneficiaries.

20. If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk. I attach a letter sent by the trustees to beneficiaries of the trust indicating that excess funds held by the trust are not the property of the beneficiaries or intended to be used for the benefit of the beneficiaries. This letter along with other conduct as indicated above in this affidavit forms the basis for this lawsuit.

FURTHER AFFIANT SAYETH NAUGHT.

D-2B-CL
David Gully

SWORN to before me this
9 day of August, 2012

Robert A. Hauler
Notary Public for South Carolina
My Commission Expires: 7/18/2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sandler, Lincoln Privette,)
Marc Ellis, Joey Carter, Betty Davis,)
And Michael Nier on behalf of)
Themselves and others similarly)
situated,)

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

**Notice of Motion and Motion to Dismiss
by Defendant South Carolina Home
Builders Self Insurers Fund**

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

TO: THE PLAINTIFFS and their attorneys

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Home Builders Self Insurers Fund ("SIF") will move to dismiss the Complaint in this action upon the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCF, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the plaintiffs to obtain the action they desire from the trustees or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.
2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the defendant from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew which is attached to the companion Motion of

#1 WNK
ROA-000279

APP000285

EXHIBIT

Defendants Herb Witter and the other Trustees and is incorporated by reference herein.

3. The cause of action for breach of contract should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached.
4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRCP, regarding allegations of fraud.
5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.
6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. The Affidavit of Jeffrey M. Ranew is submitted in support of this motion.
7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.
8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the trustees have been studied and considered in good faith and the defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.

#2 WWH

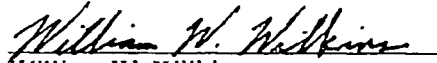
ROA-000280

APP000286

9. This action should be transferred for improper venue. S.C. Code Ann. Section 62-7-204 provides that the venue for a judicial proceeding involving a trust is the county in which the trust's principal place of administration is located, and the principal place of administration of the trust in this case is Richland County. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Home Builders Self Insurers Fund moves for a protective order pursuant to Rule 26(c)(1) and (2), SCRCP, upon the grounds that it should be protected from having to respond to the plaintiffs' Request for Production and the plaintiffs' Interrogatories until such time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment.


William W. Wilkins

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**Attorneys for Defendant South Carolina
Home Builders Self Insurers Fund**

Columbia, South Carolina
March 15, 2012

#3

ROA-000281

APP000287

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sandler, Lincoln Privette,)
Marc Ellis, Joey Carter, Betty Davis,)
And Michael Nier on behalf of)
Themselves and others similarly)
situated,)

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

**Notice of Motion and Motion to Dismiss
by Defendants Herb Witter, Colin
Campbell, Eddie Weaver, Tom
Markovich, Keith Smith, and Jim
Gregorie, Individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund**

TO: THE PLAINTIFFS and their attorneys

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as trustees of the South Carolina Home Builders Self Insurers Fund, move to dismiss the Complaint in this action upon the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCF, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the plaintiffs to obtain the action they desire from the trustees or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.
2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the defendant from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew.

ROA-000282

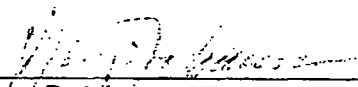
APP000288

3. The cause of action for breach of contract should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached.
4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the plaintiffs and the defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRPC, regarding allegations of fraud.
5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.
6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. The Affidavit of Jeffrey M. Ranew is submitted in support of this motion.
7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.
8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the trustees have been studied and considered in good faith and the defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.
9. This action should be transferred for improper venue. S.C. Code Ann. Section 62-7-204 provides that the venue for a judicial proceeding involving a trust is the county in which the trust's principal place of

administration is located, and the principal place of administration of the trust in this case is Richland County. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurance Fund, will move for a protective order pursuant to Rule 26(c)(1) and (2), SCRCP, upon the grounds that they should be protected from having to respond to the plaintiffs' Request for Production and the plaintiffs' Interrogatories until such time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment.


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**Attorney for Defendants Herb Witter,
Colin Campbell, Eddie Weaver, Tom
Markovich, Keith Smith and Jim
Gregorie, individually and as trustees of
the South Carolina Home Builders Self
Insurers Fund**

Columbia, South Carolina
March 15, 2012

ROA-000284

APP000290

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

C/A No. 2012-CP-40-4311

Allen Patterson, Steve Tilton, Richard
Sandler, Lincoln Privette, Marc Ellis, Joey
Carter, Betty Davis, and Michael Nier,
on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

**MOTION TO DISMISS AMENDED
COMPLAINT BY DEFENDANTS HERB
WITTER, COLIN CAMPBELL, EDDIE
WEAVER, TOM MARKOVICH, KEITH
SMITH, JIM GREGORIE, INDIVIDUALLY
AND AS TRUSTEES OF THE SOUTH
CAROLINA HOME BUILDERS SELF
INSURERS FUND**

YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund (the "Trustees") move for an Order dismissing Plaintiffs' Complaint on the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the Plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCF, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the Plaintiffs to obtain the action they desire from the Trustees or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.

2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the Trustees from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew, which is incorporated herein by reference and was previously attached to the Motion of the Defendant Trustees filed on March 20, 2012.

3. The cause of action for breach of contract should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of

PPAB 1978239v1

ROA-000285

APP000291

action in that the trust agreement is not a contract between the Plaintiffs and the Defendants and there are no allegations as to how a contract was created, nor how that contract was breached.

4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the Plaintiffs and the Defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRPC, regarding allegations of fraud.

5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.

6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. This motion is supported by the Affidavit of Jeffrey M. Ranew.

7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.

8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the Trustees have been studied and considered in good faith and the Defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.

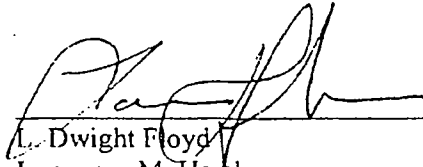
YOU WILL PLEASE TAKE NOTICE that Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, will move for a protective order pursuant to Rule 26(c)(1) and (2), SCRPC, upon the grounds that they should be protected from having to respond to the Plaintiffs' Request for Production and the Plaintiffs' Interrogatories until such

ROA-000286

APP000292

time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment.



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Attorneys for Defendants Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund

July 3, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

C/A No. 2012-CP-40-4311

Allen Patterson, Steve Tilton, Richard
Sendler, Lincoln Privette, Marc Ellis, Joey
Carter, Betty Davis, and Michael Nier,
on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

**MOTION TO DISMISS AMENDED
COMPLAINT BY DEFENDANT SOUTH
CAROLINA HOME BUILDERS SELF
INSURERS FUND**

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Home Builders Self Insurers Fund ("SIF") moves for an Order dismissing Plaintiffs' Complaint on the following grounds:

1. This action should be dismissed because it is a derivative action and fails to state facts to constitute a cause of action in that the Plaintiffs' complaint fails to comply with the requirements of Rule 23(b)(1), SCRCF, including the requirement that the complaint be verified, and fails to allege with particularity the efforts, if any, made by the Plaintiffs to obtain the action they desire from the SIF or the workers' compensation commission and, if necessary, from the members and the reasons for their failure to obtain the action or for not making the effort.

2. This action should be dismissed for failure to state facts sufficient to constitute a cause of action because the business judgment rule protects the Trustees from this action. This motion is supported by the Affidavit of Jeffrey M. Ranew, which is incorporated herein by reference and was previously attached to the Motion of Defendant Trustees filed on March 20, 2012.

3. The cause of action for breach of contract should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the Plaintiffs and the

ROA-000288

Defendants and there are no allegations as to how a contract was created, nor how that contract was breached.

4. The cause of action for breach of contract accompanied by a fraudulent act should be dismissed because the Plaintiffs have failed to state facts sufficient to constitute a cause of action in that the trust agreement is not a contract between the Plaintiffs and the Defendants and there are no allegations as to how a contract was created, nor how that contract was breached. Furthermore, plaintiffs have failed to meet the heightened pleading standard of Rule 9(b), SCRPC, regarding allegations of fraud.

5. In the alternative, this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust and is subject to the exclusive jurisdiction of the Probate Court pursuant to S.C. Code Ann. Section 62-7-201.

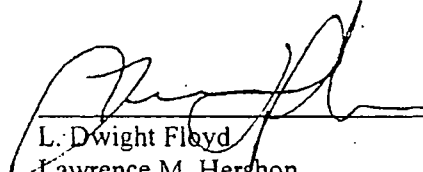
6. In the alternative, the action should be dismissed for lack of subject matter jurisdiction. The action involves a self insurance fund established pursuant to the South Carolina Workers' Compensation Act and Regulations related thereto, and the administration of the SIF is controlled and regulated by the South Carolina Workers' Compensation Commission and, upon information and belief, the plaintiffs have sought no relief from the Commission, which has approved actions taken by the SIF. This motion is supported by the Affidavit of Jeffrey M. Ranew.

7. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act should be dismissed for failure to state facts sufficient to constitute a cause of action because there is no contract between the defendants and the plaintiffs and there is no breach of contract accompanied by a fraudulent act or otherwise. This motion is supported by the Affidavit of Jeffrey M. Ranew.

8. This action should be dismissed for failure to state facts sufficient to constitute a cause of action upon the grounds that the actions of the Trustees have been studied and considered in good faith and the Defendants, under the Trust Agreement, are not liable for any action taken in good faith. This motion is supported by the Affidavit of Jeffrey M. Ranew.

YOU WILL PLEASE TAKE NOTICE that Defendant the South Carolina Home Builders Self Insurers Fund, will move for a protective order pursuant to Rule 26(c)(1) and (2), SCRPC, upon the grounds that they should be protected from having to respond to the Plaintiffs' Request for Production and the Plaintiffs' Interrogatories until such time as a determination is made as to whether this court has subject matter jurisdiction of the action.

YOU WILL TAKE FURTHER NOTICE that the Court will be asked, pursuant to Rule 12(b), SCRCP, to consider matters outside of the Complaint and treat the motion as one for summary judgment.



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Attorneys for Defendant the South Carolina Home
Builders Self Insurers Fund.

July 3, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sendler, Lincoln Privette,)
Marc Ellis, Joey Carter, Betty Davis,)
And Michael Nier on behalf of)
Themselves and others similarly)
situated,)

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

vs.)

Affidavit of Jeffrey M. Ranew

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

PERSONALLY APPEARED BEFORE ME, Jeffrey M. Ranew, who being duly sworn, deposes and says:

1. I am Jeffrey M. Ranew. I am the Administrator of the South Carolina Home Builders Self Insurers Fund ("SIF") and I have served in this capacity since March 24, 2003. I make this affidavit based upon personal knowledge.

2. The administration of the SIF is regulated and controlled by the South Carolina Workers' Compensation Commission. The SIF is not an insurance company and the South Carolina Department of Insurance has no control over the administration of the SIF. The SIF does not issue policies of insurance. If a home builder wants to become a member of the SIF in order to satisfy his employer's obligation under the South

ROA-000291

APP000297.

EXHIBIT

Carolina Workers' Compensation Act, he completes a workers' compensation application, completes a WCC Form 6a, and pays a \$25.00 non-refundable fee to the South Carolina Workers' Compensation Commission. Attached as Exhibit A is a copy of the workers' compensation application. Attached as Exhibit B is the WCC Form 6a. The WCC Form 6a and the check is then submitted to the Commission for approval. Upon approval, the home builder receives a certificate confirming that he is a member of the SIF. The SIF then provides the new member with a new member package with information about the SIF and the management of the SIF. Attached as Exhibit C is a new member package. After five weeks and a report on his operation, the new member is billed for the premium relating to his business. Attached as Exhibit D is a copy of the certificate that is issued. The certificate sets forth the responsibilities of the employer and the SIF. There are no written contracts signed by the member and the SIF. There are no written contracts signed by the member and the trustees.

3. The Complaint alleges that the defendants have used trust funds to purchase a building. Use of SIF funds for this purpose was approved by the South Carolina Workers' Compensation Commission. See Exhibit E. The building is owned by Center point V, LLC which is owned by the SIF. The SIF occupies part of the building, with the remainder being leased out or available for lease.

4. The Complaint alleges that the defendants removed approximately \$5,000,000.00 from the trust corpus for the purpose of establishing a separate mutual insurance company which would not provide any benefit to the beneficiaries of the trust. The funds were only transferred and held in an account after 96.5% of the SIF

membership voted to approve the transfer of the funds. The SIF mailed out 933 ballots and the vote was as follows:

- 533 marked "yes"
- 33 marked "no"
- 188 designated by recipient as "proxy"
- 179 abstentions subsequently recorded as "proxy"

After Board approval and acceptance of proxy votes, pursuant to the balloting letter, the vote tally was recorded as follows:

- Yes: 900 votes (96.5%)
- No: 33 votes (3.5%)

The plaintiffs voted as follows, as shown by their ballots marked Exhibit F:

- Lincoln Privette voted "yes" with conditions and his vote was counted as a "no" vote
- Joey Carter approved it
- Marc Ellis approved it
- Barry Davis approved and disapproved it
- Allen Patterson authorized the Board to vote on his behalf
- Richard Sandler approved it
- Michel Nieri approved it through his Authorized Agent Maureen Smirdall
- Ron Boshan approved it on behalf of Steve Tilton

Prior to the transfer of the funds, an agreement was reached that the \$5,000,000.00 would be returned to the SIF if an agreement could not be reached with the Home Builders Association of South Carolina ("HBASC") regarding the establishment and operation of the proposed mutual insurance company. The South Carolina Workers' Compensation Commission approved the transfer of the funds. See Exhibit G. When an agreement could not be reached with the HBASC regarding the establishment and operation of the proposed mutual insurance company, the application for a mutual insurance company was withdrawn, and the \$5,000,000.00 was returned to the SIF.

5. The establishment of a separate mutual insurance company has been studied and under consideration by the SIF since 2003 when the SIF Board Chairman and Administrator introduced the concept of a mutual insurance company to a meeting of the Home Builders Association of South Carolina senior leadership and received a provisional endorsement. Attached as Exhibit H are copies of Board Minutes beginning in 2003 wherein the establishment of a mutual insurance company has been addressed. There are real and substantial benefits in transitioning from a self insured fund to a mutual insurance company. Members of a mutual insurance company are not jointly and severally liable for claims as members of a self insured fund such as the SIF are. While SIF members would continue to remain jointly and severally liable for claims until the SIF is terminated, formation of a mutual company would start the process leading to termination of the SIF and the eventual end of exposure for joint and several liability. A mutual company could offer other types of insurance to a broader customer base which would help insure the viability and availability of the insurance coverage. The number of members of the SIF has been reduced because of the negative impact of the recession on the home building industry. The SIF's effort to move from a self insured fund to a mutual insurance company using \$5,000,000.00 in non-pledged assets of the SIF was approved last year by the South Carolina Workers' Compensation Commission. See Exhibit I.

6. The Complaint alleges that the trustees did not advise the beneficiaries that the funds that were being transferred to establish the mutual company could have been returned to the membership. Attached as Exhibit J is a letter from the South Carolina Workers' Compensation Commission which outlines all of the requirements for

seeking to distribute dividends to the membership. A return of member contributions in the amount of \$750,000.00 was made in 2009. Member contributions in the amount of \$750,000.00 were returned in 2010. However, there is no pending request to the Commission for additional return of member contributions or the payment of dividends.

7. The Complaint alleges that the trustees have taken significant amounts of money out of the trust for their own benefit by virtue of payments to themselves for unnecessary means and for other unnecessary payments. However, for the period from 1995 to 2008, the trustees received no compensation for time/travel to regularly scheduled board meetings. Beginning in 2008, the trustees began to receive \$250.00 for time/travel expense for each board meeting attended. There are 12 board meetings per year. If the trustee attends all meetings, he receives a maximum of \$3,000.00 per year. Board meetings frequently take as much as a full day. Some trustees travel from Seneca, Greenville and Charleston to attend these meetings. In addition thereto, approximately every six months, the trustees attend a meeting with similar SIF's from other states. The expense incurred for travel and meals for trustees and their spouses or guests are reimbursed by the SIF. According to the SIF records, trustees have attended such meetings since the mid-1990's.

8. In December 2007, the SIF hired a consulting firm to assist in selecting a new software computer program. The recommendation of the consulting firm was accepted and on December 19, 2008, the Board of Trustees voted to purchase the new software program.

9. To my knowledge, plaintiffs have filed no petitions with the South Carolina Workers' Compensation Commission seeking relief regarding the actions of the

defendants. Plaintiff Ellis did participate on behalf of the HBASC in a mediation between the SIF and the HBASC regarding establishment of the mutual insurance company. However, the plaintiffs have never contacted the SIF or sought to appear before the SIF Board to address and/or resolve their claims which are set forth in their complaint.

10. Attached hereto as Exhibit K is a true and genuine copy of the Agreement and Declaration of Trust dated September 27, 1995, with amendments, all of which have been approved by the South Carolina Workers' Compensation Commission as shown by the initials. Attached as Exhibit L are letters from the Commission regarding their approval.

11. The SIF's business office is located in Richland County and has always been located in Richland County. The offices are located at 1370 Browning Road, Suite 130, Columbia, South Carolina 29210, which is the principal place of administration of the Trust.

12. None of the alleged acts or omissions referred to in the Complaint have taken place in Lexington County. All SIF actions have taken place in Richland County.

SWORN TO AND SUBSCRIBED BEFORE ME

this 15 day of March, 2012

[Signature]
Notary Public for South Carolina

My Commission Expires: 7/6/15

[Signature]
Jeffrey M. Ranew

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton, Richard)
Sandler, Lincoln Privette, Marc Ellis,)
Joey Carter, Barry Davis, Michel Nieri,)
Allen Patterson Residential LLC, Tilton)
Group, Sandler Construction Co., Inc.,)
Privette Enterprises, Ellis Construction)
Company, Inc., The Barry Davis Company,)
Inc., Great Southern Homes, and J. Carter,)
LLC, on behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self Insurers Fund, and the South Carolina)
Home Builders Self Insurers Fund,)

Defendants.)

C/A No. 2012-CP-40-0431

RICHLAND COUNTY
FILED
2013 MAR -5 AM 10:19
JENNETTE H. McBRIDE
C.C.P. & G.S.

**ORDER DISMISSING MATTER
WITHOUT PREJUDICE**

This matter came before the Court on Tuesday, September 4, 2012 at 9:30 a.m.. S. Jahue Moore appeared on behalf of the Plaintiffs. Pope Johnson and Dwight Floyd appeared on behalf of the Defendants.

This matter is brought as a class action by members and beneficiaries of the Trust entitled the South Carolina Home Builders Self Insurers Fund.

The Defendants have set forth at least eight separately numbered reasons to dismiss this matter. The Court heard arguments from all parties regarding the motions to dismiss.

In particular, the Defendants moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involves the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201. That section indicates that "[s]ubject to the provisions of Section 62-1-302(d), the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts." Based upon this section, the Court is concerned that this matter should be initially filed in Probate Court rather than Circuit Court. The South Carolina Code also indicates that a matter of this type may be removed from Probate Court to Circuit Court under South Carolina Code Section 62-1-302(d)(4).

The Court is concerned regarding the matters of alleged lack of subject matter jurisdiction. The Court is concerned that this matter could be litigated in full and the subject matter question raised later. This would lead to a waste of judicial resources.

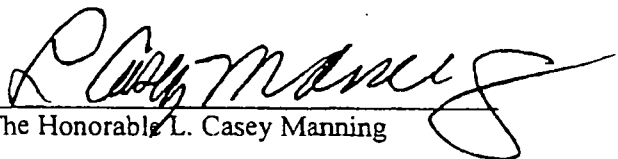
It is clear from the documents submitted to the Court that this dispute concerns a trust. It is also clear that the South Carolina Code at least implies that trust actions should originate in Probate Court.

With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

AND IT IS SO ORDERED.

Columbia, South Carolina

March 4, 2013


The Honorable L. Casey Manning

ROA-000298

APP000304

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) Civil Action No. 2013-CP-40-02655

Allen Patterson, Steve Tilton, Richard
Sendler, Lincoln Privette, Marc Ellis, Joey
Carter, Barry Davis, Michel Nieri, Allen
Patterson Residential LLC, Tilton Group,
Sendler Construction Co., Inc., Privette
Enterprises, Ellis Construction Company,
Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter,
LLC, on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

**DEFENDANTS' REPLY TO PLAINTIFFS'
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO
RECONSIDER**

The Defendants reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Reconsider as follows:

1. Plaintiffs' statement of facts is full of glaring misstatements.

a. Plaintiffs' Memorandum provides the Court with what may be best summed up as a jury argument rather than a true statement of facts. Examples include:

- That the insurance company that SIF has attempted to establish would "not have any particular benefit to the beneficiaries of the trust."
- That the Trustees "intend to use" \$20,000,000 "to set up a separate insurance company."
- That "there will be insufficient assets to cover [SIF's] risks which will expose the beneficiaries to additional risk."

ROA-000299

APP000305

The Court need look no further than the Affidavit of Jeffrey Ranew, filed in the previous litigation, to obtain an accurate picture of the facts of this case. Key facts include:

- Jeffrey Ranew does not state that SIF is a trust, as alleged by Plaintiffs in the Memorandum of Law; instead, when the word “trust” is used, it is qualified, stating, for example, that “The Complaint alleges that the defendants have used trust funds....” This is not an admission that SIF is a trust; rather, it is a restatement of the allegations against SIF. [Affidavit of J. Ranew, March 15, 2012, ¶ 3, 4]
- The \$5,000,000 withdrawal for the purpose of establishing a mutual insurance company was done with the approval of the Works’ Compensation Commission and used non-pledged assets. When the application for establishing the insurance company was withdrawn, the \$5,000,000 was returned to the Fund. [*Id.*, ¶ 4, 5]
- SIF, through a wholly owned limited liability company, purchased a building with the approval of the Workers’ Compensation Commission. The building generates revenue, as part of the building is available for lease. [*Id.*, ¶3]
- A mutual insurance company will confer great benefits to the members of SIF, and has been studied as an option since 2003: members of a mutual insurance company are not jointly and severally liable for claims; the creation of the insurance company would allow for a transition of all members from SIF and terminate the risk of joint and several liability; and because the insurance company would likely have a larger membership, per-member costs would decrease due to a greater sharing of risk of loss among a larger membership base. [*Id.*, ¶5]

The Memorandum is based on conjecture and is supported by an affidavit that relies on hearsay that should not be considered by the Court, per Rule 56, SCRPC.

b. Plaintiffs’ statement of facts acts as a distraction from the true issues in the Motion to Dismiss and Motion to Reconsider. Regardless of the misstatement of facts and the disagreement between the parties as to the facts, the Court can and should dismiss the lawsuit based on the law, as cited in the previous filings with the Court. The discussion instead must be focused on South Carolina law: (1) SIF is not a trust and (2) the requirements of Rule 23 have not been met.

2. *Navarro Savings Ass'n v. Lee* is entirely inapplicable to the case at bar.

a. The subject matter of *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980) is entirely unrelated and inapplicable to the case at bar. *Navarro* involves the single issue of whether the residence of shareholders or trustees of a business trust organized under the laws of Massachusetts should be considered for determining subject matter jurisdiction in diversity lawsuits in federal courts. The sole issue in *Navarro* was whether shareholder citizenship of a real estate trust is relevant for establishing diversity jurisdiction, and has no relevance here. Derivative action requirements (Rule 23) were not at issue and indeed were never mentioned anywhere in the opinion. In fact, several states, in addition to Massachusetts, utilize this form of business trust and define it as an "unincorporated association." See, e.g., Indiana (IND. CODE § 23-5-1-2); Washington (WASH. REV. CODE § 23.90.020); Ohio (OHIO REV. CODE ANN. § 1746.01). These business trusts, like SIF, operate for business, rather than testamentary, purposes. These business trusts are unincorporated associations for purposes of Rule 23. Likewise, SIF is an unincorporated association.

3. Judicial estoppel does not apply.

a. As is clearly stated in the Motions to Dismiss in the previous lawsuit, the remedy of dismissal for failure to file the lawsuit in the Probate Court was pled in the alternative. In fact, *it was the Plaintiffs* who submitted the order executed by Judge Manning dismissing the lawsuit on the grounds that it was not filed in the Probate Court; the proposed order submitted by Defendants argued for dismissal based on Rule 23 grounds.¹ Plaintiffs cannot use an alternative argument made by Defendants (and, in the end,

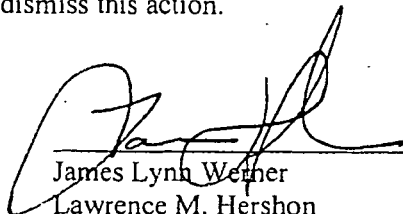
¹ The Defendants' proposed order from the previous lawsuit is attached hereto as Exhibit A; Plaintiffs' proposed order is attached as Exhibit B.

supported by *Plaintiffs*) and bootstrap it to prevent Defendants from pursuing their primary justifications for dismissal. That alternative pleading is similar to the position the Plaintiffs took in this motion: first alleging that the SIF was a trust and then alleging that the Complaint met the requirements of Rule 23.

b. Plaintiffs' Memorandum omits a very important qualification regarding the application of judicial estoppel from the *Hayne Federal* case: "the doctrine does not apply to conclusions of law or assertions of legal theories." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). This is the exact situation presented by Plaintiffs; therefore, judicial estoppel is inapplicable.

Conclusion

Based on the law and arguments cited in Defendants' previously filed Motion to Reconsider and Memorandum of Law in Support of their Motion to Dismiss, Defendants respectfully request that this Court reconsider its Order entered November 12, 2013 and alter, amend or vacate its previous Order, and dismiss this action.

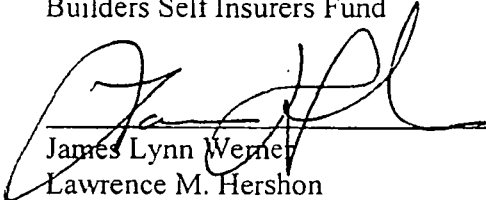


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Attorneys for Defendants Herb Witter, Colin
Campbell, Eddie Weaver, Tom Markovich, Keith
Smith and Jim Gregorie, individually and as
Trustees of the South Carolina Home Builders Self
Insurers Fund

January 10, 2014
Columbia, South Carolina

ROA-000303

APP000309

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) Civil Action No. 2012-CP-40-04311

Allen Patterson, Steve Tilton, Richard)
Sandler, Lincoln Privette, Marc Ellis, Joey)
Carter, Barry Davis, Michel Nieri, Allen)
Patterson Residential, LLC, Tilton)
Group, Sandler Construction Co., Inc.,)
Privette Enterprises, Ellis)
Construction Company, Inc., The)
Barry Davis Company, Inc., Great)
Southern Homes, and J. Carter, LLC on)
behalf of themselves and others)
similarly situated,)

Plaintiffs,)

vs.)

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith Smith,)
Jim Gregorie, individually and as Trustees)
of the South Carolina Home Builders)
Self-Insurers Fund, and the South)
CarolinaHome Builders Self Insurers)
Fund,)

Defendants.)

**ORDER DISMISSING SECOND
AMENDED COMPLAINT**

Before the Court are the Defendants' Motions to Dismiss the Plaintiffs' Second Amended Complaint (the "Amended Complaint") pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The Defendants have moved to dismiss the Amended Complaint in its entirety against all Defendants, as a matter of law, based upon pleading deficiencies. On September 4, 2012, the undersigned presided over oral argument regarding this Motion. The Defendants submitted an affidavit in support of its motion, but based on the deficiencies in the Amended Complaint, it is unnecessary to convert the motion into one for summary judgment. For the

reasons stated herein, the Court grants the Defendants' Motion to Dismiss the Amended Complaint.

I

Through their Amended Complaint, the Plaintiffs' allege that they are beneficiaries of an Agreement and Declaration of Trust that created the South Carolina Home Builders Self Insurers Fund ("SIF"). Established in 1995, SIF is an organization comprised of South Carolina homebuilders who have joined together to provide a secure source for workers' compensation coverage. SIF is operated by a Board of Trustees. The Plaintiffs are all home builders who claim to be beneficiaries of the SIF; they seek to serve as class representatives for a proposed class of all SIF beneficiaries in the subject lawsuit. The gravamen of the Plaintiffs' Amended Complaint alleges that misconduct by the Trustees has harmed SIF. The Plaintiffs allege that the Trustees have engaged in the following misconduct:

1. The Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust.
2. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.
3. The Trustees did not advise the beneficiaries that the funds could have been returned to them.
4. The Trustees have failed to advise the members of the potential tax consequences of their action.
5. The Trustees have purchased a building as well as expensive software programs for the purpose of creating a member owned insurance company which will convey no benefit on the beneficiaries of the Trust.
6. The Trustees have used trust funds to purchase the building and the insurance software program.

7. The Trustees have used trust funds and assets to hire attorneys, consultants, and other employees for the purpose of setting up a member owned insurance company which will convey no benefit on the members of the Trust.

8. The Trustees have used and intend to use trust assets to pay employees and other costs for setting up the member owned insurance company which will convey no benefit on the beneficiaries of the Trust.

9. The Trustees have taken significant amounts of money out of the Trust for their own benefit by virtue of payments to themselves for unnecessary meetings and other unnecessary payments.

(Amended Complaint, p. 3-4). The Plaintiffs have alleged that they are entitled to the following relief:

1. The plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded, enjoining further violations of the fiduciary duties and trust agreement, and awarding the plaintiffs and the class actual and punitive damages.

(Amended Complaint, p. 5).

Although this Court is presented with a complex case, the subject motion is straight forward. It can be resolved by answering one question: who is entitled to recover damages? The Plaintiffs assert that they and the class of beneficiaries they seek to represent are entitled to individual damages. The Plaintiffs, therefore, seek to prosecute this lawsuit as a class action. The Defendants', however, assert that the Plaintiffs' allegations plead derivative claims. Consequently, the Defendants assert that any damages belong to SIF, and not each individual in the putative class. As detailed below, this Court finds that the subject lawsuit is a derivative action and, therefore, must comply with the requirements of Rule 23(b)(1), SCRPC.

II

A motion to dismiss pursuant to Rule 12(b)(6) requires this Court to accept as true the well-pleaded facts in the complaint, but the Court need not give any weight to conclusions of law alleged therein. *Jones v. Gilstrap*, 288 S.C. 525, 343 S.E.2d 646 (Ct. App. 1986); *Charleston County School Dist. v. S.C. State Ports Authority*, 283 S.C. 48, 320 S.E.2d 727 (Ct. App. 1984). It is fundamental that a complaint must allege all facts necessary to satisfy each of the legal elements to support a cause of action or it should be dismissed. The motion to dismiss must be granted if the facts alleged in the complaint, and inferences reasonably deducible therefrom, do not entitle plaintiff to the relief sought. *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001) (citing *Jarrell v. Petoseed Co.*, 500 S.E.2d 793, 794 (Ct. App. 1998)).

III

Based upon the allegations and the relief sought by the Plaintiffs, this Court finds that the subject lawsuit is a derivative action. The Court's conclusion is driven by two critical determinations: (1) the gravamen of the Plaintiffs' Amended Complaint is that SIF has been harmed by the conduct of the Board. *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) ("A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder."); and (2) the allegations of the Amended Complaint assert identical harm to each beneficiary. *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (noting that allegations of "identical harm to all shareholders . . . [gives] rise to a classic shareholders' derivative suit"). The Court further concludes that notwithstanding the allegation that SIF is a trust, the same rules of corporate

litigation apply.¹ *Ex parte Callan Assocs., Inc.*, 87 So. 3d 1161, 1165 (Ala. 2011) (“[B]efore a beneficiary may proceed with filing a derivative claim on behalf of the trust, the beneficiary ‘must first move the trustee to act, or show some sufficient reason for the failure to do so.’”(citations omitted)); *accord Saunders v. Muratori*, 251 P.3d 550, 553 (Colo. Ct. App. 2010) (“In equity, trust beneficiaries may bring a suit for the benefit of a trust when the trustees refuse to do so. . . . Such a suit is analogous to a shareholder derivative suit on behalf of a corporation.”).²

A. Plaintiffs’ have pleaded a derivative lawsuit

When a plaintiff alleges corporate malfeasance “that result[s] in identical harm to all shareholders,” he has alleged a “breach of fiduciary duty claim that [gives] rise to a classic shareholders’ derivative suit.” *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006). Identical harm to all shareholders results in a derivative claim because identical harm connotes harm to the corporation or trust. A derivative suit is one “brought by the plaintiff in the right of the corporation.” *Johnson v. Baldwin*, 221 S.C. 141, 149, 69 S.E.2d 585, 588 (1952); see also *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (“An action seeking to remedy a loss to the corporation is generally a derivative one.”). It is brought for the corporation or trust because the “liability of directors for loss to a corporation due to their

¹ As an alternative ground, if SIF is not a trust then it is an unincorporated association. The same rules of corporate litigation apply to unincorporated associations. Rule 23(b)(1), SCRCF (“In a derivative action brought by one or more . . . members to enforce a right of . . . an unincorporated association . . .”).

² An analogous situation is a wrongful death action; the South Carolina Supreme Court has stated that the “rule, which is frequently cited in . . . instances of trusteeship,” is that the beneficiary may himself bring an action “[i]f a trustee refuse[s], after demand, to bring an action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust.” *Bailes v. S. Ry. Co.*, 227 S.C. 176, 182-83, 87 S.E.2d 481, 484 (1955) (“[T]he beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust.”).

mismanagement is an asset of the corporation and any recovery on such a cause of action belongs solely to the corporation.” *Id.* at 149, 69 S.E.2d at 588 (emphasis added). Where the alleged injury falls directly on a corporation or a trust and only secondarily on shareholders or trust beneficiaries, the plaintiff’s claim is necessarily derivative. *See Ex parte Morgan Asset Mgmt., Inc.*, 86 So. 3d 309 (Ala. 2011) (holding that plaintiffs, who were beneficiaries of trusts that held shares of investment funds, and who claimed they were injured by diminution in value of funds, were alleging injury that fell directly on funds and only secondarily on plaintiffs, making their claim derivative).

The allegations of the Amended Complaint confirm that this is a derivative lawsuit. For example, and as detailed in full above, the Plaintiffs allege that “[t]he Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust”; they further allege that “[t]he Trustees have used and intend to use trust assets to pay employees and other costs for setting up the member owned insurance company which will convey no benefit on the beneficiaries of the Trust.” (Amended Complaint, p. 3-4). The Plaintiffs’ allegations refer to a harm that is felt by all beneficiaries of SIF. These allegations plead a classic derivative suit. *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) (noting that where a plaintiff asserts allegations of corporate mismanagement “that result[] in identical harm to all shareholders,” that plaintiff has asserted a “classic shareholder’s derivative suit”).

B. Plaintiffs are not entitled to maintain individual actions

The Plaintiffs seek to represent a class of all current beneficiaries of SIF with the goal of recovering individual damages for each beneficiary (shareholder). (Amended Complaint, p.5 (“Plaintiffs are entitled to an Order . . . awarding the[m] . . . and the class actual and punitive

damages.”)). Since this is a derivative action, the proposed class is not entitled to individual damages as all damages, if any, belong to SIF. This conclusion is confirmed by the body of case law addressing a shareholder or beneficiary’s entitlement to bring a direct or individual action.

A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. *See Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 362, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995); *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App. 2012). In order for an individual to suffer a “separate and distinct” injury, he must suffer a specific injury that is not equally felt by the corporation. *See Ward v. Griffin*, 295 S.C. 219, 367 S.E.2d 703 (Ct. App. 1988) (“If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder.”). A classic example of a “separate and distinct” shareholder injury is that of an aggrieved minority shareholder. *See generally Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001).

Plaintiffs fail to allege an injury that is separate and distinct from the injury to the other Trust beneficiaries or injury to the Trust. The Amended Complaint makes it clear that it was the Trust that was allegedly directly injured, and only through that harm to the Trust were the beneficiaries allegedly (and derivatively) injured. As a result, Plaintiffs’ claims are of a derivative nature and the proposed class is not entitled to recover as individuals. *Gary v. Matthews*, 148 S.C. 125, 145 S.E. 702 (1928) (“A stockholder cannot maintain a suit for the indirect injury done him as an indirect result of an injury to the corporation.”). Accordingly, the Plaintiffs may only proceed with this manner as a derivative action.

