THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appeal No. 2016-001840
Case No. 2013-CP-07-1807

William Loflin and Leslie Loflin,

Appellants,

v.

BMP Development LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,

Defendants,

OF WHICH

Chicago Title Insurance Company,

Respondent.

RECORD ON APPEAL
VOLUME I

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(843)856-4488

ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
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ATTORNEY FOR RESPONDENT

INDEX

VOLUME I

ORDERS

09-03-14	Order of the Honorable Ernest Kinard Denying Defendants' Motions to Dismiss	1
01-06-15	Order of the Honorable Ernest Kinard of Default as to BMP Development LP	3
01-06-15	Order of the Honorable Ernest Kinard Permitting Plaintiff to file and serve 2nd Amended Complaint	5
01-13-16	Order of the Honorable Carmen Mullen designating case as complex (filed 01-15-16)	7
07-16-15	Order of the Honorable Carmen Mullen Denying Coward Hicks' Motion to Dismiss and Holding Balsam's Motion to Dismiss in Abeyance	9
08-15-16	Order of the Honorable Carmen Mullen Granting Chicago Title's Motion for Summary Judgment	11
08-15-16	Order of the Honorable Carmen Mullen Granting Counsellor Title's Amended Motion for Summary Judgment	22
08-15-16	Order of the Honorable Carmen Mullen Granting Coward Hicks' Motion for Summary Judgment	34

PLEADINGS AND MOTIONS

07-18-13	Plaintiffs' Complaint	42
08-08-13	Chicago Title's Motion to Dismiss	48
08-08-13	Counsellor Title's Motion to Dismiss	51
09-05-13	Balsam Mountain Preserve Community Association's Motion to Dismiss	60

09-26-13	Balsam Mountain Preserve Community Association's Motion for Protection from Discovery	66
04-14-14	Plaintiffs' Amended Complaint	70
04-14-14	Affidavit of Service of Amended Complaint	98
04-15-14	Chicago Title's Motion to Dismiss Amended Complaint	99
04-24-14	Counsellor Title's Motion to Dismiss the Amended Complaint	102
07-17-14	Plaintiffs' Motion for Default Judgment as to BMP Development LP	113
08-20-14	Chicago Title's Memorandum in Support of Motion to Dismiss Amended Complaint	117
09-09-14	Chicago Title's Answer to Amended Complaint	126
01-06-15	Plaintiffs' Second Amended Complaint	137
01-16-15	Chicago Title's Answer to Second Amended Complaint	180
07-09-15	Chicago Title's Motion for Summary Judgment	194
07-28-15	Counsellor Title's Motion for Summary Judgment	197
08-05-15	Plaintiffs' Third Amended Complaint	201
08-20-15	Chicago Title's Answer to Third Amended Complaint	247
12-16-15	Plaintiff's Notice of Deposition for Chicago Title	261
12-30-15	Chicago Title's Motion to Quash	264
03-02-16	Counsellor's Answer to Third Amended Complaint and Cross Claim against Defendants Coward, Hicks & Siler, P.A, and J.K. Coward, Jr	268
04-01-16	Coward, Hicks & Siler, P.A., and J.K. Coward, Jr.'s Answer to Counsellor Title's Cross-Claim	302

06-10-16 Chicago's Memorandum in Support of Motion for Summary Judgment....308

07-01-16 Plaintiff's Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment....320

07-11-16 Chicago Title's Supplemental Memorandum in Support of Motion for Summary Judgment....362

09-01-16 Notice of Appeal....372

09-19-16 Second Amended Notice of Appeal....375

TRANSCRIPTS

06-13-16 Transcript of Hearing before the Honorable Carmen Mullen (pp. 1-73)....378

VOLUME II

DEPOSITIONS

02-09-16 Deposition of Craig Lehman (pp. 1-3, 7, 13-17, 20, 31, 37, 54-55, 57, 59-61, 63-65, 67, 86, 98-100)....451

01-21-16 Cynthia Baines deposition excerpts (pp. 1, 10-17)....477

01-23-15 Randy Herron deposition excerpt (pp. 1, 44)....486

01-06-14 Sarah Robertson deposition excerpts (pp. 1, 4, 6, 11-12, 22, 48)....488

09-28-15 J.K. Coward, Jr. deposition excerpts (pp. 1, 5, 7-9, 27-29, 33, 52, 141-142)....495

01-06-14 William L. Bethea, Jr. deposition excerpts (pp. 1, 5-6, 12, 20-23, 25-26)....507

EXHIBITS AND OTHER MATERIALS OR DOCUMENTS

08-16-00 NC Secretary of State - Certificate of Domestic Limited Partnership filed by Balsam Mountain Preserve, Limited Partnership (Ex. 7 to P's 07/01/16 Memorandum)....517

08-16-00 - 10-02-00	NC Secretary of State - Articles of Incorporation for Balsam Mountain Company, LLC and Balsam Mountain Property Owners' Association (Ex. 8 to P's 7/01/16 Memo)	518
09-25-00	Agreement of Limited Partnership of Balsam Mountain Preserve, Limited Partnership (Ex. 13 to P's 07/01/16 Memorandum)	523
09-26-00	NC Secretary of State - Counsellor's Application for Certificate of Authority (Ex. 4 to P's 07/01/16 Memorandum)	572
09-05-01	Letter from Bethea to Coward re Balsam Mountain Preserve, Limited Partnership (Ex. 9 to P's 07/01/16 Memorandum)	576
10-19-01	Founder's Balsam Mountain Reservation Agreement (Ex. 14 to P's 07/01/16 Memorandum)	577
12-10-01	Recorded Plat, Plat Cabinet 11 at Slide 383, in Jackson County, NC	585
02-06-02	Unrecorded Plat for Balsam Mountain Preserve	586
02-11-02	Spring Island Closing Documents (Ex. 16 to P's 07/01/16 Memorandum) (HUD Settlement Statement, Mortgage)	587
02-12-02	Coward letter to Loflins re Founders Acquisition of Balsam Mountain Preserve Homestead No. 108 (Ex. 12 to P's 07/01/16 Memorandum)	603
02-14-02	Compliance Agreement (Ex. 18 to P's 07/01/16 Memorandum)	605
02-15-02	Deed of Trust to Lot 108, Balsam Mountain Preserve recorded 02-19-02 in Book 1227 at Page 202 in Jackson County, NC (Ex. 17 to P's 07/01/16 Memorandum)	606
02-19-02	Attorney J.K. Coward, Jr.'s Final Opinion of Title of Owner's and/or Mortgagee Policy (Ex. A to Counsellor's 03/02/16 Answer to Plaintiff's 3rd Amended Complaint)	618

02-19-02	Chicago Title Insurance Company's Residential Title Insurance Policy 34 0063 097 00000014 issued by Counsellor Title Agency, Inc. (Attachment 1 to Chicago's 6-10-16 Memorandum)	620
03-25-02	Letter from Coward to Loflins (Ex. 19 to P's 07/01/16 Memorandum)	626
05-01-06	NC Secretary of State - Statement of Change of Registered Office and/or Registered Agent for Balsam Mountain Preserve (Craig Lehman)	627
03-23-12	Letter from Gibson Solomons to Chicago Title submitting claim (Ex. 20 to P's 07/01/16 Memorandum)	628
08-21-12	Letter from Chicago Title to Gibson Solomons denying claim (Ex. 21 to P's 07/01/16 Memorandum)	629
04-08-14	Plat of Homestead 108 prepared for William P. Loflin and Leslie W. Loflin by L. Kevin Ensley, P.L.S	631
02-13-15	Letter from Speights to Stepp enclosing index	632
02-26-16	Letter from Susan Murdaugh to Counsel	635
06-09-16	Affidavit of William Loflin (ex. 22 to P's 7/1/16 Memo)	636
07-01-16	Supplemental Affidavit of William Loflin (Ex. 1 to P's 07-01-16 Memorandum)	638
08-11-16	4:11 PM Email from Judge Mullen's Law Clerk to Counsel re Judge Mullen's rulings on Defendants' Motions for Summary Judgment	640
08-15-16	9:15 AM Email from O'Kelly (Chicago) to Judge Mullen's Law Clerk attaching Order Granting Summary Judgment to Chicago Title	641
N/A	NC Secretary of State - BMP Development LP (lists former names (Ex. 2 to P's 7/1/16 Memo)	654

N/A	NC Secretary of State Information for Anthony Investments, LLC (Ex. 10 to P's 7/1/16 Memo)	660
N/A	Blowup of Lot 108 (Herron's deposition Ex. 3A) (Ex. 15 to P's 7/1/16 Memo)	661
N/A	Deed of Correction and Quit-Claim Deeds prepared by the Coward Firm (Ex. 23 to P's 7/1/16 Memo)	662

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP0701807

PLAINTIFF(S)		DEFENDANT(S)	
William Loflin	Leslie Loflin	Chicago Title Insurance Company BMP Development LP	Counsellor Title Agency, Inc

2014 SEP -3 PM 3:53
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Motions to Dismiss filed on 4/28/2014 and 4/16/2014 are respectfully denied.

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

Circuit Court Judge

2017
Judge Code

9/3/2014
Date

For Clerk of Court Office Use Only

This judgment was entered on 4 **September, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on 4 **September, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Algernon Gibson Solomons III PO Box 685 Hampton, SC 29924

ATTORNEY(S) FOR THE PLAINTIFF(S)

George Hamlin O'Kelley III 652 Coleman Blvd., Ste.200 Mt. Pleasant, SC 29464
Robert E. Stepp PO Box 11449 Columbia, SC 29211
Laura Figueroa Locklair 200 Meeting St., Ste. 301 Charleston, SC 29401-3156

ATTORNEY(S) FOR THE DEFENDANT(S)

Jamie Thompson

Court Reporter-Mona Manley

Jerri Ann Roseneau - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**ORDER OF DEFAULT**
	)	
BMP Development LP, Chicago Title Insurance Company and Counsellor Title Agency, Inc.	)	
	)	
	)	
Defendants.	)	
	)	

2015 JAN -6 PM 2:17

It appears to the Court that the Summons and Amended Complaint were personally served by Ronald Reynolds, process server, on Craig Lehman, individually and as registered agent for service for Defendant, BMP Development LP, on April 14, 2014, as reflected in the Affidavit of Service which was filed with this Court on April 21, 2014; and that more than thirty (30) days have elapsed since service of the said Summons and Amended Complaint; and no Answer, Notice of Appearance or other responsive pleading has been filed with the Court.

It further appears to the Court that on July 17, 2014, said registered agent of service for Defendant, BMP Development LP, was served with the Notice of Motion and Motion for Default Judgment Default by said process server; that more than ten (10) days have elapsed since service of the said Motion; and that no response to said Motion has been filed with the Court;

Therefore, it is

ORDERED, ADJUDGED, AND DECREED that Defendant, BMP Development LP, is in default and that an entry of default shall be and hereby is entered against Defendant, BMP Development LP; and that this matter shall be referred to the Honorable Marvin H. Dukes, III, Master-in-Equity, to conduct a damages hearing as to the Defendant, BMP Development LP.

IT IS ORDERED.

Circuit Court Judge
14th Judicial Circuit

Beaufort, South Carolina
January 6, 2015

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ORDER
	)	
BMP Development LP, Chicago Title Insurance Company and Counsellor Title Agency, Inc.,	)	
	)	
	)	
Defendants.	)	
	)	

2015 JAN -6 PM 2:18

Upon Motion of the Plaintiffs, by and with the consent of the Defendants who have filed responsive pleadings in this matter (an Affidavit of Default having been entered as to Defendant BMP Development, LP), and with good cause appearing therefor,

IT IS ORDERED that Plaintiffs be and they hereby are permitted to file and serve a Second Amended Complaint adding additional parties to this action.

IT IS SO ORDERED.

Judge, Fourteenth Judicial Circuit

Beaufort, South Carolina

January 6, 2015

WE SO MOVE:

Daniel A. Speights (SC Bar # 5027)
A. G. Solomons, III (SC Bar# 68291)
SPEIGHTS & RUNYAN

100 Oak Street
Post Office Box 685
Hampton, South Carolina 29924
(803)943-4444
(803)943-4599 (fascimile)

By: _____ 1/6/2015
Daniel A. Speights

ATTORNEYS FOR PLAINTIFFS

WE CONSENT:

G. Hamlin O'Kelley, III, Esquire
BUIST, BYARS & TAYLOR, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464

By: _____ Jan. 4, 2015
G. Hamlin O'Kelley, III

ATTORNEYS FOR CHICAGO
TITLE INSURANCE COMPANY

Robert E. Stepp, Esquire
Sowell, Gray, Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211

By: Robert E. Stepp / by _____
Robert E. Stepp

ATTORNEYS FOR COUNSELLOR
TITLE AGENCY, INC.

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	**ORDER**
v.	)	
	)	
BMP Development LP, Balsam Mountain Group, LLC, COWARD HICKS & SILER, P.A., J.K. Coward, Jr., Chicago Title Insurance Company and Counsellor Title Agency, Inc.	)	
	)	
Defendants.	)	

2015 JAN 15 PM 2:17

This matter comes before the Court with the consent of counsel for all parties. The parties have consented to have this case designated complex and assigned to the undersigned. The pleadings were most recently joined on August 20, 2015, after the undersigned ruled on Motions to Dismiss filed by three Defendants which Plaintiffs named in their Second Amended Complaint. This case is appropriate to be designated complex because of the number of parties, five of which are out of state; the number of witnesses from out of state; and the distinct legal theories as to the various parties. This case will benefit from having a single Judge assigned to the case for the purpose of supervising discovery, adopting a Scheduling Order, directing pretrial proceedings, and conducting the trial of this case.

NOW, THEREFOR, upon Motion of all parties, and with good cause appearing therefor,

IT IS ORDERED that this case is hereby designated as complex and assigned to the undersigned for the management of discovery, the handling of pre-trial matters, and the trial of this lawsuit. This assignment will remain in effect until this case is tried or until further Order of this Court.

AND IT IS SO ORDERED.

Honorable Carmen T. Mullen
Circuit Court Judge

Beaufort, South Carolina
January 13, 2016

WE SO MOVE AND CONSENT:

Daniel A. Speights (SC Bar # 5027)
A. G. Solomons, III (SC Bar# 68291)
SPEIGHTS & RUNYAN
100 Oak Street, Post Office Box 685
Hampton, SC 29924
ATTORNEYS FOR PLAINTIFFS

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G. Hamlin O'Kelley, III, Esquire
BUIST, BYARS & TAYLOR, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
ATTORNEYS FOR DEFENDANT, CHICAGO TITLE INSURANCE COMPANY

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013CP0701807

William Loflin

PLAINTIFF(S)

Balsam Mountain Preserve Community Association

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Defendant Coward Hicks and Siler Pa's Motion for Protective Order and Motion to Dismiss are respectfully denied. Defendant Balsam Mountain Group LLC's Motion to Dismiss will be held in abeyance. Balsam Mountain is ordered to turn over acquisition and sale paperwork. Plaintiff has 20 days to amend the complaint and file it with the court. Plaintiff has 45 days after filing the amended complaint to take Mr. Coward's deposition.

2015 JUL 27 P 4:32

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order.

Received

JUL 27 2015

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Sheheen & Runyan

SCRCP Form 4C (03/2013)

Page 1

Circuit Court Judge | 417 Judge Code | 1-16-15 Date

For Clerk of Court Office Use Only

This judgment was entered on the 20 day of July, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 24 day of July, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Algernon G. Solomons, III PO Box 685 Hampton, SC 29924

Daniel A. Speights PO Box 685 Hampton, SC 29924

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Laura F. Locklair 200 Meeting Street, Ste. 301 Charleston, SC 29401

Michael B. McCall 40 Calhoun Street, Ste. 400 Charleston, SC 29401

George H. O'Kelley, III 652 Coleman Blvd., Ste. 200 Mt. Pleasant, SC 29464

Robert E. Stepp PO Box 11449 Columbia, SC 29211

David S. Wyatt 935 S. Main Street, Ste. 203 Greenville, SC 29601

ATTORNEY(S) FOR THE DEFENDANT(S)

Veronica Roberts / Staff
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2013-CP-07-1807

William Loflin and Leslie Loflin,

Plaintiffs,

vs.

BMP Development, LP, Balsman Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,

Defendants.