IV

ROA-000310

APP000316

Having concluded that the Plaintiffs' lawsuit is exclusively derivative, the Court will now turn to whether the Plaintiffs' have complied with Rule 23(b)(1), SCRC. This rule provides as follows:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. . . .

Thus, under Rule 23(b)(1), a plaintiff must meet certain pleading requirements in order to institute a derivative action. This Rule seeks to prevent the unrestrained use of derivative actions, "which would undermine the basic principle of corporate governance that the decisions of the corporation should be made by its management." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2001). The rule requires that the Plaintiffs file a verified complaint, and that they allege with particularity their efforts to obtain the action they desire from the Trustees and the reason for their failure to not obtain the action (the "demand requirement"). If the Plaintiffs have not made the demand requirement, then they must state the reasons for not making the effort. Rule 23(b)(1), SCRC. "A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRC is properly dismissed pursuant to Rule 12(b)(6)." *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339 (citing *Whittle*, 343 S.C. 176, 539 S.E.2d 402).

The particularized allegations surrounding the demand requirement must illustrate the efforts made to demand that the board take the action sought, and they must support an earnest effort to induce remedial action on the part of the board. *Id.* at 189-90, 539 S.E.2d at 410. At a

minimum, the demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused, and request remedial relief. *Id.* at 189, 539 S.E.2d at 409. The same demand requirements apply to derivative actions in the context of a trust. *Ex parte Callan*, 87 So. 3d at 1165 (action by mother of designated beneficiary of Prepaid Affordable College Tuition Trust Fund on behalf of beneficiary and Fund was premature, where mother failed to make a demand on trustees prior to bringing suit); *Ex parte Morgan Asset Mgmt. Inc.*, 86 So. 3d 309 (Ala. 2011) (holding that trust beneficiaries' must comply with requirements of Rule 23.1 of the Alabama Rules of Civil Procedure, titled "Derivative Actions by Shareholders").

A review of the Amended Complaint confirms that the Plaintiffs' have failed to comply with the requirements of this Rule. First, the Plaintiffs' Complaint is not verified. Second, it fails to allege that the Plaintiffs made or attempted to make a demand on the Trustees prior to filing suit. Third, the Plaintiffs also fail to allege the reasons for not making such a demand on the Trustees. Accordingly, the Court is compelled to dismiss the Amended Complaint. Because this Court is dismissing the Amended Complaint pursuant to Rule 12(b)(6) for failure to comply with Rule 23(b)(1), it declines to address the Defendants' jurisdictional arguments for dismissal.

CONCLUSION

As detailed above the Plaintiffs' have pleaded a derivative action. The Amended Complaint does not comply with the requirements of Rule 23(b)(1), SCRCF. Accordingly, the Plaintiffs' Amended Complaint is hereby dismissed.

IT IS SO ORDERED.

The Honorable L. Casey Manning
Circuit Court Judge, 5th Judicial Circuit

January __, 2013
Columbia, South Carolina

ROA-000312
APP000318

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Allen Patterson, Steve Tilton, Richard	)	C/A No. 2012-CP-40-04311
Sendler, Lincoln Privette, Marc Ellis,	)	
Joey Carter, Barry Davis, Michel Nieri,	)	
Allen Patterson Residential LLC, Tilton	)	
Group, Sendler Construction Co., Inc.,	)	
Privette Enterprises, Ellis Construction	)	
Company, Inc., The Barry Davis Company,	)	
Inc., Great Southern Homes, and J. Carter,	)	
LLC, on behalf of themselves and others	)	
similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	ORDER DISMISSING MATTER
	)	WITHOUT PREJUDICE
Herb Witter, Colin Campbell, Eddie	)	
Weaver, Tom Markovich, Keith Smith,	)	
Jim Gregorie, individually and as Trustees	)	
of the South Carolina Home Builders	)	
Self Insurers Fund, and the South Carolina	)	
Home Builders Self Insurers Fund,	)	
	)	
Defendants.	)	

This matter came before the Court on Tuesday, September 4, 2012 at 9:30 a.m.. S. Jahue Moore appeared on behalf of the Plaintiffs. Pope Johnson and Dwight Floyd appeared on behalf of the Defendants.

This matter is brought as a class action by members and beneficiaries of the Trust entitled the South Carolina Home Builders Self Insurers Fund.

The Defendants have set forth at least eight separately numbered reasons to dismiss this matter. The Court heard arguments from all parties regarding the motions to dismiss.

In particular, the Defendants moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involves the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201. That section indicates that "[s]ubject to the provisions of Section 62-1-302(d), the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts." Based upon this section, the Court is concerned that this matter should be initially filed in Probate Court rather than Circuit Court. The South Carolina Code also indicates that a matter of this type may be removed from Probate Court to Circuit Court under South Carolina Code Section 62-1-302(d)(4).

The Court is concerned regarding the matters of alleged lack of subject matter jurisdiction. The Court is concerned that this matter could be litigated in full and the subject matter question raised later. This would lead to a waste of judicial resources.

It is clear from the documents submitted to the Court that this dispute concerns a trust. It is also clear that the South Carolina Code at least implies that trust actions should originate in Probate Court.

With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

AND IT IS SO ORDERED.

Columbia, South Carolina

The Honorable L. Casey Manning

_____, 2013

ROA2-000314

APP000320

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) Civil Action No. 2013-CP-40-02655

Allen Patterson, Steve Tilton, Richard
Sendler, Lincoln Privette, Marc Ellis, Joey
Carter, Barry Davis, Michel Nieri, Allen
Patterson Residential LLC, Tilton Group,
Sendler Construction Co., Inc., Privette
Enterprises, Ellis Construction Company,
Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter,
LLC, on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

Herb Witter, Colin Campbell, Eddie
Weaver, Tom Markovich, Keith Smith,
Jim Gregorie, individually and as Trustees
of the South Carolina Home Builders
Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund,

Defendants.

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFFS' MOTION
TO RECONSIDER**

The Defendants respond to Plaintiffs' Motion to Reconsider the Court's February 11, 2014 Order as follows:

1. For all of the reasons set forth in Defendants' Motion to Reconsider Order Denying Motion to Dismiss, dated November 27, 2013, and Defendants' Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Reconsider, dated January 10, 2014, the Plaintiffs' request for reconsideration of the Court's Order dated February 11, 2014 should be denied.

2. In addition, as directed by the Court in the February 11, 2014 Order, the Board of the South Carolina Home Builders Self Insurers Fund will respond to the January 30, 2013 letter received from Plaintiffs as a demand made pursuant to Rule 23, SCRPC. If Plaintiffs deem the

ROA-000315

APP000321

response to the demand letter unsatisfactory and decide to file yet another shareholder's derivative lawsuit, the complaint would properly be filed in the Circuit Court.

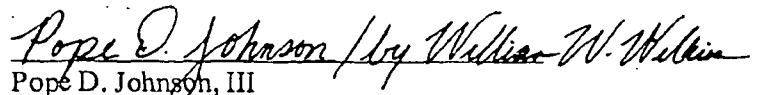
Respectfully submitted,



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*Counsel for the South Carolina Home Builders Self
Insurers Fund*



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ROA-900316

APP000322

James Lynn Werner
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jimwerner@parkerpoe.com
lawrencehershon@parkerpoe.com

Counsel for Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith and Jim Gregorie, individually and as Board Members of the South Carolina Home Builders Self Insurers Fund

March 13, 2014
Greenville, South Carolina

ROA-000317

APP000323

S. JAHUE MOORE
J. MARK TAYLOR*
DAVID L. THOMAS†
C. VANCE STRICKLIN, JR.
JAMES EDWARD BRADLEY
SHEILA McNAIR ROBINSON
ROBERT D. HAZEL
CHRISTIAN G. SPRADLEY††
C. DAVID SAWYER, JR.††
WILLIAM H. EDWARDS
STANLEY L. MYERS
JANE H. DOWNEY**
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JOHN C. BRADLEY, JR.



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January 30, 2013

Pope D. Johnson, III, Esquire
P.O. Drawer 11209
Columbia, SC 29211-1209

Re: Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michel Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, vs. Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund
C/A No. 2012-CP-40-04311

Dear Pope:

It is our understanding that you represent Defendant Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund. In that capacity, please take this letter as a request for action as follows on behalf of your clients. This letter is written to reaffirm previous actions taken and obtain actions from the Trustees of the South Carolina Home Builders Self Insurers Fund.

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

ROA-000318

APP000324

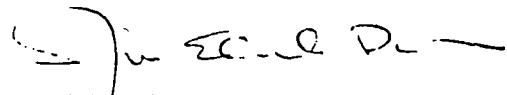
Pope D. Johnson, III, Esquire
January 17, 2013
Page 2

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

I believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. I believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

If your clients' position is any different, please let me know so we can discuss this matter. If I do not hear from you regarding this, I will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Sincerely,



James Edward Bradley

/lgi

cc:

Allen Patterson ✓
Stephen Tilton ✓
Richard Sendler ✓
Lincoln Privette ✓
Marc Ellis ✓
Joey Carter ✓
Barry Davis ✓
Michael Nieri ✓
Mark Nix ✓

ROA-000319

APP000325

POPE D. JOHNSON, III
Attorney at Law

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TELEPHONE 803-799-9791
FAX 803-253-8084

Direct Dial: 803-376-8965
E-Mail: pope@popejohnsonlaw.com

April 16, 2014

James Edward Bradley, Esquire
Moore Taylor & Thomas, P.A.
1700 Sunset Boulevard
West Columbia, SC 29171

RE: Response to January 30, 2013 Demand Letter

Dear Ward:

I write you on behalf of the South Carolina Home Builders Self Insurers Fund ("Fund") and its Board of Trustees ("Board") in response to your demand letter dated January 30, 2013, a copy of which is attached as Exhibit A. In responding to your letter, I want to make several points and then set forth the Board's response to your specific demands. The Board has met and has approved and authorized me to send this letter to you, as is shown by the copy of the Board's resolution marked as Exhibit B.

First, the Board and the Fund have sought to be open and transparent throughout this dispute with your clients. When the original complaint was filed, we served the attached Affidavit of Jeffrey M. Ranew without the supporting exhibits (Exhibit C) that addressed the issues you and your clients were raising. We thought if you knew the facts, you would reconsider your position about your suit. Needless to say, we were disappointed when your clients re-filed the action with many of the same allegations even though they had in hand information that showed that many of their allegations were baseless or simply wrong.

Second, you served discovery requests in the first civil action and we assembled the responsive documents. However, we objected to the discovery requests and moved for a protective order to prohibit discovery until there was a ruling on our motion to dismiss. We offered to meet with your clients and go over the documents provided your clients would consent to a confidentiality order. Your clients refused to consent to a confidentiality order and did not avail themselves of the opportunity to meet and see the records. However, Jeff Ranew, the Fund's administrator, Mike Hill, the Fund's Chief Financial Officer, Herb Witter, Chairman of the Board of Trustees, and I met with you and went over the documents and answered questions. Insofar as I know, we answered all of your questions and had the necessary records available for your review.

Third, as you know, after the first lawsuit was dismissed we invited your clients to meet with the Board to discuss the issues they were raising. Attached as Exhibit D is a copy of the letter that was sent to each of your clients. None of your clients availed themselves of the opportunity to meet with the Board and discuss these issues.

ROA-000320

APP000326

Against this backdrop, the Board addresses your specific demands as follows:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

Answer: The Board has concluded that distribution of the \$5,000,000 you refer to would not be in the best interest of the SCHBSIF (SIF) and its members. It is also important to make clear that the proposed mutual insurance company was never intended to, and would not, operate as a competing entity; it was proposed to operate as a successor entity, and under a corporate form that would not expose its membership to personal liability, as is presently the case. In addition, any distribution of funds rests in the sole discretion of the Board, subject to the approval of the S.C. Workers Compensation Commission. The S.C. Workers Compensation Commission must approve in advance any distribution and its Director of the Self-Insurance Division, Mr. W.C. Smith, has advised that it would not approve of this distribution. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.

Answer: Since its inception the SIF has always maintained an accounting of all funds, and has consistently made quarterly and annual accounting to the S.C. Workers Compensation Commission. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.

Answer: The Agreement and Declaration of Trust dated September 27, 1995, as amended, states in Definitions that Trustees shall be appointed. In Article IV, Section 1, the Agreement states that Trustees shall be elected by the participating members. The Agreement does not require or provide for any schedule for holding elections and none are scheduled at this time.

4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.

Answer: The Board has no current plans or time tables to establish a mutual insurance company. It is also important to make clear that the proposed mutual insurance company was never intended to, and would not, operate as a competing entity; it was proposed to operate as a successor entity, and under a corporate form that would not expose its membership to personal liability, as is presently the case. Until a successor mutual insurance

ROA-000321

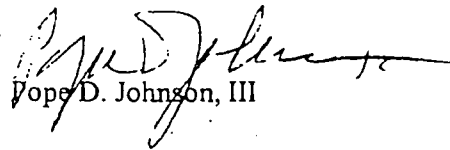
APP000327

company has been established that would provide workers compensation insurance coverage to the members of the SIF, the Board has concluded that it would not be appropriate to dissolve the Fund. In addition, the S.C. Workers Compensation Commission must approve in advance any dissolution and its Director of the Self-Insurance Division, Mr. W.C. Smith, has advised that it would not approve of this action. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

Answer: The Board has concluded that it would not be in the best interest of the SIF and its members to sell any assets owned by the Fund. In addition, subject to approval of the S.C. Workers Compensation Commission, distributions to members rest in the sole discretion of the Board.

Sincerely,



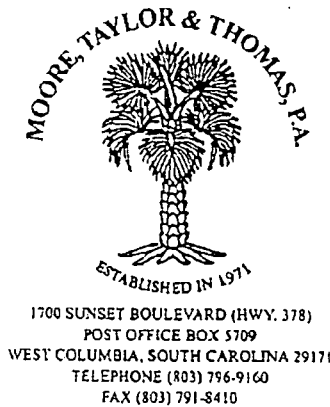
Pope D. Johnson, III

PDJIII/sww
Enclosures

ROA-000322

APP000328

S. JAHUE MOORE
J. MARK TAYLOR*
DAVID L. THOMAS†
C. VANCE STRICKLIN, JR.
JAMES EDWARD BRADLEY
SHEILA McNAIR ROBINSON
ROBERT D. HAZEL
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C. DAVID SAWYER, JR.††
WILLIAM H. EDWARDS
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M. BROOKS BIEDIGER
AMBER L. FULMER
SARAH TAYLOR CASSIDY
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RETIRED:
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†GREENVILLE OFFICE:
(864) 271-6371

January 30, 2013

RECEIVED FEB 1 2013

Pope D. Johnson, III, Esquire
P.O. Drawer 11209
Columbia, SC 29211-1209

Re: Allen Patterson, Steve Tilton, Richard Sandler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michel Nieri, Allen Patterson Residential LLC, Tilton Group, Sandler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, vs. Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund
C/A No. 2012-CP-40-04311

Dear Pope:

It is our understanding that you represent Defendant Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund. In that capacity, please take this letter as a request for action as follows on behalf of your clients. This letter is written to reaffirm previous actions taken and obtain actions from the Trustees of the South Carolina Home Builders Self Insurers Fund.

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

*Fellow of the American Academy of Matrimonial Lawyers
**Certified Specialist in Bankruptcy & Debtor/Creditor Law

ROA-000323

APP000329



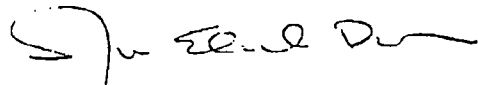
Pope D. Johnson, III, Esquire
January 17, 2013
Page 2

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
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4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

I believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. I believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

If your clients' position is any different, please let me know so we can discuss this matter. If I do not hear from you regarding this, I will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Sincerely,



James Edward Bradley

/lgi
cc: Allen Patterson
Stephen Tilton
Richard Sendler
Lincoln Privette
Marc Ellis
Joey Carter
Barry Davis
Michael Nieri
Mark Nix

ROA-000324

APP000330

**RESOLUTION OF THE BOARD OF TRUSTEES
DATED APRIL 16, 2014**

WHEREAS, Allen Patterson, Steve Tilton, Richard Sandler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential, LLC, Tilton Group, Sandler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and other similarly situated, brought a derivative action against the Board of Trustees and the South Carolina Home Builders Self Insurers Fund ("SIF") in Civil Action No. 2013-CP-40-02655; and

WHEREAS, the Board of Trustees and the SIF moved to dismiss the action upon the grounds that the plaintiffs had failed to comply with the requirements of Rule 23, SCRCF, including the requirement of making a demand for relief on the Board prior to bringing the suit; and

WHEREAS, the attorneys for the Board of Trustees and the SIF, at the hearing on the motion to dismiss, agreed to treat the plaintiffs' letter dated January 30, 2013 attached as Exhibit 1 as a demand letter as required by Rule 23(b)(1), SCRCF, and respond to it; and

WHEREAS, the Court dismissed the aforesaid civil action by an Order dated February 11, 2014 and gave the Board of Trustees and the SIF sixty (60) days within which to make a written response to the letter dated January 30, 2013.

NOW, THEREFORE, the Board of Trustees for the SIF and on behalf of the SIF at its regularly scheduled meeting on April 16, 2014, has resolved as follows:

1. The Board of Trustees has considered the response that should be made to the demand letter dated January 30, 2013.
2. The Board of Trustees, after due consideration and deliberation, has voted unanimously to approve the letter attached as Exhibit 2 as the Board's response to the demand letter.
3. The Board of Trustees has authorized and directed that its attorney, Pope D. Johnson, III, send the response, Exhibit 2, to James Edward Bradley in satisfaction of the Board's responsibility as set forth in the Order dated February 11, 2014.

AND IT WAS SO RESOLVED.



Chairman, Board of Trustees

Date: 4/16/14



ROA-000325

APP000331

S. JAHUE MOORE
J. MARK TAYLOR*
DAVID L. THOMAS†
C. VANCE STRICKLIN, JR.
JAMES EDWARD BRADLEY
SHEILA McNAIR ROBINSON
ROBERT D. HAZEL
CHRISTIAN G. SPRADLEY††
C. DAVID SAWYER, JR.††
WILLIAM H. EDWARDS
STANLEY L. MYERS
JANE H. DOWNEY**
S. JAHUE MOORE, JR.
JOHN C. BRADLEY, JR.



1700 SUNSET BOULEVARD (HWY. 378)
POST OFFICE BOX 5709
WEST COLUMBIA, SOUTH CAROLINA 29171
TELEPHONE (803) 796-9160
FAX (803) 791-8410

MELISSA K. MOORE
WILLIAM B. FORTINO
R. NICHOLS "NICK" RILEY, JR.
M. BROOKS BIEDIGER
AMBER L. FULMER
SARAH TAYLOR CASSIDY
MARGARET "MEG" HAZEL

RETIRED:
BILLY C. COLEMAN††

††SALUDA OFFICE:
(864) 445-4544 OR (866) 604-4544
†GREENVILLE OFFICE:
(864) 271-6371

January 30, 2013

RECEIVED FEB 1 2013

Pope D. Johnson, III, Esquire
P.O. Drawer 11209
Columbia, SC 29211-1209

Re: Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michel Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Company, Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, vs. Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund
C/A No. 2012-CP-40-04311

Dear Pope:

It is our understanding that you represent Defendant Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund. In that capacity, please take this letter as a request for action as follows on behalf of your clients. This letter is written to reaffirm previous actions taken and obtain actions from the Trustees of the South Carolina Home Builders Self Insurers Fund.

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

*Fellow of the American Academy of Matrimonial Lawyers
**Certified Specialist in Bankruptcy & Debtor/Creditor Law

ROA-000326

APP000332



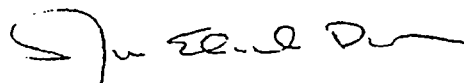
Pope D. Johnson, III, Esquire
January 17, 2013
Page 2

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

I believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. I believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

If your clients' position is any different, please let me know so we can discuss this matter. If I do not hear from you regarding this, I will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Sincerely,



James Edward Bradley

/lgi

cc: Allen Patterson
Stephen Tilton
Richard Sandler
Lincoln Privette
Marc Ellis
Joey Carter
Barry Davis
Michael Nieri
Mark Nix

ROA-000327

APP000333

POPE D. JOHNSON, III
Attorney at Law

1230 RICHLAND STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE 803-799-9791
FAX 803-253-6084

Direct Dial: 803-376-8965
E-Mail: pope@popejohnsonlaw.com

April 16, 2014

James Edward Bradley, Esquire
Moore Taylor & Thomas, P.A.
1700 Sunset Boulevard
West Columbia, SC 29171

RE: Response to January 30, 2013 Demand Letter

Dear Ward:

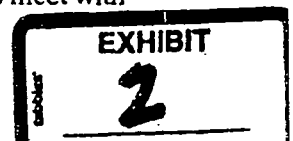
I write you on behalf of the South Carolina Home Builders Self Insurers Fund ("Fund") and its Board of Trustees ("Board") in response to your demand letter dated January 30, 2013, a copy of which is attached as Exhibit A. In responding to your letter, I want to make several points and then set forth the Board's response to your specific demands. The Board has met and has approved and authorized me to send this letter to you, as is shown by the copy of the Board's resolution marked as Exhibit B.

First, the Board and the Fund have sought to be open and transparent throughout this dispute with your clients. When the original complaint was filed, we served the attached Affidavit of Jeffrey M. Ranew without the supporting exhibits (Exhibit C) that addressed the issues you and your clients were raising. We thought if you knew the facts, you would reconsider your position about your suit. Needless to say, we were disappointed when your clients re-filed the action with many of the same allegations even though they had in hand information that showed that many of their allegations were baseless or simply wrong.

Second, you served discovery requests in the first civil action and we assembled the responsive documents. However, we objected to the discovery requests and moved for a protective order to prohibit discovery until there was a ruling on our motion to dismiss. We offered to meet with your clients and go over the documents provided your clients would consent to a confidentiality order. Your clients refused to consent to a confidentiality order and did not avail themselves of the opportunity to meet and see the records. However, Jeff Ranew, the Fund's administrator, Mike Hill, the Fund's Chief Financial Officer, Herb Witter, Chairman of the Board of Trustees, and I met with you and went over the documents and answered questions. Insofar as I know, we answered all of your questions and had the necessary records available for your review.

Third, as you know, after the first lawsuit was dismissed we invited your clients to meet with the Board to discuss the issues they were raising. Attached as Exhibit D is a copy of the letter that was sent to each of your clients. None of your clients availed themselves of the opportunity to meet with the Board and discuss these issues.

ROA-000328
APP000334



Against this backdrop, the Board addresses your specific demands as follows:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

Answer: The Board has concluded that distribution of the \$5,000,000 you refer to would not be in the best interest of the SCHBSIF (SIF) and its members. It is also important to make clear that the proposed mutual insurance company was never intended to, and would not, operate as a competing entity; it was proposed to operate as a successor entity, and under a corporate form that would not expose its membership to personal liability, as is presently the case. In addition, any distribution of funds rests in the sole discretion of the Board, subject to the approval of the S.C. Workers Compensation Commission. The S.C. Workers Compensation Commission must approve in advance any distribution and its Director of the Self-Insurance Division, Mr. W.C. Smith, has advised that it would not approve of this distribution. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.

Answer: Since its inception the SIF has always maintained an accounting of all funds, and has consistently made quarterly and annual accounting to the S.C. Workers Compensation Commission. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.

Answer: The Agreement and Declaration of Trust dated September 27, 1995, as amended, states in Definitions that Trustees shall be appointed. In Article IV, Section 1, the Agreement states that Trustees shall be elected by the participating members. The Agreement does not require or provide for any schedule for holding elections and none are scheduled at this time.

4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.

Answer: The Board has no current plans or time tables to establish a mutual insurance company. It is also important to make clear that the proposed mutual insurance company was never intended to, and would not, operate as a competing entity; it was proposed to operate as a successor entity, and under a corporate form that would not expose its membership to personal liability, as is presently the case. Until a successor mutual insurance

company has been established that would provide workers compensation insurance coverage to the members of the SIF, the Board has concluded that it would not be appropriate to dissolve the Fund. In addition, the S.C. Workers Compensation Commission must approve in advance any dissolution and its Director of the Self-Insurance Division, Mr. W.C. Smith, has advised that it would not approve of this action. See attached Affidavit of W.C. Smith of the South Carolina Workers' Compensation Commission, Exhibit E.

5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

Answer: The Board has concluded that it would not be in the best interest of the SIF and its members to sell any assets owned by the Fund. In addition, subject to approval of the S.C. Workers Compensation Commission, distributions to members rest in the sole discretion of the Board.

Sincerely,

Pope D. Johnson, III

PDJIII/sww
Enclosures

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sandler, Lincoln Privette,)
Marc Ellis, Joey Carter, Betty Davis,)
And Michael Nier on behalf of)
Themselves and others similarly)
situated,)

Civil Action No. 2012-CP-32-00757

Plaintiffs,)

vs.)

Affidavit of Jeffrey M. Ranew

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

FILED
2012 MAR 20 A 8:24
BETH A. CARLIGS
CLERK OF COURT
LEXINGTON SC

PERSONALLY APPEARED BEFORE ME, Jeffrey M. Ranew, who being duly sworn, deposes and says:

1. I am Jeffrey M. Ranew. I am the Administrator of the South Carolina Home Builders Self Insurers Fund ("SIF") and I have served in this capacity since March 24, 2003. I make this affidavit based upon personal knowledge.

2. The administration of the SIF is regulated and controlled by the South Carolina Workers' Compensation Commission. The SIF is not an insurance company and the South Carolina Department of Insurance has no control over the administration of the SIF. The SIF does not issue policies of insurance. If a home builder wants to become a member of the SIF in order to satisfy his employer's obligation under the South



ROA-000331

APP000337

Carolina Workers' Compensation Act, he completes a workers' compensation application, completes a WCC Form 6a, and pays a \$25.00 non-refundable fee to the South Carolina Workers' Compensation Commission. Attached as Exhibit A is a copy of the workers' compensation application. Attached as Exhibit B is the WCC Form 6a. The WCC Form 6a and the check is then submitted to the Commission for approval. Upon approval, the home builder receives a certificate confirming that he is a member of the SIF. The SIF then provides the new member with a new member package with information about the SIF and the management of the SIF. Attached as Exhibit C is a new member package. After five weeks and a report on his operation, the new member is billed for the premium relating to his business. Attached as Exhibit D is a copy of the certificate that is issued. The certificate sets forth the responsibilities of the employer and the SIF. There are no written contracts signed by the member and the SIF. There are no written contracts signed by the member and the trustees.

3. The Complaint alleges that the defendants have used trust funds to purchase a building. Use of SIF funds for this purpose was approved by the South Carolina Workers' Compensation Commission. See Exhibit E. The building is owned by Center point V, LLC which is owned by the SIF. The SIF occupies part of the building, with the remainder being leased out or available for lease.

4. The Complaint alleges that the defendants removed approximately \$5,000,000.00 from the trust corpus for the purpose of establishing a separate mutual insurance company which would not provide any benefit to the beneficiaries of the trust. The funds were only transferred and held in an account after 96.5% of the SIF

membership voted to approve the transfer of the funds. The SIF mailed out 933 ballots and the vote was as follows:

533 marked "yes"
33 marked "no"
188 designated by recipient as "proxy"
179 abstentions subsequently recorded as "proxy"

After Board approval and acceptance of proxy votes, pursuant to the balloting letter, the vote tally was recorded as follows:

Yes: 900 votes (96.5%)
No: 33 votes (3.5%)

The plaintiffs voted as follows, as shown by their ballots marked Exhibit F:

Lincoln Privette voted "yes" with conditions and his vote was counted as a "no" vote
Joey Carter approved it
Marc Ellis approved it
Barry Davis approved and disapproved it
Allen Patterson authorized the Board to vote on his behalf
Richard Sendler approved it
Michel Nieri approved it through his Authorized Agent Maureen Smirdall
Ron Boshan approved it on behalf of Steve Tilton

Prior to the transfer of the funds, an agreement was reached that the \$5,000,000.00 would be returned to the SIF if an agreement could not be reached with the Home Builders Association of South Carolina ("HBASC") regarding the establishment and operation of the proposed mutual insurance company. The South Carolina Workers' Compensation Commission approved the transfer of the funds. See Exhibit G. When an agreement could not be reached with the HBASC regarding the establishment and operation of the proposed mutual insurance company, the application for a mutual insurance company was withdrawn, and the \$5,000,000.00 was returned to the SIF.

5. The establishment of a separate mutual insurance company has been studied and under consideration by the SIF since 2003 when the SIF Board Chairman and Administrator introduced the concept of a mutual insurance company to a meeting of the Home Builders Association of South Carolina senior leadership and received a provisional endorsement. Attached as Exhibit H are copies of Board Minutes beginning in 2003 wherein the establishment of a mutual insurance company has been addressed. There are real and substantial benefits in transitioning from a self insured fund to a mutual insurance company. Members of a mutual insurance company are not jointly and severally liable for claims as members of a self insured fund such as the SIF are. While SIF members would continue to remain jointly and severally liable for claims until the SIF is terminated, formation of a mutual company would start the process leading to termination of the SIF and the eventual end of exposure for joint and several liability. A mutual company could offer other types of insurance to a broader customer base which would help insure the viability and availability of the insurance coverage. The number of members of the SIF has been reduced because of the negative impact of the recession on the home building industry. The SIF's effort to move from a self insured fund to a mutual insurance company using \$5,000,000.00 in non-pledged assets of the SIF was approved last year by the South Carolina Workers' Compensation Commission. See Exhibit I.

6. The Complaint alleges that the trustees did not advise the beneficiaries that the funds that were being transferred to establish the mutual company could have been returned to the membership. Attached as Exhibit J is a letter from the South Carolina Workers' Compensation Commission which outlines all of the requirements for

seeking to distribute dividends to the membership. A return of member contributions in the amount of \$750,000.00 was made in 2009. Member contributions in the amount of \$750,000.00 were returned in 2010. However, there is no pending request to the Commission for additional return of member contributions or the payment of dividends.

7. The Complaint alleges that the trustees have taken significant amounts of money out of the trust for their own benefit by virtue of payments to themselves for unnecessary means and for other unnecessary payments. However, for the period from 1995 to 2008, the trustees received no compensation for time/travel to regularly scheduled board meetings. Beginning in 2008, the trustees began to receive \$250.00 for time/travel expense for each board meeting attended. There are 12 board meetings per year. If the trustee attends all meetings, he receives a maximum of \$3,000.00 per year. Board meetings frequently take as much as a full day. Some trustees travel from Seneca, Greenville and Charleston to attend these meetings. In addition thereto, approximately every six months, the trustees attend a meeting with similar SIF's from other states. The expense incurred for travel and meals for trustees and their spouses or guests are reimbursed by the SIF. According to the SIF records, trustees have attended such meetings since the mid-1990's.

8. In December 2007, the SIF hired a consulting firm to assist in selecting a new software computer program. The recommendation of the consulting firm was accepted and on December 19, 2008, the Board of Trustees voted to purchase the new software program.

9. To my knowledge, plaintiffs have filed no petitions with the South Carolina Workers' Compensation Commission seeking relief regarding the actions of the

defendants. Plaintiff Ellis did participate on behalf of the HBASC in a mediation between the SIF and the HBASC regarding establishment of the mutual insurance company. However, the plaintiffs have never contacted the SIF or sought to appear before the SIF Board to address and/or resolve their claims which are set forth in their complaint.

10. Attached hereto as Exhibit K is a true and genuine copy of the Agreement and Declaration of Trust dated September 27, 1995, with amendments, all of which have been approved by the South Carolina Workers' Compensation Commission as shown by the initials. Attached as Exhibit L are letters from the Commission regarding their approval.

11. The SIF's business office is located in Richland County and has always been located in Richland County. The offices are located at 1370 Browning Road, Suite 130, Columbia, South Carolina 29210, which is the principal place of administration of the Trust.

12. None of the alleged acts or omissions referred to in the Complaint have taken place in Lexington County. All SIF actions have taken place in Richland County.

SWORN TO AND SUBSCRIBED BEFORE ME

this 15 day of March, 2012

[Signature]
Notary Public for South Carolina

My Commission Expires: 7/5/15

[Signature]
Jeffrey M. Ranew



March 26, 2013

Mr. Lincoln Privette
Privette Enterprises, Inc.
PO Box 19
Darlington, SC 29540

Dear Mr. Privette:

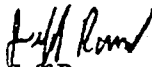
Enclosed you will find documents regarding the South Carolina Home Builders Self Insurance Fund (SIF); specifically, enclosed please find financial information with an exhibit of trustee travel reimbursement, and a copy of the amended trust agreement.

The SIF Board of Trustees has instructed me to send you this letter which will serve as a personal invitation to you to attend a meeting. The Board of Trustees has set aside April 17, 2013 at 11:00 a.m. for you to personally meet with Herb Witter, the Chairman of the Board of Trustees, possibly other trustees, and me at the SIF's office. The purpose of the meeting if you wish to attend will be to answer your questions regarding the SIF and its administration.

This would be a meeting without lawyers where hopefully businessmen and homebuilders can engage in discussion regarding any questions you have about the SIF. The Fund and the trustees believe that such a meeting would provide the forum to answer and resolve all questions.

Please let me know if you want to sit down with us. We will address your questions.

Sincerely,


Jeff Ranew

P.O. Box 7727 • Columbia, SC 29202 • 800/678-8178 • 803/771-0568
Claims Fax 803/771-1598 • Policy Services/Admin. Fax 803/252-8581
ROA-000337

APP000343



STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Allen Patterson, Steve Tilton,)
Richard Sendler, Lincoln Privette,)
Marc Ellis, Joey Carter, Barry Davis,)
Michael Nieri, Allen Patterson)
Residential, LLC, Tilton Group,)
Sendler Construction Co., Inc.,)
Privette Enterprises, Ellis)
Construction Company, Inc., The)
Barry Davis Company, Inc., Great)
Southern Homes, and J. Carter,)
LLC, on behalf of themselves and)
others similarly situated,)

Civil Action No. 2013-CP-40-02655

Plaintiffs,)

vs.)

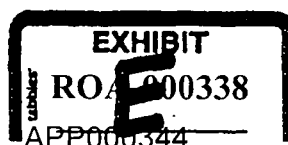
Affidavit of W. C. Smith

Herb Witter, Colin Campbell, Eddie)
Weaver, Tom Markovich, Keith)
Smith, Jim Gregorie, individually)
and as Trustees of the South Carolina)
Home Builders Self Insurers Fund,)
and the South Carolina Home)
Builders Self Insurers Fund,)

Defendants.)

PERSONALLY APPEARED BEFORE ME, W. C. Smith, who being duly sworn,
deposes and says:

1. I am W. C. Smith. I am the Director of the Self-Insurance Division of the South Carolina Workers' Compensation Commission. Attached as Exhibit A are two pages from the Commission's webpage which identify me as the Director and provides information regarding the Self-Insurance Division.



2. Also attached as Exhibit B is a letter dated March 13, 2014 from Jeff Ranew asking me to answer the questions contained in the letter. I answered the questions by checking the appropriate box and by initialing my checkmark.

SWORN TO AND SUBSCRIBED BEFORE ME

this 28 day of March, 2014

Priscilla J. [Signature]
Notary Public for South Carolina

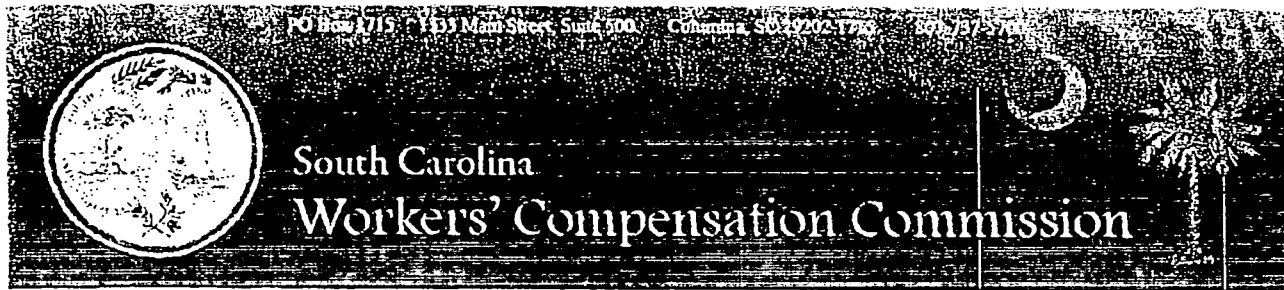
My Commission Expires: 7/5/15

W.C. Smith [Signature]

W. C. Smith

3/28/14

Workers Compensation Commission - Home



Raven Cliff Falls

Photo courtesy of SC Department of
Parks, Recreation and Tourism
www.discoverouthcarolina.com
1-803-734-1700

[Home](#) > Insurance and Medical Services

Insurance And Medical Services

The Insurance and Medical Services Department is responsible for monitoring required workers' compensation insurance coverage; investigating matters of non-compliance and enforcing compliance with the law; administering the workers' compensation self-insurance program; establishing the fee schedules for hospitals, physicians and ambulatory surgery centers and overseeing and coordinating the creation of all Commission claim files.

This is accomplished through the efforts of four divisions.

<u>Coverage & Compliance</u>	Wayne Ducote, Director wducote@wcc.sc.gov	(803) 737-6203
<u>Self-Insurance</u>	W.C Smith, Director wsmith@wcc.sc.gov	(803) 737-5712
<u>Medical Services</u>	Bridgette Amick, Medical Policy Analyst bamick@wcc.sc.gov	(803) 737-5743

Contact Information:

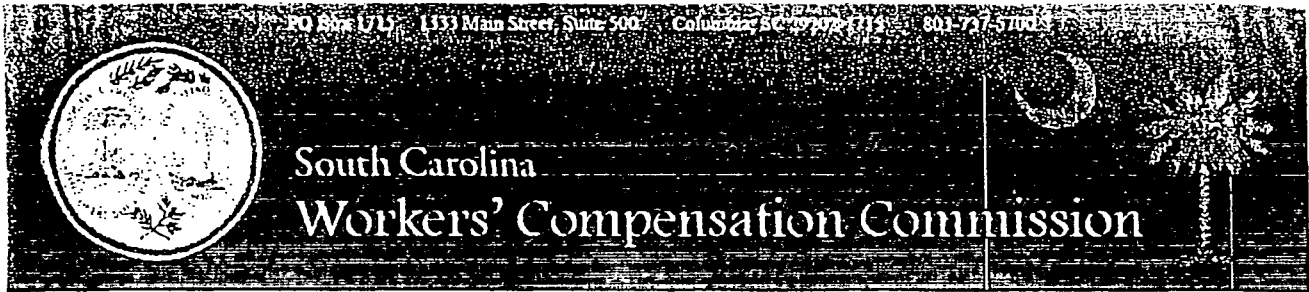
Insurance and Medical Services
Telephone: 803-737-6203
Fax: 803-737-1258

ROA-000340
APP000346



3/28/14

Workers Compensation Commission - Self-Insurance



[Home](#) > [Insurance and Medical Services](#) > Self-Insurance

Self-Insurance Division

The Self-Insurance Division approves and regulates self-insured employers, singly or as political subdivisions and group self-insured funds, to assure their compliance with South Carolina Workers' Compensation Law, Title 42 and Workers' Compensation Commission Regulation 67-1500.

Self-insured employers are required to provide all appropriate workers' compensation benefits to their injured workers in accordance with South Carolina Law, and to secure excess insurance and post with the Commission a surety in the form of a surety bond or letter-of-credit to be determined by the Self-Insurance Division.

Employers who wish to self-insure must provide three years' audited GAAP financial statements with their application. Once approved, the self-insurer is required to provide the Self-Insurance Division its annual audited GAAP financial statement to ensure it continues to meet financial requirements.

Approved self-insurers are required to pay the state a self-insurance tax at the end of their fiscal year. The tax rate is 2.5% of the self-insurer's total paid expenses for the program in South Carolina. This tax is collected by the Self-Insurance Division and is also due from former self-insured employers until all claims and expenses from their self-insured period have been satisfied. Additionally, self-insured employers and self-insured funds are required to pay an annual assessment to the South Carolina Second Injury Fund.

A list of self-insured employers and self-insured funds and their claims address is available for a fee. Please call the Self-Insurance Division at 803-737-5704.

Contact Information:

W.C. Smith, III, CPCU, ARM
Director
Telephone: 803-737-5704
Fax: 803-737-1258
self-insurance@wcc.sc.gov

ROA-000341

APP000347



March 3, 2014

W. C. Smith
SC Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

RE: Allen Patterson etal. v. Herb Witter etal.
Civil Action No. 2013-CP-40-02655

Dear Mr. Smith:

The plaintiffs in the above-referenced matter commenced a derivative action against the defendants. I have enclosed herewith a copy of the Summons and Complaint in Civil Action No. 2012-CP-40-04311. The action has been dismissed without prejudice. A copy of the Order dismissing the action is enclosed.

As you can see from the Order, an issue was whether the plaintiffs had made a proper demand to satisfy the pleading requirements of Rule 23, SCRCF. The defendants agreed that if the court dismissed the action, the defendants would treat the letter of the plaintiffs' attorney dated January 30, 2013 as a demand letter and would respond within 60 days to the questions set forth in that letter. I have enclosed a copy of the letter dated January 30, 2013 which the defendants have agreed can be treated as a demand letter under Rule 23, SCRCF.

I need your assistance and position in order to respond to paragraphs 1, 2 and 4. Please let me have your response to these questions as set forth below. If any explanation is needed, feel free to provide any such explanations.

In responding to these questions, I ask that you keep in mind that the Fund has 1,100+ members at the present time and the plaintiffs (8 individuals and their companies) are the only ones who have submitted a demand letter.

P.O. Box 7727 • Columbia, SC 29202 • 800/678-8178 • 803/771-0566
Claims Fax 803/771-1598 • Policy Services/Admin. Fax 803/252-8581
ROA-000342

APP000348



1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.

Would making the \$5,000,000 disbursement require approval by the South Carolina Workers' Compensation Commission?

☒ YES ☐ NO

Would the Commission approve a disbursement of \$5,000,000 as set forth above based upon the request of 8 members?

☐ YES ☒ NO

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.

Does the Fund provide a quarterly accounting and a yearly accounting to the Commission?

☒ YES ☐ NO

Has the Commission identified any excess funds?

☐ YES ☒ NO

Are there any excess funds available for distribution?

☐ YES ☒ NO

If so, what is the amount of excess funds? _____

4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.

Would the Commission approve the dissolution of the Fund based upon the request of 8 members?

☐ YES ☒ NO

Is there any current request by the South Carolina Home Builders Self Insurers Fund to form a competing entity?

☐ YES ☒ NO

Does the South Carolina Home Builders Self Insurers Fund continue to serve its functions?

☒ YES

☐ NO

WCS

Sincerely,

W.C. Smith

Jeffrey M. Ranew

B

AGREEMENT AND DECLARATION OF TRUST
CREATING THE
SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

THIS AGREEMENT, made and entered into this 27 day of September, 1995
by and between the Home Builders Association of South Carolina, Inc., a corporation not
for profit, organized and existing under and by virtue of the laws of the State of South
Carolina, hereinafter referred to as the "Settlor", and a Board of Trustees, hereinafter
referred to as the "Trustees", has been designated for the purposes, among others, of
directing the affairs of the Fund.

WITNESSETH:

WHEREAS, the Settlor and the Trustees intend to apply to the South Carolina
Workers' Compensation Commission for the establishment of a group self insurers fund
pursuant to South Carolina statutes for the benefit of the members of the Home Builders
Association of South Carolina, Inc.; and

WHEREAS, the establishment of a group self insurers fund for the purpose of
satisfying an employers' obligation under the South Carolina Workers' Compensation Act
would be in the best interest of the members of the Home Builders Association of South
Carolina, Inc.; and

WHEREAS, it is considered to be in the best interest of the members of the Home
Builders Association of South Carolina, Inc. that an Agreement and Declaration of Trust
fully setting forth the duties and responsibilities of the Trustees be entered into;

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND is hereby established as follows:

ARTICLE I

DEFINITIONS

Fund - The group self insurers fund or funds which are hereby created for the purposes set forth herein.

Indemnity Agreement - The Indemnity Agreement which shall be filed by the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND pursuant to the Rules for Self Insurers as issued by the South Carolina Workers' Compensation Commission.

Member - A company, firm, corporation, individual, partnership or other legal entity involved in on-site home construction which is a participating member in good standing of the Home Builders Association of South Carolina, Inc.

Rules for Self-Insurers - The Rules for Self Insurers under the South Carolina Workers' Compensation Act as amended from time to time and administered by the South Carolina Workers' Compensation Commission.

Service Agent - Any individual, co-partnership, corporation, firm or other legal entity engaged in the business of servicing approved workers' compensation self-insurance programs which has made application to, and been approved by, the South Carolina Workers' Compensation Commission.

Trustees - The Trustees appointed to serve on the Board of Trustees of this Fund as provided herein.

ARTICLE II

CREATION OF THE TRUST

There is hereby established and created a Trust Fund which shall be known as the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND and the Trustees thereof may hold property, enter into contracts and in all matters as hereinafter set forth act in behalf of the Trust Fund in that name. This Trust Fund shall be used for the purposes as hereinafter set forth.

ARTICLE III

PURPOSE

This Trust Agreement is made and executed for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; to form an overall self insurers fund pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building industry.

ARTICLE IV

DESIGNATION OF TRUSTEES

SECTION 1 NUMBER AND ELIGIBILITY OF TRUSTEES

The operation and administration of the Trust Fund shall be the joint responsibility of a Board of Trustees consisting of a number of Trustees of not less than five (5) nor more than nine (9). The Board of Trustees shall consist of at least one representative from each of the five Home Builders Association of South Carolina, Inc. districts. The President and Vice President of the Home Builders Association of South Carolina, Inc. shall serve as Ex-Officio Trustees: they shall have voting privileges if and only if they are Members of the Fund. Except for the two Ex-Officio Trustees, Trustees shall be elected by the participating Members by a mail ballot.

*Trustee elections shall be held by mail ballot to all members of the Fund. Trustees receiving a vote of 51% of returned ballots shall be declared duly elected. The Trustees shall elect from one of their number, one Trustee to serve as Chairman. Except for the two Ex-Officio Trustees, only members of the Home Builders Association of South Carolina, Inc. whose businesses participate in the Trust, or their employees, may serve as Trustees. If the Trust wants to change the makeup of the Board of Trustees or requirements for being a Trustee, it must first be approved by the Home Builders Association of South Carolina Board of Directors.

SECTION 2 RESIGNATION OR REMOVAL OF TRUSTEES

Any Trustee herein named, or any successor Trustee, may resign at any time, with or without cause, by giving not less than sixty (60) days written notice of the intention to so resign to the Board of Trustees and to the Board of Directors of the Home Builders Association of South Carolina, Inc. The Board of Directors of the Home Builders

*By-Law change approved by The SCHBSIF Board of Trustees on November 13, 1997.

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Association of South Carolina, Inc. may remove a Trustee now serving or any successor Trustee with or without cause, by giving not less than ten (10) days written notice to the Trustee being removed and to the Board of Trustees. Prior to the effective date of such resignation or removal, the Board of Trustees shall nominate a successor Trustee to complete the term of the removed Trustee, subject to the approval of the Executive Committee of the Board of Directors of the Home Builders Association of South Carolina, Inc. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee or subsequent to his resignation or removal as Trustee. A successor Trustee shall not be required to inquire into or take any notice of the prior administration of the Trust Fund. Any successor Trustee, immediately upon his acceptance in writing to the Trust, shall become vested with all the estate, rights, powers, discretion and duties of his predecessor Trustee with like effect as if originally named as Trustee herein.

No Trustee may be appointed who is, or continues to serve as a Trustee after becoming an owner, officer or employee of a service agent.

SECTION 3. TRUSTEES' TITLE.

In case of death, resignation, refusal or inability to act by any one or more of the Trustees, the remaining Trustees shall have all of the powers, rights, estates and interest of this Trust and shall be charged with its duties, provided that in such cases, no action may be taken unless it is concurred in by not less than a majority of the remaining Trustees, which shall be not less than two (2) in number.

SECTION 4. TRUSTEE OFFICERS.

The Trustees shall meet as promptly as possible after execution of this Trust Agreement and elect from among the Trustees a Chairman and a Secretary of the Board of Trustees. The term of such offices shall commence on the date of their election and continue to the end of the fiscal year. Thereafter, such officers shall be elected annually.

ARTICLE V

ADMINISTRATION OF FUND

SECTION 1. MEETINGS.

The Trustees shall meet at least quarterly, and more often if required, at the principal office of the Fund or at such other location as may be acceptable to a majority of the Trustees. The Chairman of the Trustees shall set the date, time and location of each meeting, and notice thereof shall be furnished to each Trustee by the Secretary or Administrator not less than ten (10) days prior to the date of such meeting. Such notice shall specify the date, time and location of such meeting and may specify the purpose thereof and any action proposed to be taken thereat. Whenever any notice is required to be given to any Trustee hereunder, such notice shall be directed to the said Trustee by certified mail, return receipt requested, to the address of such Trustee as recorded in the office of the Fund.

Special meetings of the Trustees may be held at any time and place without notice provided all Trustees execute a waiver of notice and consent to the said meeting.

For the purposes of a duly called and noticed meeting of the Board of Trustees a quorum shall consist of four (4) members of the Board of Trustees, unless the Board of

Trustees consists of less than four (4) Trustees in which case all Trustees shall be required to constitute a quorum. Meetings, including votes, may be conducted by telephone conference. The Secretary, acting Secretary, or his designee shall keep minutes of all meetings, proceedings and acts of the Board of Trustees, but such minutes need not be verbatim. Copies of all minutes of the meetings of the Board of Trustees shall be sent by the Secretary, acting Secretary or a designee to all Trustees.

SECTION 2. VOTING.

All actions by, and decisions of, the Board of Trustees shall be by the vote of a majority of the number of Trustees attending a duly called meeting of the Trustees at which a quorum is present; provided, however, that actions by, and decisions of, the Board of Trustees may be taken by a vote of a majority of the number of Trustees attending a special meeting without notice when a proper waiver and consent has been obtained as provided in Section I above.

SECTION 3. OFFICE OF THE FUND.

The Trustees shall establish and maintain an office of the Fund, the exact location of which is to be made known to the parties interested in or participating in the said Fund and to the appropriate governmental agencies and departments of state. The books and records pertaining to the Fund and its administration shall be kept and maintained at the office of the Trust.

SECTION 4. EXECUTION OF DOCUMENTS.

A certificate signed by the chairman and secretary of the Fund shall be evidence of the action of the Board of Trustees and any such certificate or other instrument so signed shall

conclusively be presumed to be authentic, and all facts and matters stated therein shall conclusively be presumed to be true.

SECTION 5. APPOINTMENT OF ADMINISTRATOR.

The Trustees shall designate a fiscal agent and/or an Administrator to administer the financial affairs of the Fund; provided, however, such fiscal agent or Administrator shall not be an owner, officer, or employee of a service agent.

Any fiscal agent and/or Administrator so appointed shall furnish a fidelity bond with the Trust as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities held by or in the name of the Fund. The amount of the bond shall be determined by the Trustees and evidence of such bond shall be filed with the appropriate governmental agencies and departments.

SECTION 6. APPROVAL OF NEW MEMBERS.

The Trustees, after the inception date of the Fund, shall receive applications for membership from prospective new members to the Fund and shall approve such application for membership in accordance with the Rules for Self-Insurers, the terms of the Indemnity Agreement, and the rules and regulations established and promulgated by the Trustees for the admission of new members to the Fund. The Board of Trustees may delegate the ministerial authority for membership approval to the Administrator or such other person as they select; provided that such Administrator or person designated is not an owner, officer, or employee of a service agent. Membership in the Fund is also contingent on the regulations of the state of South Carolina and approval by the South Carolina Workers' Compensation Commission.

SECTION 7. ESTABLISHMENT OF FUNDS.

The Trustees shall be responsible for establishing such Trustee funds, loss funds, or other funds which may be required from time to time by South Carolina Statutes, or the Rules for Self-Insurers or the Rules of Conduct and Administration of this Fund as may be established by the Trustees from time to time.

SECTION 8. POSTING OF SECURITY.

The Trustees shall be responsible for and shall undertake the posting of such security deposit and/or security bonds as may be required to be posted with the South Carolina Workers Compensation Commission pursuant to South Carolina Statutes, or the Rules for Self-Insurers or such other legislative enactments or administrative regulations which may be established from time to time.

SECTION 9. REPORTS BY TRUSTEES.

The Trustees shall be responsible for and shall cause to be filed such annual or other periodic audits, reports, and disclosures as may be required from time to time pursuant to applicable federal or state statutes or governmental regulations.

SECTION 10. FISCAL MANAGEMENT AND AUTHORITY.

The Trustees shall have said authority and take all necessary precautions to safeguard the assets of the Fund including, but not limited, to the following:

- a. The designation of a fiscal agent and/or Administrator to administer the financial affairs of the Fund, who shall furnish a fidelity bond with the Trustees as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Trustees, and

evidence of such bond shall be filed with the Commission, said bond being one of the conditions required for approval of the establishment and continued operation of a self insurers fund. Such fiscal agent or Administrator shall be an owner, officer, or employee of the service organization.

b. Retaining control of all monies collected or disbursed for the Fund. All loss funds or funds of any type shall remain in the custody of the Trustees or the authorized Administrator. Provided, however, that a revolving fund for payment of compensation benefits due and other related expenses may be established for the use of the authorized service company. The service company shall furnish a fidelity bond covering its employees, with the Trustees as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Provided, however, that should the bond required of the fiscal agent and/or Administrator also cover the monies in the revolving fund, separate bond shall not be required.

c. Having the accounts and records of the Fund audited annually or at any other time as may be necessary to determine the financial stability of the Fund or the adequacy of the monetary reserves, such audits to be made by Certified Public Accountants.

d. The Trustees shall make active efforts to collect delinquent accounts resulting from any unpaid premiums by members.

e. The Trustees or fiscal agent or Administrator shall not utilize any of the monies collected as premium for any purpose unrelated to workers' compensation insurance.

f. The Trustees shall be authorized to invest Trustees' funds, claims funds and unappropriated surplus in the following types of investments only:

1. Savings accounts or certificates of deposit in a duly chartered commercial bank located within the State of South Carolina and insured through the Federal Deposit Insurance Corporation.

2. Share accounts or savings certificates in a duly chartered savings and loan association located within the State of South Carolina and insured through the Federal Savings and Loan Insurance Corporation.

3. Direct obligations of the United States Treasury, such as notes, bonds or bills which are backed by the full faith and credit of the United States Government.

g. The safety of any investment of surplus monies or claims reserves shall be the responsibility of the Trustees.

h. The Trustees shall be prohibited from making any type of investment as authorized by these rules with the intent to trade, dispose or sell the security in any manner other than redeeming it at maturity. Therefore, it shall be the responsibility of the Trustee to purchase securities in such denominations and with dates of maturity to insure that these securities shall be redeemable at the same time and in the same amounts as the Fund's current and long-term liabilities.

i. The Trustees shall report annually, as part of the financial statement of the Fund, a schedule showing the disposition of all investment income earned during the Fund year just ended.

j. The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act which is incorporated herein by

reference as permitted by statute 62-7-703 (b) as if fully set out herein.

SECTION 11. RULES AND REGULATIONS.

The Trustees may prescribe such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided the rules and regulations shall not be inconsistent with the provisions of this Declaration of Trust, the Indemnity Agreement, the Rules for Self Insurers, applicable federal and/or state statutes and applicable governmental regulations.

SECTION 12. TRUSTEES' LIABILITIES.

No Trustees shall be liable for any action taken pursuant to this Trust Agreement in good faith or for an omission, by any other Trustee or by any employee of Trustee.

The Trustees are hereby authorized and empowered to obtain, at the expense of the Fund, liability insurance fully protecting the Trustees and the Fund from any loss or expense incurred, including reasonable attorney's fees, for all acts of the Trustees except bad faith and gross negligence on the part of the Trustees. The Fund hereby agrees to save, hold harmless and indemnify the Trustees while acting in the capacity of Trustees excepting bad faith and gross negligence.

SECTION 13. RELIANCE ON COUNSEL'S OPINION.

The Trustees may consult with legal counsel concerning any questions which may arise with reference to the duties and powers or with reference to any other matter pertaining to this Agreement or the Trust created hereby; and the opinion of such counsel shall be full and complete authorization and protection in respect to any action taken or suffered by the Trustees hereunder in good faith in accordance with the opinion of such counsel, and the

Trustees shall not be liable therefor.

ARTICLE VI

MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Settlor. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by a concurrence of all of the parties to this Agreement, including the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities: in which case, the Trust may continue in perpetuity unless otherwise terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

SECTION 3. SITUS OF THE TRUST.

This Trust Agreement is executed by the parties hereto and accepted by the Trustees in the State of South Carolina, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of South Carolina.

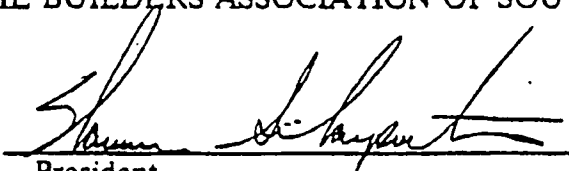
SECTION 4. CONSTRUCTION.

Whenever any words are used in this Agreement in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and whenever any words are used in this Agreement in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and whenever any words were used in the Agreement in the plural form, they shall be construed as though they were also in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, this Agreement and Declaration of Trust has been executed the day and year first above written.

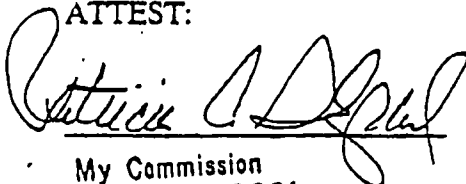
SETTLOR:

HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA, INC.

By: 

President

ATTEST:



My Commission
expires 5-2-2001

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 30, 2014



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S. Jahue Moore, SC Bar # 4063
Margaret "Meg" Hazel, SC Bar # 100634
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Attorneys for Appellants

RECEIVED

OCT 30 2014

SC Court of Appeals

ROA-000359

APP000365

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellant Case No. 2014-000963

RECEIVED

NOV 20 2014

SC Court of Appeals

Allen Patterson, Steve Tilton, Richard Sendler,
Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis,
Michel Nieri, Allen Patterson Residential LLC, Tilton
Group, Sendler Construction Co., Inc., Privette Enterprises,
Ellis Construction Co., Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter, LLC, on behalf of
themselves and others similarly situated.....Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver,
Tom Markovich, Keith Smith, Jim Gregorie,
individually and as Trustees of the South Carolina
Home Builders Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund.....Respondents.

RECORD ON APPEAL - SUPPLEMENT

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Attorneys for Respondents Herb Witter,
Colin Campbell, Eddie Weaver, Tom
Markovich, Keith Smith and Jim Gregorie,
individually and as Trustees of the South
Carolina Home Builders Self Insurers Fund



WORKERS COMPENSATION APPLICATION

DATE (MM/DD/YYYY)

AGENCY NAME AND ADDRESS		COMPANY:			
		UNDERWRITER:			
		APPLICANT NAME:			
		OFFICE PHONE:	MOBILE PHONE:		
PRODUCER NAME: CS REPRESENTATIVE NAME: OFFICE PHONE (INC. No. Ext.) MOBILE PHONE: FAX (INC. No.): E-MAIL ADDRESS:		MAILING ADDRESS (Including ZIP + 4 or Canadian Postal Code)		YRS IN BUS:	
		SIC:			
		NAICS:			
		WEBSITE ADDRESS:			
E-MAIL ADDRESS:		E-MAIL ADDRESS:		E-MAIL ADDRESS:	
CODE:		SUB CODE:		CREDIT BUREAU NAME:	
AGENCY CUSTOMER ID:		FEDERAL EMPLOYER ID NUMBER		NCCI RISK ID NUMBER	
		ID NUMBER:		OTHER RATING BUREAU ID OR STATE EMPLOYER REGISTRATION NUMBER	

STATUS OF SUBMISSION		BILLING / AUDIT INFORMATION	
☐ QUOTE	☐ ISSUE POLICY	☐ BILLING PLAN	☐ PAYMENT PLAN
☐ BOUND (Give date and/or attach copy)	☐ AGENCY BILL	☐ ANNUAL	☐ AT EXPIRATION
☐ ASSIGNED RISK (Attach ACORD 133)	☐ DIRECT BILL	☐ SEMI-ANNUAL	☐ MONTHLY
		☐ QUARTERLY	☐ QUARTERLY
		% DOWN:	

LOCATIONS	
LOC #	STREET, CITY, COUNTY, STATE, ZIP CODE

POLICY INFORMATION				
PROPOSED EFF DATE	PROPOSED EXP DATE	NORMAL ANNIVERSARY RATING DATE	PARTICIPATING	RETRO PLAN
PART 1 - WORKERS COMPENSATION (States)		PART 2 - EMPLOYER'S LIABILITY	NON-PARTICIPATING	OTHER COVERAGES
		EACH ACCIDENT	DEDUCTIBLES (N/A in W)	AMOUNT / % (N/A in W)
		DISEASE-POLICY LIMIT	MEDICAL	U.S.L. & H. VOLUNTARY COMP
		DISEASE-EACH EMPLOYEE	INDEMNITY	FOREIGN COV
DIVIDEND PLAN/SAFETY GROUP		ADDITIONAL COMPANY INFORMATION		
SPECIFY ADDITIONAL COVERAGES / ENDORSEMENTS (Attach ACORD 101, Additional Remarks Schedule, if more space is required)				

TOTAL ESTIMATED ANNUAL PREMIUM - ALL STATES				
TOTAL ESTIMATED ANNUAL PREMIUM ALL STATES	TOTAL MINIMUM PREMIUM ALL STATES	TOTAL DEPOSIT PREMIUM ALL STATES		
\$	\$	\$		
CONTACT INFORMATION				
TYPE	NAME	OFFICE PHONE	MOBILE PHONE	E-MAIL
INSPECTION				
ACCTG RECORD				
CLAIMS INFO				

INDIVIDUALS INCLUDED / EXCLUDED									
PARTNERS, OFFICERS, RELATIVES (Must be employed by business operations) TO BE INCLUDED OR EXCLUDED (Remuneration/Payroll to be included must be part of rating information section.) Exclusions in Missouri must meet the requirements of Section 287.090 RSMo.									
STATE	LOC #	NAME	DATE OF BIRTH	TITLE/ RELATIONSHIP	OWNER-SHIP %	DUTIES	INC/EXC	CLASS CODE	REMUNERATION/PAYROL

SIF 001

EXHIBIT

A

PRIOR CARRIER INFORMATION / LOSS HISTORY

AGENCY CUSTOMER ID: _____

PROVIDE INFORMATION FOR THE PAST 5 YEARS AND USE THE REMARKS SECTION FOR LOSS DETAILS						LOSS RUN ATTACHED
YEAR	CARRIER & POLICY NUMBER	ANNUAL PREMIUM	MOD	# CLAIMS	AMOUNT PAID	RESERVE
	CO: _____ POL #: _____					
	CO: _____ POL #: _____					
	CO: _____ POL #: _____					
	CO: _____ POL #: _____					
	CO: _____ POL #: _____					
	CO: _____ POL #: _____					

NATURE OF BUSINESS / DESCRIPTION OF OPERATIONS

GIVE COMMENTS AND DESCRIPTIONS OF BUSINESS, OPERATIONS AND PRODUCTS: MANUFACTURING - RAW MATERIALS, PROCESSES, PRODUCT, EQUIPMENT; CONTRACTOR - TYPE OF WORK, SUB-CONTRACTS; MERCANTILE - MERCHANDISE, CUSTOMERS, DELIVERIES; SERVICE - TYPE, LOCATION; FARM - ACREAGE, ANIMALS, MACHINERY, SUB-CONTRACTS.

GENERAL INFORMATION

EXPLAIN ALL "YES" RESPONSES

1. DOES APPLICANT OWN, OPERATE OR LEASE AIRCRAFT / WATERCRAFT?

2. DO / HAVE PAST, PRESENT OR DISCONTINUED OPERATIONS INVOLVE(D) STORING, TREATING, DISCHARGING, APPLYING, DISPOSING, OR TRANSPORTING OF HAZARDOUS MATERIAL? (e.g. landfills, wastes, fuel tanks, etc)

3. ANY WORK PERFORMED UNDERGROUND OR ABOVE 15 FEET?

4. ANY WORK PERFORMED ON BARGES, VESSELS, DOCKS, BRIDGE OVER WATER?

5. IS APPLICANT ENGAGED IN ANY OTHER TYPE OF BUSINESS?

6. ARE SUB-CONTRACTORS USED? (If "YES", give % of work subcontracted)

7. ANY WORK SUBLET WITHOUT CERTIFICATES OF INSURANCE? (If "YES", payroll for this work must be included in the State Rating Worksheet on Page 2)

8. IS A WRITTEN SAFETY PROGRAM IN OPERATION?

9. ANY GROUP TRANSPORTATION PROVIDED?

10. ANY EMPLOYEES UNDER 16 OR OVER 60 YEARS OF AGE?

11. ANY SEASONAL EMPLOYEES?

12. IS THERE ANY VOLUNTEER OR DONATED LABOR? (If "YES", please specify)

GENERAL INFORMATION (continued)

AGENCY CUSTOMER ID: _____

EXPLAIN ALL "YES" RESPONSES

Y/N

13. ANY EMPLOYEES WITH PHYSICAL HANDICAPS?

14. DO EMPLOYEES TRAVEL OUT OF STATE? (If "YES", indicate state(s) of travel and frequency)

15. ARE ATHLETIC TEAMS SPONSORED?

16. ARE PHYSICALS REQUIRED AFTER OFFERS OF EMPLOYMENT ARE MADE?

17. ANY OTHER INSURANCE WITH THIS INSURER?

18. ANY PRIOR COVERAGE DECLINED / CANCELLED / NON-RENEWED IN THE LAST THREE (3) YEARS? (Missouri Applicants - Do not answer this question)

19. ARE EMPLOYEE HEALTH PLANS PROVIDED?

20. DO ANY EMPLOYEES PERFORM WORK FOR OTHER BUSINESSES OR SUBSIDIARIES?

21. DO YOU LEASE EMPLOYEES TO OR FROM OTHER EMPLOYERS?

22. DO ANY EMPLOYEES PREDOMINANTLY WORK AT HOME? If "YES", # of Employees: _____

23. ANY TAX LIENS OR BANKRUPTCY WITHIN THE LAST FIVE (5) YEARS? (If "YES", please specify)

24. ANY UNDISPUTED AND UNPAID WORKERS COMPENSATION PREMIUM DUE FROM YOU OR ANY COMMONLY MANAGED OR OWNED ENTERPRISES?
IF YES, EXPLAIN INCLUDING ENTITY NAME(S) AND POLICY NUMBER(S).

REMARKS (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

APPLICABLE IN TENNESSEE AND VERMONT: IT IS A CRIME TO KNOWINGLY PROVIDE FALSE, INCOMPLETE OR MISLEADING INFORMATION TO ANY PARTY TO A WORKERS COMPENSATION TRANSACTION FOR THE PURPOSE OF COMMITTING FRAUD. PENALTIES INCLUDE IMPRISONMENT, FINES AND DENIAL OF INSURANCE BENEFITS.

ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR ANOTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME AND SUBJECTS THE PERSON TO CRIMINAL AND (NY: SUBSTANTIAL) CIVIL PENALTIES. (Not applicable in CO, DC, FL, HI, MA, NE, OH, OK, OR, VT or WA; in LA, ME, TN and VA, insurance benefits may also be denied)

IN THE DISTRICT OF COLUMBIA, WARNING: IT IS A CRIME TO PROVIDE FALSE OR MISLEADING INFORMATION TO AN INSURER FOR THE PURPOSE OF DEFRAUDING THE INSURER OR ANY OTHER PERSON. PENALTIES INCLUDE IMPRISONMENT AND/OR FINES.

IN MASSACHUSETTS, NEBRASKA, OREGON AND VERMONT, ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR ANOTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING INFORMATION CONCERNING ANY FACT MATERIAL THERETO, MAY BE COMMITTING A FRAUDULENT INSURANCE ACT, WHICH MAY BE A CRIME AND MAY SUBJECT THE PERSON TO CRIMINAL AND CIVIL PENALTIES.

IN WASHINGTON, IT IS A CRIME TO KNOWINGLY PROVIDE FALSE, INCOMPLETE, OR MISLEADING INFORMATION TO AN INSURANCE COMPANY FOR THE PURPOSE OF DEFRAUDING THE COMPANY. PENALTIES INCLUDE IMPRISONMENT, FINES, AND DENIAL OF INSURANCE BENEFITS.

APPLICANT'S SIGNATURE (Must be Officer, Owner or Partner)

DATE

PRODUCER'S SIGNATURE

NATIONAL PRODUCER NUMBER

ACORD 130 (7/00/01/01)

ROA Supp000004

APP000371



SCHBSIF CONTRACTORS SUPPLEMENTAL APPLICATION

- ☐ HOMEBUILDER % Residential _____
☐ ARTISAN
☐ OTHER % Commercial _____

Agency Name: _____

Applicant _____ Effective Date _____

Type of Business _____ Applicant's Cell/Mobile # _____

Has the owner ever been insured or quoted by the SCHBSIF?

☐ Yes ☐ No If yes, policy number(s) _____

Do you currently have Workers Compensation coverage in force? ☐ Yes ☐ No

If yes, who is your current WC carrier? _____ If not in force, please advise last
cancellation/expiration date for WC coverage: _____

Are you currently an HBA member? Yes No If so how long have you been an HBA member? _____

Years in Business _____ Years Experience _____ # of Employees _____

Previous FEIN's, DBA's and AKA's _____

Payroll Past Year: Employees _____

Payroll Past Year: Uninsured Subcontractors _____

What type of uninsured subs does the applicant use? _____

Are insured subcontractors allowed to work without providing the applicant with a certificate of insurance?

☐ Yes ☐ No If Yes, Details: _____

Do you use any cash, casual labor, or labor services? ☐ Yes ☐ No If Yes, how many days per year is it
used? _____ What is the estimated cost for cash, casual or labor services? _____

If cash services used, how is it documented? _____

Any work performed outside the state of South Carolina? ☐ Yes ☐ No If Yes, please describe _____

Please describe hiring procedures for employees: _____

.....
Please complete the following sections as they apply to the applicant. If N/A, please note. Explain all
"Yes" responses in remarks.