ORDER GRANTING CHICAGO TITLE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

2016 AUG 25 P 12:23

THIS MATTER came before this Court on June 13, 2016, for a hearing of the Defendant Chicago Title Insurance Company's Motion for Summary Judgment filed July 14, 2015. Present at the hearing were G. Hamlin O'Kelley, III, for Chicago Title Insurance Company, Daniel A. Speights and A. Gibson Solomons, III, for the Plaintiffs.[1] For the reasons stated herein, the Motion is GRANTED.

STANDARD OF REVIEW

Summary judgment is proper when it is clear that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SCRCivP 56 (c); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of

[1] Motions by the Defendants Coward, Hicks & Siler, P.A., J.K. Coward, Jr., and Counsellor Title Agency, Inc., were heard at the same time and are addressed by separate Orders of this Court.

a factfinder." *Moore v. Weinberg*, 733 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007), *aff'd by* 383 S.C. 583, 681 S.E.2d 875 (2009).

Summary judgment should be granted when plain, palpable, and undisputed facts exist upon which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co., Inc.*, 314 S.C. 542, 544, 431 S.E.2d 565, 555 (1993). Where there is no dispute over the operative facts, summary judgment is proper as a matter of law. *Citizens & Southern Nat'l Bank of S.C. v. Langford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994). Here, the material facts are not in dispute and, based upon those undisputed facts, Chicago Title Insurance Company is entitled to judgment as a matter of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Plaintiffs are the owners of Lot 108 in the Balsam Mountain Preserve development located in Jackson County, North Carolina. (Third Amended Complaint, ¶ 13) The Plaintiff William Loflin purchased this property in 2002 for $495,000.00. (*Id.* at ¶ 10) Chicago Title Insurance Company (hereinafter "Chicago Title") issued the Plaintiff a title insurance policy (the "Policy") for Lot 108.[2] (Third Amended Complaint. at ¶ 5). At the time of the closing in 2002, Lot 108 was not staked. (*Id.* at ¶ 10) During the closing, the Plaintiffs received a deed to Lot 108 and a copy of the only recorded plat reflecting that Lot 108 consisted of 1.837 acres. (*Id.* at ¶ 13). The only recorded plat also showed that the Balsam Mountain Preserve Round went around Lot 108. (Third Amended Complaint, *id.* at 10) The plat was recorded in Jackson County, North Carolina, in Plat Cabinet 11 at Slide 383 and incorporated in the deed to the Plaintiffs which deed was recorded in Jackson County in Book 1227 at Page 202. (*Id.* at ¶13.) The plat recorded in Plat Cabinet 11 at Slide 383 is the only recorded plat for Lot 108 (the "Recorded Plat")(*Id.* at 13). The deed conveyed Lot 108 as shown on the Recorded Plat. (*Id.*) The Plaintiffs have

alleged that they purchased Lot 108 as shown on the Recorded Plat. (*Id.*) The Title Insurance Policy issued to the Plaintiffs by Chicago Title insured the Plaintiffs' title to Lot 108 containing 1.837 acres as referenced in the Recorded Plat in Jackson County, North Carolina. (*Id.* at ¶ 13).

Four years after the closing, in 2006, the Plaintiffs claim that BMP Development informed them that, contrary to the duly recorded deed and duly recorded plat, Lot 108 only contained 1.4 acres and that Balsam Mountain Preserve Road went "through" their property as shown on an unrecorded plat. (*Id.* at ¶ 20). Although allegedly discovered in 2006, the Loflins did not file suit until 2013. (Complaint, July 18, 2013). The Plaintiffs claim the unrecorded plat shows both the reduced acreage and the Balsam Mountain Preserve Road going through their Lot 108. (Third Amended Complaint, *id.* at ¶20) According to the Complaint, there is no recorded plat or deed showing the reduced acreage or Balsam Mountain Preserve Road going through Lot 108. (*Id.*) The Plaintiffs claim that there is a trespass and encroachment upon their property by way of this unrecorded plat, which they discovered in 2006. (*Id.* at ¶ 16)

In 2012, six years after discovering this unrecorded plat, the Plaintiffs informed Chicago Title of the unrecorded plat. (*Id.* at ¶ 20). In response, Chicago Title advised that based upon a title search, the only recorded deed and the Recorded Plat did not show any impairments to the Plaintiff's title and denied the claim. (*Id.*)

The Plaintiffs have asserted breach of contract and negligence actions against Chicago Title and Counsellor Title Agency, Inc. (*Id.* at ¶¶ 147-151) The Plaintiffs claim they entered into a contract with Chicago Title to "investigate and insure lot 108 was protected from all risks set forth herein, including, but not limited to, easements, encumbrances and fraud." (*Id.* at ¶ 148). In addition, they allege that Lot 108 contains 1.4 rather than 1.837 acres and there is a road dissecting the property as shown on an unrecorded plat, rather than what is shown on the

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hicago Title issued lenders' policies of title insurance for refinances of the property at later dates. (*Id.*)

recorded plat. (*Id.* at ¶ 149) There are no specifics alleged as to how Chicago Title breached its contract. The claim for negligence states that Chicago Title knew or should have known the risks associated with Lot 108 and either allowed exposure to such risk or negligently failed to ascertain and insure against such risks. (*Id.* at ¶ 153-155). The Plaintiffs claim they are entitled to the full value of their property and consequential damages. (*Id.* at ¶155). These are the only claims against Chicago Title.

None of the Plaintiffs' claims may stand as set forth below as follows:

I. THE PLAINTIFFS CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS AS TO ALL CAUSES OF ACTION

The Plaintiffs' claims are barred by the applicable statute of limitations. The Plaintiffs have asserted claims against Chicago Title for breach of contract and for negligence. (Third Amended Complaint, ¶¶ 147-155). The applicable statute of limitations for both causes of action is three years. S.C. Code Ann. §15-3-530. The "discovery rule" governs and runs on the date the party first knew or should have known by the exercise of reasonable diligence that a cause of action has arisen. *Dean v. Ruscon*, 321 S.C. 360, 468 S.E.2d 645 (1996). At the time a party should realize his injury is attributable to someone else's actions, the statute begins to run. *Republic Contr. Corp. v. South Carolina Dep't of Highways & Pub. Transp.*, 332 S.C 197, 503 S.E.2d 761 (1998). As established in their Third Amended Complaint, the Plaintiffs learned in 2006 that contrary to their deed and recorded plat there was a potential encroachment on their property, that there was less acreage than they thought they had, and that Balsam Mountain Road went through instead of around their property. (Third Amended Complaint, ¶20). Yet, the Plaintiffs failed to file suit until July, 2013, well beyond the three year statute of limitations. Accordingly, the Chicago Title is entitled to judgment as a matter of law under the applicable statute of limitations.

II. THE PLAINTIFFS HAVE NO CLAIMS FOR DAMAGE DUE TO AN UNRECORDED PLAT AS THEY HAVE TITLE TO THE PROPERTY AS INSURED AND CONVEYED PURSUANT TO THE RECORDED PLAT IN JACKSON COUNTY, NORTH CAROLINA

The Plaintiffs took title to their property based upon the only plat recorded in Jackson County, North Carolina, recorded in in Plat Cabinet 11 at Slide 383 and incorporated in the deed to the Plaintiffs which deed was recorded in Jackson County in Book 1227 at Page 202. (Third Amended Complaint, *id.* at 10) The plat recorded in Plat Cabinet 11 at Slide 383 is the only recorded plat for Lot 108 (*Id.* at 13). At the hearing of this matter, no one disputed that this is the only plat recorded in Jackson County, North Carolina, surveying the Plaintiffs' property. As this property is in North Carolina, North Carolina substantive law as to recording must apply. According to North Carolina Code Section 47-18, unrecorded interests in land are invalid against subsequent purchasers of property. *See* N.C.G.S.A. §47-18. Unless an interest is "of record", it cannot be enforced against any subsequent purchaser. *Id.*; *see Hill v. Pinelaw Memorial Park*, 292 S.E.2d 779 (N.C. 1981). By enacting Section 47-18, the intent of the North Carolina General Assembly was that prospective purchasers should be able to rely only on the public record. *Schuman v. Roger Baker & Assoc., Inc.*, 319 S.E.2d 208 (N.C. Ct. App. 1984). It is only when a search of the public records reveals an encumbrance that a purchaser is chargeable with the notice of its existence. *Turner v. Glenn*, 18 S.E.2d 197 (N.C. 1942). If no interest is recorded, it is not enforceable against subsequent purchasers. *Id.* In this matter, the unrecorded plat cannot create any encumbrance and cannot create any damages for the Plaintiffs by this Defendant as it has no impact upon the Plaintiffs' title to their property. Accordingly, Chicago Title is entitled to judgment as a matter of law.

III. THE PLAINTIFFS CLAIMS MUST FAIL AS A MATTER OF LAW AS TO THEIR CAUSE OF ACTION AGAINST CHICAGO TITLE FOR BREACH OF CONTRACT AS SET FORTH IN THE TWENTIETH CAUSE OF ACTION

The Plaintiffs have alleged that the contract at issue is the policy of title insurance issued by Chicago Title through its agent, Counsellor Title Agency, Inc., in 2002 (the "Policy) (*Id.* at ¶ 5) The Plaintiffs have acknowledged that the Policy was issued (*Id.*) The Plaintiffs have acknowledged that their deed references the Recorded Plat showing the correct acreage and the Balsam Mountain Road going around Lot 108. (*Id.* at ¶¶ 13-14) The Policy complies with the deed and recorded plat and insures that title which the Plaintiffs have and have had since 2002. (*Id.* at ¶ 13-14). There are no allegations stated in the Third Amended Complaint that support any breach of the contract by this Defendant as the Plaintiffs received the benefit of their bargain, have the title for which they bargained, and for which there is title insurance. There are no allegations to support the Plaintiffs' claims that Chicago Title had to "investigate and insure that Lot 108 was protected from all risks." In their lengthy Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment, there are no case law or other citations supporting this allegation of investigation and insurance for Lot 108 being protected from "all risks". Further, Chicago Title relies on its agents and does no investigations. There has been no evidence or testimony produced to support those allegations. The Plaintiff's own allegations state that their deed referenced the recorded plat. In the deposition of Cynthia Baines, claims counsel for Chicago Title, counsel for the Plaintiffs asked the following questions:

> Q. Okay. Do you understand that Mr. and Ms. Loflin claim responsibility of a Chicago title even if there's no problem with record title?
> A. That seems to be their allegation.

(Baines Depo, pp. 11, ll. 22-25).

> Q. Are you personally familiar with a lawsuit brought by an insured against Fidelity in which the insured claims that there should have been coverage but the record title was good – even though the record title was good?
> A. This case.

(Baines Depo; p. 14)(copies of these pages attached).

By this very questioning of the Plaintiffs' counsel, it is acknowledged that the title of record in this matter is good as recorded in Jackson County, North Carolina. To this very day, there is no other plat to search or rely on by Chicago Title or its agents in issuing a title insurance policy. There is simply no breach by Chicago Title as the Plaintiffs received the title referenced in both their recorded deed and the Recorded Plat referenced in that deed.

None of the enumerated "Covered Title Risks" in the Policy are triggered by the Plaintiffs' allegations related to the unrecorded plat or by any evidence presented to this Court at the time of the hearing of this matter or in the Plaintiffs' Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment submitted to this Court after the hearing on June 13, 2016.

The Title Insurance Policy states:

This Policy overs the following title risks, if they affect your title on the ***Policy Date***

1. *Someone else owns an interest in your title.*
2. *A document is not properly signed, sealed, acknowledged, or delivered.*
3. *Forgery, fraud, duress, incompetency, incapacity, or impersonation.*
4. *Defective recording of any document.*
5. *You do not have legal right of access to and from the land.*
6. *There are restrictive covenants limiting your use of the land.*
7. *There is a lien on your title because of: (a) a mortgage or deed of trust; (b) a judgment, tax or special assessment; (c) a charge by a homeowner's or condominium association.*
8. *There are liens on your title arising now or late for labor and material furnished before the Policy Date – unless you agreed to pay for the labor and material.*
9. *Others have rights out of leases, contracts, or options.*
10. *Someone else has an easement on your land.*
11. *Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease, or to make a mortgage loan.*
12. *You are forced to remove your existing structure – other than a boundary wall or fence- because:*
    - *it extends on to adjoining land or on to any easement*
    - *it violates a restriction shown in Schedule B*
    - *it violates an existing zoning law.*

13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.
14. Other defects, liens, or encumbrances.

(Policy, Owner's Coverage Statement)(emphasis added).

The Policy also contains Exclusions that states the insured is not insured against loss, costs, attorneys' fees and expenses resulting from the following:

3. Title Risks:
• that are created, allowed or agreed to by you
• that are known to you, but not to us, on the Policy Date – unless they appeared in the public records
*• **that first affect your title after the Policy Date** - this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks.*

(Policy, Exclusions)(emphasis added).

None of the Title Risks set forth in the Owner's statement of coverage are triggered, and, perhaps more importantly, the allegations of the unrecorded plat affect title after the Policy Date, meaning they are specifically excluded from coverage under the Policy. As stated above and here again, the Plaintiffs' title is as shown on the Recorded Plat and only on the Recorded Plat. Therefore, there is no coverage, and, accordingly, no breach of contract.

IV. THE PLAINTIFFS RECEIVED THE BENEFIT OF THEIR TITLE INSURANCE POLICY AND FAIL TO ALLEGE ANY CAUSE OF ACTION FOR ANY BREACH OF THAT CONTRACT

Title insurance is retrospective, not prospective. The Plaintiffs received the benefit of their title issuance and there has been no breach of that contract. Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title **which are in existence at the time the insured takes title.** *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013); *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981)(citing *National Mortgage Corp. v. American Title Ins.. Co.*, 261 S.E.2d 844 (N.C. 1980))(emphasis added). Title insurance is

unique in that it is retrospective, not prospective. *Firstland Village Assoc., id.* at 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id* Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save the insured harmless from any loss through defects, liens, or encumbrances that may affect or burden the insured's title when the insured takes it. *Id.*

Here, the Plaintiffs allege that the title Policy insured Lot 108, containing 1.837 acres as described in the deed and recorded plat, which they received title for at their closing in 2002. The Plaintiffs admit that the recorded deed references the Recorded Plat with the correct acreage and showing the road going around their property. It was not until 2006, four years after the closing, that the Plaintiffs claim to have learned of the alleged unrecorded plat showing a different acreage and a different configuration of Balsam Mountain Preserve Road. At the time the Plaintiffs took title, there were no encumbrances of record, and the Plaintiffs received good title to their land. Further, there is no reference to the so-called unrecorded plat, meaning there can be no coverage to have been breached. *See Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996) (holding Chicago Title could not have breached a contract where there was no coverage for a fourteen acre tract of land). As in *Christensen*, where there is no coverage, there is no breach.

Neither Chicago Title nor its agents at Counsellor Title Agency, Inc., could have been aware of any unrecorded plat. To the contrary, the Plaintiffs have alleged in Paragraph 10 of their Amended Complaint that they received a duly executed deed to Lot 108 referencing a recorded plat showing 1.837 acres transferred and Balsam Mountain Preserve Road going around Lot 108. (Plaintiffs' Third Amended Complaint, ¶ 13) There was no lien, encumbrance, defect or other matter recorded at the time the Plaintiffs' Policy was issued that could have been

discovered at the time of closing. (*Id.* ¶13). Instead of protecting the insured against matters that may arise during a stated period *after* the issuance of the policy, a title policy is designed to save the insured from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it. *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981)

In this matter, there were no such defects, liens, or encumbrances of record at the time of the issuance of the policy. The Plaintiffs' own allegations make that clear. Accordingly, there is no breach of contract by Chicago Title and Chicago Title is entitled to judgment as a matter of law.