Fall Protection

1. Is Scaffolding used? ☐ Yes ☐ No

2. If Yes, to what height? _____

3. Are guard rails used on scaffolding? ☐ Yes ☐ No

Describe in detail all fall protection used on job site (i.e. guardrails, harnesses, covers, etc.) and under what
circumstances they are used: _____

Air Conditioning & Heating

1. Any Boiler Work Done? ☐ Yes ☐ No

2. Any Asbestos Removal Done? ☐ Yes ☐ No

Carpentry

1. Any Roofing Done? If "yes", what % _____ ☐ Yes ☐ No

2. Any Shop Work Done? ☐ Yes ☐ No

3. Any Renovation Work Done? If "yes", what % _____ ☐ Yes ☐ No

4. Any Gutting of Interior Load Bearing Walls? ☐ Yes ☐ No

SCHBSIF Supplemental Application (01/2011)

Electrical Wiring1. Any Underground Cable Work? ☐ Yes ☐ No**Excavation & Grading of Land and Septic Tank Installation**

1. Depth-typical and maximum _____

2. Type of Excavation: Water Lines ☐ Yes ☐ No
Sewer ☐ Yes ☐ No
Septic ☐ Yes ☐ No
Basements ☐ Yes ☐ No
Other _____ ☐ Yes ☐ No3. Any Work Done in Streets or Roads? ☐ Yes ☐ No4. Are trench boxes used? ☐ Yes ☐ No

Describe when and how they are used. If no, explain: _____

Insulation1. Any removal? If "yes, indicate what type and disposal Procedures ☐ Yes ☐ No

2. Indicate type of insulation work done _____

Landscaping1. Any grading of land or excavation work done? ☐ Yes ☐ No
If "Yes", what % _____2. Any spraying of bushes, lawn, etc, with pesticides, herbicides, or fertilizers? If "Yes", explain extent, how often and what is used? ☐ Yes ☐ No3. Any Tree Trimming work done? ☐ Yes ☐ No
If "Yes", what % _____**Masonry**1. Do you excavate also? ☐ Yes ☐ No**Painting**1. Inside % _____ Outside % _____ ☐ Yes ☐ No2. Any work done above two stories? ☐ Yes ☐ No3. Any scaffolding used? ☐ Yes ☐ No
If "Yes", to what height? _____4. Any epoxies used? ☐ Yes ☐ No5. Any lead paint removal done? ☐ Yes ☐ No**Plumbing**1. Any septic tank installation? ☐ Yes ☐ NoRemarks: Explanations as needed from responses above: _____

To the best of my knowledge all the information I have given about my business is true and correct. If information is found to be different as the result of my knowingly attempting to defraud the SCHBSIF, or information is concealed for the purpose of misleading, or another person files an application for insurance containing materially false information the SCHBSIF may send direct notice of cancellation.

Officer or Owner of Business _____

Date _____

SCHBSIF Supplemental Application (01/2011)



No Loss Statement

I certify that there have been no losses, accidents or circumstances that might give rise to a claim for the following time period: _____ to _____

Applicant/Member Name (Please print)

Applicant/Member Signature

Member # (If applicable): _____

P O Box 7727 Columbia, SC 29202 * 800/678-8178 * 803/771-0566
Claims Fax 803/771-1598 * Policy Services/Admin. Fax 803/252-8581

RESUME

Name of Applicant: _____

of Years in Business: New Venture

of Years Experience: _____

I, _____, have experience working in the
_____ business for the past _____ years.

My experience includes the following:

Signature of Applicant

Date

Statement of Assets & Liabilities
(Balance Sheet)
(if CPA-prepared balance sheet is not available, use this form)
for the purpose of
SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

Company Name _____ Date _____

A. Current Assets

Cash on Hand.....	\$ _____
Cash in Bank.....	\$ _____
Notes Receivable.....	\$ _____
Other.....	\$ _____
Other.....	\$ _____
Total of Section A.....	\$ _____

B. Fixed Assets

Machinery/Tools.....	\$ _____
Real Estate.....	\$ _____
Investment.....	\$ _____
Other.....	\$ _____
Other.....	\$ _____
Total of Section B.....	\$ _____

C. TOTAL ASSETS (A&B)..... \$ _____

D. Current Liabilities

Accounts Payable.....	\$ _____
Other.....	\$ _____
Other.....	\$ _____
Total of Section D.....	\$ _____

E. Long-Term Debt

Notes Payable.....	\$ _____
Bonded Indebtedness.....	\$ _____
Mortgage Indebtedness.....	\$ _____
Other.....	\$ _____
Other.....	\$ _____
Total of Section E.....	\$ _____

F. TOTAL LIABILITIES (D&E)..... \$ _____

G. OWNER'S EQUITY or NET WORTH.... \$ _____
(subtract line F from line C)

Signature of Company Owner _____

Note: Applications with negative equity (line G) will be declined

AGREEMENT TO PAY PREMIUMS AND REASONABLE ATTORNEY'S FEES
AND COSTS WHICH MAY BE INCURRED IN COLLECTION OF SUCH PREMIUMS

(To be completed by all applicants)

In order to induce the South Carolina Home Builders Self Insurers Fund of Columbia, South Carolina to accept _____ as a member and an insured, the undersigned agrees to pay any and all premiums due or which become due from the undersigned to the South Carolina Home Builders Self Insurers Fund of Columbia, South Carolina, including reasonable attorney's fees and all costs which might be incurred in the collection of such premiums. The undersigned agrees that this agreement includes all past due balances, current balances, and future balances hereafter incurred by the undersigned.

Executed this _____ day of _____, _____
(month) (year)

Applicant's Name: _____ (SEAL)

Resident Address: _____
Resident Phone # _____

Signature: _____

PERSONAL GUARANTY

(to be completed by applicants who are corporations, limited liability companies,
limited liability partnerships, or partnerships)

In order to induce the South Carolina Home Builders Self Insurers Fund of Columbia, South Carolina to accept _____ as a member and as an insured, I / we hereby, personally and individually guarantee the payment of any premiums due or to become due by the company above listed to South Carolina Home Builders Self Insurers Fund, including reasonable attorney's fees which might be incurred in the collection of such premiums. This guaranty shall include all past due balances, current balances, and future balances hereinafter incurred by _____.

This guaranty shall remain in full force and effect until revoked in writing by the maker hereof in the same manner by which this guaranty has been made.

Executed this _____ day of _____, _____
(month) (year)

Individually and as Guarantor(s): (Must include social security numbers and dates of birth for all guarantors.)

GUARANTOR(s):

Signature: _____ (SEAL)

Signature: _____ (SEAL)

Name: _____

Name:

Resident Address: _____

Resident Address: _____

Resident Phone # _____

Resident Phone #: _____

SSN: _____ DOB: _____

SSN: _____ DOB: _____

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

CORPORATE OFFICER NOTICE TO REJECT

To the Employer of the Undersigned and the Employer's Insurance Carrier:

The undersigned officer rejects their terms, conditions and provisions of the South Carolina Workers' Compensation Act and elects to pursue compensation for personal injuries under the common law and statutes of South Carolina.

As provided by law (Section 42-1-520), "An officer of a corporation who elects not to operate under this title, shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this title, proceed at common law and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk, as such defenses exist at common law."

This notice becomes effective on the date listed below, no sooner than the day following the date signed by the corporate officer.

*** PLEASE PRINT OR TYPE ALL INFORMATION*** ORIGINAL SIGNATURES REQUIRED***

Name of Officer		Corporate Title	Name of Business (Legal Name)		
Street Address		Post Office Box	Street Address Post Office Box		
City	State	Zip	City	State	Zip
Social Security Number			Federal Employer ID#		
Area Code		Telephone Number	Area Code		Telephone Number
Signature of Officer		Date	Effective Date		
Subscribed and sworn to me this _____ day of _____					
_____, My commission expires: _____					
Notary Public					

This form may be used when an officer desires to become exempt from the provisions of the South Carolina Workers' Compensation Act. For additional information regarding the provision of Section 42-1-520 and this form, contact your insurance carrier or the South Carolina Workers' Compensation Commission, Coverage and Compliance Division, Post Office Box 1715, Columbia, South Carolina 29202-1715 (803) 737-5709.

NOTICE OF ELECTION OF COVERAGE
UNDER WORKERS' COMPENSATION LAW

To: South Carolina Home Builders
Self-Insurers Fund

Effective Date _____
Unit # 010-_____
NCDI # _____
FEIN # _____

RE: _____
Please type or print the owners' name(s)

doing business as _____
Firm or Trade name

Street Address and City

I / we, sole proprietor or partner of the above named business, do hereby certify that I /
we devote full time to the proprietorship or partnership and that I / we hereby elect to be
included in the definition of employee for the purpose of entitlement to benefits under the
workers' compensation coverage issued to this company.

Name of Owner or Partners:

Type or print name and position under signature

Date

Signature _____

Name & Position _____

Signature _____

Name & Position _____

Signature _____

Name & Position _____

THE COVERAGE SHALL BE EFFECTIVE THIRTY DAYS AFTER RECEIPT

South Carolina Workers' Compensation Commission
SELF-INSURANCE DIVISION
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5706

Page One of Two

APPLICATION FOR MEMBERSHIP IN A SELF-INSURED FUND

1. Fund Name: _____
2. Applicant's Name: _____
3. Applicant's Address: _____
4. Applicant's Telephone Number: (____) _____
5. Employer's Federal Identification Number: _____
6. The Employer is a: (check one)

☐ (A) Corporation: Attach a list of officers and their residence address.

☐ (B) Partnership: Attach a list of officers and their residence address.

☐ (C) Sole Proprietorship: Name and Residence: _____

☐ (D) Other. Explain _____

7. Who is your present workers' compensation insurance carrier:

8. In the most recent fiscal year what was your workers' compensation premium and experience modification for South Carolina?

Premium Amount: _____ Experience Modification: _____

9. List all employment locations in South Carolina.
(provide attachment if necessary)

Locations	Number of Employees
_____	_____
_____	_____
_____	_____

10. Provide the following information for workers' compensation claims for South Carolina for the past three years.

Year	Number of Claims	Amount Paid	Amount Incurred

For further information, refer to Article 15 of the South Carolina Workers' Compensation Commission's Regulations.

South Carolina Workers' Compensation Commission
SELF-INSURANCE DIVISION
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5706

Page Two of Two

11. Describe the nature of your business including products manufactured, sold or services provided.

12. Provide the following employment information for the current year.

Year _____

Employee Class Codes	Number of Employees	Estimated Payroll

13. Attach a current financial statement.

14. Attach a twenty-five dollar application fee. Make the check payable to the South Carolina Workers' Compensation Commission.

In consideration of the approval of this application, the applicant agrees to fully comply with the terms of the South Carolina Workers' Compensation Act and Regulations.

If the applicant is approved, it is agreed and acknowledged, that the applicant, along with the other members of the Fund will be jointly and severally liable, for any liability of the Fund, which is incurred during the applicants membership in the Fund.

By: Applicant's Name: _____

Signature: _____

Sworn and subscribed before me

this _____ day of _____ year _____

Notary Public for: _____

My commission expires: _____

Reserved for Commission Use Only

Fund Number: _____ Effective Date: _____

For further information, refer to Article 15 of the South Carolina Workers' Compensation Commission's Regulations.

WCC FORM • 6A REV. DATE 3/96

APPLICATION FOR MEMBERSHIP IN A SELF-INSURED FUND

ROA Supp000014
APP000381

SIF 014

WORKERS' COMP COVERAGE



SIF 015



ROA Supp000015
APP000382



Benefits OF SOUTH CAROLINA HOME BUILDERS ASSOCIATION



COLUMBIA
(803) 771-0566
TOLL FREE
1-800-678-8178

Looking out for *your* SAFETY



COLUMBIA
(803) 771-0566
TOLL FREE
1-800-678-8178

- All fund services provided "in-house" by our Columbia office
- Competitive rates and discounts
- Monthly self-audit billing that provides coverage on consignment
 - the covered member pays each month based on his payroll for that month
- Competitive Risk control plan
 - the plan provides safety service of job sites, accident analysis, local safety seminars, recommendations for the correction of hazardous work practices and the implementation of a safety program, thereby reducing the potential for claims that raise experience rating and premiums.
- Personalized and aggressive claims management
 - managing claims vs. claims paying approach
 - rehabilitation services
 - report accidents over the telephone
 - drug and alcohol policy
 - all claims with lost time from work investigated
 - pursue Second Injury Fund and subrogation claims

A service available *only* to members of the Home Builders Association of South Carolina

SIF 016

Application packet to Bind/Issue

Acord 130

Contractors Supplemental Application

Loss information :

- If prior coverage, please provide 3 year loss information or 3 year signed no- loss statement.
- Loss runs are required within 30 days of coverage being bound.
- If no prior coverage, please provide signed 3 year no-loss statement

Application for membership in a Self Insured Fund

Inclusion and/or exclusion forms if applicable

Statement of Assets and Liabilities (Balance Sheet)

Agreement to Pay Premiums and Reasonable Attorney's Fees and Costs in the Event Collection Becomes Necessary/Personal Guaranty Forms

Deposit check made payable to SCHBSIF

\$25.00 check made payable to SCWCC

If applicable:

- Mod Sheet
- If no prior coverage, please provide resume on all owners/officers showing at least 5 years experience.

NOTE: Coverage cannot be bound until original signed documents and payment checks are received by SCHBSIF. Faxed or E-Mailed copies of checks cannot be used to bind coverage. If you have any questions please contact the SCHBSIF office.



New Member Checklist

General:

___ Membership in a local HBA is required for all residential contractors. If membership cancels, the policy is subject to non-renewal.

___ All new members must attend a Risk Control & Claims seminar within the first 12 months of the policy term. Upcoming meetings are included in each monthly report mailing and are available on our website.

Policy Services:

___ Monthly reporting forms are mailed on or around the 24th of the month. The completed form and premium due must be received by the 10th of the following month. If not received by the 20th a late notice will be issued and a \$25.00 fee will apply. If still not received by the last day of that month, a cancellation notice will be mailed and a reinstatement fee of \$30.00 will apply.

___ Undocumented payroll exposure may be grounds for cancellation of coverage.

___ Roofing is not acceptable. If more than 10% of total audited payroll is roofing, the policy will be subject to cancellation.

___ All policies are audited annually. We require payroll, tax records, certificates of insurance and job descriptions to complete the audit. For subcontracted work, invoices must be broken down between labor and materials.

___ Certificates of Insurance for subcontractors should be obtained from an insurance agent directly BEFORE work begins. Save this Certificate of Insurance for audit purposes.

___ Only incidental out of state exposure is allowed (10% or less), but there is no coverage if the employee is hired out of state, is a casual laborer from out of state or is an uninsured subcontractor from out of state. All employees must have contract of hire in South Carolina.

___ Certificates of Insurance that you need to provide are obtained from your insurance agent.

___ If you need to add a class code to your policy, please call your Customer Service Representative.

___ If there are any changes in your business including address, telephone, officer, or type of business, please contact your Customer Service Representative.

P.O. Box 7727 Columbia, SC 29202 800/678-8178 803/771-0566
Claims Fax 803/771-1598 Policy Services/Admin Fax 803/252-8581

ROA Supp000018
APP000385



Risk Control:

___ Cooperation with Risk Control is a condition of membership in the SCHBSIF.

___ Risk Control will be contacting you to schedule surveys. Please return calls.

___ Follow the enclosed safety guidelines. If you have questions about these guidelines or other safety concerns, please call the Risk Control Department.

Do you have company vehicles? (circle one) YES NO If so, how many? ___

If you have company vehicles, who maintains them? _____

Claims:

___ Have all existing and new employees complete the following forms immediately. This needs to be prior to a workplace accident to be valid:

1. Post-Injury Drug and Alcohol Testing Acknowledgement Form (page 9 in Operations Guidelines)

___ In the event of a workplace accident, please note the following:

1. Complete the Accident Reporting and Treatment Form. Fill out for every injury, even if reported for information only. Fill out the gray part and send with the patient to the doctor.
2. A list of approved doctors is included. Use Doctors Care or Urgent Care. If it is an emergency, use ambulance and ER.
3. Tell the doctor that you are a SCHBSIF member and the injured worker needs a drug test.
4. Call us by telephone to report the injury. We will need the information on the enclosed Acord Form.
5. Please note that prompt accident reporting is the law.
6. When an injured employee returns to work, inform the adjuster.

Member Name: _____ Member #: _____

Member Cell #: _____ Member Fax #: _____

Date: _____

SIF: _____ Date: _____

P.O. Box 7727 Columbia, SC 29202 800/678-8178 803/771-0566
Claims Fax 803/771-1598 Policy Services/Admin Fax 803/252-8581

ROA Supp000019
APP000386

03/12/2012

Hi, I am your Customer Service Representative for your workers' compensation coverage. Let me be the first to welcome you and encourage you to contact me if you have any questions concerning your policy.

Enclosed in this packet is information regarding claims reporting, coverage agreement, and useful ways of keeping records that can potentially save you even more money.

Again, welcome to South Carolina Home Builders Self Insurers Fund. We are glad you are with us and appreciate your support of the Home Builder's programs efforts on behalf of the residential industry in South Carolina.

Sincerely,

Your CSR

cc:



Dear Homebuilder:

Welcome to the South Carolina Home Builders Self Insurers Fund (SIF). We are pleased that you have chosen to become a member of the Home Builders Association of South Carolina, and to enjoy the benefits of the Workers' Compensation program available only to HBA of SC members.

The SIF was formed in 1995 by members of the homebuilding industry who recognized the need for a stable, cost-effective source of workers' compensation coverage. They considered various options, and decided upon forming a Workers' Compensation self insurers fund which was approved by, and is closely regulated by the South Carolina Workers' Compensation Commission.

Today, the SIF provides workers' compensation coverage to over 1000 general contractors and artisan subcontractors who contribute approximately \$8,000,000 annually to pay for the costs of claims and administration of the SIF. The SIF employs a staff of veteran insurance professionals who provide claim management, risk control, and policyholder services exclusively to members of the SIF.

While the SIF provides coverage to many members, admission to the program is not guaranteed to everyone. And because members share risk, it is essential that everyone abide by the rules (copy provided with this letter) governing participation. As a requirement of participation, each new member whose effective date of coverage is July 1, 2003 or later will be required to attend an Orientation Seminar within 1 (one) year of the effective date of coverage. Failure to comply with this requirement may result in the termination of your workers' compensation coverage. These seminars provide valuable information regarding the operation of the SIF; loss control and the promotion of occupational safety; and your participation in the claim management process. The staff of the SIF will conduct approximately 24 (twenty-four) seminars annually in various locations around the state. Please consult the enclosed schedule for the locations and dates of seminars near you.

Again, welcome to the South Carolina Home Builders Self Insurers Fund. We look forward to your participation and hope that you will contact our staff if you have questions or require assistance. A list of key contacts and their telephone numbers is included in this package for your convenience.

Sincerely,

Herb Witter
Chairman, SCHBSIF

Operations & Audit

GUIDELINES



www.schbsif.com

Effective January 2012



OPERATIONS & AUDIT GUIDELINES

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I-General Information

It is required that all members of the SCHBSIF be a member of any local Home Builders Association in SC. Failure to maintain membership will result in cancellation of your workers' compensation coverage.

We reserve the right to reject any application for membership, when in the judgment of management, to accept such application may obligate SCHBSIF to accept risk contrary to the best interest of its members.

II-Safety and Risk Control

As your workers' compensation insurer, we share your commitment to preventing workplace accidents and injuries. The workers' compensation premiums you pay provide coverage for medical expenses and a portion of your injured employees' wages. Indirect costs associated with occupational accidents and injuries can result in substantial additional costs to you such as work stoppage, damaged materials and replacement of injured workers. As the costs of accidents and injuries increase, your expenses may increase as a result of higher workers compensation insurance rates and if applicable, an increase in your experience modifier.

The Risk Control and Safety Department conducts safety surveys of SCHBSIF's members to assist them in providing a safe workplace for their employees and reducing the potential for accidents and injuries. Your cooperation with the scheduling of surveys and compliance with prescribed corrective actions is vital to the success of this program.

Being a SCHBSIF member gives you the opportunity to affect your workers' compensation premium by controlling on-the-job accidents. To achieve this objective, an effective Safety and Risk Control Plan is a viable and necessary cost containment tool. For these reasons, and as part of our service, we provide numerous accident prevention services including:

- A) Consultation on specific safety related problems
- B) Safety surveys of your premises and/or job sites
- C) Analysis of accident causes
- D) Recommendation for correction of hazards of work practices or work sites
- E) Employee safety training
- F) Regional safety seminars

Safe work practices are *required* of all members. See safety insert for specific requirements.

All members of SCHBSIF are expected to follow OSHA regulations at a minimum.

Please contact the Risk Control and Safety Department at SCHBSIF if you have a specific loss problem or would like safety assistance.

III-Safety and Risk Control and Claims Management Seminars

All new members are **REQUIRED** to attend a Safety and Risk Control/Claims Management Seminar within 12 months of joining SCHBSIF. If you report your premiums monthly, you will be notified monthly, by mail, of all upcoming seminars. You may also locate upcoming seminars on our website at www.schbsif.com under the topics Safety and Risk Control or Calendar of Events, or in your member packet. In addition, if you are placed on probation based on losses or other reasons, you will be required to attend the NEXT seminar in your area which will be specified in a letter mailed to you about the probationary status. Also, if your loss ratio is 70% or greater at renewal you will be required to attend a seminar during the policy term. You will receive notification with your renewal information if this is required.

Failure to attend the required seminars will result in cancellation of your workers' compensation coverage.

IV-Hiring Practices

Your hiring decisions can have a direct impact on your workers' compensation experience. Hiring qualified individuals who know how to do the job and are capable of performing the tasks needed coupled with a safe work environment makes good business sense. Consider the following in your hiring practices:

Be cautious of who you consider for employment

- Confirm prior employment
- Check job references
- Require a Motor Vehicle Record of any employee operating a vehicle for your business-your vehicle or theirs. CDL if required by law.
- Is the applicant qualified to do the job? If not, is training available to ensure they will perform the job safely and properly?
- Is the applicant physically capable for the demands of the job?
- I-9 Form completed

Please remember, any casual labor or uninsured subcontractor is your employee for workers' compensation purposes. Can you verify the above information for these individuals as well? If not, a workers' compensation claim could become your responsibility.

V-Premium Volume Discount /Schedule Credits/Debits

- A. Premium volume and /or scheduled credits/debits are determined annually.
- B. Final premium volume discounts are based upon audited premium and may vary with the final adjustment of actual premium.
- C. There are no premium discounts for minimum premium policies.
- D. Those members attaining the Master Builder designation created by the Home Builders Association of South Carolina will receive up to a 10% credit on their premiums. If the designation is received prior to July 1st, the credit will apply for the entire fund year. If the Master Builder designation is received July 1st or later, the credit will be applied to the next year's renewal.

VI-Payment Plans

Annual Pay

Monthly Self Reporting

Members on monthly reporting will receive a monthly payroll reporting form.

This form:

- A. Provides maximum control of cash flow
- B. Projects a more realistic final audit due to accurate monthly payroll reporting

Monthly payroll reports are mailed to each member on or around the 24th of the month. They are to be completed and returned along with premium owed by the 10th of the following month. If no payroll is generated for the month, return the report indicating no payroll. *Premiums and/or Monthly Payroll Reports received after the 10th day of the month will be considered delinquent. If the Premiums and/or Monthly Payroll Reports are not credited to your account by the close of business on the 20th day of the month, a Late Notice will be mailed to the member and a Late Fee of \$25.00 will apply. Premiums and/or Monthly Payroll Reports credited to your account after the close of business on the last day of the month will result in cancellation. If the policy is reinstated, only the applicable reinstatement fee will apply.*

SCHBSIF does not accept premium finance contracts.

VII-Special Conditions or Operations Affecting Coverage and Premium

A) Corporate Officers

Executive officers of a corporation are defined as the "president, vice president, treasurer or any other officer appointed in accordance with the charter or bylaws of corporation."

Executive officers covered under the policy have the same status as the other employees under the policy. In South Carolina, executive officers can elect not to be subject to coverage provided by the law by completing and signing a Corporate Officer Notice to Reject form. If a Corporate Officer chooses to exclude himself from coverage, the change will be effective the date we receive the properly completed form in our office.

B) Sole Proprietors, Partners and Members of a Limited Liability Company or Limited Liability Partnership

These individuals are excluded from workers' compensation coverage unless they elect to be covered. While normally not considered employees, sole proprietors, partners and members of a limited liability company or limited liability partnership can be covered under the policy by election. Once covered, they will have the same status as employees under the policy.

When covered sole proprietors, partners or members of a limited liability company or limited liability partnership are considered employees, their payroll will be assigned to classifications and rates under the rules that apply to employees. Premium for each sole proprietor, partner and member of a limited liability company or limited liability partnership treated as an employee shall be based on the flat payroll amount established by NCCI. Please contact the Policy Services Department at SCHBSIF if you have any questions.

For any form of business, an Election of Coverage form can be secured from your agent or from SCHBSIF. Once an election has been filed, it remains in effect until a withdrawal of election is filed. If an election of coverage is requested after inception of coverage, the election will be effective 30 days after receipt at SCHBSIF.

C) Changes in Operation

If your firm experiences a change in operation or undertakes a new operation that is not reflected on your monthly payroll report, please call SCHBSIF for new payroll classifications. This will provide us with more accurate payroll reports and notify us of a new exposure, and will allow you to report your exposures correctly.

VIII-Certificate of Insurance

Please contact your insurance agent for all Certificates of Insurance. If a Waiver of Subrogation, individual or blanket, is needed, the agent must obtain prior approval. A waiver of subrogation request form must be completed and include the following information:

- A. Location of job
- B. Type of work to be performed
- C. Length of job
- D. Contract number (#) if available

The agent must also show on all Certificates of Insurance whether Principals (Proprietor/Partner/Corporate Officer or Member of Limited Liability Company or Limited Liability Partnership) are included or excluded from coverage.

IX-Subcontractors

Members of SCHBSIF will be subject to the following provision relating to workers' compensation coverage for their uninsured subcontractors:

A contractor is liable for the injuries to any uninsured subcontractor including its sole proprietor, partner, corporate officer or member of a limited liability company or limited liability partnership or any employee of any uninsured subcontractor.

The member is responsible for benefits and therefore liable for premium for all uninsured subcontractors. Waivers of Subrogation in lieu of Certificates of Insurance are not acceptable.

X-Endorsements/Changes

The following is a list of changes that require an endorsement. Please notify your agent or SCHBSIF in writing for any of the following:

- A) Name Change
- B) Address Change
- C) Changes in Federal Employer ID number
- D) Ownership Change
- E) Addition/Deletion of Named Insured with the same Federal Employer ID Number
- F) Changes in Legal Entity
- G) Addition or Deletion of an Officer
- H) Change in Percentage Ownership by Officers/Partners

*Please note that certain changes will require that you complete an ERM-14 and a new Agreement to Pay Premium and Reasonable Attorney's Fees and Costs in the Event Collection Becomes Necessary/Personal Guaranty Form. This form will be provided to you by your agent or can be located on our website at www.SCHBSIF.com under the topic Applications and Forms.

XI-Operations-Exclusions

*This coverage excludes exposures under the US Longshoreman and Harbor Workers Act, the Admiralty Law and the Federal Employers Liability Act. This coverage also excludes exposure arising out of aircraft operations. If at audit or during inspection it is determined the member's payroll includes prohibited operations, the coverage may be subject to nonrenewal.

XII-Out-of-State Exposures

SCHBSIF provides South Carolina workers' compensation benefits to employees hired in South Carolina by an employer domiciled in South Carolina. There may be coverage afforded for *Incidental* out of state exposures. Please contact your agent or SCHBSIF if you will be working outside the state of South Carolina.

There is NO coverage afforded for employees, casual labor or uninsured subcontractors hired outside the state of South Carolina. Please note that if your percentage of out of state payroll exceeds 10% your coverage may be subject to cancellation.

XIII-Late Fees, Cancellation, Reinstatement and Termination

A) Late Fees

Premiums and/or Monthly Payroll Reports received after the 10th day of the month are considered delinquent. If the Premiums and/or Monthly Payroll Reports are not credited to your account by the close of business on the 20th day of the month, a Late Notice will be mailed to you and a Late Fee of \$25.00 will apply. Premiums and/or Monthly payroll reports credited to your account after the close of business on the last day of the month will result in cancellation. If the policy is reinstated, only the applicable reinstatement fee will apply.

B) Cancellation

Cancellation of your coverage can occur for the following reasons:

- 1) Nonpayment of premium due (30 day notice of cancellation)
- 2) Noncompliance (30 day notice of cancellation)
 - a) Failure to submit monthly payroll report
 - b) Failure to comply with HBA membership requirements

ROA Supp000027

APP000394

- c) Failure to comply with year end physical audit
- d) Failure to comply with Safety & Risk Control recommendations
- e) Unsafe work practices
- f) Delinquency in claims reporting
- g) Failure to cooperate with Claims Department in the investigation and/or defense of a claim
- h) Failure to attend a required seminar
- i) Underwriting reasons

C) Reinstatement

The Board of Trustees has adopted a reinstatement fee policy for members that have received cancellation notices. *If a reinstatement is allowed*, a fee of \$30.00 will be applied to your account.

Only three (3) cancellations and reinstatements are allowed per member in any policy year. Members whose policies are cancelled for nonpayment of premium (monthly premium, renewal premium, renewal deposit, expense constant or premium audit due) and/or failure to submit Monthly Payroll Reports *for a fourth time* during that policy year will be ineligible for coverage for a period of 12 months from the final date of cancellation.

D) Cancellation - Member's Request

Requests for cancellation of coverage must be in writing from the member and received in our office no later than 30 days in advance of the requested cancellation date and must include:

- 1) Signature of an Owner or Officer
- 2) Reason for cancellation of coverage

We are required to give 30 days notice of cancellation to the SCWCC. If we do not receive your request at least 30 days in advance, the cancellation date will be 30 days after we have received your request in our office.

Duplicate Coverage

In the event that you replace your coverage with a new carrier, you must send proof of coverage (binder or copy of new policy) in order to cancel on the effective date of the new coverage.

Short Rate Penalty

Please be advised that if you request to cancel your workers' compensation policy midterm, there will be a short rate penalty calculated in accordance with NCCI rules.

XIV-Renewals

All members have a common renewal date of January 1st, regardless of their original effective date. **Your policy will automatically renew on January 1st unless you request cancellation thirty (30) days prior to that date.** We are required by the South Carolina Workers' Compensation Commission to give 30 day notice of cancellation. **If we do not receive the request at least 30 days in advance, the cancellation date will be 30 days after we receive the signed request in our office.**

The staff of SCHBSIF annually reviews the program's overall safety record to determine which members will be required to attend a Safety and Risk Control and Claims Management Seminar during the next fund year. The decision is based on the cost of claims that a member's employees incur, the nature of the injury as well as premiums paid. The member will be notified with their renewal policy if attendance is required. *Attendance will be required irrespective of whether the member has attended a seminar in any previous year. Failure to attend will result in cancellation of coverage.*

XV-Expense Constant

All members are charged annually for an Expense Constant. This is an administrative fee. The fee is fully earned and nonrefundable in the event of cancellation of coverage.

XVI- Premium Audit Guidelines

Final audits are required and will be conducted for all members after each policy year. The audit consists of obtaining and verifying gross payrolls by job classification for all employees, included owners as well as uninsured subcontractors, contract, casual and cash laborers.

The purpose of the final payroll audit is to accurately and equitably determine the amount of premium payable to SCHBSIF for the length of time coverage was provided. *Compliance with an audit is mandatory. You will receive a letter detailing the audit appointment and records needed. See sample of audit appointment letter page 15.*

Failure to comply with an audit appointment request after two attempts will result in your audit being "Closed Out". The result of this action will be the doubling of your policy premium. The state of South Carolina permits a tripling of premium under these circumstances. SCHBSIF has chosen to take a more moderate approach. This premium is payable and due until a final audit is completed. Please keep in mind our auditors cover an extensive territory and are not readily available to return to your area if you cancel an appointment.

SECTION A

EMPLOYEE RECORDS REQUIRED FOR AUDIT

- Records Required:** Computerized Payroll Printout or Manual Payroll Register
(See sample of Computerized Payroll Printout on Page 17)
General Ledger/Journal
Check Book
- Verification Documents:** W2's, W3, 941's, 940, Schedule C, 1120, P & L Statement,
or South Carolina Employment Security documents.
(If the audit cannot be verified to a second record source return premiums
cannot be refunded until these documents are provided.)
- Notes:** The following is included in payroll:
- Payments for bonuses, travel, commissions, holidays or vacations, overtime, periods of sickness, value of meals and value of lodging/housing.
 - Corporate officers are subject to minimum and maximum payrolls annually unless they elect to be excluded - see *sample of Corporate Officer Notice to Reject form on page 18*. The current minimum is \$26,000 annually and the maximum is \$145,600 annually. This amount is subject to change based on NCCI rules.
 - Owners/sole proprietors, partners and members of LLC/LLP, who elect to be included for coverage, are subject to a flat amount for annual payroll. The current annual amount is \$36,700. This amount is subject to change based on NCCI rules.
 - Payments or allowances to employees for hand or power tools furnished by employees.
 - Flat expenses included in payroll are not deductible unless properly documented with receipts or expense reports.
Employee contributions to medical and dental plans.
- The following applies to exclusion of payroll:
- **Corporate officers must elect to exclude themselves** from coverage if so desired, by completing a Corporate Officer Notice to Reject Form-see *sample of Corporate Officer Notice to Reject form on page 18*. This form is available from SCHBSIF or your Insurance Agent. The effective date of the Exclusion form is the date received by SCHBSIF. The exclusion cannot be backdated.
 - Overtime, when properly documented, will be credited at 1/3 rate for time and a half and 1/2 rate for double time. To qualify for this discount you must maintain accurate records providing a detailed listing by employee of the amount of overtime paid and an exact description of the work performed.
 - Employer contributions to medical and dental plans.
 - Severance pay, uniform allowance, third party sick pay, active military duty pay and jury duty pay.
 - Reimbursed expenses and flat expense allowances, except for hand or power tools, paid to employees may be excluded, provided they meet the following conditions:
 1. The reimbursed actual expense or expenses for which the allowances were paid were incurred in conjunction with business conducted for or on behalf of the employer,
and
 2. The amount of each employee's expense payments or allowances is shown separately in the records of the employer.

SECTION B

SUBCONTRACTOR, CONTRACTOR OR CASUAL LABOR

Records Required:

Payment Printout by subcontractor, contractor and casual labor
Computerized Accounts Payable Printout-see *sample* on Page 19.

Check Book/Register
General Ledger/Journal
Disbursement Journal

1096

1099's

Schedule C (from personal income tax return)

Certificates of Insurance

- COI's are required to be available on the date of the audit appointment
- COI's must show workers' compensation coverage for the entire period of time that the subcontractor was engaged and/or paid for work performed. Multiple COI's may be necessary to cover the period.
- Lapses in coverage will be included as payroll for audit

Uninsured subcontractors may be eligible for Materials Credit if properly documented- must have an itemized Material and Labor Invoice reflecting division for each job performed. Please note this division must be by dollar amount—percentages are not acceptable.-see *sample of Invoice* on Page 20.

- In the absence of an itemized Material and Labor Invoice and at the auditor's discretion, if through the auditor's investigation on a specific job it is **substantiated** that the subcontract price includes materials, then payroll may be calculated as follows:
 - o In contracts for mobile equipment with operators (such as but not limited to earth movers, graders, or bulldozers. the payroll shall not be less than 33 1/3% of the subcontract price.
 - o In contracts for labor and material, without an invoice, the payroll shall be 100% of the subcontract price.
 - o In contracts for labor and material, with an invoice, but no breakdown, the payroll shall not be less than 75% of the subcontract price.
 - o In contracts for labor and material with an invoice breaking each down, the payroll shall be the actual labor cost.
 - o In contracts for labor only, the payroll shall be established at 100% of the subcontract price.

ACORD. CERTIFICATE OF LIABILITY INSURANCE

1

DATE (MM/DD/YYYY)

PRODUCER

2

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE

NAIC #

INSURED

3

INSURER A:

INSURER B:

INSURER C:

INSURER D:

INSURER E:

4

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR ADD'L TR	INSR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YYYY)	POLICY EXPIRATION DATE (MM/DD/YYYY)	LIMITS
		GENERAL LIABILITY ☐ COMMERCIAL GENERAL LIABILITY ☐ CLAIMS MADE ☐ OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: ☐ POLICY ☐ PRO-JECT ☐ LOC				EACH OCCURRENCE \$ DAMAGE TO RENTED PREMISES (Ea occurrence) \$ MED EXP (Any one person) \$ PERSONAL & ADV INJURY \$ GENERAL AGGREGATE \$ PRODUCTS - COMPOP AGG \$
		AUTOMOBILE LIABILITY ☐ ANY AUTO ☐ ALL OWNED AUTOS ☐ SCHEDULED AUTOS ☐ HIRED AUTOS ☐ NON-OWNED AUTOS				COMBINED SINGLE LIMIT (Ea accident) \$ BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
		DAMAGE LIABILITY ☐ ANY AUTO				AUTO ONLY - EA ACCIDENT \$ OTHER THAN AUTO ONLY: EA AGG \$ AGG \$
		EXCESS/UMBRELLA LIABILITY ☐ OCCUR ☐ CLAIMS MADE DEDUCTIBLE \$ RETENTION \$				EACH OCCURRENCE \$ AGGREGATE \$ \$ \$ \$
4		WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/ MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below OTHER				WC STATU-TORY LIMITS OTH-ER E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$
				5		

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS

6

CERTIFICATE HOLDER

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL _____ DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE

7

8

ACORD 25 (2007/08)

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SECTION C

CERTIFICATES OF INSURANCE

What Is A "Good" Certificate of Insurance (COI)?

Following is a checklist of items you should note when accepting a COI. *The following information corresponds to the COI example on page 12.*

- 1) **Date:** The date should correspond with the date the Certificate of Insurance was requested by you. Also, agents may often keep a log of Certificate Holders and routinely mail new certificates at the time the policy is renewed. *However, the responsibility for obtaining a current certificate of insurance rests with you our insured.*
- 2) **Producer:** This should be the complete name and address of the agent that issued the Certificate of Insurance. It should include their telephone number and fax number.
- 3) **Insured:** The name of the Insured must match the subcontractor's name. It will also include the insured's address. Payments **must** be made in this **exact name**. Example: payments for John Smith Concrete, Inc. cannot be made to Jack Smith. This is unacceptable and no exceptions will be made.
- 4) **Insurers Affording Coverage:** A carriers name should appear and correspond with the Insurer Letter (A,B, etc) shown on the far right hand column for workers' compensation and employers' liability coverage.
- 5) **Workers' Compensation and Employers' Liability:** If any principals are excluded from coverage it should be marked "Y" or "Yes" in Section 4. List Excluded persons by name under Description of Operations, Section 6. The policy number should be shown. **If this is shown as "Binder", TBD or NCCI you need to follow up with the Agent to obtain a revised COI showing the policy number.** Clearly stated policy effective and expiration dates should always be shown. Employer Liability Limits should always be shown.
- 6) **Description of Operations/Locations/etal:** This section should be used to state if any subcontractor principals are excluded from coverage. It is also used to state if a Waiver of Subrogation applies complete with all the details of the specific project.
- 7) **Certificate Holder:** This must be your complete name and should include your address. Most agents will also show your fax number.
- 8) **Authorized Representative:** All Certificates of Insurance issued by an agency and must be signed by a licensed agent.

IMPORTANT INFORMATION!!!!!!

Do not allow a subcontractor to perform work for you until you have a valid Certificate of Insurance in hand. Otherwise, this can cause you increased premium and possibly effect your experience modification due to the potential of claims exposure.

Request a new COI or verbally verify the COI with the Insurance Agent every 30 days. If workers' compensation insurance is cancelled for nonpayment of premium or any other reason, 30 days notice of cancellation must be provided to the insured (Not the Certificate Holder) as required by the South Carolina Workers' Compensation Commission. *The insurance agent is not required to notify a Certificate Holder of cancellation of coverage.* **According to Section 42-1-415 of the workers' compensation statute, the subcontractor is required to notify the higher tier subcontractor, contractor or project owner of a lapse in coverage within five days after the lapse. Failure to do so is considered fraud. This notification of cancellation of coverage must be by certified mail to the higher tier contractor.**

Accept COI's ONLY FROM YOUR SUBCONTRACTOR'S INSURANCE AGENT. Do not accept a COI from the subcontractor directly.

If there is any appearance of alteration of the Certificate of Insurance-different font type, obvious white out and retyping of information, please contact the Insurance Agent listed on the Certificate of Insurance immediately.

If you know the Certificate of Insurance presented is not valid, it is deemed to be insurance fraud and should be reported to the Attorney General's Office for Investigation:



TO:

Member #:
Policy Period: to

NOTICE OF INSURANCE PREMIUM AUDIT APPOINTMENT

Dear Member,

When your Workers' Compensation policy was written, the premium was based on anticipated exposures for the policy year. Now that your policy year, noted above, has expired, an audit of the actual exposure must be completed, per the policy provisions, in order to determine if a final adjustment is necessary.

DATE OF VISIT: _____

I have multiple appointments scheduled for this date. If you require an estimated time for our appointment or you are unable to meet with me on this date please contact me ASAP so we can schedule a time or new date. Please understand if you cancel our appointment it may be some time before I am back in the area again.

PLEASE HAVE THE FOLLOWING RECORDS, if applicable, READY FOR REVIEW:

☒	Payroll Records For All Locations - QuickBooks, Dome, ADP, manual, etc
☒	Subcontractor/Contractor List & Payments - showing payment dates
☒	Subcontractor Costs - breakdown of labor vs material , if applicable
☒	Certificates of Insurance for subcontractors
☒	Cash Disbursements Journal, Check Book
☒	Uninsured Subs & Contract Labor - Name, Amount Paid, Type Of Work (including amounts of \$600 or less)
☒	Listing of All Cash Payments Made To Laborers
☒	1099's & 1096
☒	Federal 941 Quarterly Reports, State Quarterly Wage & Tax Report, W3 or 940
☒	Personal Income Tax Return Schedule C - for sole proprietors
☒	Most Current Profit & Loss Statement



SAMPLE MONTHLY PAYROLL REPORT

ABC Construction
123 Main Street
Anywhere, SC 29200

For Month:	March, 200x
Payment Due:	April 10, 200x
Payrolls from:	3/1/200x Through 3/31/200x

Payroll Code	Payroll Description	Number of Employees	Actual Gross Payroll	Rate per \$100	Manual Premium
42	Landscaping				
5022	Masonry NOC				
5190	Electrical Wiring				
5348	Stone Mosaic or Terrazzo				
5437	Carpentry Cabinet & Trim				

Please report all figures using rounded numbers (nearest whole dollar) only.

CONTINUED NEXT PAGE

Previous Balance:	1. Total Manual Premium	
Deposit Due:	2. Experience Modifier (multiply)	x
Expense Constant:	3. Subtotal (equals)	=
Fees:	4. Discount/Surcharge factor (multiply)**	x
Unpaid Premium:	5. Current Premium Due	=
Subtotal:*	6. Enter total from line 5 or enter \$100, whichever is greater	
Month not reported:***	7. Previous Balance (add)	+
Make check payable to: SC Home Builders SIF P O Box 8476 Columbia, SC 29202-8746	Pay this amount*** (line 6 plus line 7; in every case, this must be \$100 or greater)	=

All subcontractors must furnish valid certificates of workers' comp. coverage; otherwise they must be reported/included in this report.

*Subtotal from previous balance is shown in box 7.

**Includes (when applicable) discounts, surcharges and increased limit factor

***Failure to report/pay will lead to prompt cancellation.

Contact:	Phone:	Date:

__ PLEASE CHECK IF NEW PHONE #

SAMPLE COMPUTERIZED PAYROLL REPORT

WORKERS COMP PAYROLL JOURNAL ABC CONSTRUCTION COMPANY

Period 1-1-200x to 12-31-200x

Employee Number	Department Number	Name Last	First	Int.	Labor Code	Job/Duties Description	Regular Wages	Over Time Wages	Gross Pay	Employee Count
Masonry & Brick Department										
2253	300	Poplin	Carl	F	5022	Mason-Brick	39,076.12	0.00	39,076.12	
3012	300	Sullivan	Frank	C	5022	Mason-Brick	200.00	0.00	200.00	
3392	300	Taylor	Robert	L	5022	Mason-Brick	35,332.88	1,788.00	37,120.88	
Code: 5022		Department Total					74,609.00	1,788.00	76,397.00	3
Cement Work & Driveways Department										
1426	515	Money	Glen	A	5221	Cement Work/Drwy	400.00	0.00	400.00	
5123	515	Newman	Morton	E	5221	Cement Work/Drwy	38,483.36	2,480.00	40,963.36	
2532	515	Pardue	Pat	L	5221	Cement Work/Drwy	31,234.80	2,045.00	33,279.80	
4775	515	Robinson	Ron	R	5221	Cement Work/Drwy	24,135.04	45.00	24,180.04	
Code: 5221		Department Total					94,253.20	4,570.00	98,823.20	4
Carpentry Trim & Cabinets Department										
3405	550	Howell	Charles	A	5437	Carpentry-Trim	33,721.92	25.84	33,747.76	
4238	550	Ball	Jack	C	5437	Carpentry-Trim	35,616.00	163.00	35,779.00	
1371	550	Adams	Jeff	K	5437	Carpentry-Trim	38,048.40	1,149.00	39,197.40	
103	550	Cauthern	Lewis	S	5437	Carpentry-Trim	33,348.00	0.00	33,348.00	
2007	550	Douglas	Paul	L	5437	Carpentry-Trim	51,001.92	0.00	51,001.92	
864	550	Fitch	Todd	P	5437	Carpentry-Trim	39,315.84	0.00	39,315.84	
110	550	Gaither	Ray	C	5437	Carpentry-Trim	44,444.64	0.00	44,444.64	
Code: 5437		Department Total					275,498.72	1,337.84	276,836.56	7
Drywall Installation Department										
275	310	Huffman	Don	S	5445	Drywall-Installation	28,396.40	1,798.00	30,194.40	
4871	310	Johnson	Phillip	L	5445	Drywall-Installation	24,806.56	1,566.00	26,372.56	
5078	310	Kincaid	Robert	A	5445	Drywall-Installation	28,927.04	0.00	28,927.04	
348	310	Lincoln	James	M	5445	Drywall-Installation	40,498.08	0.00	40,498.08	
Code: 5445		Department Total					82,130.00	3,364.00	125,990.08	4
Sales Department										
1694	340	Duncan	Patty	D	8742	Sales-Outside	43,949.84	0.00	43,949.84	
4276	340	Everham	Doug	T	8742	Sales-Outside	29,191.96	1,358.00	30,549.96	
Code: 8742		Department Total					73,141.80	1,358.00	74,499.80	2
COMPANY TOTALS							599,630.72	12,417.84	612,048.56	20

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

CORPORATE OFFICER NOTICE TO REJECT

To the Employer of the Undersigned and the Employer's Insurance Carrier:

The undersigned officer rejects their terms, conditions and provisions of the South Carolina Workers' Compensation Act and elects to pursue compensation for personal injuries under the common law and statutes of South Carolina.

As provided by law (Section 42-I-520), "An officer of a corporation who elects not to operate under this title, shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this title, proceed at common law and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk, as such defenses exist at common law."

This notice becomes effective on the date listed below, no sooner than the day following the date signed by the corporate officer.

*** PLEASE PRINT OR TYPE ALL INFORMATION*** ORIGINAL SIGNATURES REQUIRED***

Name of Officer Corporate Title

Name of Business (Legal Name)

Street Address Post Office Box

Street Address Post Office Box

City State Zip

City State Zip

Social Security Number

Federal Employer ID#

Area Code Telephone Number

Area Code Telephone Number

Signature of Officer Date

Effective Date

Subscribed and sworn to me this _____ day of _____.

Notary Public My commission expires: _____

This form may be used when an officer desires to become exempt from the provisions of the South Carolina Workers' Compensation Act. For additional information regarding the provision of Section 42-I-520 and this form, contact your insurance carrier or the South Carolina Workers' Compensation Commission, Coverage and Compliance Division, Post Office Box 1715, Columbia, South Carolina 29202-1715 (803) 737-5709.

Sample Computerized Accounts Payable Printout

Accounts Payable Department
ABC Construction Company

Period 1-1-200x to 12-31-200x

Contractor Number	Transaction Date	Contractor Name	Type Work	Job/Services Performed	Amount Paid	Labor Charges	Material Charges	Insured with Certificate
J1005	01/05/0x	Jimmy Jones Heating & Air	Furnace	Repair Furnace	320.00	180.00	140.00	No
	03/03/0x	Jimmy Jones Heating & Air	Furnace	Repair Furnace	675.00	431.00	244.00	No
	04/04/0x	Jimmy Jones Heating & Air	A/C	Replace Unit	7,800.00	3,400.00	4,400.00	No
	09/07/0x	Jimmy Jones Heating & Air	A/C	Re-charge Unit	480.00	190.00	290.00	No
	09/24/0x	Jimmy Jones Heating & Air	A/C	Adjust A/C	120.00	120.00	0.00	No
	11/01/0x	Jimmy Jones Heating & Air	Furnace	Annual Service	600.00	600.00	0.00	No
			Vendor/Contractor Totals		9,995.00	4,321.00	5,074.00	
D1032	03/15/0x	D & J Electrical	Electrical	Add Outlet	124.00	112.00	12.00	Yes
	04/13/0x	D & J Electrical	Electrical	Light Repairs	370.00	300.00	70.00	Yes
	05/26/0x	D & J Electrical	Electrical	Re-Wire Office	4,200.00	2,900.00	1,300.00	Yes
	08/18/0x	D & J Electrical	Electrical	Repair to Breakers	760.00	340.00	420.00	Yes
	10/01/0x	D & J Electrical	Electrical	Add service outlets	398.00	347.00	49.00	Yes
			Vendor/Contractor Totals		6,850.00	3,999.00	1,851.00	
P1071	02/07/0x	Pat Hefferman Plumbing	Plumbing	Comode Repairs	276.00	146.00	130.00	No
	04/08/0x	Pat Hefferman Plumbing	Plumbing	Leaking Pipe	182.00	182.00	0.00	No
	05/05/0x	Pat Hefferman Plumbing	Plumbing	Add Utility Sink	332.00	140.00	192.00	No
	07/01/0x	Pat Hefferman Plumbing	Plumbing	Pipe damage repair	486.00	320.00	166.00	No
	08/01/0x	Pat Hefferman Plumbing	Plumbing	Clogged Drain	132.00	132.00	0.00	No
	09/09/0x	Pat Hefferman Plumbing	Plumbing	Clogged Drain	132.00	132.00	0.00	No
			Vendor/Contractor Totals		1,540.00	1,052.00	488.00	
U1053	04/22/0x	Tom's Roof Services	Roof Repairs	Leaky Roof-fix	766.00	535.00	231.00	Yes
	7/27/0x	Tom's Roof Services	Roof Repairs	Roof Patch	388.00	320.00	68.00	Yes
			Vendor/Contractor Totals		1,154.00	855.00	299.00	

Sample Materials & Labor Invoice

Jimmy Jones Heating & A/C

1001 Cool Lane
Beach City, SC 29277

Phone Number 843-555-5555

SOLD TO:

ABC Construction Company
123 Main Street
Anywhere, SC 29200

Invoice Number	200x-12-155
Invoice Date	Dec 15-200x
Our Order Number	N/A
Your Order Number	Cozy Home #5
Terms	
Sales Rep	Jones
Shipped Via	

SHIPPED TO:

Cozy Home-Lot #5
Cozy Home Devepment S/D
Hwy 11
Beach City, SC 29277

Quantity	Description	Unit Price		Amount
1	Trane 2.5Ton Heat Pump-A/C SER12 Model #12.5-12 Ser#22222	3,400.00		3,400.00
1	Installation Assembly Kit	432.00		432.00
1	Base Mount Platform	42.00		42.00
1	Air Handler/Filtration	1,440.00		1,440.00
1	Duct Work package 230'	230.00		230.00
1	Labor-A/C System Installation	1,835.00		1,835.00
			Sutotal	7,379.00
			Tax	
			Freight	

Questions concerning this invoice?

MAKE ALL CHECKS PAYABLE TO:

\$7,379.00
PAY THIS
AMOUNT

Call: 843-555-5555

Jimmy Jones Heating & A/C

THANK YOU FOR YOUR BUSINESS!

Note: For an invoice presented in this manner, only \$1,835.00 will be used as labor for workers' compensation premium calculation purposes.

XVII-Deposits

SCHBSIF requires a deposit in the amount equal to 15% of the estimated annual premium on all monthly reporting policies. The deposit is adjusted annually based on your most recent audited or reported payrolls in order to maintain 15% of the estimated annual premium and is retained to apply towards audited premium in the event of nonpayment after cancellation. This requirement promotes the financial integrity of SCHBSIF by controlling exposure to bad debt.

A surety bond may be available in lieu of deposit.

XVIII- Returned Checks

All checks which are returned for "insufficient funds" or other reasons will subject the member to an additional charge per check. The second time a member submits a payment that is returned as described above, it will be necessary for the member to submit all future payments to SCHBSIF with certified checks or money orders.

XIX-Drug and Alcohol Testing

A) Post-Injury Drug and Alcohol Testing

History- Drug and alcohol abuse poses a direct threat to the well being of the user, the workplace and the public at large. The use of alcohol, drugs, illegal or nonprescription controlled substances impair judgment and motor sensory coordination on the job. SCHBSIF policy requires post injury drug and alcohol testing after any alleged work related injury.

Purpose- In order to protect the public and to promote health and safety in the workplace, SCHBSIF has established a post injury drug and alcohol testing program.

Statement of Policy- Any employee reporting a work related injury requiring medical treatment must be tested for the presence of drugs or alcohol at the time of the initial treatment.

An employee's refusal to submit to drug and alcohol testing will be deemed an admission of impairment. Any person who refuses to submit to such a screening, test or any other procedure to help in the detection of drug and alcohol use, or is found working under the influence of alcohol, illegal substances or non-prescribed controlled substances may be denied workers' compensation benefits under 42-11-100 of the Workers' Compensation Act. All terms and conditions of employment are strictly within the discretion and control of the employer.

Procedures- SCHBSIF requires each member to notify its employees of this policy, and to obtain a signed authorization form as soon as an employee is hired.

SCHBSIF requires that you instruct your employees to immediately report any alleged work-related injury to the appropriate company representative.

Employers must contact SCHBSIF office immediately to report the incident and to receive assistance on the initial medical treatment and drug and alcohol testing procedures.

SCHBSIF requires a signed Drug and Alcohol Testing Acknowledgement Form accompany any employee seeking medical treatment whenever possible. Drug and alcohol testing for emergency room cases should be managed in the way most suitable to the member, but it must be done within the requirements of the policy.

SCHBSIF requires that employers refer any alleged related injury treatment to an approved health care provider. Please see the enclosed list of approved medical providers or contact the Claims Department for additional information.

B) Service Procedures for Workers' Compensation Management

- 1) After the initial hiring, ensure all employees sign the Drug and Alcohol Testing Acknowledgement Form.
- 2) Report all alleged work-related injuries to SCHBSIF as soon as you are aware of them.
- 3) For non-emergencies, refer injured employees to one of the providers approved by SCHBSIF.
- 4) When an injury occurs outside of normal operating hours, or in an emergency situation, the injured employee should be directed to the nearest emergency facility.
- 5) Ensure the employee provides the Accident Reporting and Treatment Form to the health care provider before initial treatment.
- 6) Ensure the insured employee's supervisor completes the gray shaded portion of the top of the Accident Reporting and Treatment Form before giving it to the employee.
- 7) Utilize alternative or light duty work options for employees who return to work after the authorized treating physician releases them to restricted work capabilities.

Please contact SCHBSIF if you have any questions. Proper claims management will ensure proper care for your employees.

**POST-INJURY
DRUG AND ALCOHOL TESTING
ACKNOWLEDGEMENT FORM**

I have read and understand the policy of the South Carolina Home Builders Self Insurers Fund. I understand that all insured member employees shall be tested for drugs and alcohol use if the employee is involved in an alleged work-related injury which may result in the filing of a workers compensation claim.

I am an employee of a SCHBSIF member employer and I consent and agree to be tested for the use of drugs, alcohol, illegal or non-prescribed substances in the event of an alleged work-related injury.

I understand that if I do not agree to be tested or to submit to any procedure to detect the presence of drugs, alcohol, illegal or non-prescribed substances, this will be deemed an admission of impairment by such substances.

I understand that according to South Carolina law, my workers compensation claim may be denied.

I understand that if the results of the test are positive for drugs or alcohol, my claim for workers compensation benefits may be denied.

I hereby acknowledge receipt of this policy concerning drug and alcohol testing.

Employee Name

Date

Employee Name (Print)

Company Representative Signature

Member Company Name

**PHYSICIAN'S POST-INJURY
DRUG AND ALCOHOL TESTING
AUTHORIZATION FORM**

Employer Information

Company Name: _____

Address: _____

City: _____ State: _____ Zip Code: _____

Testing Results Recipient's Name: _____ Title: _____

Phone #: _____ Fax #: _____

Employee Information

Name: _____ Occupation: _____

Address: _____

City: _____ State: _____ Zip Code: _____

Phone #: _____

Forward Drug and Alcohol Testing Fees to:

Attn.: Claims Department
South Carolina Home Builders Self Insurers Fund
P.O. Box 7727
Columbia, SC 29202
1-800-678-8178 or (803) 771-0566

XX-Notice of Compliance

The South Carolina Workers' Compensation Commission Notice of Compliance (available at no charge from SCHBSIF) is to be posted in a conspicuous location where it can be seen by all employees.

XXI-Report of Injury

The law requires the employer to report an on the job injury within ten (10) days of notification. Failure to do so could cause a fine to be levied against the employer. Proper reporting following the enclosed guidelines, will also ensure prompt payment of those claims that are covered.

XXII-Initial Report

Call SCHBSIF at 1-800-678-8178 or 803-771-0566 to report a new injury. Specific instructions regarding information needed are enclosed.

XXIII-Return to Work Report

Whenever an employee returns to work, please call SCHBSIF at 1-800-678-8178 or 803-771-0566 to ensure the appropriate workers' compensation benefit is paid.

XXIV-Claims Reporting Procedures

After an on the job accident, the member should direct the appropriate immediate medical attention: on-site first aid, Minor Emergency/Urgent Care Center, emergency room or ambulance assistance. *Advise the care provider that this is a workers' compensation accident and to perform an alcohol and drug test during treatment. All medical procedures after the initial treatment must be authorized by SCHBSIF to secure payment of further procedures.* Send all correspondence and medical bills to SCHBSIF office.

Immediately after learning of an on the job injury, please complete an Acord Form 4 (Workers' Compensation-First Report of Injury or Illness). The form should be accurate, complete and legible. As an alternative, you can call SCHBSIF at 1-800-678-8178 or 803-771-0566 and we will take the claim over the telephone.

The Workers' Compensation-First Report of Injury or Illness form must include the employee's correct social security number, address and date of birth, as well as the county where the accident occurred and the member's federal tax identification number. The company name must be the exact name on the workers' compensation policy. The claim cannot be processed without these items.

You may fax the Acord Form 4 (Workers' Compensation-First Report of Injury or Illness) to SCHBSIF (fax 803-771-1598), but please mail the original to: SCHBSIF, P.O. Box 7727, Columbia, SC 29202.

- *Do not mail the Acord Form 4 to your agent, your association office or the SC Workers' Compensation Commission Office.*
- *Mail new reports of injury separately from other correspondence.*
- *Please send subsequent correspondence, SC Workers' Compensation Commission Forms and medical bills to SCHBSIF office.*

When sending follow up material on pending claims, some members identify that material by attaching a photocopy of the Acord 4 to the material. If you do this, please write "Photocopy" on the form so it will not be confused with a new claim. All that is needed to identify a claim is the employer name, the employee name or the social security number and the date of the accident.

XXV - Contact Information for the SCHBSIF

Address: P. O. Box 7727 • Columbia, SC 29202

Telephone: 803-771-0566

Toll Free: 800-678-8178

Fax-Policy Services: 803-252-8581

Fax-Claims: 803-771-1598

Email Addresses

Jeff Ranew, Administrator	JRanew@schbsif.com	803-309-9601
Brandy Shealy, Policy Services/Underwriting Manager	BShealy@schbsif.com	
Kathy Fleming, Policy Services-CSR-names A-F	KFleming@schbsif.com	
Kenyana Carter, Policy Services-CSR-names G-M	KCarter@schbsif.com	
Linda Humphries, Policy Services-CSR-names N-Z	LHumphries@schbsif.com	
Darlene Frick, Claims Manager	DFrick@schbsif.com	803-309-9761
Vickie Rita, Senior Claims Adjuster	VRita@schbsif.com	
Danny Dilworth, Risk Control Safety Manager	Dilworth@schbsif.com	803-309-9603
Scott Manns, Safety Consultant	SManns@schbsif.com	803-600-2468
Kerry Grimm, Safety Consultant	KGrimm@schbsif.com	803-309-9604
Tammy Floyd, Risk Control Scheduler	TFloyd@schbsif.com	
Brian Emery, Manager, Premium Audit Services	BEmery@schbsif.com	803-603-2297
John Iannace, Senior Audit Consultant	JIannace@schbsif.com	803-603-5227
Craig Manning, Senior Audit Consultant	CManning@schbsif.com	803-603-5228
Andrew Woodham, Marketing Manager	AWoodham@schbsif.com	803-309-3564
Mike Hill, Controller	MHill@schbsif.com	803-603-5362
Kelly Credille, Accounting Clerk	KCredille@schbsif.com	



www.schbsif.com

PO Box 7727 • Columbia, SC 29202 • 803.77.0566 or 1.800.678.8178

ROA Supp000047
APP000414

Information & Forms



SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

Quick Reference

Classification & Rates
Effective January 1, 2012

Code	Classification	Preferred Rate per \$100	Standard Rate per \$100	Recouper Rate pe \$10
0005	Farm: Nursery Employees & Drivers-includes planting at customers location(s) when incidental to insured's nursery operation	4.67	4.92	5.16
0042	Landscape Gardening & Drivers.....	6.99	7.69	8.46
1803	Stone Cutting or Polishing - Referral Required.....	5.91	6.25	7.13
2802	Carpentry-Shop Only & Drivers.....	7.46	7.89	9.00
2812	Cabinet Works-with power machinery	7.73	8.14	8.57
2883	Furniture Manufacturing	4.49	4.74	5.41
3257	Wire Goods Mfg.	4.73	4.98	5.22
3724	Machinery or Equipment Erection or Repair NOC & Drivers-includes installation of overhead (garage) doors if performed by specialty contractors	8.82	9.28	9.74
4130	Glass Merchant	6.62	7.00	7.98
5020	Ceiling Installation-Suspended Acoustical Grid Type	8.26	8.72	9.95
5022	Masonry NOC-includes brick cleaning & plastering or stucco work on building exteriors, includes installation of structural glass blocks	9.58	10.11	11.54
5102	Door, Door Frame or Sash Erection-Metal or Metal Covered-does not apply to storm doors or storm sash or overhead door installation	9.55	10.09	11.51
5183	Plumbing NOC & Drivers-includes installation of underground lawn sprinkler systems	5.99	6.59	7.25
5190	Electrical Wiring-Within Buildings & Drivers.....	6.50	7.15	7.87
5215	Concrete Construction-Incidental to the Construction of Private Residence-ex. Pouring of concrete footings, foundation walls, cellar floors, basements, sidewalks and driveways.	7.50	8.25	9.08
5221	Concrete or Cement Work-Floors, Driveways, Yards or Sidewalks & Drivers-does not apply to work on commercial buildings	6.49	6.83	7.20
5223	Swimming Pool Construction-Not Iron or Steel & Drivers	8.94	9.41	9.90
5348	Ceramic Tile, Indoor Stone, Marble or Mosaic Work-includes installation of cultured marble and bathtub and shower liners	5.25	5.78	6.35
5437	Carpentry-Installation of Cabinet Work or Interior Trim/Punch List Work-includes installation, sanding or scraping of wood floors-except wood flooring installed using glue-down or interlocking methods	11.59	12.26	13.05
5445	Wallboard Installation within Buildings & Drivers	8.73	9.23	9.46
5474	Painting or Paperhanging NOC & Shop Operations, Drivers-includes interior and exterior painting	11.25	11.89	13.55
5478	Carpet/Tile Installation excluding ceramic, stone, terrazzo and mosaic tile.	4.77	5.04	5.75
5479	Insulation Work NOC & Drivers	11.21	11.85	13.52
5480	Plastering NOC & Drivers-interior plastering only	13.13	13.82	14.55

SIF 049



Fall Protection Requirements

Work on roofs: Any workers on a roof after the sheathing is completed must be protected by safety harnesses and lanyards. This includes papering unless the paper is installed at the same time as the roof sheathing. Included in this requirement is work by any trade. **Only incidental roofing payroll is allowed. If roofing payroll including payroll of uninsured subcontractors exceeds 10% of total annual payroll, coverage is subject to cancellation.**

Truss and rafter erection, floor joist installation: If the fall hazard exceeds six feet, work must be done from below using interior scaffolding or ladders. Workers may work from interior top plates only after the first two trusses or rafters are in place and braced. These workers must remain within the braced trusses or rafters. No workers are allowed on exterior top plates.

Roof sheathing: Slide guards (a 2x4 with a 2x6 turned up in front) or roof jacks must be used along the roof eave and then again every 8 feet on roofs with a pitch less than 8:12 and every 4 feet on roofs with pitch greater than or equal to 8:12.

Sub flooring installation: If the fall hazard exceeds six feet, the first sheets must be installed from below using scaffolding or ladders. Once a work platform is secured, workers may complete the work from the deck using harnesses and lanyards. After the deck is complete, the floor will be marked with a painted warning line six feet from any open side until the walls are erected. Any workers outside the warning line must be in a safety harness.

Wall construction and erection: If the fall hazard exceeds six feet, all workers within six feet of the edge must use safety harnesses. After the wall is erected, window and door openings must be guarded immediately.

Scaffolding: All scaffolding must be properly erected and braced to support four times its maximum intended load. All braces and pins must be in place. The working surfaces must be completely decked with scaffold grade lumber or manufactured walk boards. Guardrails and toe boards are required if the fall hazard exceeds six feet. Ladders must be used for scaffold access. If job built scaffolds are used safety harnesses and lanyards must be used if the fall hazard exceeds six feet.



Safety & Risk Control/Claims Management Seminar Schedule for 2012

January

12th Myrtle Beach

February

21st Spartanburg

March

8th Columbia

April

10th Beaufort

May

10th Rock Hill

June

12th Greenville

July

26th Florence

August

21st Charleston

September

13th Aiken

October

11th Anderson

November

7th Charleston

8th Columbia

10th Greenwood

**If you are interested in a Spanish Seminar
Please contact Tammy Floyd at (800) 678-8178**

**Call Tammy Floyd at Extension 114 at (800) 678-8178 or (803) 771-0566
to make your reservation**

P.O. Box 7727 Columbia, SC 29202 800/678-8178 803/771-0566
Claims Fax 803/771-1598 Policy Services/Admin Fax 803/252-8581

**ROA Supp000051
APP000418**

Local Executive Officers

Alken County - 4208

Mary Ellen Bush
HBA of Alken County
4360 Whiskey Road
Aiken, SC 29803
803-641-6863
803-641-0061 Fax
mbrush@aikenbuilders.com

Anderson - 4210

Dino Hicks-Brannon
HBA of Anderson
1921 McConnell Springs Rd
Anderson, SC 29621
864-226-0347
864-226-2415 Fax
hbaa@att.net

Charleston-Trident - 4216

Phillip Ford
Charleston-Trident HBA
2120 Nolsette Blvd., Ste. 106
N. Charleston, SC 29405
843-572-1414
843-572-8227 Fax
pford@charlestonhomebuilders.org

Cherokee County - 4220

Richard L. Lavender
HBA of Cherokee County
PO Box 218
Gaffney, SC 29342
864-487-5529
864-487-5529 Fax
Richard1640@bellsouth.net

Greater Columbia - 4224

Earl E. McLeod, Jr.
HBA of Greater Columbia
PO Box 725
Columbia, SC 29202
803-256-6238
803-779-0635 Fax
earl@columbiabuilders.com

Greater Pee Dee - 4232

Cheryl Floyd
HBA of Greater Pee Dee
PO Box 13494
Florence, SC 29504
843-665-5885
843-629-9488 Fax
cfloyd@hbapeedee.org

Greater Spartanburg - 4272

Jennifer Bradley Hoy
HBA of Greater Spartanburg
PO Box 2582
Spartanburg, SC 29304
864-583-5471
864-583-5472 Fax
jenniferbradley@hbaspartanburg.com

Greenville - 4240

Michael Dey
HBA of Greenville
5 Creekside Park Court, Suite A
Greenville, SC 29615
864-254-0133
864-254-0134 Fax
mdey@hbaofgreenville.com

Hilton Head Area - 4248

Ashley Feaster
Hilton Head Area HBA
PO Box 22360
Hilton Head, SC 29925
843-681-9240
843-689-5780 Fax
afeaster@hhahba.com

Horry-Georgetown - 4251

Rose Ann O'Reilly
Horry-Georgetown HBA
728 Hwy 501 Bypass East
Conway, SC 29526
843-438-4124
843-347-2774 Fax
rao@hghba.com

Lakelands - 4242

Nick Nicholson
Lakelands HBA
PO Box 3194
Greenwood, SC 29648
864-229-7722
864-229-7722 Fax
lakelandsHBA@emeraldis.com

Lancaster County - 4230

Donna Fox
HBA of Lancaster County
305 West Dunlap Street, Suite C
Lancaster, SC 29720
803-285-2600
803-283-5972 Fax
homebuilders@comporium.net

Laurens-Newberry - 4250

Lallie Waites
Laurens-Newberry HBA
PO Box 257
Pomaria, SC 29126
803-276-4590
803-276-4550 Fax

Lowcountry - 4213

Deb Fielding
HBA of the Lowcountry
PO Box 716
Beaufort, SC 29901
843-524-5203
843-524-2660 Fax
info@beaufort.org

Oconee - 4280

Russ Price
HBA of Oconee
PO Box 337
Seneca, SC 29679
864-882-1657
864-882-1676 Fax
info@hbaoconee.com

Orangeburg-Bamberg-Calhoun - 4260

Adolphus Johnson
HBA of Orangeburg-Bamberg-Calhoun
PO Box 870
Orangeburg, SC 29116
803-534-1383

Sumter-Clarendon - 4276

Nelle Tomlinson
HBA of Sumter-Clarendon
PO Box 1215
Sumter, SC 29151
803-775-6800
803-775-6801 Fax
hbasumclar@ftc-i.net

Union County - 4290

Jerry Harris
Union County HBA
1501 Whitmire Highway
Union, SC 29379
864-429-9033
864-429-9035 Fax
unlimitedagain@live.com

York County - 4264

Linda Wilson
HBA of York County
PO Box 2881
Rock Hill, SC 29732
803-328-8460
803-328-1917 Fax
hbayc@comporium.net



PROMPT ACCIDENT REPORTING IT'S THE LAW!!!

It is the law in South Carolina that an employer must promptly report all workers compensation injuries or be subject to a fine.

Failure to promptly report an injury does not make the injury go away. In fact, it can make the claim more costly to your company by reducing the control we have over medical treatment, extends the claimants time out of work, and increases the overall cost of the claim.

It is the sole responsibility of the employer to see that his/her employees and uninsured subcontractors report losses promptly. Each employer should examine his/her claim reporting procedures and make sure that all employees/uninsured subcontractors are aware of the guidelines for prompt reporting.

As a member of the South Carolina Homebuilders Self Insurers Fund, there are no reporting forms to complete. You can simply call us locally at 803-771-0566 or toll free at 1-800-678-8178. We will take the loss information from you by telephone. If you would prefer, you may also complete the enclosed Acord 4 and fax or mail to:

SCHBSIF
P O Box 7727
Columbia, SC 29202
Fax: 803-771-1598

The most important information needed will be:

- Name
- Date of birth
- Social security number
- Telephone number
- Address
- Date of accident
- Type of injury
- How it happened
- Work status

Late reporting or failure to report will jeopardize your coverage with the South Carolina Homebuilders Self Insurers Fund.