V. THERE IS NO LIABILITY FOR ANY NEGLIGENCE CLAIM WHERE THE PLAINTIFFS' OWN ALLEGATIONS SET FORTH NO DUTY TO PROTECT THE PLAINTIFFS FROM UNRECORDED MATTERS, NO TITLE SEARCH WOULD REVEAL UNRECORDED MATTERS, AND NO EXPERT HAS ESTABLISHED ANY DUTY OR BEACH THEREOF

The Plaintiffs have alleged that Chicago Title is negligent since it "knew or should have known the risks associated with Lot 108 and either willingly allowed exposure to such risks despite this knowledge or negligently failed to ascertain and insure against such risks." (Plaintiffs' Third Amended Complaint, ¶ 153) By their own allegations, no title search could have revealed that there was an unrecorded plat. No title search would have revealed an unrecorded plat. There are no allegations that state what risks were known or should have been known at the time the policy of insurance was issued, which is the time at issue as to the coverage under the policy. *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013). There has been no expert witness named nor testimony provided that Chicago Title has been negligent in the denial of any claims. The only allegation in the Third Amended Complaint relating to the time of issuance of the policy is that

the deed references the recorded plat and that plat showing Lot 108 containing 1.87 acres and showing Balsam Mountain Road going around the property. (Plaintiffs' Third Amended Complaint, ¶ 13). There can be no negligence where the Plaintiffs' allegations fail to show how Chicago Title could have breached any duty to the Plaintiffs at the time the policy was issued as was required by the recorded documents on file in Jackson County, North Carolina.

Chicago Title denied the Plaintiffs' claim regarding the unrecorded plat discovered in 2006, a copy of which is not part of the Plaintiffs' Amended Complaint. The Plaintiffs' own pleadings make clear that this is an item discovered four years after the policy was issued. There can be no breach of a duty of care here for a failure to investigate something that was not of public record and issued after the policy. *Preservation Capital Consultants, LLC, id. at*, 406 S.C. 309, 751, S.E.2d 256 (2013) The policy at issue, referenced as the First Insurance Contract, insures Lot 108, with 1.87 acres, without a road going through it based upon the recorded plat from 2002. Title insurance is unique in that it is retrospective, not prospective. *Firstland Village Assoc., id.* at 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id.* There can be no negligence in failing to ascertain and insure risk when those risks arise four years after the policy was issued and remain unrecorded. Accordingly, the claims against Chicago Title should be granted judgment as a matter of law; therefore it is hereby

ORDERED, that the Defendant Chicago Title Insurance Company be awarded a judgment as a matter of law in this matter and is hereby dismissed from this action with finality; and

IT IS SO ORDERED!

Beaufort, South Carolina
12-15, 2016

The Honorable Carmen T. Mullen
Presiding Judge of the Fourteenth Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
William Loflin and Leslie Loflin,	)	Civil Action No. 2013-CP-07-1807
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	**ORDER GRANTING DEFENDANT COUNSELLOR TITLE AGENCY, INC.'S AMENDED MOTION FOR SUMMARY JUDGMENT**
BMP Development LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J. K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
	)	
Defendants.	)	

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This matter is before the Court on Defendant Counsellor Title Agency, Inc.'s ("Counsellor") Amended Motion for Summary Judgment. Counsellor's motion was filed on March 7, 2016 and the Court held a hearing on Counsellor's motion on June 13, 2016. Plaintiffs were represented at the hearing by Daniel A. Speights and A.G. Solomons, III, and Counsellor was represented by Robert E. Stepp. Following the hearing, the Court took Counsellor's motion under advisement and allowed the parties to submit additional briefs and supporting materials in support of their respective positions.

After hearing the arguments of counsel at the hearing and considering the briefs and other materials submitted by the parties in connection with the motion, the Court grants Counsellor's Amended Motion for Summary Judgment.

UNDISPUTED FACTS

The undisputed facts of this case may be summarized as follows. In February of 2002, Plaintiffs purchased Lot 108 in the Balsam Mountain Preserve Subdivision in Jackson County,

North Carolina. (Third Am. Compl. ¶¶ 10, 12.) According to Plaintiffs, the seller, BMP Development LP ("Balsam"), represented to Plaintiffs that Lot 108 "consisted of approximately 1.9 acres and that Balsam Mountain Road circumnavigated Lot 108." (Third Am. Compl. ¶ 10.) Upon completion of the closing, Balsam provided to Plaintiffs a deed to Lot 108 and an individual recorded plat of Lot 108. (Third Am. Compl. ¶ 13.) The recorded plat "reflected that Lot 108 consisted of 1.837 acres, and that Balsam Mountain Preserve Road went around rather than through Lot 108." (Third Am. Compl. ¶ 13.)

The deed to Plaintiffs incorporated the recorded plat and was recorded in Jackson County, North Carolina. (Third Am. Compl. ¶ 13.) Upon completion of the closing, Counsellor, in its capacity as agent for Chicago Title Insurance Company ("Chicago Title"), issued an owner's title insurance policy that insured, subject to the terms and exceptions stated therein, title to Lot 108 using the same legal description as was contained in the deed.

Plaintiffs allege that Balsam informed them in 2006 that, contrary to the deed and the recorded plat, Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road went through Lot 108 instead of around it. (Third Am. Compl. ¶ 20.) Plaintiffs allege that this configuration of Lot 108 is contained in an unrecorded plat. No plat or other document reflecting this configuration has ever been recorded in the public records. (Third Am. Compl. ¶ 20.) Plaintiffs contend that the true configuration of Lot 108 is shown on the unrecorded plat and represents an encroachment and/or trespass on Lot 108. (Third Am. Compl. ¶¶ 20-21.) Seven years after discovering these facts about their property, Plaintiffs filed their original complaint in this matter on July 18, 2013. Plaintiffs have since amended their complaint three times. With respect to Counsellor, Plaintiffs assert two causes of action: (1) breach of contract; and (2)

negligence. (Third Am. Compl. ¶¶ 147-155.) Now before the Court is Counsellor's Amended Motion for Summary Judgment.

LEGAL STANDARD

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." Singleton v. Sherer, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Quail Hill, LLC v. County of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Singleton, 377 S.C. at 197-98, 659 S.E.2d at 203. Instead, "[t]he nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 198, 659 S.E.2d at 203. "It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine." Evans v. Stewart, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006). "Although summary judgment is a drastic remedy which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper." Id.

Applying this standard to the undisputed facts of this case, the Court grants Counsellor's Amended Motion for Summary Judgment for the reasons discussed below.

CONCLUSIONS OF LAW

Counsellor has moved for summary judgment in this case on several separate grounds. (1) Counsellor argues Plaintiffs' claims against Counsellor are barred by the statute of limitations. (2) Counsellor argues Plaintiffs have not suffered any loss or damage because Plaintiffs have title to the property as insured and as conveyed. (3) Counsellor argues Plaintiffs' claims are barred because Plaintiffs consented to, acquiesced in, or failed to mitigate the damages they allege to have suffered and, as a result, no act or omission of Counsellor proximately caused any damage Plaintiffs allege. (4) Counsellor argues Plaintiffs' breach of contract cause of action fails because there is no evidence of any agreement between Plaintiffs and Counsellor beyond Counsellor's agreement to issue the title policy as agent for Chicago Title. Counsellor also argues that it cannot be liable to Plaintiffs under the title insurance policy and that Plaintiffs are not entitled to any relief under the policy in any event. (5) Counsellor argues Plaintiffs' negligence cause of action fails because Counsellor was not under any duty to advise Plaintiffs regarding coverage issues. The Court finds Counsellor is entitled to summary judgment on grounds 1, 2, 3, 4, and 5 and that each of these is independently sufficient to warrant summary judgment in Counsellor's favor.

A. Plaintiffs' claims against Counsellor are barred by the statute of limitations.

The Court finds the statute of limitations expired well before Plaintiffs commenced this action and, as a result, Counsellor is entitled to summary judgment. The statute of limitations for both causes of action asserted by Plaintiffs against Counsellor is three years. S.C. Code Ann. § 15-3-530. Pursuant to the discovery rule, the statute of limitations begins to run on the date "the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action [has arisen]." Dean v. Ruscon, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).

"The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." Gibson v. Bank of America, N.A., 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). "The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery is developed." Id.

"Once a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party might exist, the requirement of reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all." Binkley v. Burry, 352 S.C. 286, 297-98, 573 S.E.2d 838, 844-45 (Ct. App. 2002) (internal quotations omitted). A plaintiff's ignorance of the "full extent of the damage is immaterial" in setting the accrual date. Dean, 321 S.C. at 365, 468 S.E.2d at 647. The statute begins to run when a party should realize his injury may be attributable to some other party's action. Republic Contracting Corp. v. S.C. Dept. of Highways & Pub. Transp., 332 S.C. 197, 208, 503 S.E.2d 761, 767 (1998). "[U]nder South Carolina law, the date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations." Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 371, 597 S.E.2d 27, 29 (2004). Likewise, the discovery of new evidence is irrelevant to the running of the statute. Tanyel v. Osborne, 312 S.C. 473, 475, 441 S.E.2d 329, 331 (Ct. App. 1994) (finding statute of limitations began to run when motorist witnessed events causing loss rather than date upon which he discovered evidence to support claim).

In determining the date the statute of limitations commences to run, "[t]he focus is upon the date of discovery of the *injury*, not the date of discovery of the *wrongdoer*." Wiggins v.

Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (emphasis added); see also Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 335 (1981) (finding plaintiff on notice when pistol accidentally and unexpectedly discharged, and thus was possibly defective). The running of the statue is not delayed until all available legal theories are developed. Austin v. Conway Hosp., Inc., 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987) (finding statute of limitations began to run when plaintiff witnessed events at hospital, rather than when a later full theory of recovery was developed after reviewing hospital's records).

In this case, the undisputed facts establish that Balsam told Plaintiffs no later than 2006 that, contrary to the deed and the recorded plat, (1) there was a possible encroachment on Lot 108, (2) the property may contain only 1.4 acres, and (3) Balsam Mountain Preserve Road apparently went through the property instead of around it. (Third Am. Compl. ¶ 20.) On that date, a reasonable person would have reason to believe that some right of his may have been invaded or that some claim against another party might exist. Binkley, 352 S.C. at 297-98, 573 S.E.2d at 844-45. At that time, the statute of limitations commenced to run. Plaintiffs did not file the instant case until July of 2013, well beyond the three-year statute of limitations period. The Court therefore finds that Plaintiffs' causes of action are barred by the statute of limitations and Counsellor is entitled to summary judgment as a matter of law.

Plaintiffs argue the statute of limitations did not commence to run until 2012 when they allegedly discovered that the road going through their property existed before the closing, which they say gave rise to a claim against Counsellor. The Court rejects Plaintiffs' argument because it is contrary to the above-cited and well-established South Carolina law that the statute of limitations begins to run on the date the Plaintiff discovers the injury, not the identity of a wrongdoer, or when a full blown theory of recovery is developed. There is no dispute that both

the nature and extent of Plaintiffs' injuries were known to them in 2006 and the statute began to run at that time. The statute expired years before this action was brought against Counsellor in 2013.

B. Plaintiffs have not suffered any loss or damage because Plaintiffs have title to the property as insured and as conveyed.

The basis of Plaintiffs' complaint in this case is that Lot 108 is not as it was represented to Plaintiffs at the closing of their purchase. Specifically, Plaintiffs complain the lot is smaller than they were told it was and that the road Plaintiffs were told circumnavigates the property actually goes through it. Applicable law establishes conclusively, however, that Plaintiffs' legal title to Lot 108 is as reflected in the recorded deed and plat and remains today as they understood it to be at the closing of their purchase. As a result, the Court holds as a matter of law that Plaintiffs have not suffered any loss or damage with respect to their title and summary judgment in Counsellor's favor is required.

North Carolina statutory law renders unrecorded interests in land invalid against subsequent purchasers of the property. [1] N.C.G.S.A. § 47-18. Thus, unless an interest or encumbrance appears in the public record, it is not enforceable against a person who acquires the land. "[A] purchaser must examine the public registry. If he finds no record [of a defect in title], even if he knows there has been a prior conveyance, he may record his deed with the assurance that his title will prevail." Hill v. Pinelawn Mem'l Park, Inc., 292 S.E.2d 779, 782 (N.C. 1981). "The General Assembly, by enacting [§ 47-18] clearly intended that prospective purchasers should be able to safely rely on the public records." Schuman v. Roger Baker & Assocs., Inc.,

[1] Because the real property that is the subject of this action is located in North Carolina, the Court finds North Carolina law controls as to matters of title and therefore controls the duties of a person conducting a title examination of that property. Otherwise, South Carolina law controls in this case.

319 S.E.2d 308, 311 (N.C. App. 1984); see also Chrysler Credit v. Burton, 599 F. Supp. 1313, 1318 (M.D.N.C. 1984). As explained by the North Carolina Supreme Court in Turner v. Glenn, "[a] purchaser is chargeable with notice of the existence of [an encumbrance] only if a proper search of the public record would have revealed it and it is conclusively presumed that he examined each recorded deed or instrument in his line of title and to know its contents." 18 S.E.2d 197, 201 (N.C. 1942). "The law contemplates that a purchaser of land will examine each recorded deed and other instrument in his chain of title and charges him with notice of every fact affecting his title which an accurate examination of the title would disclose." Hensley v. Ramsey, 199 S.E.2d 1, 2 (1973). "A purchaser is put on notice of any fact or circumstance affecting his title which is reasonably disclosed by the *instruments* in his line of title." Chrysler Credit, 599 F. Supp. at 1318 (citing Turner, 18 S.E.2d 197 (N.C. 1942)) (emphasis in original).

Because interests in North Carolina land that are not reflected in the public record are not enforceable against subsequent purchasers for value, the Court finds the unrecorded plat at issue in this case cannot operate to diminish or encumber the estate that Plaintiffs received in their deed and, therefore, cannot legally burden Lot 108. The unrecorded plat about which Plaintiffs' complain has not diminished Plaintiffs' title to the property. Therefore, as a matter of law, Plaintiffs have suffered no damages resulting from an alleged diminution of their title to Lot 108 at the hands of Counsellor and therefore Counsellor is entitled to judgment as a matter of law.[2]

[2] Because the Court concludes the unrecorded plat has no legal effect under North Carolina law, Plaintiffs may have valid claims against any persons or entities that are acting in derogation of Plaintiffs' title. Shuman, 319 S.E.2d at 311; Stephenson v. Jones, 316 S.E.2d 366 (N.C. App. 1984) (holding that secret, hidden, and unregistered trusts will not defeat a bona fide purchaser for value).

C. Plaintiffs' breach of contract claim against Counsellor fails because, as a matter of law, Counsellor cannot be liable to Plaintiffs under the title insurance policy.

In their breach of contract cause of action, Plaintiffs seek to recover benefits under the contract of title insurance they entered into with Chicago Title. Plaintiffs allege Counsellor agreed "to investigate and insure that Lot 108 was protected from all risks set forth herein, including but not limited to, easements, encumbrances, and fraud." (Third Am. Compl. ¶ 148.) Plaintiffs further allege that "[i]n contradiction to the Insurance Contracts, Lot 108 contains 1.4 rather than 1.87 acres, and is and has been since before the Closing encumbered and encroached upon by a road dissecting the property." (Third Am. Compl. ¶ 149.) Plaintiffs conclude that Counsellor (and Chicago Title) breached the insurance contract by "refusing to provide [Plaintiffs] any relief from the damages caused by the insured risks." (Third Am. Compl. ¶ 150.)

The Court finds Plaintiffs do not have a breach of contract cause of action against Counsellor, either pursuant to the insurance policy itself or based upon the alleged agreement by Counsellor to perform services for Plaintiffs beyond those typically performed by a title insurance agent. With respect to the insurance policy itself, Counsellor is not a party to that contract. Counsellor is not the insurer under the owner's title insurance policy as the guarantor of that insurer. It is undisputed that Counsellor served only as the agent for Chicago Title, the insurer, in the issuance of the policy. "[W]here an agent enters into a contract for a known principal, while acting within his authority as such agent, he is not personally liable on the resultant contract." Keeshan v. Eau Claire Co-op. Health Centers, Inc., C.A. No. 3:05-3601-MBS, 2007 WL 2903962, at *23 (D.S.C. Oct. 2, 2007) (citing Skinner & Ruddock, Inc. v. London Guarantee & Acc. Co., 239 S.C. 614, 124 S.E.2d 178, 180 (1962)); Green v. Indus. Life & Health Ins. Co., 199 S.C. 262, 18 S.E.2d 873 (1942). "The liability, if any, for a breach of such

contract is that of the principal alone." Id. Therefore, any claim by Plaintiffs under the insurance policy itself would be a claim against Chicago Title, not against Counsellor.