**Approved Medical Providers
Minor Emergency/Urgent
Care Centers**

Aiken

Doctors Care-Aiken
850 Aiken Mall Drive
Aiken, SC 29803
803-648-1464

Doctors Care-North Aiken
1029 York Street
Aiken, SC 29801
803-648-4119

Family Medcenters
216 Edgefield Ave. NW
Aiken, SC 29801
803-648-4224

Anderson

Doctors Care-Anderson
2126 Highway 81
Anderson, SC 29621
864-226-2660

Beaufort

Doctors Care-Beaufort
1510 South Ribaut Road
Port Royal, SC 29935
843-770-0676

Bluffton

Doctors Care-Bluffton
64 Bluffton Road
Bluffton, SC 29910
843-757-0676

Cayce

Doctors Care-Cayce
977 Knox Abbott Drive
Cayce, SC 29033
803-794-0476

Charleston

Doctors Care-West Ashley
1851 Sam Rittenberg Blvd.
Charleston, SC 29407
843-556-5585

Charleston-cont'd

Doctors Care- James Island
743 Folly Road
Charleston, SC 29412
843-762-2360

Doctors Care-Northwoods
8091 Rivers Avenue
Charleston, SC 29406
843-572-7000

Doctors Care-Charleston West
3424 Shelby Ray Court
Charleston, SC 29414
843-402-6834

Clemson

Clemson Urgent Care
885 Tiger Blvd.
Clemson, SC 29631
864-654-6800

Columbia

Doctors Care-Ridgeview
4234 Hardscrabble Road
Columbia, SC 29223
803-736-8955

Doctors Care-Seven Oaks
100 Jimmy Love Lane
Columbia, SC 29212
803-772-5030

Doctors Care-Northeast
110 Atrium Way
Columbia, SC 29223
803-788-1153

Doctors Care-Columbia East
7659 Garners Ferry Road
Columbia, SC 29209
803-783-2661

Doctors Care-Forest Acres
4416 Forest Drive, Suite A
Columbia, SC 29206
803-738-9522

Columbia-cont'd

Doctors Care-Beltline
511 Beltline Blvd.
Columbia, SC 29526
803-782-4051

Conway

Doctors Care-Conway 501
1113 Church Street
Conway, SC 29526
843-248-6269

Doctors Care-Conway
1400 Main Street
Conway, SC 29526
843-381-8206

Darlington

McLeod Medical Center-Urgent
Care
964 Lochend Drive
Darlington, SC 29532
843-393-6056

Florence

Firstchoice Healthcare
1920 2nd Loop Road
Florence, SC 29501
843-678-9777

Doctors Care-S. Irby
2200 S. Irby Street
Florence, SC 29505
843-662-9945

Doctors Care-Hoffmeyer
2410 Hoffmeyer Road
Florence, SC 29501
843-662-8182

McLeod Urgent Care Center
3015 W. Palmetto Street
Florence, SC 29501
843-777-6870



Approved Medical Providers
Minor Emergency/Urgent
Care Centers

Rock Hill

Riverview Medical Center
1393 Celanese Road
Rock Hill, SC 29732
803-329-3103

Piedmont East Urgent Care Center
760 Addison Avenue
Rock Hill, SC 29730
803-329-1930

Simpsonville

Doctors Care-Simpsonville
35 Ray E. Talley Court
Simpsonville, SC 29680
864-967-7028

Spartanburg

Doctors Care-East Blackstock
218 East Blackstock Road
Spartanburg, SC 29301
864-576-8646

Urgent Care Mary Black
Westside Medical Park
2995 Reidville Road
Spartanburg, SC 29301
864-587-3010

Summerville

Doctors Care-Dorchester
10160 Dorchester Road
Summerville, SC 29485
843-871-7900

Doctors Care-Summerville
410 North Main Street
Summerville, SC 29483
843-871-3277

Sumter

Doctors Care-Sumter
2745 Broad Street
Sumter, SC 29150
803-778-6555

Surfside Beach

Doctors Care-Surfside
1600 Hwy 17 North
Surfside Beach, SC 29575
843-238-1461

Swansea

Lexington Medical Center-Swansea
935 West 2nd Street
Swansea, SC 29160
803-568-2000

West Columbia

Doctors Care
2836 Augusta Road
West Columbia, SC 29170
803-939-0545

Doctors Care Family Medical
3240 Sunset Boulevard
West Columbia, SC 29169
803-796-4251

York

Piedmont West Urgent Care
1190 Filbert Hwy
York, SC 29745
803-628-0004



P.O. Box 7727
Columbia, SC 29202
803/771-0566 • Fax 803/771-1598
800/678-8178

ACCIDENT REPORTING AND TREATMENT FORM

Claim # _____

* A C C I D E N T	Employer Name _____	Time _____
	Employee Name _____	Phone _____
	Employer Contact _____	Employee SS# _____
	Home Address _____	Birthdate _____
	Date of Injury _____	Home Phone # _____
Describe what happened including exact location, machine or activity _____		
Supervisor Name _____		
Witness (if any) _____		

M E D I C A L	I hereby authorize any physician, practitioner, hospital, clinic, insurance company or other organization, institution or person that has any records of (Employee Name) _____ to give to (Employer Name) _____, South Carolina Home Builders SIF or its authorized representatives any such information.
	A photographic copy of this authorization shall be as valid as the original.
Employee Signature _____	Date _____

F I R S T A I D	Nature of Injury: ☐ New Injury ☐ No injury/illness found ☐ Recurrence/aggravation of existing condition ☐ Employee refused treatment
	Type of injury: _____ Body part injured: _____
	Treatment action taken: ☐ Return to work ☐ Needs additional treatment

M E D I C A L P R O V I D E R	Where was the employee taken for initial treatment? _____ Arrival time: _____				
	Nature of injury: ☐ New Injury ☐ No injury/illness found ☐ Recurrence/aggravation of existing condition ☐ Employee refused treatment				
	Type of injury: _____ Body part injured: _____ Dominant hand: <u> R </u> <u> L </u>				
	RECOMMENDATIONS FOR WORK: ☐ Regular work ☐ Transitional-duty ☐ No work	LIFTING LIMITED TO: ☐ 10 lbs. ☐ 20 lbs. ☐ 30 lbs. ☐ 40 lbs. ☐ 50 lbs. ☐ No lifting ☐ Lifting limited to _____ times per hour.	CARRYING LIMITED TO: ☐ 10 lbs. ☐ 20 lbs. ☐ 30 lbs. ☐ 40 lbs. ☐ 50 lbs. ☐ No carrying ☐ Carrying limited to _____ times per hour.	PUSHING/PULLING LIMITED TO: ☐ 10 lbs. ☐ 20 lbs. ☐ 30 lbs. ☐ 40 lbs. ☐ 50 lbs. ☐ Pushing/pulling limited to _____ times per hour.	POSITION LIMITATION: ☐ No repetitive body motion (list body part) _____ ☐ No reaching above shoulders ☐ No reaching below knee ☐ No exposure to substances (specify): _____ ☐ Sitting/standing limited to _____ hrs/day ☐ No climbing ☐ Not to drive vehicles ☐ Other work limitations _____
	Treatment and comments: _____				
Patient disposition: ☐ Return to Supervisor; no modifications needed. ☐ Return to Supervisor with modifications (above) for _____ days. ☐ Return to Supervisor; send home (employee can return to work on _____ (date). Follow up appointment on _____ with _____					
Medical provider signature _____ Date _____					

R T W	To be completed by the employee and his/her supervisor The above restrictions (if applicable) have been reviewed and the employee: ☐ Has been placed in an appropriate transitional-duty position ☐ Cannot be accommodated at this time ☐ Was sent home per medical instructions	SIF 062. ☐ Employee refused to return duty, no modifications ☐ Employee refused transitional-duty ☐ Employee did not return to work
	Supervisor _____	Date _____
	ROA Supp000056 APP000423	



**P.O. Box 7727
Columbia, South Carolina 29202**

Phone: (803) 771-0566 • Toll Free 1-800-678-8178
Fax Claims: (803) 771-1598 • Fax Policy Services: (803) 252-8581
www.schbsif.com

SIF 066

**ROA Supp000057
APP000424**

*--"Client satisfaction is the top priority of our agency.
The SCHBSIF provides this better than any company
we represent."*

Howard Cox, Agent
Greenville, SC

*"I like the program and try to sell it to all my fellow
builders and sub-contractors."*

Alex Hudson, Builder
Spartanburg, SC

*"I like the way the program is set up and the monthly
reporting."*

George Wyant, Sr., Builder
Spartanburg, SC

*"The SCHBSIF provides cost-effective, affordable
worker's comp coverage for the residential construction
industry. The SCHBSIF and its independent agents
are good 'partners' with the local HBAs."*

Audrey Cook, Executive Officer
HBA of the Greater Pee Dee



SIF 067

State of South Carolina Workers' Compensation Commission

CERTIFICATE OF APPROVAL TO SELF-INSURE WORKERS' COMPENSATION LIABILITIES IN THIS STATE

SI: FEIN:

Being a business of similar nature to other businesses in the fund, and in compliance with S.C. Code 42-1-10 et seq., (1976, amended), and Chapter 67 of the Code of Regulations, (1990, as amended), has been granted the privilege of self-insuring its workers' compensation liabilities as a member of the South Carolina Home Builders SIF.

The employer and the Fund are subject to and shall abide by all requirements of the Workers' Compensation Act, amendments thereto, and regulations that now are or hereafter adopted by the South Carolina Workers' Compensation Commission.

This Certificate shall remain in force for thirty days following notice to the Commission of the employer's voluntary or involuntary withdrawal from the Fund. The Fund shall remain liable for all claims incurred by the employer and its employees while the employer was a member of the Fund until all benefits available under the Act are fully paid.

The privilege to self-insure is subject to revocation by the Commission upon sixty days notice and an opportunity for the employer to be heard.

This Certificate becomes effective on

**SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION**

Gary M. Cannon

Executive Director

SIF 068



ROA Supp000059

APP000426

From: Smith, W [mailto:WSmith@wcc.sc.gov]
Sent: Monday, August 09, 2010 9:09 AM
To: Jeff Ranew
Subject: Building Purchase

Dear Jeff! We have reviewed the information you provided concerning the purchase of a building to serve as offices for the SCHBSIF. We approve the use of \$1.6 million in fund investments to purchase the building. We will require the fund to designate an additional \$500,000 in investments as pledged to the South Carolina Workers' Compensation Commission prior to the purchase. Please have your bank send me a new safe keeping receipt for all securities pledged to the Commission to include the additional \$500,000. If you have any questions please advise and keep us informed as to your progress with the property purchase.
WC Smith, Director, Self-Insurance, SCWCC

3/9/2012

SIF 069

ROA Supp000060
APP000427





RECEIVED
FEB 25 2011
SCHBSIF

BALLOT

- To vote upon the establishment of the South Carolina Home Builders Mutual Group Insurance Company (SCHBMGIC), and
- To approve the transfer of assets of the South Carolina Home Builders Self Insurers Fund (SCHBSIF) to SCHBMGIC for the purpose of providing surplus funds sufficient to meet the requirements of Title 38 of The South Carolina Code of Laws.

THIS BALLOT MAY ONLY BE SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE COMPANY

2-24-11

Date

Yes, I approve the above proposal See condition of my yes vote attached below Yes only
"IE"

Lincoln L. Privette Sr.

Printed Name / Title Privette Enterprises Inc Signature



Only if the SCHBA retains governance over the BHM Mutual Comp. by way of SCHBA's 5 districts having total say (vote) on the board members and the election thing each & every third year.

d of Trustees of SCHBSIF to vote on my behalf

X

Signature

X

Signature

(332-2)

SIF 070

ROA Supp000061

APP000428





RECEIVED
FEB 17 2011
SCHBSIF

BALLOT

1. To vote upon the establishment of the South Carolina Home Builders Mutual Group Insurance Company (SCHBMGIC), and
2. To approve the transfer of assets of the South Carolina Home Builders Self Insurers Fund (SCHBSIF) to SCHBMGIC for the purpose of providing surplus funds sufficient to meet the requirements of Title 38 of The South Carolina Code of Laws.

2-15-11

Date

Yes, I approve the above proposal

Lennie J. Carter - Sr.
Printed Name

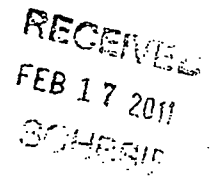
X [Signature]
Signature

I waive my voting privilege and authorize the Board of Trustees of SCHBSIF to vote on my behalf

X
Printed Name Signature

No; I do not approve the above proposal

X
Printed Name Signature



1. To vote upon the establishment of the South Carolina Home Builders Mutual Group Insurance Company (SCHBMGIC), and
2. To approve the transfer of assets of the South Carolina Home Builders Self Insurers Fund (SCHBSIF) to SCHBMGIC for the purpose of providing surplus funds sufficient to meet the requirements of Title 38 of The South Carolina Code of Laws.

Date _____

MARE ELLIS
Printed Name

X Marc Ellis
Signature

Printed Name

X
Signature

Printed Name _____

X
Signature



BALLOT

- To vote upon the establishment of the South Carolina Home Builders Mutual Group Insurance Company (SCHBMGIC), and
- To approve the transfer of assets of the South Carolina Home Builders Self Insurers Fund (SCHBSIF) to SCHBMGIC for the purpose of providing surplus funds sufficient to meet the requirements of Title 38 of The South Carolina Code of Laws.

THIS BALLOT MAY ONLY BE SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE COMPANY

3/1/2011
Date

Yes, I approve the above proposal

Barry Davis / President
Printed Name / Title

x Barry P. Davis
Signature

I waive my voting privilege and authorize the Board of Trustees of SCHBSIF to vote on my behalf

X
Printed Name / Title Signature

No, I do not approve the above proposal

Barry Davis / President
Printed Name / Title

x Barry P. Davis
Signature

RECEIVED

(2437-2)

MAR 02 2011

SCHBSIF

P.O. Box 7727 • Columbia, SC 29202 • 803/732-6155 • FAX 803/732-6156

SIF 073

ROA Supp000064

APP000431



BALLOT

1. To vote upon the establishment of the South Carolina Home Builders Mutual Group Insurance Company (SCHBMGIC), and
2. To approve the transfer of assets of the South Carolina Home Builders Self Insurers Fund (SCHBSIF) to SCHBMGIC for the purpose of providing surplus funds sufficient to meet the requirements of Title 38 of The South Carolina Code of Laws.

Date

Yes, I approve the above proposal

Printed Name

X

Signature

I waive my voting privilege and authorize the Board of Trustees of SCHBSIF to vote on my behalf

J. Allen Patterson
Printed Name

X
[Signature]
Signature

No, I do not approve the above proposal

Printed Name

X

Signature

(4957)



BALLOT

- To vote upon the establishment of the South Carolina Home Builders Mutual Group Insurance Company (SCHBMGIC), and
- To approve the transfer of assets of the South Carolina Home Builders Self Insurers Fund (SCHBSIF) to SCHBMGIC for the purpose of providing surplus funds sufficient to meet the requirements of Title 38 of The South Carolina Code of Laws.

THIS BALLOT MAY ONLY BE SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE COMPANY

MARCH 1, 2011
Date

Yes, I approve the above proposal

RICHARD N. SENDER, PRES.
Printed Name / Title

SENDER CONSTRUCTION CO., INC.

X Robert M. Senter, PRES.
Signature

I waive my voting privilege and authorize the Board of Trustees of SCHBSIF to vote on my behalf

X
Printed Name / Title Signature

No, I do not approve the above proposal

X
Printed Name / Title Signature

RECEIVED

MAR 02 2011

(5469-2)

SCHBSIF

P.O. Box 7727 - Columbia, SC 29207-7727

SIC 075

ROA Supp000066

APP000433



RECEIVED
FEB 16 2011
SCHBSIF

BALLOT

1. To vote upon the establishment of the South Carolina Home Builders Mutual Group Insurance Company (SCHBMGIC), and
2. To approve the transfer of assets of the South Carolina Home Builders Self Insurers Fund (SCHBSIF) to SCHBMGIC for the purpose of providing surplus funds sufficient to meet the requirements of Title 38 of The South Carolina Code of Laws.

2-15-11
Date

Yes, I approve the above proposal

Maureen M. Sindell
Printed Name

X Maureen M. Sindell
Signature

authorized Agent for Great Southern Home

I waive my voting privilege and authorize the Board of Trustees of SCHBSIF to vote on my behalf

X
Printed Name Signature

No, I do not approve the above proposal

X
Printed Name Signature



BALLOT

1. To vote upon the establishment of the South Carolina Home Builders Mutual Group Insurance Company (SCHBMGIC), and
2. To approve the transfer of assets of the South Carolina Home Builders Self Insurers Fund (SCHBSIF) to SCHBMGIC for the purpose of providing surplus funds sufficient to meet the requirements of Title 38 of The South Carolina Code of Laws.

Date

2/24/11

Yes, I approve the above proposal

RON BOSHAUW

Printed Name

X

Signature

I waive my voting privilege and authorize the Board of Trustees of SCHBSIF to vote on my behalf

X

Printed Name

Signature

No, I do not approve the above proposal

X

Printed Name

Signature

(5854)

5854 -- Tilton Group, Inc.

Address	Phone	Contact
Tilton Group Inc PO Box 1937 Bluffton, SC 29910	(843) 757-5896	Steve Tilton X 224

CSR -- Linda Humphries

DATE	TIME	BY	COMMENTS
2/28	1:51	ADW	Left Message
3-7	11:07		Steve mailed ballot last week

SIF 078

Jeff Ranew

From: Smith, W [WSmith@wcc.sc.gov]
Sent: Monday, May 23, 2011 3:46 PM
To: Jeff Ranew
Cc: Fickle, Brad
Subject: Fund Closure

Hello Jeff! This email is in follow-up to our meeting this past Friday, May 20, 2011, and our analysis of the supporting data you provided. In response to your request we have approved the release of \$5 million in non-pledged assets of the SC Home Builders Self-Insurers Fund to be used solely to capitalize the SC Builders Insurance Group, Inc., in conjunction with the closure of the self-insured fund. It is understood that the fund will cease accepting new members effective July 1, 2011 and will become no longer self-insured for workers' compensation in South Carolina effective January 1, 2012. The outstanding liabilities of the fund at the time of closure, January 1, 2012, will remain the responsibility of the self-insured fund and its membership under joint and several liability. The fund is required to provide a final audited financial statement following closure and will continue to provide the Commissions Form 11, Fund Quarterly Financial Report, until further notice. The fund will also be required to comply with Self-Insurance Tax and Second Injury Fund Assessment requirements following the funds closure. If I can be of further assistance please advise. WC Smith, Director, Self-Insurance, SCWCC



SCHBSIF Trustee Meeting
September 24, 2003

The September meeting of the South Carolina Home Builders Self Insurers Fund Trustees was held at the SCHBSIF office. Those in attendance were Herb Witter, Chairman, Al Bailey, Vice Chairman, Trustees, John Curl, Eddie Weaver, Keith Smith, Roland Bergeron, Colin Campbell, and Tom Markovich. Also present were Jeff Ranew, Danny Dilworth, Darlene Frick, Brandy Shealy, and Mary Ann Ray.

Chairman Witter called the meeting to order and the minutes of the August 14th meeting were reviewed. There was a mistake in the minutes as Colin Campbell attended the August 14th meeting and was not listed. John made a motion to approve the minutes of the last meeting and Eddie seconded. The motion carried.

Chairman Witter went over the Monthly Financials. The comparative financials were missing and we will make sure they are listed for the October 22nd meeting.

Darlene Frick went over the Fund Profile and claims update.

Mary Ann Ray went over the Marketing & Cancellation Reports. A discussion was held regarding the cancellation procedures and reinstatement fees. Mary Ann recommended that we return to the 4th and final cancellation rule and increase the reinstatement fees as we have members that continuously pay late. Al made a motion to accept Mary Ann's recommendation. Effective 1/1/04 we will start the 4th and final cancellation procedure. The administrator for extenuating circumstances may make exceptions. Jeff will advise the Board of any exceptions. The reinstatement fees will be increased to the following:

- 1st cancellation - \$100.00
- 2nd cancellation - \$200.00
- 3rd cancellation - \$300.00
- 4th cancellation - Will not be reinstated. Cannot be rewritten for a full year.

Eddie seconded the motion. No opposed and the motion carried.

Danny Dilworth updated the Board on the Risk Control & Claims Orientation Seminars. They are going great. He has hired the new Risk Control Consultant. They have also implemented some new procedures. They are now leaving a list of recommendations. If there was a serious fall hazard then a written response will be required from the insured.

Jeff Ranew went over the Fund update. He informed the Board that Midwest Employers recently audited the Fund. This was an underwriting audit, which went really well. We received excellent reviews. We should be receiving a premium indication by October 15th for the 2004 renewal.



SIF 082

A discussion was held regarding the 2004 rates. Colin made a motion to give staff the authority to review rates and recommend a minimum increase of 12% with the maximum recommendation still competitive. The Board would like to generate at least a 1 million dollar fund balance. Al seconded the motion and the motion carried.

Tom Markovich advised the Board that we have not received any nominations for the upcoming Trustee election. Al and Roland will be running unopposed. The Trust Agreement states there shall be an election so ballots will need to be mailed out.

Jeff advised the Board that the State Farm building currently has a contract on it but we are looking for other buildings. We also have a real estate agent looking for other options.

Neely Loring and Tom Colton with Matrix Consulting presented a proposal for a new AS/400. The current machine is seven years old and the capacity is almost at max. The estimated cost for new hardware is \$35,000.00. Roland made a motion to go ahead and purchase new hardware. Eddie seconded the motion. No opposed and the motion carried.

Tim Buhler and Greg Liechty with Evergreen Investment went over the investment accounts and their procedures.

* The Board then discussed the possibility of becoming a mutual insurance company. After much discussion Keith made a motion to take the next step in the review process. Eddie seconded. No opposed and the motion carried. The Executive Committee of the HBA of SC is having a retreat 10/9/03 - 10/11/03. Herb and Jeff will attend and advise the Executive Committee.

Herb advised everyone the next meeting is scheduled for October 15th. He asked everyone to think about locations for the Trustee Retreat and bring recommendations to the next meeting.

* Multi-State will be October 29-31 in Norfolk, VA. They are in the process of putting an agenda together.

Roland made a motion to go into Executive Session.

Meeting adjourned.

SCHBSIF Trustee Meeting
October 15, 2003

The October meeting of the South Carolina Home Builders Self Insurers Fund Trustees was held at the SCHBSIF office. Those in attendance were Herb Witter, Chairman, Al Bailey, Vice Chairman, Trustees, John Curl, Eddie Weaver, Keith Smith, Roland Bergeron, and Colin Campbell. Also present were Jeff Ranew, Danny Dilworth, Darlene Frick, Brandy Shealy, and Buddy Leaphart.

Chairman Witter called the meeting to order and the minutes of the September 24th meeting were reviewed. There was a mistake in the minutes as the next Board meeting was scheduled for October 15th not October 22nd. Roland made a motion to approve the minutes of the last meeting with the correction and Al seconded. The motion carried.

Jeff updated the Board on the status of the new AS/400. Matrix Consulting has offered an alternate proposal for a used AS/400 costing less money. The Board gave the Administrator the authority to review the proposals and make the decision on which to purchase.

Buddy went over the Quarterly Financials.

Herb went over the Quickbooks Budget Comparison YTD.

Darlene went over the Fund Profile. She also informed the Board that the adjusters are contacting providers to attempt to reduce/negotiate large medical bills.

Jeff went over the Marketing & Cancellation reports.

Danny presented a proposed new safety plan for fall hazards. Should we observe a fall hazard greater than 20 feet, we will advise the insured to correct the hazard before continuing work. Should the insured fail to cooperate, we would issue cancellation notice. If cancellation is issued the member may request a review during the pending cancellation time frame to show the SIF that this issue has been corrected. The agent would also be notified. We would like to implement 1/1/04. There was a discussion held regarding insured subs and actual members and their employees. Colin suggested that we design a small card with the Top 10 Hazards we will be looking for and maybe put the SIF telephone number on it. After much discussion, Danny will have program outlined for the Board's review at our next meeting.

Jeff advised the Board that we have received the Midwest renewal. We are still working on other options but we have received a proposed contract for 2004.

Jeff also informed the Board that we have received a proposed realty contract. Jeff has had Ms. Smith review and she has some recommendations for changes. The Board would also like clarification on the commission to be paid.

A discussion was held regarding the 2004 Trustee Meeting schedule. Jeff will send out a proposed schedule to all Trustees. Jeff will also look into the Trustee Retreat for 2004.

X Herb updated the Board on his and Jeff's visit with the Executive Committee of the HBA of SC to inform them of the possibility of the SIF becoming a mutual insurance company.

The next SIF Board meeting is scheduled for November 19th.

Executive Session

The meeting was adjourned.

SCHBSIF Trustee Meeting
November 19, 2003

The November meeting of the South Carolina Home Builders Self Insurers Fund Trustees was held at the SCHBSIF office. Those in attendance were Herb Witter, Chairman, Al Bailey, Vice Chairman, Trustees, John Curl, Eddie Weaver, Roland Bergeron, Marc Ellis and Colin Campbell. Also present were Jeff Ranew, Danny Dilworth, Mary Ann Ray, Brandy Shealy, and Buddy Leaphart.

Chairman Witter called the meeting to order and the minutes of the October 15th meeting were reviewed. There was a mistake in the minutes, as the Board did not hold an Executive Session at this meeting. Al made a motion to approve the minutes of the last meeting with the correction and Roland seconded. The motion carried.

Buddy went over the monthly financials.

Herb went over the QuickBooks Budget Comparison.

Jeff went over the Fund Profile and the claims update.

A discussion was held on the proposed rates for 2004. Al made a motion to approve the proposed rates with an effective date of 1/1/04. Eddie seconded. No opposed and the motion carried.

Danny presented the Fall Protection Plan. A discussion was held. Colin made a motion to approve and Eddie seconded.

Brandy Shealy went over the agenda and menu for the SIF Christmas party scheduled for December 12, 2003 at the Adams Mark Hotel.

Jeff advised the Board that we now have a signed contract with a real estate agent. We are expanding the search area and looking at a lease with the option to buy.

X Jeff also updated the Board on where we are with the mutual insurance company. He met with WC Smith last week and he seemed willing to consider releasing some of the 9 million dollars of securities prior to 2 years but we will have to wait and see.

Jeff and Al updated the Board on their recent trip to the Multi-State Meeting. The 2004 Fall Multi-State Meeting will be in Charleston and the SIF will host.

The next SIF Board meeting is scheduled for December 17th.

The meeting was adjourned.

SCHBSIF Trustee Meeting
April 21, 2004

The April meeting of the South Carolina Home Builders Self Insurers Fund Trustees was held at the SCHBSIF office. Those in attendance were Herb Witter, Chairman, Trustees, John Curl, Eddie Weaver, Vern Pottenger, Tom Markovich, Colin Campbell, and Keith Smith. Also present were Jeff Ranew, Danny Dilworth, Mary Ann Ray, Brandy Shealy, and Darlene Frick.

Chairman Witter called the meeting to order and the minutes of the March 24th meeting were reviewed. Keith made a motion to approve the minutes of the last meeting and Colin seconded. None opposed and the motion carried.

Buddy Leaphart went over the monthly financials. After a three-year study was done, it was determined that the premium audits usually generate 9 to 10 % increase in premium. This increase has been adjusted to revenues on the March financials and will continue going forward.

Jeff Ranew presented a summary of the Accounts Receivable by Fund year for the 1995-2003 years. Jeff also presented the Board with a copy of a Personal Guaranty drafted by Crews Law Firm.

Mary Ann Ray went over the Marketing and Cancellation Reports.

Attorney Sam Crews and Kip Fordham of Crews Law Firm joined the Board meeting. Mary Ann Ray went over the procedures on how a file is processed as well as when and how a file is turned over to collections if money is owed that we have not been able to collect. Sam then informed the Board of how files are handled in their office once they are received. He explained to the Board that we have 36 months to sue on bad debt. SC Law goes by the date the bill was actually due or last payment made. Crews went over the Personal Guaranty they drafted. He suggested that we attach this Personal Guaranty to all renewals for 2005 with a note stating "Please see attached new change in policy". He also stated that it would be safer to send out each year rather than just initially. It would need to be sent to each individual company. Colin Campbell made a motion to make the Personal Guaranty policy on all new business and 2005 renewals. The limit is not negotiable and it should be sent out each year to all members. John raised a question regarding joint and several liability being shared by each company, as we are a self-insured fund. Would signing the Personal Guaranty be him personally accepting joint and several liability? He would not want to do this. Jeff will ask Crews to tighten up the Personal Guaranty limiting it to only premiums due and ask WC Smith to clearly define what happens in joint and several liability. There being no other discussion there were none opposed and the motion carried.

Jeff presented the Board with a handout regarding a building for sale. He will keep looking for more opportunities.

Danny informed the Board that he has been speaking at local HBA meetings and also wrote a newsletter article for Vee Daniel, which was forwarded to all local EO's. He is currently still in search of another Risk Control Consultant. We are listed on 5 different college websites.

Jeff informed the Board of a seminar done for Pointsett Homes. Pointsett Homes required all on their subcontractors to attend. Jeff has asked Danny to pick the 5 biggest accounts and continue with this process.

Jeff advised the Board of Regina McMichael's proposal to do a Safety Seminar at the 2004 State HBA Convention. Colin made a motion to approve and John seconded. All SIF members that attend will receive credit. Tom Markovich advised the Board that the State HBA will cover some of the cost but is not sure at this point exactly how much funds are available.

Jeff advised the Board he has been contacted by the NAHB regarding creating a database of loss experience (no personal information). He will not give out information without Board approval.

Jeff went over his and Brandy's meeting with NBSC and visit to their operations center in Sumter where their lockbox is processed. The lockbox would actually be in Columbia and a courier would pick the mail up each day and take it to Sumter to be processed. If we decide to change our banking relationship it would make sense to move investments as well. Jeff will be meeting with them later next week to discuss. In the meantime he will check with other banks regarding lockboxes in SC and bring information back to the Board.

Mary Ann Ray updated the Board of the status of the 2003 audits. Overland Solutions are also working on the 15 special general contractors audits to compare to the template that Roland is working on. Southern Homes of the Upstate has a history of audit issues. Jeff is planning on meeting with them and we may end up actually reauditing them. We are going to treat this as an isolated case for now.

Jeff discussed dates and locations for the 2004 Agents Advisory Committee. It was decided that July 29-31st appeared to be best for the Board. A location of somewhere on the coast was discussed. We will also attempt to work the July SIF Board meeting in during the Agents Advisory Committee Retreat.

Jeff informed the Board that he had been contacted by an insurance company in Atlanta that is considering providing GL coverage if the SIF will allow them to place our excess insurance. Jeff will bring more information back to the Board as received.

X

Jeff also informed the Board that we are still looking at January 1st for the Mutual Insurance Company however the financial condition of the SIF will play a large role.

X

John McCoy will be here on May 5 with Lloyds of London to discuss excess for the mutual in case Midwest decides they don't like us.

A discussion was held regarding a rate increase. It was determined that a mid-year rate increase would not do us a whole lot of good if it just affected new business. It was decided to look at 1/1/05 for a rate increase.

The next meeting is scheduled for May 19th @ 9:00 am.

Colin made a motion to go into executive session. There being no other business the meeting was adjourned. The Board then met in Executive Session.

SCHBSIF Trustee Meeting
May 19, 2004

The May meeting of the South Carolina Home Builders Self Insurers Fund Trustees was held at the SCHBSIF office. Those in attendance were Herb Witter, Chairman, Al Bailey, Vice Chairman, Trustees, John Curl, Eddie Weaver, Vern Pottenger, Tom Markovich, Colin Campbell, Roland Bergeron, and Keith Smith. Also present were Jeff Ranew, Danny Dilworth, Mary Ann Ray, and Brandy Shealy.

Chairman Witter called the meeting to order and the minutes of the April 21st meeting were reviewed. Keith made a motion to approve the minutes of the last meeting and Vern seconded. None opposed and the motion carried.

Danny Dilworth introduced Trey Brown, Risk Control Consultant.

John Sadler presented the D&O renewal. This policy covers the Trustees liabilities as well as the operations of the insurance company. John then went over the policy exclusions and terrorism coverage. After a brief discussion Roland made a motion to exclude terrorism and Al seconded. There were no opposed and the motion carried. Tom made a motion to accept the D&O renewal and Keith seconded. There were no opposed and the motion carried.

Al Bailey made a motion to go into Executive Session to receive information from the Fund's attorney.

The Board came out of Executive Session.

After a brief discussion on rates, Colin Campbell made a motion to increase rates 15% for all tiers effective 7/1/04. This rate increase will be for new business only. Eddie Weaver seconded the motion. There were no opposed and the motion carried. Jeff will visit or call our top 15 agents to make them aware of this rate increase.

Jeff went over the monthly financials as well as the QuickBooks YTD Summary.

Jeff then went over the Fund Profile and claims update.

Mary Ann Ray went over the Marketing & Cancellation Reports.

Jeff informed the Board that our new Marketing Representative, Leigh Polhill, has been on the road 4 to 4 1/2 days per week visiting agents. She has found out there is a new company writing workers' compensation for residential builders with 15% down and 10 installments.

Danny Dilworth went over the Risk Control Activities for the month of April as well as year to date. Danny will continue this on a monthly basis.

X

Jeff informed the Board that the Agents Advisory Retreat is scheduled for July 29-31st. He asked the Board to let him know if they would be attending and whether or not they will be bringing a guest. We are pushing ahead with the applications for the mutual insurance company. Once they are submitted the state is required to respond within 60 days. We are also still meeting with different banks gathering information and will bring information back to the Board once completed.

Roland has provided a template for the special audits and we are still working on these audits to see if we are losing revenue.

Jeff is still looking for a new building. The lease runs out here in February of 2005.

Herb advised the Board that Darlene has provided a list of the top 20 claims for their review.

Herb also informed the Board that the Personal Guarantee has been revised due to the joint and several liabilities. John Curl thinks we need to have some exceptions to the personal guarantee. Jeff will put together a list of possible exceptions for the next Board meeting.

The next meeting is scheduled for June 16th @ 9:00 am.

SCHBSIF Trustee Meeting
June 16, 2004

The June meeting of the South Carolina Home Builders Self Insurers Fund Trustees was held at the SCHBSIF office. Those in attendance were Herb Witter, Chairman, Al Bailey, Vice Chairman, Trustees, John Curl, Eddie Weaver, Vern Pottenger, Tom Markovich, and Roland Bergeron. Also present were Jeff Ranew, Danny Dilworth, Darlene Frick, and Brandy Shealy.

Chairman Witter called the meeting to order and the minutes of the May 19th meeting were reviewed. Al made a motion to approve the minutes of the last meeting and John seconded. None opposed and the motion carried.

Danny Dilworth introduced Eric Buchanan, Risk Control Consultant. Danny then went over the number of surveys conducted in May.

Herb Witter went over the Monthly Financials and the QuickBooks YTD summary.

Darlene Frick went over the claims update and Fund Profile.

Jeff Ranew went over the Marketing and Cancellation Reports.

X Jeff then advised the Board of his meeting with the Department of Insurance to go over the first cut of the mutual insurance applications. We should know where we stand and some sort of time line in the next couple of months. He also reminded the Board of the Agents Advisory Retreat in Pawley's Island July 29th - 31st. We also have the annual State HBA convention coming up in Asheville. Regina McMichael will be helping with the Risk Control & Claims Seminar we will be holding at the convention. The Multi-State Meeting will be in October. So far we know that New Mexico, Louisiana, Minnesota, and Kansas will be joining us.

Jeff advised the Board that we are finishing up Roland's loss ratio report. We are still working on the Accounts Receivable and bad debt. We think we will be looking at around \$500,000 to \$550,000 to write off.

Jeff is still looking for a new building. We are now focusing on lease options or lease with purchase. We now know that the State HBA will not be moving with us so we have reduce the square footage to around 8,000.

Jeff has completed the analysis of the banks but he is not qualified to make a decision on the investment piece. The service we have been getting with the lockbox is the driving force behind changing banks. Jeff thinks the choice should be narrowed down to Carolina First or NBSC, as they are the only banks with lockbox in SC. Al made a motion to choose NBSC for portfolio and treasury services. John Curl recused himself

because he sits on the Bank Advisory Board. Tom seconded the motion. There were no opposed and the motion was unanimously approved.