The only evidence of any agreement between Plaintiffs and Counsellor relates to the issuance of the title policy. Therefore, Plaintiffs' allegation that Counsellor agreed "to investigate" can refer only to an investigation necessary to issue the title insurance policy. Title examiners investigating title to land in North Carolina are not required to look for information that is not publicly available. See, e.g., Stern v. Lee, 20 S.E. 736, 743 (N.C. 1894) (recognizing prospective purchasers are not required to hire "detectives," but instead may rely on the public record). Rather, "[i]n order to give a title opinion, an abstractor must make a careful . . . search of the *public* records." Burkhead, 146 S.E.2d at 805 (emphasis added). A title examiner's duty to investigate title is limited to a review of matters appearing in the public record, absent a specific agreement to do more. Hill, 282 S.E.2d at 782 (holding that title protection requires examination of the public registry only); Beach & Adams Builders, Inc. v. Northwestern Bank, 220 S.E.2d 414, 416 (N.C. App. 1975) (recognizing title examiner's right to rely on public record); Burkhead v. Farlow, 146 S.E.2d 802 (N.C. 1966) (holding that a title abstractor must examine public records).

Plaintiffs complain Counsellor failed to investigate title by failing to discover a plat that by Plaintiffs' own admission has never been made part of the public record. Because the duty of title examiners does not extend to matters that are not in the public record at the time of their search, and because the Third Amended Complaint does not allege and Plaintiffs have not identified any evidence that supports a finding of any special agreement by which Counsellor undertook to do more than examine the public record, the Court concludes Plaintiffs' breach of contract cause of action against Counsellor fails as a matter of law.

D. Plaintiffs' breach of contract claim against Counsellor fails because, even if Counsellor could be liable under the title insurance policy, Plaintiffs are not entitled to any relief under the policy.

As set forth above, the Court concludes there is no basis upon which Counsellor, as title insurance agent, may be held liable to Plaintiffs under the title insurance policy itself. However, even if Plaintiffs were able to set forth a theory upon which such liability may exist, the Court finds Counsellor still would be entitled to summary judgment because Plaintiffs are not entitled to any relief under the policy. The Court has entered a separate order granting summary judgment in favor of Chicago Title and the Court incorporates that order herein by this reference.

E. Plaintiffs' negligence claim against Counsellor fails because Counsellor was not under any duty to advise Plaintiffs regarding coverage issues.

Plaintiffs' negligence cause of action alleges Counsellor was under a duty "to investigate and recommend an insurance policy to protect [Plaintiffs] from reasonably foreseeable risks" and that Counsellor "negligently failed to select a policy to insure [Plaintiffs] from the risks which Chicago has denied are covered by the Insurance Contract." (Third Am. Compl. ¶ 154.) Plaintiffs' argument concerning the duties of an insurance agent is contrary to applicable law.

"An insurance agent is under no duty to advise an insured at the point of application, absent an express or implied undertaking to do so." Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005); Sullivan Co. v. New Swirl, Inc., 313 S.C. 34, 36, 437 S.E.2d 30, 31 (1993); Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 333, 574 S.E.2d 502, 509 (Ct. App. 2002); Trotter v. State Farm Mut. Auto Ins. Co., 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988) (holding that the agent was under no duty to advise an insured about an exclusion in the policy sold to the insured). Plaintiffs have not alleged or established that there was any agreement by Counsellor to advise Plaintiffs regarding the title insurance policy they were purchasing. Despite having submitted two affidavits from Mr. Loflin, Plaintiffs

have not identified for the Court any facts in the record that would support such an inference, such as the payment of additional consideration beyond payment of the title insurance premium, a clear request for advice by the insured, a clear agreement by Counsellor to provide that advice, or a course of dealing pursuant to which Counsellor provided that advice to Plaintiffs over a long period of time. See Trotter, 377 S.E.2d at 347.

Because Counsellor was not under any duty to make any recommendation to Plaintiffs and because Plaintiffs have not alleged circumstances from which such a duty can be inferred, Plaintiffs' negligence cause of action against Counsellor fails as a matter of law.

CONCLUSION

Having considered all of the evidence submitted and arguments raised, both at the hearing and through submitted briefs and materials, the Court finds Counsellor is entitled to judgment as a matter of law in this case on each of the grounds addressed above. Accordingly, Counsellor's Amended Motion for Summary Judgment is granted.

IT IS SO ORDERED.

The Honorable Carmen T. Mullen
Presiding Judge

Beaufort, S.C.
9-15, 2016

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	CASE NO.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	
Plaintiffs,	
vs.	**ORDER GRANTING DEFENDANTS J.K. COWARD, JR. AND COWARD, HICKS & SILER, P.A.'S MOTION FOR SUMMARY JUDGMENT**
BMP Development, LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company and Counsellor Title Agency, Inc.	
Defendants.	

FILED
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This matter comes before the Court on Defendants J.K. Coward, Jr. and Coward, Hicks & Siler, P.A.'s motion for summary judgment. A hearing was held on June 13, 2016. Defendants submitted a supporting memorandum and exhibits prior to the hearing. The Court subsequently reviewed a response memorandum and exhibits submitted by Plaintiffs, and Defendants' reply memorandum. For the reasons stated herein, the Court grants Defendants' motion.

Introduction

This lawsuit arises out of Plaintiffs William and Leslie Loflin's purchase of an undeveloped lot in Jackson County, North Carolina in 2002. The Loflins have asserted a variety of claims against the developer/seller, the title insurer, the title agency, and the closing attorney and his law firm. All of the claims stem from a dispute over the size and configuration of the lot they purchased. Defendant J.K. Coward, Jr. is an attorney in Sylva, North Carolina who represented the Loflins in their purchase of the lot in 2002. His firm, Defendant Coward, Hicks & Siler, P.A., subsequently handled two refinance closings for the Loflins in 2004 and 2006.

The lot that is the subject of this lawsuit is Lot 108 in Balsam Mountain Preserve. The Loflins contracted to purchase Lot 108 with the understanding that it consisted of approximately

1.9 acres as shown on a plat prepared for the developer/seller. Defendant J.K. Coward represented the Loflins in the closing on February 15, 2002. In that closing, the Loflins received title to Lot 108 consisting of 1.837 acres as shown in a plat recorded at the same time as their deed (the "Recorded Plat").

Four years later, in 2006, the Loflins were approached by the developer/seller, who claimed that Lot 108 was not 1.837 acres as shown in the Recorded Plat, but was actually 1.4 acres, and that a road shown in the Recorded Plat as bordering their lot actually encroached onto their property. The Loflins were shown another unrecorded plat depicting what the developer represented to be the actual size and configuration of Lot 108 (the "Unrecorded Plat"). The developer asked the Loflins to sign a quit claim deed to make their title consistent with the lot shown in the Unrecorded Plat. The Loflins refused, and the ensuing dispute between the Loflins and the developer/seller is what ultimately gave rise to this litigation.

In March of 2012, the Loflins made a claim under their title insurance policy. Chicago Title denied the claim, finding that the Loflins held title to Lot 108 as depicted in the Recorded Plat, and that the Unrecorded Plat did not create a title defect. In July 2013, the Loflins filed this lawsuit against the developer/seller, Chicago Title, and Counsellor Title, asserting claims for trespass, encroachment, and breach of contract.

In January 2015, the Loflins amended their complaint to assert claims against J.K. Coward, Jr. and Coward, Hicks & Siler, P.A. The Loflins' claims against the Coward Defendants were brought based on their belief that the Coward Defendants knew about the Unrecorded Plat when they closed in 2002 and when they refinanced in 2004 and 2006, but failed to disclose it to the Loflins. It has since been shown in discovery and is undisputed that Coward Defendants first learned about the existence of the Unrecorded Plat after this lawsuit was filed.

The Coward Defendants filed the instant motion on April 5, 2016 asserting, *inter alia*, that the Loflins' claims are barred by North Carolina's four-year statute of repose and South Carolina's three-year statute of limitations.

Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24, 25 (1988).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 545 (1991). "Once moving party carries its initial burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings." Id. (internal citations and quotations omitted).

Findings and Conclusions

I. North Carolina's statute of repose

The Coward Defendants have asserted that the claims against them are barred by North Carolina's four-year statute of repose, which runs from "the last act of the defendant giving rise

to the cause of action" N.C. Gen. Stat. § 1–15(c) (2013) ("in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action.").

A. Choice of law

The Court must first determine whether North Carolina law applies. The application of North Carolina law and this statute of repose in particular was the subject of a recent decision by the South Carolina Court of Appeals. In Rogers v. Lee, 414 S.C. 225, 777 S.E.2d 402, 405 (Ct. App. 2015), the court held that claims against an attorney and his law firm arising out of the attorney's representation of his client in a North Carolina workers' compensation proceeding were governed by North Carolina law, notwithstanding that the client resided in South Carolina and felt the consequences of the alleged conduct in South Carolina. The Rogers court applied the long-standing principle of *lex loci delicti* and found that because the injury occurred in North Carolina, North Carolina law governed.

The Coward Defendants are a North Carolina attorney and his North Carolina law firm. They are being sued by the Loflins for alleged acts and omissions that occurred in North Carolina in the course of representing the Loflins in their purchase and refinancing of real property in North Carolina. The Court finds that the alleged wrongful conduct on the part of the Coward Defendants and any resulting injury sustained by the Loflins occurred in North Carolina, and therefore, North Carolina law governs. As the Rogers court observed, to hold otherwise would subject South Carolina attorneys representing out-of-state clients in South Carolina matters to the laws of another jurisdiction simply by virtue of the client's residence. Id. at 407 n. 2.

The Loflins' attempts to distinguish Rogers are unavailing. The Rogers court did not resolve the choice of law dispute by weighing the connections with the respective states as a court might do if applying some other choice of law test. Nor did the holding in Rogers turn on the presence of a choice of law provision. Although the Rogers court separately addressed the impact of a choice of law provision, the court held that North Carolina law applied because the injury occurred in North Carolina. To read Rogers in such a way would require departing from South Carolina's long-standing principle of *lex loci delicti*.

The Court finds that the Loflins' claims against the Coward Defendants are governed by the substantive law of North Carolina, including North Carolina's four-year statute of repose.

B. Application of North Carolina's statute of repose

The Loflins first asserted claims against the Coward Defendants in their Second Amended Complaint filed on January 6, 2015. To be timely under North Carolina's statute of repose, the last act giving rise to the claims must have occurred no earlier than January 6, 2011. N.C. Gen. Stat. § 1–15(c) (2013) (". . . in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action.").

The Loflins' claims against the Coward Defendant arise out of a real estate closing that occurred on February 15, 2002. The Coward Defendants subsequently represented the Loflins in refinancing their loan on the property in 2004 and 2006, the last of which occurred on April 28, 2006. It is undisputed that the Coward Defendants have not represented the Loflins in connection with any other matters and they have not provided any legal advice to the Loflins in the four years preceding the Second Amended Complaint.

The Loflins argue that by previously representing them, the Coward Defendants became obligated to assist the Loflins in all future issues arising from the transaction, and their failure to

do so constitutes some "act" within the four years preceding the Second Amended Complaint. The Loflins' argument amounts to what would be a continuing duty arising out of a real estate transaction that, if correct, would render the statute of repose meaningless. North Carolina courts have considered what constitutes "the last act of the defendant giving rise to the cause of action" and rejected this very proposition.

In Jordan v. Crew, 125 N.C. App. 712, 482 S.E.2d 735, 737-38 (Ct. App. 1997), the plaintiffs filed a legal malpractice suit in 1995 arising out of a 1980 closing. To avoid the four-year statute of repose, the plaintiffs argued that the last act for purposes of the statute was the attorney's alleged failure and refusal to correct the error in 1992 when the attorney filed an allegedly false affidavit. The court rejected this argument, and instead held that the last act that triggered the statute was the drafting and delivery of the deeds in 1980. Id. The court found that the "defendant's legal duty to the grantor ended upon the drafting and delivery of the deeds" Id. at 739. The court observed that accepting the plaintiffs' argument "would forever stay the applicable statutes of limitations and repose for actions involving errors in deeds . . . ." Id. at 739.

The Loflins' claims against the Coward Defendants arise out of closings that occurred in 2002, 2004 and 2006. The Court finds that the last act giving rise to their claims occurred more than four years prior to January 5, 2015. Accordingly, their claims against the Coward Defendants are barred by North Carolina's four-year statute of repose.

II. South Carolina's three-year statute of limitations.

The Coward Defendants have also moved for summary judgment based on the expiration of South Carolina's statute of limitations. All of the Loflins' claims against the Coward Defendants are subject to a three-year statute of limitations. *See* S.C. Code Ann. § 15-3-530(5) (2005). The statute of limitations is subject to the discovery rule, which requires commencement

of an action "within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535 (2005).

"Under the discovery rule, the statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence." Cline v. JE Faulkner Homes, Inc., 359 S.C. 367, 597 S.E.2d 27, 29 (Ct. App. 2004) (*citing* Smith v. Smith, 291 S.C. 420, 354 S.E.2d 36, 40 (1987). "Under this objective test, one is charged with discovery when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim might exist." Id. (*citing* Austin v. Conway Hosp., Inc., 292 S.C. 334, 356 S.E.2d 153, 156 (Ct. App. 1987).

The Loflins' pleadings demonstrate that they have known, since 2006, that a dispute exists over the size and configuration of Lot 108. Specifically, the Loflins allege that beginning in 2006, they were aware of the developer/seller's claim about the size and configuration of the lot, they were aware of the alleged road encroachment, they were aware of the Unrecorded Plat, and they knew that the developer/seller refused to remedy the problem. *See* Third Am. Compl. ¶ 20. The Loflins knew or objectively should have known at that point that a claim might exist.

The Loflins do not dispute that they were on notice of claims against the developer/seller beginning in 2006, but they argue that the statute of limitations did not begin running on their claims against other defendants in this lawsuit until 2012. However, "under South Carolina law, the date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations." Cline, 597 S.E.2d at 29.

The focus of the discovery rule is "the date of discovery of the injury, not the date of discovery of the wrongdoer." Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169, 170 (1994).

The injury that the Loflins complain of in this lawsuit is the same injury arising out of the same dispute that the Loflins have had actual knowledge of since 2006. The statute of limitations began running at that point for all of the Loflins' claims. *See* id. ("If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury.").

The Loflins did not file suit against the Coward Defendants until January 6, 2015, almost nine years after they knew or objectively should have known that the claims might exist. The Court finds that their claims against the Coward Defendants are barred by South Carolina's three-year statute of limitations.

Conclusion

Based on the foregoing, the Coward Defendants are entitled to judgment as a matter of law as to each cause of action against them.

Accordingly, Defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

This 15 day of August, 2016

C Mullen

Carmen T. Mullen
Circuit Court Judge

Beaufort, South Carolina

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	COMPLAINT
	)	
Balsam Mountain Preserve Community Association, Chicago Title Insurance Company and Counsellor Title Agency, Inc.	)	
Defendants.	)	

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FILED AND RECORDED
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Plaintiffs, by and through undersigned counsel, allege as follows:

PARTIES

1. Plaintiffs William and Leslie Loflin ("Loflins") are residents of Beaufort County, South Carolina

2. Defendant Balsam Mountain Preserve Community Association ("BMPCA") is a foreign corporation with it's registered agent for service residing in Beaufort County South Carolina.

3. Defendant Chicago Title ("Chicago") is a foreign corporation doing systematic and continuous business in Beaufort County and throughout South Carolina.

4. Defendant Counsellor Title Agency Inc. ("Counsellor") is a resident of Beaufort County, South Carolina.

JURISDICTION

5. This Court has jurisdiction over this matter.

FACTUAL ALLEGATIONS

6. In 2001, the Loflins purchased lot 108 located at Balsam Mountain Preserve in Sylva, North Carolina for a purchase price of $495,000.00.

7. The purchase price reflected a discount from actual price to the public at large due to the Loflins being enabling investors in the development.

8. Mr. Loflin inspected the property prior to closing. Lot 108 was not staked at the time of inspection, but Mr. Loflin was told that the property consisted of approximately 1.9 acres and that the road circumnavigated his property as shown on the development plan map provided to him.

9. Prior to closing, the Loflins entered into contract with Chicago and Counsellor in Beaufort County, South Carolina. The purpose of the contract was to investigate and insure the title of lot 108 as more fully set forth therein.

10. At closing, Mr. Loflin was presented with a plat which reflected that Lot 108 consisted of 1.837 acres, and that the road went around rather than through Lot 108.

11. The deed to Mr. and Mrs. Loflin incorporated the plat showing that Lot 108 consisted of 1.837 acres, and that the road went around rather than through the property. The plat was recorded in the Jackson County Records in Plat Cabinet 11 at Slide 383.

12. In 2011, the Loflins became aware that another plat was prepared for Balsam Mountain Preserve prior to closing which showed that the property purportedly consisted of 1.4 acres and that the Balsam Mountain Preserve road dissected the

Loflins' property. The second plat was never recorded or shown to the Loflins before the closing.

13. Contrary to the recorded plat, the Balsam Mountain Preserve road dissects Lot 108.

14. BMPCA exercises control and maintains the road through the Loflins' property and .437 acres owned by the Loflins.

15. In 2012, the Loflins contacted Chicago informing Chicago that they were now aware that a second plat was created and that the road did not circumnavigate but rather dissected lot 108, impairing the value, the utility, and the insured title.

16. After performing a title search, Chicago responded that the only recorded deed and plat did not show any impairments on the title and therefore the Loflins had no cognizable injury.

17. Upon receipt of the correspondence from Chicago, the Loflins contacted BMPCA and informed BMPCA that it was encroaching and continuously trespassing upon lot 108. BMPCA refused to remedy this situation, and it continues to encroach and continuously trespass upon Lot 108.

CAUSES OF ACTION

FOR A FIRST CAUSE OF ACTION
CONTINUOUS TRESPASS

18. The Loflins specifically incorporate all other paragraphs contained in this Complaint as if specifically stated herein.

19. The Loflins own lot 108 in Balsam Mountain Preserve which consists of 1.837 acres and the only recorded plat is contained at Plat Cabinet 11, Slide 383 in the Jackson County Records in North Carolina.

20. BMPCA, in contradiction to the deed, plat, development plan, and title policy, controls and maintains a road dissecting lot 108.

21. The road and the materials making up the road constitute a continuing trespass and an encroachment under the applicable law.

22. As a result of BMPCA's continuing trespass and encroachment, the Loflins have been and continue to be injured.

23. The Loflins are entitled to relief including compensation for the injury and an Order directing BMPCA to immediately remove the road from the property and restore all of the acreage which they purchased.

FOR A SECOND CAUSE OF ACTION
ENCROACHMENT

24. The Loflins specifically incorporate all other paragraphs contained in this Complaint as if specifically stated herein.

25. A road maintained and/or owned and operated for the benefit of BMPCA, contrary to the plat, the development plan, and all explanations prior to sale, encroaches upon lot 108. BMPCA is the successor in interest of the original encroaching party and has continued the encroachment to its own benefit. The Defendant has been notified of the encroachment and has not taken any action to cure the encroachment, if it can be cured at all.

26. As a result of Defendant BMPCA's encroachment, the Loflins have been and continue to be injured and are entitled to full relief including compensation and removal of the encroachment.

FOR A THIRDCAUSE OF ACTION
BREACH OF CONTRACT

27. The Loflins specifically incorporate all other paragraphs contained in this Complaint as if specifically stated herein.

28. The Loflins entered into contract with Counsellor and Chicago to investigate title and insure that the title the Loflins received for lot 108 was valid and free from any encumbrance.

29. The insurance policy specifically covers, among other things:

a. Forgery, Fraud, Duress Incompetency, Incapacity or Impersonation

b. Defective recording of any document

c. Someone else has an easement on your land

d. Encumbrances

30. The Loflins are being damaged as a result of specifically covered risks set forth in the policy.

31. In contradiction to good title, the lot is and has been since before closing encumbered and encroached upon by a road dissecting the property. That same road being described as going around the property on the only recorded plat.

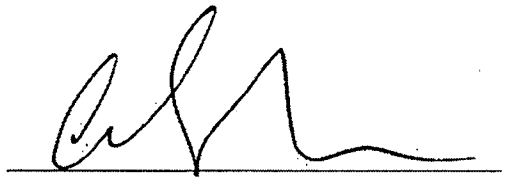
32. Despite Counsellor and Chicago receiving consideration for the investigation of title and issuance of a title policy, neither have provided any relief even after the Loflins contacted Chicago and informed it of the problems with the property.

33. As a result of the breach of duty in either investigating or insuring the title or both, the Loflins have been and continue to be injured.

34. The Loflins are entitled to full value of the property as a result of the breaches of duty as well as any consequential damages which have been incurred.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for an award of damages as may be determined by a jury to have been sustained by the Loflins. Additionally, Plaintiffs request an Order requiring the Defendant BMPCA to remove its continuing trespass and for any other relief to which it may be justly entitled.



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July 18, 2013

Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO. 2013-CP-07-1807
	)	
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	THE DEFENDANT CHICAGO TITLE
vs.	)	INSURAUCNE COMPANY'S MOTION
	)	TO DISMISS
Balsam Mountain Preserve Community Association, Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
	)	
Defendants.	)	

TO: A.G. SOLOMONS, III, ESQ.
SPEIGHTS & RUNYON
ATTORNEYS FOR THE PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the Defendant Chicago Title Insurance Company will move before the Presiding Judge of the Fourteenth Judicial Circuit, within ten (10) days after service hereof, or as soon thereafter as counsel may be heard, for an Order dismissing it from this action based upon the lack of subject matter jurisdiction over the property described in the Plaintiffs' Complaint. The Defendant will also move to dismiss this Complaint as the Plaintiffs have received the basis of their bargain having received title to Lot 108 at Balsam Mountain Preserve as described on "the only recorded plat" contained in Plat Cabinet 11, Slide 383 in Jackson County, North Carolina, which shows 1.837 acres of property. The Defendant will further move to dismiss this Complaint as it has received the benefit of the title insurance policy in that they own Lot 108 and have done so continuously and without interruption since 2001 meaning that there is no breach of any title insurance policy.

The Motion will be supported by additional memoranda, and briefs to be submitted to the Court prior to the hearing.

Pursuant to Rule 11 SCRCP, counsel certifies that consultation would serve no useful purpose.

Please be present to defend if so minded.

BUIST, BYARS & TAYLOR, LLC

Mt. Pleasant, South Carolina

By: _____

august 8, 2013

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CERTIFICATE OF MAILING

I hereby certify that on aug. 8 '13, 2013, a copy of the foregoing was mailed, postage prepaid, to all counsel of record in this matter, as follows.

A.G. Solomons, III, Esq.
Speights & Runyan
P.O. Box 685
100 Oak Street, East
Hampton, South Carolina 29924

G. Hamlin O'Kelley, III

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
William Loflin and Leslie Loflin,	)	Civil Action No. 2013-CP-07-1807
Plaintiffs,	)	
	)	
vs.	)	**MOTION TO DISMISS BY COUNSELLOR TITLE AGENCY, INC.**
	)	
Balsam Mountain Preserve Community Association, Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
	)	
Defendants.	)	
	)	

Defendant Counsellor Title Insurance Agency, Inc. ("Counsellor") hereby moves pursuant to S.C.R.Civ.P. 12(b)(6) for an order dismissing the complaint against Counsellor on the grounds that a) the allegations thereof fail to state facts sufficient to constitute a cause of action against Counsellor for breach of contract; b) the facts alleged in the Complaint do not support any claim against Counsellor under any theory of the case; and c) Plaintiffs have not suffered any damage attributable to Counsellor as a matter of law.

LEGAL STANDARD

A motion to dismiss a claim pursuant to Rule 12(b)(6), S.C.R.Civ.P. must be based "solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007); *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). "'The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for

relief.'" *Doe*, 373 S.C. at 395, 645 S.E.2d at 247-48 (quoting *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)).

FACTS AS ALLEGED IN THE COMPLAINT

Plaintiffs' complaint alleges that they purchased lot 108 in the Balsam Mountain Preserve subdivision in Jackson County, North Carolina in 2001 for $495,000. (Compl. ¶ 6.) According to the complaint, Plaintiffs inspected the lot prior to purchasing it, but the boundaries and corners were not staked out at that time. (Id. ¶ 8.) The Loflins received a plat of their lot at closing, which showed the area of the lot as 1.837 acres, and also showed that a road went around the boundaries of the lot. (Id. ¶ 10.) This plat was incorporated into the deed to Plaintiffs and recorded in Jackson County, North Carolina in Plat Cabinet 11 at Slide 383 as part of the closing of Plaintiffs' purchase of the lot. (Id. ¶ 11) Thus, the real property Plaintiffs thought they were buying was what was conveyed to them.

The complaint then alleges that nine years later in 2011, Plaintiffs discovered a different plat of the same lot, which shows the area as 1.4 acres, and which also shows that the road goes through the lot rather than around it. (Id. ¶ 12.) The complaint alleges that this plat was never recorded although it predated the closing. (Id.) Plaintiffs further allege or imply that the road as shown on the unrecorded plat actually exists, runs through their lot, (Id. ¶¶ 20, 25) and is controlled and maintained by Defendant Mount Preserve Community Association ("BMPCA"). (Id. ¶ 12.) Plaintiffs then allege that the existence of the road and/or the unrecorded plat creates an encroachment and trespass upon their property by BMPCA. Based thereon, Plaintiffs allege causes of action for trespass and encroachment. Those causes of action appear to be against BMPCA solely and do not mention Counsellor.

The third cause of action is for breach of contract, and Plaintiffs allege that they entered into a contract with Counsellor and Chicago Title "to investigate and insure that the title [Plaintiffs] received for lot 108 was valid and free from any encumbrance." (Id. ¶¶ 9 & 28.) Plaintiffs allege that the lot "has been since before closing encumbered and encroached upon by a road dissecting [sic] the property." (Id. ¶ 31.) As to damages, Plaintiffs allege that "[a]s a result of the breach of duty in either investigating or insuring the title or both, the Loflins have been and continue to be damaged." (Id. ¶33.)

I. THE FACTS ALLEGED ARE INSUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST COUNSELLOR.

The only claim in the complaint directed to Counsellor is for breach of contract. The only substantive allegation regarding the contract is that Plaintiffs entered into a contract with Counsellor and Chicago Title "to investigate and insure that the title . . . for lot 108 . . . was valid and free from any encumbrance." (Compl. ¶ 28.) This allegation does not state facts sufficient to constitute a cause of action against Counsellor because a title examiner's duty to investigate title is limited to a review of matters appearing in the public record, absent a specific agreement to do more. Hill v. Pineland Mem'l Park, 282 S.E.2d 779 (N.C. 1981) (holding that title protection requires examination of the public registry only); Burkhead v. Farlow, 146 S.E.2d 802 (N.C. 1966) (holding that a title abstractor must examine public records).[1] Plaintiffs do not allege any such agreement in the present case.

Title searches are limited to the public record, among other reasons, because North Carolina (like South Carolina) has a statute that renders unrecorded interests in land invalid against subsequent purchasers of the property. N.C.G.S.A. § 47-18; Chrysler Credit v. Burton,

[1] Because the real property that is the subject of this action is located in North Carolina, North Carolina law should control the duties of a person conducting a title examination of that property.

599 F.Supp. 1313 (M.D.N.C. 1984) (holding that the purpose of the North Carolina recording statute is to enable prospective purchasers to rely with safety on the public record concerning the status of land titles). Thus, unless an interest or encumbrance appears in the public record, it is not enforceable against a person who acquires the land. As the court in Hill explained, "a purchaser must examine the public registry. If he finds no record [of a defect in title], even if he knows there has been a prior conveyance, he may record his deed with the assurance that his title will prevail." 292 S.E.2d at 782. "The General Assembly, by enacting [§ 47-18] clearly intended that prospective purchasers should be able to safely rely on the public records." Schuman v. Roger Baker & Assoc., Inc., 319 S.E.2d 308, 311 (N.C. App. 1984). As explained by the North Carolina Supreme Court in Turner v. Glenn, 18 S.E.2d 197, 201 (N.C. 1942), "[a] purchaser is chargeable with notice of the existence of [an encumbrance] only if a proper search of the public record would have revealed it and it is conclusively presumed that he examined each recorded deed or instrument in his line of title and to know its contents."

In the present case, Plaintiffs are alleging that Counsellor has breached its contract to investigate title by failing to discover a plat that by Plaintiffs' own admission was never made part of the public record. Because the duty of title examiners does not extend to matters that are not in the public record, and because the complaint does not allege any special agreement by which Counsellor undertook to do more than examine the public records, the complaint fails to state facts sufficient to constitute a cause of action for breach of contract against Counsellor, and should be dismissed with prejudice as to Counsellor.

II. COUNSELLOR IS NOT LIABLE TO PLAINTIFFS AS A MATTER OF LAW UNDER ANY THEORY.

It is equally clear that Plaintiffs may not recover against Counsellor "under any theory of the case." Stiles v. Onorato, supra. As the above cases make clear, title is only affected by

things that are a part of the public record, and therefore a title searcher's duty to a prospective purchaser, whether arising under a contract or imposed by law, is similarly limited. Title examiners are not required to be private detectives who look for information that is not publicly available. As the North Carolina Supreme Court has noted,

> [i]n this country, where it is deemed so essential to commercial prosperity that property of all kinds should pass freely from one to another, and that, in order to facilitate that object, no lien should attach to real estate that cannot be discovered by a diligent examination of public records, it would be startling to the legal profession and to dealers in real estate to announce that, after a careful searching of such records, a purchaser might in many instances still be unsafe, unless he should trace the proposed vendor, by the aid of detectives, through all of his wanderings in different counties of the state for a score of years, in order ascertain whether the allotment of some other homestead to him in another county had disabled him from making a valid title to that offered for sale.

Stern v. Lee, 20 S.E. 736, 743 (N.C. 1894).

Rather, "[i]n order to give a title opinion, an abstractor must make a careful . . . search of the public records." Burkhead, supra. There is no issue in the present case regarding the adequacy of the search of those records. The issue is entirely whether Counsellor was under any duty of any nature to discover and/or report any matter that is not in those records. Counsellor had no such duty. No unrecorded instrument can affect Plaintiffs' title, and as a result, Plaintiffs cannot state any claim against Counsellor based upon the unrecorded plat. The complaint against Counsellor should be dismissed with prejudice.

III. BECAUSE THE UNRECORDED PLAT DOES NOT CREATE AN ENCUMBRANCE AS A MATTER OF LAW, PLAINTFFS HAVE NOT SUFFERED ANY DAMAGES PROXIMATELY CAUSED BY THE TITLE EXAMINATION.

First, in reciting the risks covered by the title insurance policy and the scope of the title examination, Plaintiffs do not allege that the title policy insures or that the title examiner made

any representation as to the area of the lot (Compl. ¶ 29.) Therefore Plaintiffs fail to allege a cause of action against Counsellor based on any difference in acreages shown on the recorded plat and on the unrecorded plat.

Next, as discussed above, interests in land that are not reflected in the public record are not enforceable against subsequent purchasers for value. In the present case, the allegations in the complaint establish that the unrecorded plat cannot operate to diminish or encumber the estate that Plaintiffs received in their deed, and, therefore, cannot create easements or encumbrances. Therefore as a matter of law, no damages are proximately caused by Counsellor's understandable and proper failure to report a matter that does not affect title.

Additionally, because the unrecorded plat has no legal effect under North Carolina law, Plaintiffs are entitled to relief against any persons or entities that are acting in derogation of Plaintiffs' title. Shuman, supra; Stephenson v. Jones, 316 S.E.2d 366 (N.C.App. 1984) (holding that secret, hidden, and unregistered trusts will not defeat a bona fide purchaser for value). Because Plaintiffs are entitled to prevail against those parties, they have not suffered any damage attributable to Counsellor, and cannot maintain a claim against Counsellor.

Further, Plaintiffs allege that they contracted with Counsellor "to investigate and insure the title of lot 108. (Compl. ¶ ¶ 8, 28). They do not allege that they contracted with Counsellor to perform a physical inspection of the lot. Importantly, Plaintiffs allege that Mr. Loflin inspected the property himself prior to closing (Id. ¶ 8) and imply that the road "dissected [sic] the Loflins' property" prior to closing. (Id. ¶ 12). If, in fact, the road was in place when Mr. Loflin inspected the lot, Plaintiffs cannot recover against Counsellor for failing to disclose information known by Plaintiffs. Lawson v. Citizens and Southern Nat. Bank of S.C., 259 S.C. 477, 193 S.E.2d 124 (1972 (holding that duty to disclose relates to facts known by one party but

unknown to the other). Alternatively, if Plaintiffs allowed the lot to be staked and/or the road to be constructed after the closing and in a manner not consistent with the recorded plat, or if "BMPCA exercises control and maintains the road through [Plaintiffs'] property" (Id. ¶ 14) without objection by Plaintiffs, any damages resulting therefrom and are not the responsibility of the title examiner.