Herb advised the Board that John Curl and Eddie Weaver will be up for re-election in 2005. Vern Pottenger will be head of the nominating committee. All other members of the Board not up for re-election will be on the nominating committee.

The next Board meeting will be July 29th @ 12:00 in Pawley's Island at the Agents Advisory Retreat. The 2003 year end financials should be ready by then.

Roland made a motion to go into Executive Session. Tom seconded. The Board then went into Executive Session.

The Board came out of Executive Session and the meeting was adjourned.

SCHBSIF Trustee Meeting
August 25, 2004

The August meeting of the South Carolina Home Builders Self Insurers Fund Trustees was held at the SCHBSIF office. Those in attendance were Herb Witter, Chairman, Al Bailey, Vice Chairman, Trustees, John Curl, Eddie Weaver, Vern Pottenger, Tom Markovich, Keith Smith, Colin Campbell, and Roland Bergeron. Also present were Jeff Ranew, Danny Dilworth, Darlene Frick, and Brandy Shealy.

Chairman Witter called the meeting to order and the minutes of the July 29th meeting were reviewed. Al made a motion to approve the minutes of the last meeting and Colin seconded. None opposed and the motion carried.

Herb Witter and Jeff Ranew went over the monthly financial statements.

Brandy Shealy went over the Quick Books YTD.

Darlene Frick went over the Fund Profile and claims update.

Jeff Ranew went over the Marketing and Cancellation Reports. July had many cancellations but 38 of the 49 non-pay cancellations were for non-pay of 2003 audit.

Danny Dilworth went over the Risk Control Activities for July and year to date. He also informed the Board that we have sold the Nissan Xterra to Trey Brown at his request and will begin paying him mileage.

Brandy Shealy presented a payment plan policy to the Board. Keith made a motion to approve and Al seconded. There were no opposed and the motion carried.

Jeff Ranew passed out the by-laws for New Mexico and Minnesota for Board review.

Jeff Ranew also presented the Board with a chart of premium and losses by cell along with the suggested new underwriting Procedures for renewal review. He also informed the Board of his plan for staff changes for 2005. He is currently looking for a staff accountant. Brandy will be moving back to Policy Services Department. She will be working with Leigh Polhill who has 20+ years experience in underwriting and Jeff to develop underwriting criteria. We will look to Midwest and Towers Perrin for training courses for Brandy.

Jeff advised the Board that we have distributed the new Employee Handbook to all staff. We are also in the process of changing banks. The investments were actually transferred to NBSC yesterday and the premium receipts will start September 1st. He then informed the Board that the multi-state room rates are only good for a few more days. Jeff asked the Board to make sure they have a reservation if they plan on attending. We are expecting a really good turn out.

Martin Moore went over the available lease property with the Board. Roland made a motion to let Jeff and Herb decide on which building would be best for the SIF. Colin seconded the motion. There were no opposed and the motion carried.

Jeff informed the Board of a request for change in the Agency Agreement. Michael Miles of Miles Insurance has written in the statement that the agency actually owns the accounts at expiration if the agency contract should be terminated. Jeff asked the Board for their recommendation. Al recommended that we allow the change for Miles Insurance Agency Agreement but not all agreements unless requested by agent. Jeff will gather copies of other companies contracts and ask Pope for his opinion. He will bring information back to the Board for review.

Jeff then informed the Board that he has received a question from an agent regarding how the SIF classifies punch list guys. We have been putting them under 9014. Is this where the Board would like for us to continue to put them? After a discussion was held, John made a motion to put punch list guys under 5437 effective 1/1/05. Tom seconded the motion. There were no opposed and the motion carried.

Jeff also advised the Board that we have agents that are combining offices for market purposes. There is not common ownership in the agencies. Will we require each office to join an HBA? The Board advised that unless there is common ownership each agency will need to join.

X

Jeff then informed the Board that the application for the mutual insurance company is now in the hands of the Department of Insurance. The big issue is how we are going to get the money needed. Jeff has a meeting with Tyler Hudson of NBSC to see what we will need for loan application. Jeff will attend the HBA Executive Committee Meeting and let them know that we have submitted the application for the mutual insurance company.

The next Board meeting will be September 22, 2004 @ 10:00 am.

There being no other business the meeting was adjourned.

Minutes of the Board of Trustees Meeting
South Carolina Home Builders Self Insurers Fund
10:00 am June 21, 2006

Those present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, Tom Markovich, James G. Graves, Ted Smith, Eddie Weaver, and Keith Smith. Staff present was Jeff Ranew, Brandy Shealy, Danny Dilworth, Darlene Frick, and Mike Hill.

Chairman Witter called the meeting to order and the minutes of the May 17, 2006 Board meeting were reviewed. John Curl moved for their acceptance, Keith Smith seconded and they were unanimously approved.

Mike Hill presented the monthly financials and Quick Book YTD Summary. Chairman Witter asked about the status of our attorney collections. Jeff Ranew informed the Board that Trey Brown has written a program through Access that will enable us to track the status of our collection accounts more efficiently. Jeff also informed the Board that we are also starting to see some money collected as a result of the Personal Guarantee Forms.

Brandy Shealy advised the Board that there are approximately 26 accounts that still have not returned the signed Personal Guarantee form. These 26 accounts represent an estimated annual premium of about \$177,127.00.

Brandy Shealy then advised the Board that there are about 10 payroll audits from the 2005 policy year that remain under investigation. We will continue to work with RTS to finish these as quickly as possible. We have billed an additional \$1.9 million in premium and issued credits in the amount of \$1.1 million which resulted in an additional premium billed of \$854,145.92.

Brandy Shealy also informed the Board that the Policy Services Department has begun the outgoing calls program in an attempt to update members' contact and policy information in our system. We will also include an update information request with the next monthly reporting forms which will be mailed out around the 24th of this month.

Darlene Frick presented the Fund Profile and Claims Update.

Jeff Ranew presented the Marketing and Cancellation Reports. Jeff also informed the Board that the Administrative Law Judge should be rendering a decision on the NCCI loss cost rate increase request within the next several weeks. We have also been advised that several of our competitors are increasing their loss cost multiplier as well as debiting their accounts at renewal as a result of the pending rate increase.

Danny Dilworth presented the Risk Control Activities for the month and year to date. Danny also showed the Board a video he has recorded of individuals on jobsites. He will begin to show these videos to our members at the monthly Safety Seminars. Danny also advised the Board that he has filled the Risk Control Scheduler position with a temporary staff hire from Jerman Personnel. This individual will start on June 26, 2006.

Jeff Ranew passed out a packet containing guidelines for our members in regards to recordkeeping and the annual payroll audit process. He asked the Board to review and advise of any changes or suggestions.

Jeff Ranew also advised the Board that he discussed the Executive Supervisor class code with the other SIF's at the Multi-State Meeting. It appears that each SIF handles this situation differently. He provided the Board with a draft copy of a job description and new classification for a job supervisor. A discussion was held. Jeff will make some adjustments to the description and discuss with RTS. He will then bring the results back to the next Board meeting for review.

Jeff Ranew also passed around a memo regarding the fall Multi-State Meeting which will be held in New Mexico. Jeff asked the Board to let them know who will be attending and what their travel itinerary will be.

Jeff Ranew then presented the Board with an updated pie chart showing the results of the 2005 audit financials. These will be posted on the SIF website and published in the next SIF newsletter.

Jeff Ranew informed the Board that the Agents Advisory Retreat has been finalized for August 24th – 26th in Savannah. He asked the Board to please complete the information sheets as requested and return to Leigh Polhill.

Jeff Ranew advised the Board that he received a call from John Cone with the HBA of SC. Carolina First has offered to donate \$10,000 to the renovation of the State HBA office and has asked to discuss a banking relationship with the SIF. Jeff Ranew advised the Board that we did not choose Carolina First when we were reviewing our banking relationships due to them not being able to offer the lockbox functions required. Jeff has agreed to meet with Carolina First and hear what they have to say and will bring the results back to the Board.

Chairman Witter had asked the SIF staff to review the information for the upcoming Trustee Election. Tom Markovich and Ted Smith will each be running again for their seat. Vern Pottenger will be the Nominating Committee Chairman and any Trustee not up for election will be part of the nominating committee. The SIF staff will send out a letter to the Local EO's by the end of July advising them of the upcoming election. An article will also be placed in the next SIF newsletter.

A discussion was held regarding the Royalty Agreement. This agreement will automatically renew for one year beginning August 15, 2006. It will then renew annually as is unless notification is given by either party six months prior to the next renewal date.

Jeff Ranew advised the Board that he has received a request from Vee Daniel for the SIF to sponsor a dinner at the annual EO Retreat. A discussion was held. Colin Campbell made a motion to donate \$800.00 to the Local EO's for this retreat. John Curl seconded. There were no opposed and the motion carried.

Jeff Ranew then advised the Board that he has received a request from the HBA of SC for two donations of \$1000.00 each for the Executive Committee Retreat to be held in October, and for sponsorship of a hospitality suite at the International Builders Show in February of 2007. A discussion was held. Colin Campbell made a motion to sponsor these two events at \$1000.00 each and Eddie Weaver seconded. There were no opposed and the motion carried.

Jeff Ranew updated the Board on the status of the mutual insurance company. The applications previously sent are now stale dated and will need to be completed again. He plans to have the applications completed around mid July. The state will then have 60 days to approve the applications. Jeff is in the process of reviewing IT platforms and has been in contact with NCCI. He has also talked with Dean Kruger about coming out to do a mock examination for us to help with the approval process.

Jeff Ranew informed the Board that we have reason to believe one of our substantial insured's has a casual laborer working for them that does not appear to have been picked up on the 2005 audit. We will attempt to verify this and will contact the insured if needed and request a 1099 for this individual.

Brandy Shealy advised the Board that we have received a request from a Premium Research Services to provide documentation regarding a policy in force with the SCHBSIF during 1998 & 1999. A letter is attached from the prior member giving Premium Research Services the authority to request this information. A discussion was held. It was determined that due to the fact this file is over seven years old this information is no longer available.

The next meeting is scheduled for July 19, 2006 @ 10:00 am.

The meeting was adjourned.

An Executive Session was held.

Minutes of the Board of Trustees Meeting
South Carolina Home Builders Self Insurers Fund
10:00 am January 17, 2007

Those present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, Tom Markovich, Keith Smith, Bill Smith, Eddie Weaver, and Ted Smith. Staff present was Jeff Ranew, Brandy Shealy, Danny Dilworth, Darlene Frick, Mike Hill, and Leigh Polhill. Guests in attendance were Tyler Hudson, Neil Price, and Donna Nesbitt of NBSC and Synovus.

Chairman Witter called the meeting to order. The minutes of the December 20, 2006 meeting were reviewed. Tom Markovich made a motion to approve as written. Keith Smith seconded. There were none opposed and the motion carried.

A discussion was held regarding the election of Chairman and Vice Chairman. Tom Markovich made a motion for Herb Witter to remain Chairman for the 2007 year. Eddie Weaver seconded the motion. There were none opposed and the motion carried. Keith Smith made a motion for Colin Campbell to remain Vice Chairman for the 2007 year. Tom Markovich seconded the motion. There were none opposed and the motion carried.

Mike Hill presented the compiled financials and Quick Books Summary. Jeff Ranew informed the Board that the audited fund balance for the year ended 12/31/05 was approximately \$715,000 on a pre-tax basis. The compiled (unaudited) financial statements for the period ended 12/31/06 provide an estimated, comparable fund balance of approximately \$5,500,000. This difference is due primarily to a continued reduction in claims liabilities and related expenses.

Leigh Polhill presented the Marketing and Cancellation Reports. Brandy Shealy advised the Board that 12 of the 41 accounts which cancelled in December were nonrenewals which represented \$307,025 of the total premium cancelled of \$524,270. Leigh also advised the Board that so far in January we have written 11 new accounts with an estimated annual premium of \$146,145.

Darlene Frick presented the Fund Profile and Claims Update. She reported on a new claim filed by Leacon Construction which occurred in December 2006 and is currently reserved at approximately \$269,000. This claimant has undergone surgery and we are awaiting receipt of charges from the hospital. Darlene also reported that she has made significant progress in closing the Cromer claim, and anticipates a reduction in total reserves based upon recent settlement of the indemnity portion of the claim.

Brandy Shealy updated the Board on the Leacon, Inc. account discussed at the last Board meeting. This insured has had 3 fall claims involving 4 workers since July of 2005 with the last claim reported reserved over \$268,000. Since inception this account has a loss ratio of 144% and a three year loss ratio of 307%. The insured has been placed on probation on two separate occasions for fall claims and has attended a safety seminar. Jeff Ranew will meet with this insured regarding our decision to cancel his coverage prior to notice being issued.

Tyler Hudson of NBSC attended this meeting along with Neil Price and Donna Nesbitt of Synovus. Tyler Hudson thanked the SIF for the relationship we have shared over the last three years. He then advised the Board that he had a discussion last week with Jeff Ranew regarding the funds moved from the Synovus investment account to a Money Market at NBSC during 2005. He suggested that we should review this structure as the SCHBSIF may benefit by returning funds to the actively managed Synovus portfolio. Tyler will work with Jeff and Neil Price to complete this transfer.

Neil Price with Synovus then presented an update of the pledged and non-pledged investments accounts. Jeff Ranew advised the Board that Synovus has been working with him over the last several months on the Custodial Agreement required by the Department of Insurance. Jeff thanked Neil and Synovus for all their help with this agreement.

Danny Dilworth updated the Board on the Risk Control Activities for the month of December and year to date. Danny also advised the Board that we have recently purchased the two trucks over 6000 lbs that were approved at the last Board meeting.

Danny then advised the Board that he plans to make an offer of employment to a candidate for the Risk Control Consultant position this afternoon.

A brief discussion was held on the progress of the Susan Harwood Grant. Danny advised the Board that we have the opportunity to apply for a six month extension on the grant due to the grant becoming effective at the time of notification that we actually received the grant.

Jeff Ranew thanked the HBA for their help and support with the Susan Harwood Grant. Jeff Ranew, Mike Hill, and Danny Dilworth are meeting with the staff at the HBA this afternoon to update the contact information for the grant.

Jeff Ranew advised the Board that he has received the draft of the 2006 reserve analysis. There are two material differences this year: one being that we are no longer seeing the reduction of claims reserves that we have seen in the past; and that anticipated recoveries from the 2nd Injury Fund have been reduced by approximately 98%. Other self-insured funds in the state are experiencing similar reductions. After discussion it was decided that the reserve analysis will reflect elimination of these recoveries beginning with the 2004 year and forward.

Jeff Ranew updated the Board on the mutual insurance company. Dean Kruger will conduct a trial examination at our office on January 22 & 23 to help us prepare for the examination to be completed by the SC Department of Insurance on February 27 & 28. Jeff advised the Board that once these are completed we should again review the requirements for the start-up and successful operation of the mutual insurance company. Per the plan of operation approved by the SC Department of Insurance the mutual company must attain on an ongoing basis a net loss ratio of 50% or less; accrue liabilities for 2nd Injury Fund assessment at a rate of 11% or less; and provide a minimum of \$5,000,000 contributed surplus (est'd at \$7mm pre-tax).

Chairman Witter advised the Board that he attended a Master Builder Committee Meeting last week. Marc Nix, Executive Officer of the HBASC has agreed to update their website monthly to ensure that the SIF can properly identify and apply credit for the Master Builders that are insured with the SIF.

Chairman Witter informed the Board that at the last meeting Leigh Polhill asked the Board to review the website and advise. Herb thought the website looked good and was easy to operate.

Chairman Witter advised the Board that he has had several discussions with Vern Pottenger in the last several weeks. A discussion was held. Vern Pottenger's absence from this meeting has been excused. Colin Campbell made a motion to start noting absences in the minutes and noting whether they are excused absences. An absence will be considered excused if the Board member notifies the Chairman or the Administrator prior to the meeting that he will not be able to attend, or makes a request for an excused absence prior to the approval of the minutes at the meeting following the absence. Eddie Weaver seconded this motion. There were none opposed and the motion carried.

The next meeting will be February 21, 2007 at 10:00 am at the SIF office.

The meeting was adjourned.

An Executive Session was held.

Minutes of the Board of Trustees Meeting
South Carolina Home Builders Self Insurers Fund
10:00am June 20, 2007

Those present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, Keith Smith, Bill Smith, Ted Smith, Eddie Weaver, Tom Markovich and Jim Gregorie. Staff present were Jeff Ranew, Brandy Shealy, Leigh Polhill, Danny Dilworth, Mike Hill and Diane Tolbert. Guest in attendance was Mark Nix from the HBA of SC.

Chairman Witter called the meeting to order. The minutes of the May 2007 meeting were reviewed. Keith Smith moved that they be accepted. Colin Campbell seconded. The minutes were unanimously approved.

Herb welcomed Jim Gregorie to the Board of Trustees to fill the remainder of the term vacated by Vern Pottenger. As a non-member of SCHBSIF, Mr. Gregorie will be welcome to discuss any topic but will not be allowed to vote.

Mike Hill presented the May 2007 Compiled Financial Statements. The balance sheet as of May 31, 2007 shows a fund equity of \$2,685,825.28. The statement of revenue and expenses shows expenses in excess of revenues in the amount of \$232,360.14. Colin Campbell mentioned that he would like to see a document showing the change in our financial position from the month prior. We will start providing this information in the future.

Jeff Ranew and Diane Tolbert presented the Claims Update & Fund Profile. Jeff Ranew discussed the Fund Profile for all years to present. On the reserve changes greater than \$25,000, there has been an overall increase of \$893,492.30. Some of this is attributable to the fact that since a prior claims adjuster left the Fund, all her outstanding claims files were reviewed and in some cases adjustments were made to outstanding liabilities. Diane Tolbert discussed the 20 largest open claims. Increases in reserves were noted for Williams and Dodgens. For Williams, which is a lifetime medical case, there has been a change in condition and reserves have been increased for lifetime exposure. For Dodgens, the reserves have been increased due to psychological problems as well as pain management. Overall the claim reserves increase since last month have increased the loss ratio from 33.29% to 43.45%.

Overview of events on Phil D. Tims

I was contacted the evening of June 10th by our case manager and advised that Mr. Tims had been admitted into Greenville Memorial Hospital in a non-responsive state. There was little known at that time; however we later learned that the aide who was taking care of him on the 9th had taken him away from the home due to the ex-wife having a wedding at the house. The aide left the house around 12:15 and did not return until 5:30. The events of the day were unknown as the aide did not show up at the hospital and has not been able to be located. We do not have any medical notes from the hospital as they will not release them to us since we are currently denying this stay. Our case manager has

been in contact with the hospital and with Mr. Tims' ex-wife. The information received does indicate that Mr. Tims did have a drug screen and he did test positive for cocaine and methamphetamine. There is also some indication that Dr. Muranda at Greenville Memorial has diagnosed Mr. Tims as having had a heat stroke which was caused by an infection in his body in combination with him being in the heat for so long on the 9th. (This has not been confirmed)

We scheduled the deposition of Dana Earls (the aide) and Pat Holcombe (ex-wife). The deposition of Pat was held on July 2nd, where we learned that according to Mr. Tims the events of that day were as follows: Mr. Tims and Dana left the home around 12:15 and drove around to see if they could locate a friend of Mr. Tims and when they were unable to locate him they went to the bank to get Mr. Tims some money to shop at Wal-Mart. Then went and picked up a lady (friend of Ms. Earl's). Went to the west side of Greenville where according to Mr. Tims the 2 ladies purchased illegal drugs and administered them to him by IV needle. After that they drove to Wal-Mart where Mr. Tims did not get out of the car. While waiting on Ms. Earls he began to feel very hot and ill. That is all he can recall of the day, however he does recall it being around 2:30 when they were at Wal-Mart.

Mr. Tims had improved some, but has now been placed back in to ICU with double pneumonia and congestive heart failure.

Ms. Earls did not show up for her deposition and we will attempt to serve her in the next couple of days so that we can get her deposition.

It is our understanding from Ms. Holcombe and her attorney that they will attempt to file a suit for liability in this case. We should anticipate being named as a party.

Reserves have not been changed in this case, however if Mr. Tims does survive and the current events are deemed compensable we will need to discuss with our excess carrier the possibility of increasing medical expense since Mr. Tims will most likely now need 24 hour care. If in fact Mr. Tims does not survive benefits will be limited to either 500 weeks or if the cause of death is deemed not compensable we should not owe additional indemnity benefits.

Current Action Plan:

Will attempt to reschedule Ms. Earl's deposition

Subpoena medical records from Greenville Memorial

Schedule depositions of physician to determine cause

Leigh Polhill presented the Marketing and Cancellation Report. For the month of May, 2007 there has been a net loss of 5 accounts with an associated reduction in estimated annual premium of \$34,291. Overall year to date we are down 15 accounts; however estimated annual premium is up by \$600,514, indicating a growth of \$72,388 from April. The primary reason for cancellation is nonpayment of premium accounting for 13 of the 22 cancellations for May. Also provided was a spreadsheet showing the new business written since January 1, 2007. Based on the policy count and premium size to date, it is estimated that we should write approximately \$2,000,000 in new business in 2007. We are seeing a slow down in submissions that seem to trend with the building industry as a whole. Mark Nix indicated there is an 18% decrease statewide in new home starts; however, South Carolina is still trending more positively than the nation as a whole. Keith Smith indicated it is very difficult to track new homes construction. Permits tend to be used; however, even though a permit is granted, it may be years before construction begins.

Danny Dilworth presented the Risk Control Update. Jeff Ranew noted that a representative from OSHA will be in our office tomorrow to conduct a financial audit of the Susan B. Harwood Grant which has been awarded to the HBASC. He will be auditing the record keeping for the delivery of services provided by SCHBSIF, and the HBA of SC to verify the charges billed for services they provide for their portion of the funds. McGregor & Co. has provided documentation to help us with this audit. The second part of this audit that will review program content will be conducted in the OSHA Atlanta office using information provided to them by the grant recipient and its subcontractors.

Danny Dilworth indicated that Trey Brown has resigned as Risk Control Consultant. He is going to work for one of the Liberty Mutual companies in Florida. Danny has two interviews on Friday; one experienced person and one without experience. In addition to this he is utilizing Monster.com to locate qualified candidates. Danny showed the Board of Trustees the 1/3 scale scaffolding that he obtained after approval at the last board meeting. He intends to use this at future Risk Control seminars and in the future will contact brick companies and building supply companies to hold meetings for interested subcontractors.

Brandy Shealy presented the Underwriting/Policy Services Update. The audits for the 2006 Fund Year are completed. Approximately 22 remaining accounts have a return premium of over \$1000 and are being reviewed for accuracy and reaudit if needed. Audit revisions have slowed but will likely increase once cancellation notices are mailed for audit premiums not paid. Overall, even though debits exceed credits, the additional premium is lower than in past years. Brandy also indicated the outgoing call program will be completed in the next two weeks.

Jeff Ranew brought the board up to date on a number of issues. The 401K administrator is being changed and the transition is moving smoothly. The loan for the HBA of SC has been approved by W.C. Smith and will be ready for disbursement when requested by the HBASC. The Multi-State meeting will be held in Nashville on October 3-5. Jeff

discussed the long term strategy session and provided the Board with a suggested agenda by NAHB. The date for this meeting is set for November 1-2, 2007. Locations suggested were the Westin Poinsett in Greenville and the Hampton Inn in downtown Greenville. Jeff will investigate these options and report back.

Leigh Polhill confirmed that we will have 100% attendance at our Agents Advisory Council meeting in August to be held in Highlands.

Leigh Polhill discussed the Christmas Party. The Hilton Convention Center hotel has agreed to allow us to hold our party there on December 14, 2007. We are awaiting contracts. We will have a block of rooms held for those who want to stay overnight.

Jeff Ranew brought two accounts to the attention of the Board. First is Tomberlin which is requesting that we reimburse him \$225.00 for the time it took him to provide us with the data to revise his audit. It was noted that his policy cancelled for failure to sign the Personal Guaranty form effective January 1, 2007. The board decided we would not make this reimbursement. Monteray Construction is contesting their 2006 audit. During the course of investigation it was revealed that this account has 100% commercial exposure. The Board instructed Jeff to treat this account as we would any other member as regards classifications and future insurability.

Jeff Ranew indicated that we have received a database from the HBA of SC for the entire membership of the state. This database can be sorted by builder and associate member as well as nature of business. With this information he plans to request that the South Carolina Workers Compensation Commission permit the SCHBSIF to offer coverage to all members of the HBASC, full and associate members alike.

Jeff Ranew updated the board on the Mutual Insurance Company. Several reinsurers will be visiting in September. Among the criteria to move forward is a loss ratio consistently at or below 50%; Second Injury Fund assessments at or below 12% on a consistent basis; \$7,000,000 or more in pre-tax surplus; and a computer system that will allow us to meet the regulatory requirements. Keith Smith mentioned that the House did vote today to pass the Workers Compensation reform bill and the Governor is expected to sign it into law. This legislation will impact us in a favorable manner as it will eventually dissolve the Second Injury Fund and has provisions to roll back prior legal decisions which impede the claims adjudication process.

Jeff Ranew discussed the IT issues we face with the conversion to a Mutual. He noted our options at this point are acquisition of a new system which operates in a language entirely different from our current system and would require extensive data conversion; a combination of separate sub-systems linking internal functions; or an upgrade of our existing system. Jeff continues to work with Dean Kruger in helping us make the best decision based on cost and ability to perform the needed functions. A discussion was held. Herb Witter suggested this be discussed further at next month's Board of Trustees meeting.

Leigh Polhill discussed the issues we were having with Van Miller in the publishing and prompt delivery of our quarterly newsletter. The Board indicated we were free to pursue other options as this point.

Leigh Polhill brought up a member, Edgar Lewis Gartman, Jr. who through a reported claim was determined to being paying the injured worker in undocumented cash. This is the second claim for this insured and in both instances the employee was paid in cash. In the prior claim in 2003, this employee was not reported on the audit. The Board instructed Leigh to proceed with reporting this individual to the Attorney General's office for Insurance Fraud.

Herb Witter brought to the Board's attention that two trustees, John Curl and Eddie Weaver are up for election in 2008. When we made our application for creation of a Mutual Insurance Company, the DOI stated that it would be compulsory that the charter Board of Directors of the mutual insurance company be comprised of those members of the Board of Trustees of the SCHBSIF. Herb asked the Board if an election should be held under the circumstances. Colin Campbell made a motion that we hold no elections for these two Trustee positions. Tom Markovich seconded. John Curl did not vote. Eddie Weaver left the meeting before the vote was conducted. The decision was unanimous to not hold elections for these two positions. Keith Smith will advise the Executive Board of the HBA of SC of the decision.

The next meeting is scheduled for July 18th at 10:00am at the SIF office. The August Board Meeting will be held in conjunction with the State HBA Convention at the Marriott Grande Dunes on August 15th at 5:30 pm.

There being no further business the meeting was adjourned.

Minutes of the Board of Trustees
South Carolina Home Builders Self Insurers Fund
10:00am January 14, 2009

Those present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, Keith Smith, Eddie Weaver, Jim Gregorie, John Curl, Tom Markovich, and Steven Mungo. Staff present was Jeff Ranew, Brandy Shealy, Mike Hill, Andrew Woodham and Brian Emery.

Chairman Witter called the meeting to order. The minutes of the December 19, 2008 meeting were reviewed. Keith Smith moved that they be accepted. John Curl seconded. The minutes were unanimously approved.

Herb Witter introduced and welcomed Steven Mungo as the newest member of the Board. Mr. Mungo was recently elected to the position of Vice President of the HBA of South Carolina and accordingly becomes a member of the Board of the Fund. Chairman Witter pointed out that although Mr. Mungo holds a seat on the Board he will not have voting privileges since he is not a member of the Self Insurers Fund.

Chairman Witter asked the Board if there were any nominations for the position of Chairman and Vice Chairman of the Fund. John Curl made the motion that Herb Witter be re-elected Chairman and that Colin Campbell be re-elected Vice Chairman. Keith Smith seconded the motion and the motion was unanimously approved.

Mike Hill presented the December, 2008 Compiled Financial Statements. For the month ending December 31, 2008 there has been an increase in Fund Equity of \$623,838 which resulted in total Fund Equity of \$4,699,579. There was a net income from operations for the month of \$417,506 and there was an unrealized gain on securities totaling \$206,332. The Income Statement for the twelve month period ending December 31, 2008 reflects expenses exceeding revenues by a total of \$61,891.08. After an Income Tax credit of \$21,043, expenses exceeded revenues by \$40,848.08. Mike then reviewed the schedule of budgeted expenses and explained the variances of any expenditure over budget. John Curl questioned why the year to date total for premiums on the Contributions from Members Report totaled

\$11,897,332 while the contributions from members on the income statement showed \$10,053,387. Mike explained that the Contributions from Members Report was on a cash basis while the income statement is reported on an earned basis. Jeff Ranew advised the Board that we received the actuarial report from Casualty Actuarial Consultants two days earlier and it indicated a significant reduction in the claim reserves as compared to the reserve on the Fund Profile. Mike advised the Board that based on the reserve provided in the actuarial report it is estimated that the Fund equity would be approximately \$5.6 million at year end.

Andrew Woodham presented the marketing report. Andrew reported that there were 4 new accounts with 20 terminations which generated a net reduction in estimated annual premium of \$105,018. Andrew provided the Board with a list of members that had cancelled coverage indicating the annual premium and the reason for cancellation. According to the report the larger accounts cancelled because our deposit requirements were deemed to be too high. Colin Campbell commented that Builders Mutual offers deposit requirements as low as ten to fifteen percent. Andrew stated that some members also prefer to pay a consistent monthly premium rather than pay based on actual payrolls. Steven Mungo said this is because our member's bankers are requiring that their clients provide accurate monthly cash flow projections to support the lines of credit being provided. Andrew stated that he continues to be upbeat about his impression of how our agents view the Fund and the services we offer. Andrew referred the Board to a summary report listing the number of cancellations for the month of December and for the full year, noting that the primary reason was due to non payment of premiums. Jeff stated that the requirement of HBA membership for membership in the SIF and the associated fees for HBA membership are being viewed as part of the cost for insurance coverage and is beginning to impact cancellations. Keith Smith asked how much new business has been written now that we have approval to write additional classes of business. Brandy Shealy replied that we have only written a couple landscaping companies and a couple cabinet makers which are attributable to the downturn in construction. John Curl commented that it is estimated that it will take approximately eleven months to reverse the downturn in construction activity because of the current excess housing inventory.

Jeff Ranew presented the claims report. Jeff stated that there were no material changes in the twenty largest claims. Jeff reported that we lost our appeal in the Timms case before the Workers Compensation Commission.

Our reinsurer has indicated that they will appeal to the Supreme Court and have asked us to appeal to the Circuit Court. Since we denied coverage there has been additional hospital expenses incurred of approximately three million dollars. We hired Medical Services Company (MSC) who then subcontracted with Home Watch Care Givers, the firm that provided the attendant for Timms and who is believed to be responsible for Timms worsened condition. Timms' attorney has filed suit against MSC and Home Watch Care Givers. Tom Markovich observed that while we have already exceeded our reinsurance retention we will have to accrue for the Second Injury Fund liability for the additional hospital expenses.

Brandy Shealy reported to the Board on the Policy Services activities. Brandy stated that she is continuing to send letters to HBA members and to firms in the Assigned Risk Pool in an attempt to obtain new business by pointing out the benefits of becoming a member of the Fund. She advised that she has been working with Brian Emery to train on the VisualAudit software that Brian has begun using for his payroll audit activities. Brandy then requested guidance from the Board on an issue that has arisen regarding Fund member, Precision Builders. Kenneth Lowe of Precision Builders has requested that the Fund reopen the 2007 Fund Year in order to allow him to present information regarding the splitting of payrolls between the interior and exterior carpentry classifications. After a brief discussion Keith Smith made a motion that the 2007 fund year not be reopened. Eddie Weaver seconded and the motion was unanimously approved.

Jeff Ranew briefly discussed the Risk Control & Safety activities. He referred the Board to the statistics set forth in the Board package indicating that there were 52 site surveys in December and 1,105 year to date. There were 9 surveys for underwriting and there were 13 surveys scheduled but later cancelled for varying reasons. Jeff then provided the Board with a hand out stating that South Carolina OSHA has revised its compliance guidelines for residential fall protection effective December 30, 2008. It was noted that OSHA's definition of residential construction is now the same as the SC Commercial Code. For work to be residential, it must be on a residential structure not more than 3 floors in height and not have more than 16 units in an apartment building.

Brian Emery presented his report of the payroll audit activities for the month. Brian reported that he had completed 9 physical audits resulting in a reduction of premium of \$4,917. Brian advised the Board that he has been training the two new auditors on the VisualAudit software. He stated that John Iannace and Craig Manning are now performing audits and should be completing close to twenty audits in January and February. Brian told the Board that when splitting payroll and materials that he will allocate 75% to payroll and 25% to materials when the member is unable to provide specific itemized invoices detailing labor and materials charges. John Curl commented that this procedure would not work with HVAC contractors. Keith Smith stated that this would also be a problem with plumbing contractors and Steven Mungo added the same would be true for turn-key concrete work. Chairman Witter responded that the operational procedure of using 75% for labor and 25% for material would be acceptable.

Jeff Ranew presented the updated strategic plan noting that the items highlighted in yellow indicated completion of these objectives and strategies. Jeff then updated the Board on the status of the IT plan noting that Trae Jones of ATSC had accepted the position of Vice President of Marketing for Tropics and that our new contact with ATSC would be Janeen Blanton. Jeff said that he was waiting on the contract from Mike Mobar of Tropics to review with ATSC and the Board. Jeff added that the details of the contract would vary depending on who we select to host the system. Tropics currently has another client who is supported by the firm Peak Ten. We are also considering whether to have our current hosting provider, Matrix, host the Tropics system.

Chairman Witter commented to the Board that the newly received Actuarial Report indicated a significant decrease in reserve requirements which would therefore increase the Fund's equity. Given the anticipated improvement in the Fund's equity Chairman Witter questioned whether it was appropriate to set a tentative target date for conversion to a mutual company. Jeff Ranew stated that the implementation of a new software platform was a condition of beginning operations as a mutual. Jeff advised that there are several variables associated with the IT conversion not the least of which is the conversion of data to the new system. It was agreed that the completion of the IT conversion would make it impractical to consider converting to a mutual insurance company prior to July 1, 2010 with a more likely date of January 1, 2011.

Mike Hill told the Board that the deposit requirement to reserve the Old Edwards Inn for the 2009 Agency Advisory Council meeting was now due. The amount of the deposit is \$10,420. Mike asked for the Board's approval to proceed to pay the deposit in light of current market conditions. After a general discussion the Board asked Andrew Woodham to investigate whether the meeting could be held at an alternate site in order to reduce costs and to report back to the Board at the next meeting.

Brandy Shealy asked the Board to consider the date for the 2009 Christmas Party so that she may be prepared to discuss plans with the Hilton hotel where the most recent party was held. After a general discussion it was agreed that the tentative date for the party would be Friday, December 18 to be held in conjunction with the December Board meeting. The Board requested that prior to making any commitment to the Hilton hotel that Brandy begin reviewing options to hold the party at other hotels or restaurants in Columbia in order to reduce costs.

Jeff reminded the Board that the next Multi-State meeting will be held in Williamsburg, Virginia on May 6 through May 8 at the Marriott hotel.

Chairman Witter asked the Board to consider whether the Fund should host a dinner for the Executive Officers of the HBA as has been done in the past in order to bring the EOs up to date regarding the activities of the Fund. The Board asked Andrew Woodham to consult with the Executive Officers to set a date that would be mutually convenient for everyone.

Chairman Witter announced that the next Board meeting will be held on Wednesday, February 18 10:00am. There being no further business the meeting was adjourned.

Minutes of the Board of Trustees
South Carolina Home Builders Self-Insurers Fund
10:00 a.m. March 18th, 2009

Those present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, Keith Smith, Eddie Weaver, Tom Markovich, Jim Gregorie and Steven Mungo. Staff present was Jeff Ranew, Brandy Shealy, Darlene Frick, Mike Hill, Brian Emery, Danny Dilworth, guest Mark Nix Executive Officer of the HBASC, Buddy Leaphart from McGregor & Co., and Christina Webster, Director at ATSC.