Just as Plaintiffs have not alleged that they engaged Counsellor to perform a physical inspection of the lot, Plaintiffs have not alleged that they engaged Counsellor to confirm the accuracy of the survey incorporated into Plaintiff's deed. See Compl. ¶¶ 8 & 28. If such survey was inaccurate or incomplete and if Plaintiffs were damaged as a result, such damages were not proximately caused by Counsellor's title examination.

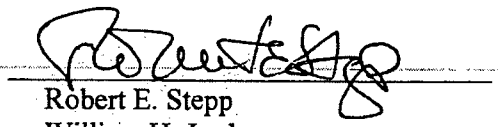
Finally, Plaintiffs have not alleged that Counsellor agreed to defend or indemnify Plaintiffs against adverse claims, and there is therefore no basis to leave Counsellor in the present action. Therefore the complaint against Counsellor should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the complaint against Counsellor should be dismissed with prejudice.

[signature block on following page]

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Robert E. Stepp
William H. Jordan
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(803) 929-1400

Attorneys for Counsellor Title Agency, Inc.

Columbia, South Carolina

August 8, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
William Loflin and Leslie Loflin,	)	Civil Action No. 2013-CP-07-1807
Plaintiffs,	)	
vs.	)	
	)	**CERTIFICATE OF SERVICE**
Balsam Mountain Preserve Community Association, Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
Defendants.	)	

I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant Counsellor Title Agency, Inc. do hereby certify that I have served all counsel in this action with a copy of the pleading hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: Motion to Dismiss

Served: A. G. Solomons, III, Esquire
Speights & Runyan
Post Office Box 685
Hampton, South Carolina 29924

Valerie N. Hampton

Columbia, South Carolina
August 8, 2013

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT WILLIAM LOFLIN AND LESLIE LOFLIN, Plaintiffs, vs. BALSAM MOUNTAIN PRESERVE COMMUNITY ASSOCIATION, CHICAGO TITLE INSURANCE COMPANY AND COUNSELLOR TITLE AGENCY, Defendant.	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action No. 2013-CP-07-1807 **DEFENDANT BALSAM MOUNTAIN PRESERVE COMMUNITY ASSOCIATION'S MOTION TO DISMISS**

PLEASE TAKE NOTICE THAT Defendant Balsam Mountain Preserve Community Association ("Balsam"), a North Carolina nonprofit corporation with its principal place of business in Sylva, North Carolina, hereby moves pursuant to Rule 12(b)(2) and (5) of the South Carolina Rules of Civil Procedure ("SCRCP") for an Order dismissing the claims of Plaintiffs William Loflin and Leslie Loflin ("Plaintiffs") against Balsam for lack of personal jurisdiction and insufficiency of service of process. The basis for this Motion is as follows:

1. Plaintiffs have not alleged, nor can they establish, personal jurisdiction over Balsam under South Carolina's long arm statute, as Balsam is not authorized to and does not transact business in South Carolina, does not maintain any offices, real or personal property, or bank accounts in South Carolina, and has not designated or authorized any agent to accept service on its behalf in South Carolina;

2. The Court's exercise of personal jurisdiction over Balsam would not comport with the due process requirements of the United States Constitution; and

3. Plaintiff failed to comply with applicable rules with respect to service of process on Balsam. Specifically, service on Craig Lehman does not comply with Rule 4 SCRCP and S.C. Code §§ 15-9-15 et seq., and is ineffective against Balsam as Mr. Lehman is not Balsam's officer, managing or general agent, president, cashier, treasurer, attorney, secretary, or registered agent for service of process.

WHEREFORE, Balsam respectfully prays to the Court that:

1. Plaintiffs' Complaint against Balsam be dismissed with prejudice;

2. Balsam recover its costs incurred in this action; and

3. This Court order such further relief as it deems just and proper.

This Motion is based upon the matters alleged in the Complaint and incorporated by reference therein, as well as the Affidavit of Bruce Fine attached as Exhibit A, controlling statues, applicable case law, and such supporting memoranda and arguments as may be submitted in connection herewith before or at the hearing on this Motion.

Respectfully submitted,

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Laura F. Locklair
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Phone: 843-727-2650
Fax: 843-727-2680

Attorneys for Defendant Balsam Mountain Preserve Community Association

September 5, 2013

Charleston, South Carolina

CERTIFICATE OF SERVICE

On September 5, 2013, I certify that a copy of the **DEFENDANT BALSAM MOUNTAIN PRESERVE COMMUNITY ASSOCIATION'S MOTION TO DISMISS** was served on counsel of record by U.S. Mail at the addresses below:

A.G. Solomons, III
Speights & Runyan
100 Oak Street East
P.O. Box 685
Hampton, SC 29924

Attorney for Plaintiffs William Loflin and Leslie Loflin

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William H. Jordan
Sowell Gray Stepp & Laffitte, L.L.C.
1310 Gadsden Street
P.O. Box 11449
Columbia, SC 29211

Attorneys for Defendant Counsellor Title Agency, Inc.

G. Hamlin O'Kelley, III
Maria E. Kiehling
Buist, Byars & Taylor, LLC
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Mt. Pleasant, SC 29464

Attorneys for Defendant Chicago Title Insurance Company

Laura J. Hocklair
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200 Meeting Street, Suite 301
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(843) 727-2650

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT WILLIAM LOFLIN AND LESLIE LOFLIN, Plaintiffs, vs. BALSAM MOUNTAIN PRESERVE COMMUNITY ASSOCIATION, CHICAGO TITLE INSURANCE COMPANY AND COUNSELLOR TITLE AGENCY, Defendant.	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action No. 2013-CP-07-1807 **AFFIDAVIT OF BRUCE FINE**

PERSONALLY APPEARED BEFORE ME, Bruce Fine, who first being duly sworn, deposes and states as follows based on his own personal knowledge:

1. I am the Manager for Balsam Mountain Preserve Community Association ("Balsam"). I am over nineteen (19) years of age, and I make this affidavit based on my personal knowledge and the information contained in the records of Balsam maintained in the normal course of business.

2. Balsam is a nonprofit corporation organized and existing pursuant to the laws of the State of North Carolina.

3. Balsam maintains its principal, and only place of business in Sylva, North Carolina.

4. Balsam does not now have, and never has had, any office or place of business in the State of South Carolina. As stated above, Balsam only maintains one office in Sylva, North Carolina.

5. Balsam does not now have, and never has had, any real or personal property which it owns, leases, occupies, operates or maintains in the State of South Carolina. Balsam only owns property in North Carolina.

6. Balsam does not now have, and never has had, any bank account in the State of South Carolina. Balsam only maintains bank accounts in North Carolina.

7. Balsam is not now, and never has been, licensed or registered to do business in the State of South Carolina.

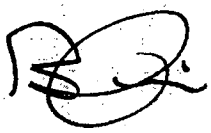
8. Balsam does not now, and it never has been required to pay, or paid, any property, use or income taxes in the State of South Carolina.

9. Balsam does not direct advertisements to or solicit business in the State of South Carolina.

10. The closing of the subject property, located at lot 108 in the Balsam Mountain Preserve in Sylva, North Carolina, occurred in North Carolina.

11. Craig Lehman is not Balsam's officer, managing or general agent, president, cashier, treasurer, attorney, secretary, or registered agent for service of process.

AFFIANT SAYETH FURTHER NOT.



Bruce Fine

Sworn to and subscribed before me this
the 29th day of AUGUST, 2013.

Catherine Murray

Notary Public for North Carolina
My Commission Expires: August 13, 2018

Catherine Murray
Notary Public
Henderson County, NC
My Commission Expires
August 13, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
WILLIAM LOFLIN AND LESLIE LOFLIN,	)	Civil Action No. 2013-CP-07-1807
Plaintiffs,	)	**DEFENDANT BALSAM MOUNTAIN PRESERVE COMMUNITY ASSOCIATION'S MOTION FOR PROTECTION FROM DISCOVERY PENDING RULING ON ITS MOTION TO DISMISS**
vs.	)	
BALSAM MOUNTAIN PRESERVE COMMUNITY ASSOCIATION, CHICAGO TITLE INSURANCE COMPANY AND COUNSELLOR TITLE AGENCY,	)	
Defendant.	)	

Pursuant to Rule 26(c)(1) of the South Carolina Rules of Civil Procedure ("SCRCP"), Defendant Balsam Mountain Preserve Community Association ("Balsam") hereby moves for an order protecting Balsam from responding to the discovery requests of Plaintiffs William Loflin and Leslie Loflin ("Plaintiffs") pending resolution of Balsam's motion to dismiss for lack of personal jurisdiction and insufficiency of service.

The basis for seeking protection is that Balsam is a North Carolina nonprofit corporation with no contacts in the State of South Carolina. As such, Balsam moved to dismiss Plaintiffs' claims on the ground that Balsam is not, as a matter of constitutional due process, subject to jurisdiction in this forum. Plaintiffs served Balsam with written and depositional discovery relating to Plaintiffs' claim that Balsam trespassed in North Carolina. None of the discovery is tailored in any fashion to seek jurisdictional discovery or otherwise address the merits of Balsam's pending motion to dismiss.

Received

SEP 27 2013

Speights & Runyan

Because a favorable resolution of Balsam's motion to dismiss on this basis would eliminate the need for discovery, good cause exists to protect Balsam from discovery pending resolution of Balsam's motion to dismiss. In further support, Balsam shows as follows:

1. Plaintiffs filed their complaint against Balsam on July 18, 2013. On September 6, 2013, Balsam moved to dismiss for lack of personal jurisdiction and insufficient service of process. The motion to dismiss is pending before this Court.

2. Plaintiffs served Balsam with written discovery in the form of interrogatories and requests for production. In addition, Plaintiffs noticed the 30(b)(6) deposition of Balsam for October 18, 2013. The discovery propounded by Plaintiffs concerns the merits of the case and is not limited to the jurisdictional issues.

3. Pursuant to Rule 11(a), SCRCP, counsel for Balsam conferred with Plaintiffs' counsel on September 16, 2013 in a good faith effort to resolve the matter contained in this motion. However, Plaintiffs will not agree to limit discovery to their jurisdictional allegations. Nor will they agree to extend Balsam's time to respond to Plaintiffs' discovery. Under these circumstances, Balsam had no choice but to seek protection from this Court.

4. Pursuant to the South Carolina Rules of Civil Procedure, a court has discretion to protect a party from discovery for "good cause shown." Rule 26(c)(1), SCRCP. A party shows good cause where disposition of a motion could entirety eliminate the need for such discovery. *See Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 551, 575 S.E.2d 74, 77 (Ct. App. 2003) (noting that a party may seek protection from discovery while a motion that would thoroughly dispose of the claims in the complaint is pending); *see also Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999) (acknowledging stay of discovery pending motions to dismiss). Where, as here, broad-based discovery would be a needless expenditure of time,

money, and resources, Balsam respectfully requests protection pending the Court's resolution of Balsam's motion to dismiss.

WHEREFORE, Balsam requests that the Court protect it from discovery, including the written discovery issued by Plaintiffs and the 30(b)(6) deposition of Balsam noticed for October 18, 2013, in accordance with Rule 26(c)(1) until the Court rules upon Balsam's motion to dismiss.

Respectfully submitted,

Laura F Locklair

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Attorneys for Defendant Balsam Mountain Preserve Community Association

September 26, 2013

Charleston, South Carolina

CERTIFICATE OF SERVICE

On September 26, 2013, I certify that a copy of the **DEFENDANT BALSAM MOUNTAIN PRESERVE COMMUNITY ASSOCIATION'S MOTION FOR PROTECTION FROM DISCOVERY PENDING RULING ON ITS MOTION TO DISMISS** was served on counsel of record by U.S. Mail at the addresses below:

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	AMENDED COMPLAINT
	)	
BMP Development LP, Chicago Title Insurance Company and Counsellor Title Agency, Inc.	)	
	)	
Defendants.	)	

Plaintiffs, by and through their undersigned counsel, allege as follows:

I. JURISDICTION

1. Plaintiffs, William and Leslie Loflin [hereinafter individually and collectively referred to as the "**Loflins**"], are residents of Beaufort County, South Carolina.

2. Defendant, BMP Development LP, f/n/a Balsam Mountain Preserve LP and Balsam Mountain Preserve, Limited Partnership [hereinafter referred to as "**Balsam**"], is a foreign entity doing systematic and continuous business in Beaufort County and throughout South Carolina. Balsam's registered agent for service, Craig Lehman, resides in Beaufort County, South Carolina. The actions herein complained of against Balsam occurred in large part in Beaufort County, South Carolina. Balsam was organized and formed by Chaffin/Light Associates [hereinafter referred to as "**Chaffin/Light**"] to develop Balsam Mountain Preserve [hereinafter referred to as the "**Project**"], located in Jackson County,

North Carolina. Chaffin/Light's principal place of business was then and is now located in Beaufort County, South Carolina. Chaffin/Light previously had formed and managed three successful community developments in Beaufort County, South Carolina: Spring Island, Callawassie, and Chechessee Creek Club. Balsam's stated purpose was to replicate Spring Island "on higher ground," building on the success of Spring Island, including the Founder Member Program. Balsam assembled a leadership team consisting of James J. Chaffin, Jr.,then and now a resident of Beaufort County, South Carolina, who had led the development of Spring Island; James A. Anthony, Jr., who served as president of Spring Island Company; Mont Blaisdell, then and now a resident of Beaufort County, South Carolina, who served as Chief Financial Officer of both Spring Island and Callawassie; and Ellen D. Savage, now deceased, who was a resident of Beaufort County, South Carolina, and served as the membership director and general manager of the Spring Island Club. Balsam assembled a Consulting Team consisting of experienced teams of professionals, half of whom were residents of South Carolina. At all times complained of herein, Balsam was represented by William L. Bethea, then and now a resident of Beaufort County, South Carolina, and one or more lawyers in his Beaufort County, South Carolina law firm, Bethea, Jordan & Griffin, P.A., which later merged with the McNair Firm, with offices in Beaufort County, South Carolina [hereinafter referred to collectively as the "**Bethea Firm**"], including Sarah F. Robertson, also then and now a resident of Beaufort County, South Carolina. Mr. Bethea prepared and filed Balsam's Certificate of Domestic Limited Partnership for

Balsam Mountain Company, LLC, whose sole members were Mr. Chaffin and James W. Light, as Balsam's general partner [hereinafter referred to as the "**General Partner**], and signed the Certificate as the Secretary for the General Partner, with the acknowledgments to be returned to Ms. Robertson. As Balsam's counsel, Mr. Bethea prepared in Beaufort County, South Carolina, the documents which are central to this dispute [hereinafter referred to collectively as the "**Offering Contract**"], to wit: Balsam's Confidential Offering Memorandum (hereinafter referred to as the "**Offering Memorandum**") setting forth Balsam's Founder Member Program offering up to thirty-five founding limited partnerships [hereinafter referred to as "**Founding Limited Partnerships**"] for limited partners [hereinafter referred to as "**Founding Limited Partners**"] to invest in the Project, which attached and incorporated three agreements: the Subscription Agreement – Power of Attorney [hereinafter referred to as the "**Subscription Agreement**"] to be entered into between Balsam and the Founding Limited Partners for admission of the Founding Limited Partners; the Agreement of Limited Partnership [hereinafter referred to as the "**Partnership Agreement**"] to be entered into between the General Partner and the Founding Limited Partners governing the affairs of Balsam and the rights and respective obligations of its partners; and the Founder's Balsam Mountain Preserve Reservation Agreement [hereinafter referred to as the "**Reservation Agreement**"] to be entered into between Balsam and each

Founding Limited Partner for selection of a homestead (commonly called a lot). The Offering Contract identified Mr. Chaffin as the Manager of the Balsam development with support to be provided by officers and staff that the General Partner had assembled in other developments including Spring Island, Callawassie and Chechessee; and that the Founding Limited Partners would provide capital to fund the acquisition of the property and the initial development activities of the Project. The Offering Contract listed thirty-three Founding Limited Partnerships to be owned by persons who had committed to be Founding Limited Partners, including sixteen to be owned in whole or part by South Carolina residents (seven of whom resided in Beaufort County) and three to be owned in whole or part by North Carolina residents. Mr. Blaisdell, who executed the Partnership Agreement in Beaufort County, South Carolina, was listed as the Initial Founding Limited Partner; and Mr. Bethea was listed on behalf of a Beaufort County, South Carolina LLC (Doubletop Mountain Holdings LLC). Balsam met with the Loflins in Beaufort County, South Carolina, and offered them the opportunity to be Founding Limited Partners by purchasing a Founding Limited Partnership unit [hereinafter referred to as a "**Unit**"]. Balsam delivered the Offering Contract to the Loflins and Mr. Chaffin and Mr. Bethea explained the project to them in Beaufort County, South Carolina. Mr. Chaffin and the Loflins executed the Partnership Agreement and the Subscription Agreement in Beaufort County, South Carolina. The Loflins executed the documents for

their purchase of Lot 108 in Beaufort County, South Carolina, including a mortgage securing the financing of their purchase, supervised by the Bethea Firm, which represented Balsam and the Loflins. Pursuant to the Offering Contract, Balsam arranged for issuance coverage for the Loflins and their lender through a South Carolina corporation, whose agent was Mr. Bethea, with its principal place of business in Beaufort County, South Carolina. Balsam is also the alter-ego of Balsam Mountain Preserve Community Association [hereinafter referred to as the "**Association**"], which Mr. Bethea, on behalf of Balsam, formed as the sole incorporator with a Beaufort County, South Carolina address, and which includes a number of members who reside in Beaufort County, South Carolina; and, upon information and belief, the alter-ego of other entities affiliated with Balsam which will be identified in discovery.

3. Defendant, Chicago Title Insurance Company [hereinafter referred to as "**Chicago**"], is a foreign corporation doing systematic and continuous business in Beaufort County and throughout South Carolina, and Defendant, Counsellor Title Agency, Inc. [hereinafter referred to as "**Counsellor**"], is a South Carolina corporation with its principal place of business in Beaufort County, South Carolina [Chicago and Counsellor are hereinafter referred to collectively as the "**Insurance Defendants**"]. At all times complained of herein, Counsellor was acting individually and as Chicago's agent, and Mr. Bethea and Ms. Robertson were agents for Chicago and Counsellor. In connection with their purchase of Lot 108, the Loflins entered into a contract of insurance [hereinafter referred to as the

"**First Insurance Contract**"] with the Insurance Defendants in Beaufort County, South Carolina. Subsequently, the Loflins refinanced their purchase of Lot 108 on two occasions, both times in Beaufort County South Carolina, and both times supervised by the Bethea Firm, and entered into two additional contracts of insurance with the Insurance Defendants [hereinafter referred to as the "**Second Insurance Contract**" and the "**Third Insurance Contract**"].

II. FACTUAL ALLEGATIONS

4. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

5. The Offering Contract provided that the Loflins would commit $350,000 as a founder contribution. The Loflins were not required to make any additional capital contributions. In return, the Loflins would receive, among other things, a credit of $200,000 toward the purchase of a homestead or lot and receive a discount of thirty percent on the purchase In addition, the Loflins were entitled to receive cash quarterly from the sales of homesteads or lots [hereinafter referred to as "**Cash Distributions**"], as opposed to waiting for the project to produce profits or pay off debt, which equated to 0.2571% of "Net Revenue from Home Sales." Balsam represented that based upon forecast gross sales revenues of 311 Homesteads on which the return would be computed, the sharing of the Net Revenue from Homestead Sales would provide a projected cash return to the Loflins of $335,343.00, and that the value of the

homesteads could reasonably be expected to appreciate in value when the golf course and club facilities were functioning. Each Founding Limited Partner was precluded from selling the homestead or lot for a period of 5 years, and except in the event of transfer because of death, the sale or exchange of a Founders Limited Partner's interest in the Partnership would be permitted only with the consent of the General Partner. Based upon Balsam's representations, the Loflins agreed to the Offering Contract and the parties executed the Subscription Agreement, the Partnership Agreement, and the Reservation Agreement.

6. The Subscription Agreement made the Loflins Founding Limiting Partners subject to the terms and conditions thereof and the provisions of the Confidential Offering Memorandum and the Partnership Agreement. The Subscription Agreement specifically provided that the provision providing for the Loflins' right to receive quarterly Cash Distributions from the sales of homesteads or lots could not be modified or amended without their express, written consent. The Subscription Agreement also provided that if the Loflins were required to institute suit to enforce their rights, and obtained a valid judgment, they would be entitled to all reasonable costs, expenses and attorney's fees.

7. The Partnership Agreement provided that Balsam's General Partner owed the Loflins a fiduciary duty to act in good faith in its exercise of its rights and obligations.

8. Pursuant to the Reservation Agreement, the Loflins reserved the right to purchase Balsam Mountain Preserve Homestead No. 108 [hereinafter referred to as "**Lot**

108"], located on the mountain side at Balsam Mountain Preserve, as shown on the Phase 1 Plan prepared by Herron Land Surveying [hereinafter referred to as the "**Development Plan**"], an excerpt of which was attached to the Reservation Agreement as Exhibit "A," following registration of the Property with HUD. Lot 108 was not staked at the time, but Balsam represented to the Loflins that the property consisted of approximately 1.9 acres and that Balsam Mountain Preserve Road circumnavigated Lot 108 as shown on the Development Plan provided to the Loflins. The purchase price for Lot 108 was $495,000.

9. The Reservation Agreement provided that, "At Closing, Seller shall convey good and marketable title to the Property to Purchaser in fee simple by general warranty deed, free from encumbrances except those restrictions and other matters referred to in this Agreement. If requested by Purchaser, Seller will arrange for the issuance by Chicago Title Insurance Company of title insurance coverage for Purchaser and, if applicable, Purchaser's lender, at Purchaser's expense." The Reservation Agreement further provided that Balsam, at Balsam's sole expense, "shall deliver to purchaser at Closing, and shall cause to be recorded prior to the deed to the Property, an individual plat of the Property. That plat will be prepared to scale by a licensed surveyor or engineer and will accurately reflect the dimensions of the Property, the courses, distances and monuments of the boundaries of the Property, the relationship of the Property to proposed or existing roads, the names of abutting roads, the ownership of abutting land and the general location of the Property in relation to the overall phase of Balsam Mountain Preserve."

10. The closing for Lot 108 was held in February 2002 [hereinafter referred to as the "**Closing**"]. In accordance with the Offering Contract, Balsam prepared and delivered to the Loflins a duly executed deed to Lot 108, and Balsam provided the Loflins with an individual plat [hereinafter referred to at the "**Recorded Plat**"]. The Recorded Plat, prepared at Balsam's request by a surveyor of its choosing, reflected that Lot 108 consisted of 1.837 acres, and that Balsam Mountain Preserve Road went around rather than through Lot 108. The Recorded Plat was recorded in the Jackson County Records in Plat Cabinet 11 at Slide 383. Balsam's Deed to the Loflins incorporated the Recorded Plat and was recorded in the Jackson County Records in Book 1227 at 202.

11. At the Closing, the Loflins entered into the First Insurance Contract with the Insurance Defendants. The First Insurance Contract insured Lot 108 containing 1.87 acres without any road going through it, as described in the Deed prepared by Balsam and the Recorded Plant and prepared at the request of and on behalf of Balsam in accordance with the Offering Contract. The purpose of the Insurance Contract was to insure the Loflins from a multitude of risks associated with Lot 108, which are more fully set forth in the First Insurance Contract in the possession of the Insurance Defendants, but which, upon information and belief, included but are not limited to fraud, trespass, easements, and encumbrances.

12. Pursuant to the Offering Contract, Balsam established annual assessments to be paid by each property owner, which, among other things, went to the maintenance of roads. Over the years, Balsam deducted the Loflins' Assessments from their quarterly Cash

Distributions and forwarded the Loflins the balance.

13. The year after the Closing, Mr. Loflin was diagnosed with cancer, and he requested Balsam to permit the Loflins to sell Lot 108, but Balsam refused, even though the Loflins were informed that Balsam had permitted at least one other Founding Limited Partner to do so.

14. In late 2005, Balsam permitted the Founding Limited Partners to sell their properties after four years, apparently in recognition of the success of the Project in selling lots and the opportunity for Founding Limited Partners to reap profits on their investments. The Loflins listed Lot 105 for $650,000.00.

15. In 2006, Balsam informed the Loflins that contrary to the Deed and the Recorded Plat that they delivered to the Loflins in connection with the Closing, which were duly recorded, there was an encroachment on Lot 108, and that the property contained only 1.4 acres, and that Balsam Mountain Preserve Road went through the property. Balsam asked the Loflins to sign a quit claim deed to make their ownership as set forth in another individual plat of Lot 108 [hereinafter referred to as the "**Unrecorded Plat**], which the Loflins believed from their discussions with Balsam had been recently prepared. The Loflins refused to sign a quit claim deed significantly reducing their lot size and permitting a road to go through their property. Balsam did not disclose to the Loflins that it knew before the Closing that Lot 108 contained only 1.4 acres with a road through it as reflected in the Unrecorded Plat or that the Unrecorded Plat had been prepared before the Closing. Thereafter, Mr. Loflin had a number of conversations with Mr. Chaffin and Balsam's general

manager, Mr. Lehman, and Balsam's salesman, Bob Tufts (all of whom are residents of Beaufort County, South Carolina). Balsam acknowledged that the Loflins would not pay their assessments until the matter could be resolved. Despite multiple representations that Balsam would remedy the problem, however, Balsam refused to do so.

16. Balsam exercises control over Balsam Mountain Preserve Road through the Loflins' property and .437 acres owned by the Loflins. The Loflins have objected to Balsam's encroachment and continuous trespass , but Balsam has refused to remedy this situation, and has continued to encroach and continuously trespass upon Lot 108. In addition, Balsam, through its Association, informed the Loflins that if they attempted to close the road encroaching through their property, it would not defend the Loflins from potential lawsuits filed by other Balsam property owners.

17. At some point, Balsam stopped forwarding the Loflins their quarterly Cash Distributions, and Balsam has continuously failed and refused to pay the Loflins their Cash Distributions, which the Loflins are entitled to under the Offering Contract.

18. Subsequently, the Loflins discovered that the Unrecorded Plat had been prepared for Balsam two weeks before the Closing.

19. In 2012, Balsam, which under the Offering Contract was the exclusive listing agent for Lot 108, informed the Loflins that they would no longer list Lot 108 for sale.

20. In 2012, the Loflins informed Chicago of the Unrecorded Plat showing that Balsam Mountain Preserve Road did not circumnavigate but rather dissected Lot 108. Chicago responded that based upon a title search, the only recorded Deed did not show any

impairments on the title, and, despite the provisions of the Insurance Contract, the Loflins had no cognizable injury.

21. In 2013, after the Loflins instituted this lawsuit, Balsam, acting through its Association, brought a retaliatory lawsuit against the Loflins in North Carolina, seeking all past assessments, even though Balsam previously acknowledged that the Loflins would not be pay assessments (which, among other things, went to the maintenance of the road encroaching through their property) until Balsam could resolve the matter, and even though the Loflins' assessments previously had been paid from their Cash Distributions (which Balsam later converted to their own use). Nevertheless, the Loflins had to hire counsel and expend significant sums to defend this lawsuit.

22. In 2014, the Loflins learned that at some point after conveying Lot 108 to the Loflins, Balsam entered Lot 108 and added to its trespass and encumbrance by expanding Balsam Mountain Preserve Road through Lot 108, moving dirt and apparently destroying one or more trees, and installing two culverts which drain water onto the Loflins' property.

FOR A FIRST CAUSE OF ACTION
FRAUD AGAINST BALSAM

23. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

24. During the negotiations to purchase Lot 108, Balsam made representations to the Loflins |hereinafter referred to as the "**Initial Misrepresentations**"| that Lot 108 contained approximately 1.9 acres free and clear of all encroachments, encumbrances and

easements, and Balsam induced the Loflins to purchase Lot 108 based upon such Initial Misrepresentations, including their showing to the Loflins the Development Plan which did not show any road or other encroachment, encumbrance, or easement through Lot 108, by delivery to the Loflins of the individual Recorded Plat of Lot 108 showing that it contained 1.87 acres with no road or other encroachment, encumbrance or easement through the property, and by preparation and delivery to the Loflins of the Deed which incorporated the Recorded Plat.

25. The foregoing Initial Misrepresentations were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

26. At the time the Initial Misrepresentations were made, Balsam knew that its Initial Misrepresentations were false and/or recklessly disregarded their falsity in that Balsam had in its possession the Unrecorded Plat that it had commissioned but never recorded showing that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

27. Balsam's Initial Misrepresentations were material in that the Loflins would not have purchased Lot 108 if Balsam had produced the secret Unrecorded Plat before the Closing or told them that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and these Initial Misrepresentations significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property.

28. The Loflins relied on said Initial Misrepresentations, not only in incurring

substantial financial obligations to purchase Lot 108, but also in purchasing a property which they believed would be marketable.

29. Balsam intended for the Loflins to rely on its Initial Misrepresentations.

30. The Loflins were ignorant of the falsity of Balsam's Initial Misrepresentations.

31. The Loflins reasonably relied and had a right to rely on Balsam's Initial Misrepresentations. The Loflins, as investors, also imposed a special trust and confidence in Balsam, which also under the Offering Contract owed them a fiduciary duty.

32. As a direct and proximate result of Balsam's Initial Misrepresentations the Loflins have suffered tremendous financial loss, the Loflins have lost the full enjoyment and use of their property, the Loflins have lost prospective sales of the property, the Loflins own property that is essentially unmarketable at anything close to the amount they paid for the property, the Loflins have incurred attorney's fees and costs, and the Loflins have suffered and will in the future continue to suffer emotional and mental distress, and other damages.

33. The Loflins are entitled to punitive damages as a result of Balsam's fraud and deceit.

FOR A SECOND CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION AGAINST BALSAM

34. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

35.. During the negotiations to purchase Lot 108, Balsam represented to the Loflins that Lot 108 contained approximately 1.9 acres free and clear of all encroachments,

encumbrances and easements, and Balsam induced the Loflins to purchase Lot 108 based upon such Initial Misrepresentations, including their showing to the Loflins the Development Plan which did not show any road or other encroachment, encumbrance, or easement through Lot 108, by delivery to the Loflins of the individual Recorded Plat of Lot 108 showing that it contained 1.87 acres with no road or other encroachment, encumbrance or easement through the property, and by preparation and delivery to the Loflins of the Deed which incorporated the Recorded Plat.

36. The foregoing Initial Misrepresentations were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

37. At the time the Initial Misrepresentations were made, Balsam should have known that its Initial Misrepresentations were false and/or recklessly disregarded their falsity in that Balsam had in its possession the Unrecorded Plat that it had commissioned but never recorded showing that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

38. Balsam's Initial Misrepresentations were material in that the Loflins would not have purchased Lot 108 if Balsam had produced the secret Unrecorded Plat before the Closing or told them that showing that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and these Initial Misrepresentations significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property.

39. The Loflins relied on said Initial Misrepresentations, not only in incurring

substantial financial obligations to purchase Lot 108, but also in purchasing a property which they believed would be marketable.

40. Balsam intended for the Loflins to rely on its Initial Misrepresentations.

41. The Loflins were ignorant of the falsity of Balsam's Initial Misrepresentations.

42. The Loflins reasonably relied and had a right to rely on Balsam's Initial Misrepresentations, and Balsam knew or should have known of the Loflin's reliance. The Loflins, as investors, also imposed a special trust and confidence in Balsam, which also under the Offering Contract owed them a fiduciary duty.

43. Balsam breached the duty of care by failing to exercise due care in making the Initial Misrepresentations to the Loflins.

44. In 2006, after the Loflins listed Lot 105 for sale, Mr. Lehman and Mr. Tufts told the Loflins that Lot 108 contains only 1.4 acres and that Balsam Mountain Preserve Road goes through rather than around the Loflins' property. Neither Mr. Lehman nor Mr. Tufts disclosed that Balsam had known these material facts before the Closing, and during the ensuing four years, but neither Mr. Lehman nor Mr. Tufts were employed by Balsam in 2002, and the Loflins do not know that Mr. Lehman or Mr. Tufts knew about the history of this matter at that time. By not disclosing these material facts known to Balsam, however, Mr. Lehman and Mr. Tufts either intentionally or unknowingly suggested that this was a recently discovered problem. Mr. Lehman and Mr. Tufts asked the Loflins to execute a quit-claim deed relieving Balsam from all responsibility for these material differences. The Loflins refused.