Herb called the meeting to order. The minutes of the February 18th, 2009 meeting were reviewed. Tom Markovich made a motion that they be accepted and Keith Smith seconded. The minutes were unanimously approved.

Herb introduced our guest from ATSC, Christina Webster. Jeff began by discussing the contract with Tropics. It had been sent back to Tropics several times for changes and our attorney Pope Johnson referred the contract to a lawyer in Florida for review because the situs is the State of Florida. Jeff and Christina then began a discussion on the technical perspective of the contract, and amendments to the draft contract. They explained to the Board the changes to the contract that had occurred since the December Board meeting, and the resulting increase in estimated 7-year cost of \$741,981. Included in this increase were additional modules related to insurance company functionality which accounted for approximately \$ 480,000 of the increase. They explained that a part of these insurer-related modules can be installed and purchased at a later date, and that the initial emphasis would be on installing the components required to run the SIF.

Mark Nix then presented the Board with an update on the projects that the HBASC is working on. He also advised that membership remains above 5,000 and that there will be two membership drives conducted during 2009. Mark then asked the board if they would be willing to make a \$3,000.00 donation to the USC Moore School of Business to assist in underwriting a portion of the cost of the economic forecast study being prepared by the school.

Mark advised the Board that the program would be beneficial for the home building community and should also benefit the SIF. A discussion followed and Colin recommended that we review the 2009 budget to determine if funding is available.

Mike then presented the February 2009 compiled financial statements. For the month ending February 2009 total assets were \$31,929,797. There was a decrease in total cash contributions collected for the month of February 2009 of \$272,409. There was an unrealized gain of Securities of \$590,559. There was total revenue of \$2,023,575. Mike then reviewed the schedule of budgeted expenses and explained the variances of any expenditure over budget. Mike then discussed the deposits we have with NBSC. Jeff and Mike met with Neal Price of Synovus Trust Company and Tyler Hudson of NBSC who advised that we have approximately \$3,700,000 invested in money market and operating checking accounts which is federally insured to \$250,000. Mike then discussed the options available to fully insure the assets in these accounts. Jeff and Mike will make the transfers necessary to accomplish this.

Buddy Leaphart then presented the discussion regarding the SIF's federal income tax liability. He advised the Board of our current estimated income tax liability and the recent estimated tax payment made, then discussed the possibility of a premium refund to the members. After a discussion the Board agreed that this might be a good time to consider refunding premium to members who were participants during 2008, and who renewed coverage for the 2009 year. Herb recommended that Jeff and Mike develop a plan for accomplishing this, and to consult with Pope Johnson before the next board meeting.

Jeff Ranew presented the marketing report and advised that we had sent renewal billings to 1,223 members and at the end of February we had 1,170 actively enrolled. Jeff asked the Board to note that "out of business and insured request" were beginning to account for more of the cancellations. Jeff then briefly explained the marketing activities for the month of February 2009. He updated the Board on the plan to revise the website. Jeff stated that we have approximately 450 visits monthly to the website, of which about 100 are confirmed legitimate searches for content or forms. The cost to update the website would be about \$2,700.00. After some discussion Steven Mungo requested that we poll the agents and the members to solicit input regarding

suggestions for improvements. Andrew will report his findings at the next Board meeting.

Darlene presented the claims reports. She went over the fund profile, and then advised the Board of the changes to the 20 largest claims. The 2008 Timothy Childers' case with reserves currently set at \$1,133,317 may have to be increased based on the cost projection we have received. She advised the Board that once we receive the final evaluation and neuropsychological evaluation we will resubmit the cost projection. Also, there was one claim added to this report for 2009 on Nicholas Cruz-Lopez. She then updated the Board on the reserve changes over \$25,000 since the last meeting and advised the board that several lifetime medicals cases had been increased in the amount of approximately \$1,200,000 which will be reflected in the March report. She then advised the board of the new Medicare reporting requirements that we are preparing for, and the potential exposure of penalties that could be assessed.

Brandy reported on the policy services activities. She reported that there had been 2 more cancellations for the month of January that had not been on last month's reports resulting in loss of annualized premium in the amount of \$16,545. She reported that there had been 20 cancellations issued, and that 6 of those members either paid or made payment arrangements. There are an additional 14 accounts yet to renew which represent about \$143,308 in premium. She then discussed an account which is currently in collections. This is the largest account we have had in collections, totaling premium due of \$85,453. They made an offer to settle for \$15,000. The board recommended that we submit a counteroffer of \$20,000, in a lump sum, with monthly payments following until a total of \$60,000 was repaid and secured with a confession of judgment.

Brandy then discussed the 2009 credits that are a result of the 2009 deposit adjustments. In a previous meeting it was decided to not refund any of these credits until the 2008 year end audits were completed. Once the 2008 audit was completed we were going to retain an amount equal to six months premium and refund any overage. Brandy advised the Board that we have had several members call in to request a refund. These members were not happy with the decision to hold six months premium. Brandy recommended that once the 2008 audit was completed we could revise the 2009 renewal off of 2008 audited figures and refund any overpayment as the credits would then be based off of audited

figures. The Board agreed to allow these refunds to be returned to the insured once the 2008 year end audit had been completed.

Danny presented his reports on the Risk Control & Safety activities. He reported that there appear to be fewer major hazards on jobsites. Colin Campbell asked Danny if he felt we were still able to justify keeping everyone in the Risk Control & Safety Department on staff and Danny indicated that he felt they could.

Brian presented his report on the payroll audit activities for the month. They have completed 500 audits through last Friday and are approximately halfway through the assigned audits. Additional estimated premium due the SIF is \$518,204. Tom Markovich asked how they were handling the rescheduling of audits and Brian advised that they are rescheduling audits as they are back in that area again, in order to control travel costs. There was discussion regarding alternate methods for conducting them including telephonic and mail-in audits. Jeff advised the board that this is something we will review after the completion of the 2008 payroll audits. Herb Witter requested that Brian and Jeff develop recommendations before the September Board meeting.

Tom Markovich asked that we re-address the topic of travel expense for ex-officio Board members. After a general discussion, Steven Mungo requested that his travel expense be retained by the SIF.

Herb Witter then advised the board that Colin Campbell missed last month's meeting due to illness, and that John Curl missed this meeting due to a commitment with the Labor and Licensing Commission. Herb requested a motion for them to be excused. Tom Markovich made the motion and Keith Smith seconded the motion. It was unanimously approved.

The meeting was then adjourned.

An executive session was held.

Minutes of the Board of Trustees
South Carolina Home Builders Self Insurers Fund
February 17th, 2010
10:00AM
SCHBSIF Conference Room
Columbia, SC

Those present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, Keith Smith, Tom Markovich, Eddie Weaver, Mike Lowman, Jim Gregorie and Steven Mungo.

Staff present were Jeff Ranew, Mike Hill, Andrew Woodham, Brian Emery, Danny Dilworth, Darlene Frick and Brandy Shealy.

The meeting was called to order by Herb Witter.

John Curl moved that the minutes for the January meeting be approved. Tom Markovich seconded the motion. They were unanimously approved.

Mike Hill then presented the financial report and noted that liabilities were \$20,221,564 with total assets of \$27,524,952. Total equity is now \$7,303,388 and this increase over last month was due to a decrease in claims reserves. Mike advised the Board that total cash collected for the month of January was \$510,954.59. Mike noted that this cash collected does not include interest income. Mike then reviewed the Balance Sheet and Income Statement. He reviewed budgeted expenses compared to actual expenses.

Jeff Ranew gave an update on the Tropics implementation. Implementation is currently running about two weeks behind schedule due to some data conversion issues. Currently our staff is testing the system to make sure it performs to our satisfaction. He then reviewed the Tropics budget expenses through January 2010. Final implementation is still scheduled for June 2010.

Andrew then presented the Board with his Marketing Report and advised that we had written 7 new accounts in January totaling \$49,879. The average premium per account was \$6040. The list of cancellations was reviewed. The Board suggested that the new business by agents not listed be shown on the report.

Andrew then recommended that the 2010 AAC meeting be held July 22-24 at the Biltmore Estates in Asheville, NC. The recommendation was approved and Andrew will complete the necessary details.

Darlene presented the Claims report. Seven claims have been reported in 2010. One is a motor vehicle accident (MVA) death claim currently reserved for \$264,000. The 20 largest outstanding claims were the same with the exception of the addition of S. Keesee claim. Regarding the Johnny Conger claim, the South Carolina Workers' Compensation Commission (SCWCC) has ruled in our favor but the injured worker has 15 days to appeal the decision.

The Underwriting report was given by Brandy. There were 1080 accounts offered renewal with an estimated premium of \$7,054,500. 1028 of these are active and represent premium of \$6,937,466. 73 accounts have an outstanding balance with an estimated annual premium totaling \$316,000. Cancellation notices for nonpayment of renewal premium were issued yesterday.

Brandy presented a request from one of our agents to allow the Master Builder discount for a current member who holds a National Master Builder Certificate. After a discussion was held the request was denied by the Board as the SIF only allows the 10% Master Builder credit for SC Certified Master Builders.

Brandy also presented a request to reinstate coverage on a 4th and final cancellation for one of our members. We would allow him three weeks to pay all prior fees and charges for 2009 as well as the 2010 renewal premium. A motion was made by Colin Campbell to allow reinstatement based on premium and charges being paid in full within three weeks. The motion was seconded by Tom Markovich. After discussion the motion passed unanimously.

Herb expressed thanks to Brandy for retaining an insured and the HBA membership by allowing the member to pay HBA dues from a SIF credit.

The Risk Control update was given by Danny. Loss Control is having trouble finding people to inspect due to volume of work. A discussion about motor vehicle accidents as they relate to workers' compensation claims was held. It was recommended that Danny include this in the 3 hour safety seminar.

Brian Emery gave the Audit report. There were 121 audits conducted in January 2010. In February there have been over 200 audits completed. We are on track to meet our goals for 2010. Average additional premium through February is \$245 per member. The Audit Department has completed 11 audits using the alternative handling (mail-in) method. These have resulted in an additional average audit payable of \$120.

Jeff distributed a survey that will be sent to SIF members to gauge interest in a group cooperative healthcare plan for SIF members sponsored by the SCHBSIF. Jeff will discuss this issue further with Ed Byrd before proceeding.

The Multi State meeting in New Orleans is scheduled for April 7 through 9 and room reservations must be made by March 8.

Jeff led a discussion on the possible time frame for becoming a mutual insurance company. A motion was made by John Curl to continue to proceed with becoming a mutual. It was seconded by Colin Campbell. The motion was unanimously approved.

The meeting was then adjourned.

An executive session was held.

**Minutes of the Board of Trustees
South Carolina Home Builders Self Insurers Fund
November 17, 2010
10:00 AM
Columbia, SC**

Those present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, Eddie Weaver, Jim Gregorie, Mike Lowman, Keith Smith, Tom Markovich and Mark Nix.

Staff present was Jeff Ranew, Mike Hill, Andrew Woodham, Mitch Draper, Danny Dilworth, Darlene Frick, Brian Emery and Brandy Shealy.

The meeting was called to order by Herb Witter.

Tom Markovich moved that the minutes for the October meeting be approved. Keith Smith seconded the motion. The minutes were unanimously approved.

Jeff introduced Bruce Hockman with Towers Watson. Bruce then discussed the current state of the Workers' Compensation marketplace both on a national and a state (SC) level. His comments included information on loss trends, loss ratios, and the current competitive market. He suggested that insurers that will survive this difficult economic environment will control expenses, create ways to grow market share, and maintain reasonable expectations about performance. He emphasized that a key factor in growth is the ability to effectively distribute product.

Mike Hill then presented the financial report as of the end of October and noted that liabilities were \$18,618,740 with total assets of \$25,523,252 and total equity of \$6,904,512. Mike advised the Board that total cash collected for the month of October was \$399,596, and the total number of members is 967. Mike noted that this cash collected does not include interest income. Mike then reviewed the Balance Sheet and Income Statement. He noted that Net Operating Income for the year to date is \$26,124.

Mitch Draper gave the IT update. We are currently in the renewal cycle and experiencing some issues with the Tropics software; however, he expects the renewals to go out on schedule. After renewals are complete, the latest version of the software will be placed in test. At that time, we will begin Phase II development and deployment, which will include changes and enhancements to support the mutual insurance company. Current cost projections remain at 108% to 110% of the initial project estimated cost.

Andrew then presented the Board with his Marketing Report and advised that we had written 5 new accounts in October totaling \$41,166. The number of terminations for the month was 14, resulting in a loss of \$68,300 in annualized premium. The New Business and Cancellations Report by Selected Agents were presented. The Summary of Business Submitted and Marketing Manager reports were also reviewed.

Darlene gave the Claims Department report with the Fund Profile Account Report. There are 38 lifetime Medical claims open and a few are Second Injury claims. She referred to the 39 open claims for the 2010 year, and the average number of claims which has been 7 per month. She then updated the Board on the large claim status which included comments about the W. Fleming and Ken Campbell claims. The Safety Seminars for 2011 have been reduced from 29 to 20. Currently we are looking into the possibility of hosting joint seminars with local HBA's to reduce cost.

Brandy gave the underwriting report. Renewals are being processed with some new challenges arising from ongoing problems with Tropics software; however, she is expecting them to be mailed by Thanksgiving. The Christmas party is scheduled for Friday December 17 at the Hilton in Columbia.

The Risk Control update was given by Danny. He advised that he is seeing fewer fall hazards on the job sites. However, he is seeing a greater turnover in employees and most are not as familiar with the tasks they are performing. He mentioned the new OSHA standards that will be effective next year.

Brian gave his Audit report. He is organizing the 967 audits for 2010 so his department can hit the ground running in January. He reported a favorable court ruling on Hudson & Associates audit legal question. Also the auditors have been making marketing calls with Andrew, and individually will call on some selected agents in the future.

Jeff then surveyed the Board members as to their preferred date for the Spring Multistate meeting in Florida. It was May the 11th thru 13th. He noted that Suite 160 is being cleared of items stored and will be available to rent shortly. The negotiations are continuing on Suite 120. Jeff is still awaiting receipt of the lease documents between the LLC and SCHBSIF, and the corporate resolution which is being prepared by Ken Ormand.

Eddie Weaver then updated the Board on the implementation status of the building security system.

Jeff then reminded everyone that the planning meeting tomorrow is scheduled to begin at 9AM with the staff and Board. We will be joined by Pope Johnson after lunch.

An Executive secession was then held.

Minutes of the Board of Trustees
South Carolina Home Builders Self-Insurers Fund
December 17, 2010
12:30PM
Hilton in the Vista
Columbia, SC

Those present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, Eddie Weaver, Jim Gregorie, Mike Lowman, Keith Smith, and Tom Markovich.

Staff Present were Jeff Ranew, Mike Hill, Andrew Woodham, Mitch Draper, Danny Dilworth, Darlene Frick, Brian Emery and Brandy Shealy.

The meeting was called to order by Herb Witter.

Keith Smith moved that the minutes for the November meeting be approved. Colin Campbell seconded the motion. The minutes were unanimously approved.

Mark Nix, Executive Director of the HBASC gave an update. The membership decline has leveled off with current membership about 4000. Verizon will sponsor a HBA membership drive this year. Mark then gave an overview of residential construction in the state with comments about each general area of the state. He also noted that the HBASC is sponsoring a fundraiser January 27 for Governor Haley and planning to raise \$30-40M for her campaign debt reduction. The South Carolina Association of Realtors will also participate in this function. Mark was very pleased with the 97% election success of candidates supported by the HBASC.

Mike Hill then presented the financial report as of the end of November and noted that liabilities were \$18,382,020 with total assets of \$25,327,243 and total equity of \$6,945,223. Mike advised the Board that total cash collected for the month of November was \$522,243, and the total number of members is 960. Mike noted that the monthly cash collected was down compared to last year. This is due to Tropics applying payments for the 2011 policy year received in 2010.

Brian gave his Audit Department report. The audit team is preparing to begin the 2010 audits the second week in January. Also, the auditors have been making informational/marketing calls to selected agents. Visits are being coordinated with both Marketing and Audit departments.

Jeff then advised that he had received the 2011 reinsurance renewal terms. It contained a 4.3% reduction from the 2010 rates. Favorable terms were also negotiated for the July 1 cut off for the mutual insurance company. Jeff announced the availability of other states coverage for applicants with less than 25% out of state payroll through Midland's PMA Insurance Company.

Jeff then reminded everyone that the next Board meeting will be January 19, 2011.

An Executive session was then held.

**Minutes of the Board of Trustees
South Carolina Home Builders Self-Insurers Fund
January 19, 2011
10:00 AM**

Those present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, David Gully, Jim Gregorie, Mike Lowman, Keith Smith, and Tom Markovich. Eddie Weaver was absent due to medical reasons.

Staff Present were Jeff Ranew, Mike Hill, Andrew Woodham, Mitch Draper, Danny Dilworth, Darlene Frick, Brian Emery and Brandy Shealy.

Also in attendance was Mark Nix, Executive Director, HBASC.

The meeting was called to order by Herb Witter.

Tom Markovich moved that the minutes for the November meeting be approved. Keith Smith seconded the motion. The minutes were unanimously approved.

Herb Witter introduced David Gully, newest member of the board.

Elections for Board Chairman and Vice Chairman were held. Herb Witter was re-elected Chairman and Colin Campbell was re-elected Vice Chairman.

Mike Hill presented the financial report as of the end of December and noted that liabilities were \$18,296,792.99 with total assets of \$25,333,915.23 and total equity of \$7,037,122.24. Mike advised the Board that total cash collected for the month of December was \$453,025.81, and the total number of members is 952. Mike then reviewed the Balance Sheet and Income Statement. Through December, Mike reported net operating income of \$270,353.30.

Mitch Draper gave the IT update. IT expenses were slightly over budget in 2010. This was primarily due to conversion costs. We are staged to move the newest release of Tropics into use.

Andrew then presented the Board with his Marketing Report and advised that we had written 10 new accounts in December totaling \$94,720 in annualized premium. The number of terminations for the month was 19, resulting in a loss of \$74,459 in annualized premium. This marks the largest month in new premium written since February 2009. The New business and Cancellations report by Selected Agents was presented. The Summary of Business Submitted and Marketing Manager reports were also reviewed.

Darlene gave the Claims Department report with the 'Fund Profile Account Report'. There are 38 lifetime Medical claims open. The Tims trial will begin January 24. The trial is expected to last about two weeks. She then pointed out a new claim that was received on a 2008 injury. The employer had been paying the employee's medical bills himself until the employee was laid off. The employee is now represented by an attorney. The Conger case has been won by us at single commissioner, full commission, and appellate trial. We will be having a hearing to stop PPD in February.

Brandy gave the Underwriting Department report. There are 175 outstanding renewal payments. Member will have until February 15th to submit renewals.

The Risk Control report was given by Danny. We should see little change in South Carolina from the change in OSHA fall protection requirements. SCOSHA had made a similar change two years ago.

Brian gave his Audit Department report. Each auditor will have approximately 320 audits to complete. The audit team has scheduled audit appointments through Feb. 17. All first appointments should be scheduled to occur before April 7. Rescheduled audits will then be done.

Mark Nix, Executive Director of the HBASC gave an update. The HBASC had 3744 members at the end of 2010. This is three more than was projected. Mark then updated the board on the HBA legislative agenda and the recent Supreme Court ruling that changed the definition of "occurrence" in general liability policies. This change means that GL insurance covers primarily Premises and Operations exposures and provides reduced coverage for Completed Operations exposures.

Mitch proposed bringing Matrix services in house. This would involve some purchases of computer equipment. He presented a pro forma that shows pay back time for the purchased equipment at 9.3 months. Tom Markovich made the motion that we proceed. John Curl seconded. The motion was carried unanimously.

Jeff stated that Eddie had quoted additional security for the building as requested. We could not pass on costs to tenants until January 2012. He will ask Eddie to quote a simpler system. All of the building tenants have different leases. We will have a standard lease form on their renewal.

Jeff, Andrew, and Mitch have been having webinars for agents concerning the move to a mutual insurance company. These will continue for the rest of the week. Agents are on board with the change providing we have competitive rates, commissions, and profit sharing program. They are excited by the prospect of the mutual writing additional classes of business.

Letters to members describing the change to a mutual were discussed. These will include a ballot. Up to three letters will be sent. Members will be told that not sending in a ballot will be giving the board their proxy. Colin Campbell moved that this be done. Jim Gregorie seconded. Motion was carried unanimously.

Mike Lowman asked for a letter of intent to the HBASC. The letter will contain the board's intent to reach agreement with the HBA concerning financial, membership, and leadership issues. Keith Smith made the motion that this be done. Colin Campbell seconded. The motion passed unanimously.

The next board meeting is February 16.

The meeting was adjourned.

An Executive session was then held.

Minutes of the Board of Trustees
South Carolina Home Builders Self Insurers Fund
February 16, 2011
10:00 AM

Those present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, David Gully, Jim Gregorie, Mike Lowman, Keith Smith, Eddie Weaver, and Tom Markovich.

Staff Present were Jeff Ranew, Mike Hill, Andrew Woodham, Mitch Draper, Danny Dilworth, Darlene Frick, and Brian Emery.

Also in attendance was Mark Nix, Executive Director, HBASC.

The meeting was called to order by Herb Witter.

John Curl moved that the minutes for the January meeting be approved with one amendment. Minutes are amended to show that Eddie Weaver was not at the January meeting due to surgery and was excused. Keith Smith seconded the motion. The minutes were unanimously approved.

Mike Hill presented an abbreviated financial report. Final numbers are not available due to a death in Mike's family. There was a \$358,000 increase in reserves, mostly due to the Kenneth Campbell case. January cash collected was \$370,000 compared to \$453,000 in December. Earned premium was \$771,000. This will be reviewed as it was much larger than the 2010 average of \$494,000.

Mike has been working with NBSC on wire transfers and our ability to move money to and from different accounts. Mike will get signatures from the five Trustees. The bank will check with one of these by phone after receiving a transfer request. John Curl will no longer have to physically go to the bank. The limit on these transfers is \$250,000.

Jeff stated that Neal Price, our investment manager with Synovus has left the company. David Kirkpatrick who has been assisting him will be taking over this job. He will meet with us at a future board meeting.

Mitch Draper gave the IT update. Last month he presented a plan to in- source the IT operations that were currently being done by Matrix. Jeff met with Tom Colton of Matrix and found that we have a three year contract instead of the two year contract that we thought we had. He expects to hear from Matrix later this week on how we can begin to bring these operations in house. This may increase the payback time on the project.

We are working with Tropics on the conversion to a mutual. They will need our carrier code as soon as possible. Uploading rates will only take a couple of days.

Andrew then presented the Board with his Marketing Report and advised that we had written 9 new accounts with an estimated premium of \$61,859. We lost 17 accounts with an estimated premium of \$138,115. The New Business and Cancellations report by Selected Agents was presented. The Summary of Business Submitted and Marketing Manager reports were also reviewed. Andrew also presented a suggested logo for the mutual. Andrew conducted eight webinars with agents to discuss the mutual. There were seventy-four attendees from forty-six agencies. This represents 77% of our premium. Andrew will have met with all agents that did not attend a webinar by the end of February. The AAC normally meets in July. Andrew suggested that due to the starting of the mutual on July 1, this be changed to September or October. He will have some suggested locations at the next meeting.

Mark Nix reported from the HBA of SC. Membership has stabilized. They are approaching the GL issue on the legislative, regulatory, and judicial sides. Several of our agents have been having classes on GL and WC issues. They are emphasizing the importance of ensuring that subcontractors have both GL and WC coverage. The HBA is also working on the issues of unemployment insurance rate increases. The Legislative Day is March 16 and The Bird Supper is March 30.

Darlene gave the Claims Department report with the 'Fund Profile Account Report'. All years are closed up to 2000. There are 38 lifetime med cases open. The Tims case trial was in January. The claimant's attorney does not want to settle the compensation portion based on the potential lifetime medical exposure.

Jeff gave the Underwriting Department report. Ballots are starting to come in. So far we have 65 yes and 3 no votes. The next letter will go out February 21 and the third ten days after that. We have several small accounts in arrears that have problems paying the reinstatement fees. The board suggested we give a one time relief on the reinstatement fees. There is an account in arrears for \$7476. The owner intends to pay. He has proposed to pay \$25 per month or to give us a lot off of Garners Ferry Rd. in Columbia. We will look at the lot and decide what to do. Greenville HBA made changes on the form to receive their first royalty payment. We will not accept changed wording on the June and future forms.

Danny gave the Risk Control report. Scheduling still is a challenge to the amount of work our members are doing. We are finding fewer serious hazards on jobsites.

Brian gave his Audit Department report. 315 audits have been completed and submitted as of February 15 with approximately \$100,000 in additional premium due. Many of our members are considering shopping coverage to eliminate HBA dues.

The board met with Darlene to discuss a claim.

Jeff presented a time line for the conversion to a mutual. He also had biographical information forms for the board and management to complete. There is a pending NCCI rate change. We do not know what the proposal will be. Jeff met with Colliers Keenan about leasing suite 160. Their representative stated that we could expect to lease for about \$14-15 per square foot. We will inquire about having an outside door installed in 160.

Eddie Weaver presented a revised proposal for hall security. Cost would be \$7067. Keith moved that we accept estimate number 2638. Tom seconded. The motion was passed unanimously with Eddie Weaver abstaining.

Herb proposed we change our next meeting date to March 23 to avoid a conflict with the NAHB legislative day. The board agreed with the proposal.

The meeting was adjourned.

An Executive session was then held.

**Minutes of the Board of Trustees
South Carolina Home Builders Self Insurers Fund
March 23, 2011
10:00 AM**

Board members present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, David Gully, Jim Gregorie, Mike Lowman, Keith Smith, Eddie Weaver, and Tom Markovich.

Staff Present were Jeff Ranew, Brandy Shealy, Mike Hill, Andrew Woodham, Mitch Draper, Danny Dilworth, Darlene Frick, and Brian Emery.

Also in attendance were Mark Nix, Executive Director, HBASC, Buddy Leaphart, McGregor and Co., David Kirkpatrick and Donna Nesbitt, Synovus.

The meeting was called to order by Herb Witter.

Tom Markovich moved that the minutes for the February meeting be approved. Keith Smith seconded the motion. The minutes were unanimously approved.

Mike Hill presented the financial report. Cash contributions were \$232,000. This is down from January. Mike believes the premium paid number is understated and is working with Tropics to get this corrected. Mike discussed several line items that are over budget so far. Most of these are due to pre-payments being made. Staff travel is over budget due to Jeff and Mitch's travel to NCCI. Claim reserves were raised a total of \$600,000.

Buddy Leaphart spoke about several tax and accounting issues. We have filed extensions for 2010 federal income tax returns. Payroll audits need to be completed before the final filing of tax returns can be completed. 2010 interim financial statements record claim reserves at the high end of actuarial estimates, and the accrual for 2nd Injury Fund assessments at approximately 17%. Buddy stated it may be prudent to leave reserves at high end due to potential volatility based on low premium. There would be tax and financial implications of any changes to our current assumptions.

Jeff Ranew said that he has met with W.C. Smith at the Workers' Compensation Commission and that we are having an analysis performed by Casualty Actuarial Consultants, Inc. to project the final cost to perfect all known and unknown claims, including loss adjustment expense and taxes for which SCHBSIF will remain responsible. The valuation date of the study will be 4/30/2011. Herb Witter stated that we need to prepare for future tax liabilities and perhaps use more realistic estimates and accruals for claims liabilities and taxes/assessments which would increase surplus. The question was raised about members rolling their annual premium deposits to the mutual insurer, and what that percentage should be. The current deposit is 25% of estimated annual premium, while some of our competitors have reduced or eliminated the deposit requirement. The question was also raised as to whether reduction or elimination of the deposit would create a taxable event. Answers to these questions will be based in part on the new actuarial study.

Mark Nix stated that the HBASC has 3750 members. This is slightly lower than projected. There will be a membership drive in May. The Bird Supper is next week. NAHB projections are for 20% growth in building in 2011. SC should be one of the top states in growth. Mark updated the board on legislative issues. Mark has met with the new state Fire Marshal.

Mitch Draper gave the IT update. We are progressing with moving servers from our current hosting vendor Matrix to our office at Center Point V. The system should be up and running in May.

We are working with Tropics on the conversion to a mutual insurer. Procedures and processes need to be developed for payment plans and deductibles. We will be a full NCCI subscriber soon so Tropics can begin updates.

Jeff stated that NCCI will be much less expensive than we thought for the first year.

Andrew then presented the Board with his Marketing Report and advised that we had written five new accounts with an estimated premium of \$10,578. We lost 12 accounts with an estimated premium of \$42,000. The New business and Cancellations report by Selected Agents was presented. The Summary of Business Submitted and Marketing Manager reports were also reviewed. Andrew

presented several options for the AAC in October. We will move forward with Market Pavilion in Charleston on October 20.

Darlene gave the Claims Department report with the 'Fund Profile Account Report'. Kenneth Campbell, Alfred Lopez, and Ed Mays reserves increased. Tropics' system is generating an inaccurate number for FY 2010 premium and skewing the loss ratio for that period. Correct numbers were presented. Darlene reported a potential death claim in the upstate. It is thought the death will be ruled a suicide.

Brandy Shealy gave the Underwriting Department report. She reported on a cancelled account, Premier Investments, with an outstanding balance of over \$7,000. Insured had previously offered a building lot in exchange for the amount owed on his account. Since the last Board meeting Premier Investments has advised us that they actually want us to purchase the lot from them. They are asking \$32,000 for the lot but would sell this lot to us for their asking price minus the amount currently owed to us. The Board recommended that we allow the member to make monthly payments as requested of \$25.00 per month in lieu of purchasing the lot provided the insured signs a Confession of Judgment.

Brandy advised the Board that we currently have 16 accounts that are pending cancellation for HBA membership. This is higher than normal. 10 accounts are pending cancellation for nonpayment of renewal. The Christmas party will be December 16 at the Hilton in Columbia. Brandy reported on two audits with large outstanding balances. Nine new accounts have been written so far in March with a total premium of about \$70,000. The Greenville HBA has requested that we change the way we verify HBA membership. They have requested information that the Board feels we cannot give them.

Danny gave the Risk Control report. We will have an OSHA close out audit in April. They have requested the same information as previous audits. Surveys continue to show fewer fall hazards and more equipment hazards. This is largely due to the type of work being done.

Brian gave his Audit Department report. As of March 22, 749 audits have been completed with 229 remaining. The outstanding audits have all been scheduled. There is a 24% rate of appointment cancellation. Additional premium due SCHBSIF as a result of the 2010 audits is \$326,000 as of March 22. This is down from previous years.

Jeff Ranew reported that he is working on the lease renewal with the tenants in Suite 120. Suite 160 is cleaned out and ready to lease. An outside door on Suite 160 would cost about \$10,000.

David Kirkpatrick of Synovus reported on last year's investment results and plans for the future including the conversion to a mutual.

A name for the mutual was discussed. John Curl moved that the name be South Carolina Builders Insurance Group and, if that was not available, Builders Insurance Group of South Carolina. Eddie Weaver seconded. The motion was passed.

Jeff reported on the ballots for the mutual. 933 were mailed. We received 531 yes votes, 188 ballots giving the board proxy, and 34 no votes. Per the mailings, ballots not received by March 11 give the board proxy. There were 165 not received. John Curl made the motion that the board votes the given proxies and the non-returned proxies as yes. Eddie Weaver seconded. The motion passed unanimously.

John Curl made the motion that we move forward to become a mutual insurance company. Keith Smith seconded. The motion passed unanimously.

The next board meeting is April 20.

The meeting was adjourned.

Minutes of the Board of Trustees
South Carolina Home Builders Self-Insurers Fund
April 20, 2011
10:00 AM

Board members present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, Jim Gregorie, Mike Lowman, Keith Smith, Eddie Weaver, and Tom Markovich.

Staff Present were Jeff Ranew, Mike Hill, Andrew Woodham, Mitch Draper, Danny Dilworth, Darlene Frick, and Brian Emery.

Also in attendance was Ed Byrd, SIC.

The meeting was called to order by Herb Witter.

Keith Smith moved that the minutes for the March meeting be approved. John Curl seconded the motion. The minutes were unanimously approved.

Jeff Ranew presented the HBA report from Mark Nix. Mark is meeting with state legislators. Membership for the HBASC is firming up. A membership drive is planned for May. The SIF is featured as one of the benefits of membership.

Ed Byrd reported on the progress of the health insurance plan. Carolina Care Plan presented a plan that would require us to include all current members of the HBA plan. It is very much like any other plan available. Ed suggested that we look at a self-funded co-op. We would need to do things and demand things of our members that others don't require to be competitive. This would include wellness plans and education. Ed will continue to work on the co-op. He will report back to the board.

Mike Hill presented the financial report. Cash contributions were \$383,000. This is up from February. The balance sheet, statement of revenues and expenses, and fund equity all reflect the adjustments in claim reserve and SIF reserve that were discussed at last month's meeting. Mike discussed several line items that

are over budget so far. Most of these are due to quarterly payments being made. Risk Control travel is higher than the pro-rated budget due to gasoline costs.

We will be writing off some of the old bad debt in preparation for our audit and mutual conversion.

Mitch Draper gave the IT update. All thin clients have been replaced with PC's. We have reserved scbig.com for our web site. We are moving forward on updating to Tropics 4.3. Mitch is also working with an outside company on disaster recovery for the mutual.

Jeff stated that we, NM, and MN. are having similar issues with Tropics. We will be working with them to compile a list of issues to present to them. We will also present a list of additional functionalities that we would like to see.

Andrew then presented the Board with his Marketing Report and advised that we had written eleven new accounts in March with a total estimated premium of \$81,100. We lost 11 accounts during the same time period with annualized premium of \$30,299 for a net gain in annualized premium of \$50,801. The AAC meeting will be moved to the Plantation Inn in Charleston. Andrew also showed potential logos and the motto "Small Company, BIG Service." It was suggested that this could be used with other last lines such as "Small Company, BIG Value."

Darlene gave the Claims Department report with the 'Fund Profile Account Report'. One large claim has been reported. It has been denied. The claim does show in the current loss ratio.

Brandy Shealy gave the Underwriting Department report. The account that we were allowing to pay monthly has not returned its confession of judgment. She will check back with them. We are finishing the audit process.

Danny gave the Risk Control report. The OSHA audit was conducted. We will receive a report in about 30 days. We have received the final payment from the grant.

Brian gave the Audit Department report. As of 4/19, 912 audits have been done. 70 remain. All are scheduled to be done before the end of April. Additional

premium as of 4/19 is \$463,000. This is down from previous years. Last year 4 audits were closed due to lack of cooperation. So far this year we have had 5.

Jeff reported that we are moving forward with the mutual. He gave the board a copy of the critical issues time line. The DOI committee that approves new companies meets the fourth Thursday of each month. This may cause the mutual to be pushed back depending on how quickly the DOI can get its audit and other work done.

John Curl stated that the May meeting was during Spring Boards. The meeting was rescheduled for May 4 at 4:00 PM at the multi-state meeting.

Keith presented a mission statement. Comments or changes are needed by the next board meeting.

Brandy asked about deposits and payment plans for the mutual. Our current deposit requirement is higher than most of our competition. We will also need to offer quarterly installments and nine month payments in addition to our current payment options. The staff will give the board a suggested solution at the next meeting. Brandy also asked about seminar attendance requirements. A general industry safety program will be developed for non-contractor members of the mutual. Brandy also brought up processing of audit payments. They will be processed based on the date of the audit being finalized.

Jeff stated that the leasing agreement for the building has been signed with Colliers Keenan.

The meeting was adjourned.

Minutes of the Board of Trustees
South Carolina Home Builders Self Insurers Fund
March 23, 2011
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Staff Present were Jeff Ranew, Brandy Shealy, Mike Hill, Andrew Woodham, Mitch Draper, Danny Dilworth, Darlene Frick, and Brian Emery.

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