45. At the time of the 2006 meeting, Balsam knew and or had the ability to know that its failure to disclose was another misrepresentation (hereinafter referred to as the "**Subsequent Misrepresentation**") that was false, misleading, and incomplete, and/or recklessly disregarded its falsity, in that Balsam knew before the Closing (and during the ensuing four years) that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108 as shown on the Unrecorded Plat it had commissioned and obtained before the Closing.

46. At the time Balsam made this Subsequent Misrepresentation, Balsam should have known that its Subsequent Misrepresentation was false, misleading, and incomplete, and/or recklessly disregarded its falsity, in that Balsam knew before the Closing (and during the ensuing four years) that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108 as shown on the Unrecorded Plat it had commissioned and obtained before the Closing.

47. Balsam's Subsequent Misrepresentation was material in that the Loflins' bargaining position was disadvantaged by Balsam knowing of its fraud and deceit and Loflins believing that its fiduciary was dealing with its Founding Limited Partners in good faith in order to resolve an unfortunate development. Had Balsam disclosed the truth, the Loflins would have insisted, among other things, that the transaction be set aside, and if that failed, would have sought the assistance of legal counsel rather than relying on and proceeding alone with discussions with its fiduciary which had led it to believe that had simply made an innocent mistake which it wanted to correct.

48. Balsam intended for the Loflins to rely on its Subsequent Misrepresentation because it did not want to disclose its fraud and deceit.

49. The Loflins were ignorant of the falsity of Balsam's Subsequent Misrepresentation.

50. The Loflins reasonably relied and had a right to rely on Balsam's Subsequent Misrepresentation. The Loflins, as investors, also imposed a special trust and confidence in Balsam, which under the Offering Contract owed them a fiduciary duty.

51. Balsam's Subsequent Misrepresentation significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property.

52. As a direct and proximate result of Balsam's Initial Misrepresentations and Balsam's Subsequent Misrepresentation [hereinafter referred to collectively as the "**Misrepresentations**"] , the Loflins have suffered tremendous financial loss, the Loflins have lost the full enjoyment and use of their property, the Loflins have lost prospective sales of the property, the Loflins own property that is essentially unmarketable at anything close to the amount they paid for the property, the Loflins have incurred attorney's fees and costs, and the Loflins have suffered and will in the future continue to suffer emotional and mental distress, and other damages.

53. The Loflins are also entitled to punitive damages as a direct and proximate result of Balsam's conduct.

FOR A THIRD CAUSE OF ACTION

RECISION AGAINST BALSAM

54. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

55. The Loflins are entitled to have the conveyance of Lot 108 rescinded, with Balsam returning to the Loflins the full purchase price, plus interest and costs. including attorney's fees, and title of Lot 108 returned to Balsam.

FOR A FOURTH CAUSE OF ACTION
BREACH OF CONTRACT AGAINST BALSAM

56. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

57. Balsam breached the Offering Contract, among other ways, by delivering the Loflins an inaccurate individual plat of Lot 108 in connection with the Closing; by taking and controlling .47 acres from the Loflins' property; by conveying Lot 108 with a road through it contrary to Recorded Plat and the Deed which it delivered to the Loflins at the Closing; by failing to disclose these facts for four years and by never telling the Loflins that they knew of these facts before the Closing; by refusing to correct the situation so that the Loflins might have the full use of the Lot 108 conveyed to them, without a road through it, and by telling the Loflins that they would provide no assistance from potential lawsuits if the Loflins attempted to partially remedy the situation by closing the road and exercising control over Lot 108 as conveyed to them by Balsam and reflected in the Recorded Plat delivered by Balsam to the Loflins at the Closing Deed prepared and recorded by Balsam and delivered

to the Loflins and which incorporated by Recorded Plat; and by Balsam's continuously refusing to pay the Loflins their Cash Contributions.

58. As a direct and proximate result of Balsam's breach of contract, the Loflins have suffered actual damages, and the Loflins are entitled to attorneys fees and costs.

FOR A FIFTH CAUSE OF ACTION
BREACH OF CONTRACT WITH FRAUDULENT INTENT
ACCOMPANIED BY FRAUDULENT ACT AGAINST BALSAM

59. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

60. In 2011, the Loflins learned that Balsam breached the Offering Contract with an intent to defraud and accompanied by a fraudulent act because Balsam already had the Unrecorded Plat of Lot 108 showing the road dissecting the subject property and that the lot contained 1.4 less acres, but Balsam concealed the existence of the Unrecorded Plat from the Loflins at the Closing and further tried to induce the Loflins to sign a quit-claim deed agreeing that Lot 108 contained 1.4 acres rather than 1.87 acres, and a road through it, without disclosing to the Loflins that they knew before the Closing that Lot 108 contained only 1.4 acres and had a road through it and had in its possession a Plat showing that before the Closing.

61. As a direct and proximate result of Balsam's breach of contract with fraudulent intent and accompanied by fraudulent act, the Loflins are entitled to actual damages and costs and attorney's fees, as well as punitive damages.

FOR A SIXTH CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY AGAINST BALSAM

62. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

63. Balsam had and has a fiduciary duty to the Loflins to act in good faith in its exercise of its rights and obligations.

64. Balsam breached its fiduciary duty as set forth herein, including the following particulars: Balsam's deceits in connection with the sale of Lot 108, Balsam's failure to pay the Loflins their Cash Distributions: Balsam's refusal to permit the Loflins to sell the property within five years, while at the same time showing preferential treatment to one or more other Founding Limited Partners by permitting such a sale; Balsam's failure to inform the Loflins for over four years that Lot 108 contained only 1.4 acres and that Balsam Road went through it, and when it did, Balsam's suggestion that it had recently learned of this fact without disclosing that it had knew of the problem before the Closing; Balsam's suspension and continuous refusal to pay the Loflins their Cash Distributions as required in the Offering Contract; Balsam's 2012 refusal to list the Loflins Lot 108 for sale; Balsam's institution, through its Association, of a retaliatory lawsuit against the Loflins for payment of assessments, to maintain, in part, Balsam's encroachment through their property, despite previously acknowledging that the Loflins would not pay assessments until this matter could be resolved, and after they stopped paying the Loflins their quarterly Cash Distributions from which Balsam had deducted their assessments; and Balsam's failure to disclose for twelve years the facts and circumstances surrounding the Unrecorded Plat.

65. As a direct and proximate result of Balsam's breach of contract with fraudulent intent and accompanied by fraudulent act, the Loflins are entitled to actual damages and costs and attorney's fees, as well as punitive damages.

FOR A SEVENTH CAUSE OF ACTION
CONVERSION AGAINST BALSAM

66. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

67. Balsam stopped paying the Loflins their Cash Distributions and continuously to this day refuses to pay the Loflins their Cash Distributions, converting the Loflins' Cash Distributions to their own use.

68. As a direct and proximate result of Balsam's Conversion, the Loflins are entitled to their Cash Distributions, as well as punitive damages, and costs and attorney's fees.

FOR AN EIGHTH CAUSE OF ACTION
UNJUST ENRICHMENT AGAINST BALSAM

69. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

70. Balsam has been unjustly enriched by taking the Loflins' monies and then failing to deliver the Loflins the benefit of their bargain, including failing to deliver Lot 108 as set forth in their Recorded Plat and Deed and by failing to pay the Loflins their Cash Distributions.

71. As a direct and proximate result of Balsam's actions, Conversion, the Loflins

are entitled to a return of all their monies, as well as costs and attorney's fees.

FOR A NINTH CAUSE OF ACTION
ACCOUNTING AGAINST BALSAM

72. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein. The Loflins are entitled to a full and complete Accounting of all monies Balsam has received from the sale of homesteads or lots.

FOR A TENTH CAUSE OF ACTION
CONTINUOUS TRESPASS AGAINST BALSAM

73. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

74. The Loflins own lot 108 in Balsam Mountain Preserve which consists of 1.837 acres and the Recorded Plat, which is the only recorded plat, is contained at Plat Cabinet 11, Slide 383 in the Jackson County Records in North Carolina.

75. Balsam, in contradiction to the Deed, Recorded Plat, Development Plan, and Insurance Contract, controls and maintains a road dissecting lot 108.

76. The road and the materials making up the road constitute a continuing trespass and an encroachment under the applicable law.

77. As a result of Balsam's continuing trespass and encroachment, the Loflins have been and continue to be injured.

78. The Loflins are entitled to relief including compensation for the injury and an Order directing Balsam to immediately remove the road from the property and restore all of the acreage which they purchased.

FOR A ELEVENTH CAUSE OF ACTION
ENCROACHMENT AGAINST BALSAM

79. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

80. A road maintained and/or owned and operated for the benefit of Balsam, including the Association, contrary to the Recorded Plat, the development plan, and all explanations prior to sale, encroaches upon Lot 108. Balsam has been notified of the encroachment and has not taken any action to cure the encroachment, if it can be cured at all.

81. As a result of Balsam's encroachment, the Loflins have been and continue to be injured and are entitled to full relief including compensation and removal of the encroachment

FOR A TWELFTH CAUSE OF ACTION
INDEMNIFICATION AGAINST BALSAM

82. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

83. As a direct result of the road through the Loflins' property, and the Loflins' right to close that road, which is a trespass and encumbrance on their property, members of the association and other property owners may in the future initiate legal action against the Loflins to recover damages for closing the road so that they can have full use and enjoyment of their property.

84. As a result of the aforesaid, the Loflins are informed and believe that they are entitled to a declaratory judgment determining that the Loflins are and will be entitled to full

and complete indemnification from Balsam, of and from all claims or actions of any nature brought against the Loflins for the purpose of seeking injunctive relief or compensatory or punitive damages, resulting from the Loflins' decision to close the road, including attorney's fees to defend any such action.

FOR A THIRTEENTH CAUSE OF ACTION
BREACH OF CONTRACT AGAINST CHICAGO AND COUNSELLOR

85. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

86. The Loflins entered into contract with the Insurance Defendants to investigate and insure that lot 108 was protected from all risks set forth herein, including, but not limited to, easements, encumbrances, and fraud.

87. In contradiction to the Insurance Contract, Lot 108 contains 1.4 rather than 1.87 acres, and is and has been since before the Closing encumbered and encroached upon by a road dissecting the property, rather going around the property on the only Recorded Plat.

88. Despite the Insurance Contract, for which they received consideration from the Loflins, the Insurance Defendants breached the Insurance Contract with the Loflins by refusing to provide the Loflins any relief from the damages caused by the insured risks described herein.

89. As a result of the breach of contract by the Insurance Defendants, the Loflins are entitled to full value of the property s well as any consequential damages which have

been incurred.

FOR A FOURTEENTH CAUSE OF ACTION
NEGLIGENCE AGAINST CHICAGO AND COUNSELLOR

90. The Loflins specifically incorporate all other paragraphs contained in this Amended Complaint as if specifically stated herein.

91. Chicago, which was in the business of providing insurance all types of property including property in nascent development, was designated by Balsam to provide insurance for the Founding Limited Partners. As such Chicago knew or should have known the risks associated with Lot 108 and either willingly allowed exposure to such risks despite this knowledge, or negligently failed to ascertain and insure against such risks.

92. Counsellor's duty was to investigate and recommend an insurance policy to protect the Loflins from reasonably foreseeable risks, which Counsellor was particularly qualified to do because its agent and the Loflins' counsel also represented Balsam, had drafted the documents central to this dispute, and was throughly familiar with every aspect of the Project. Counselor negligently failed to select a polity to insure the Loflins from the risks which Chicago has denied are covered by the Insurance Contract.

93. As a result of the Insurance Defendants negligence, the Loflins are entitled to full value of the property s well as any consequential damages which have been incurred.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for a judgment against Defendants as set forth herein, including:

(a). An Order as to Balsam rescinding the Offering Contact and the conveyance of Lot 108 and returning the parties to their respective positions, including title to Lot 108 being returned to Balsam, and Balsam returning the Loflins' consideration, together with all interest thereon, and attorney's fees and costs;

(b) In the alternative, as to Balsam, an Order requiring Balsam to remove its continuing trespass and an award of actual damages as may be determined by a jury to have been sustained by the Loflins, as well as punitive damages and costs and attorney's fees;

(c) An award of actual damages as to the Chicago and Counsellor as may be determined by a jury to have been sustained by the Loflins, as well as costs and attorney's fees and such other relief provided for in the Insurance Contract which is in the possession of the Chicago and Counsellor.

(d) Such additional relief as to all Defendants which this Court should determine to be proper.

Daniel A. Speights (SC Bar # 5027)
A. G. Solomons, III (SC Bar# 68291)
SPEIGHTS & RUNYAN
100 Oak Street
Post Office Box 685
Hampton, South Carolina 29924
(803)943-4444
(803)943-4599 (fascimile)

By: 
A. G. Solomons, III

ATTORNEYS FOR PLAINTIFFS

Hampton, South Carolina

April 14, 2014

STATE OF SOUTH CAROLINA

William Loffin
Leslie Loffin
Plaintiff

vs.

BMP Developement, L.P.
Chicago Title Insurance Co.
& Title Agency Inc
Defendant

AFFIDAVIT OF SERVICE

Case# 2013-CP-07-1807

Personally appeared before me the undersigned deponent, who being duly sworn, says that he served the Amended, Summons and Complaint

in this action on the Respondent, CRAIG DEHMAN

(X) by delivery to CRAIG DEHMAN, personally
( ) by delivery to _____, a person

of age and discretion (_____) at the residence of the Respondent,
Relationship
and leaving copies of the same at 88 Farnsleigh Ave in Bluffton, S.C.
on the 14 day of Apr, 2014, at 6:00 Am /(Pm) and that deponent is not a party to this action, and has no interest therein or connection therewith.

Sworn to before me, this 14 day of Apr, 2014

Martin Jean Reynolds
Notary Public for South Carolina

My Commission expires: **11/12/2018**

J.J. Reynolds
Processor

REYNOLDS PROCESS SERVICE
1000 LURAY ROAD
HAMPTON, SC 29924

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT William Loflin and Leslie Loflin, Plaintiffs, vs. BMP Development, LP, Chicago Title Insurance Company, and Counsellor Title Agency, Inc., Defendants.	IN THE COURT OF COMMON PLEAS CASE NUMBER: 2013-CP-07-1807 **THE DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S MOTION TO DISMISS THE PLAINTIFF'S AMENDED COMPLAINT**

TO: DANIEL A. SPEIGHTS, ESQ.
SPEIGHTS & RUNYAN
ATTORNEYS FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the Defendant Chicago Title Insurance Company will move before the Presiding Judge of the Fourteenth Judicial Circuit, within ten (10) days after service hereof, or as soon thereafter as counsel may be heard, for an Order dismissing it from this action based upon the lack of subject matter jurisdiction over the property described in the Amended Complaint and the failure to state a claim against this Defendant. The Defendant will also move to dismiss this Amended Complaint as the Plaintiffs have alleged that they received title to Lot 108 at Balsam Mountain Preserve and have continued to own that property during the time complained of in the Amended Complaint so as to have received the benefit of the insurance policy continuously and without interruption since 2001.

Received

APR 16 2014

Speights & Runyan

The Motion will be supported by any additional memoranda or briefs to be submitted to the Court prior to the hearing.

Pursuant to Rule 11 SCRCP, counsel certifies there is no duty of consultation connected with the filing of this Motion.

Please be present to defend if so minded.

BUIST, BYARS & TAYLOR, LLC

Mount Pleasant, South Carolina

April 15, 2014

By: _____

G. Hamlin O'Kelley, III
S.C. Bar No. 15491
Maria Kiehling Brees
S.C. Bar No. 76799
652 Coleman Boulevard, Suite 200
Mount Pleasant, South Carolina 29464
(843) 856-4488
hamlin.okelley@buistbyars.com

Attorneys for the Defendant Chicago Title Insurance Company

CERTIFICATE OF MAILING

I hereby certify that on April 15, 2014, a copy of the foregoing was mailed, postage prepaid, to all counsel of record in this matter, as follows.

Daniel A. Speights, Esq.
Speights & Runyan
100 Oak Street, East
P.O. Box 685
Hampton, SC 29924

Robert E. Stepp, Esq.
Sowell, Gray, Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

Laura F. Locklair, Esq.
Parker Poe
200 Meeting St., Suite 301
Charleston, SC 29401

G. Hamlin O'Kelley, III

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
William Loflin and Leslie Loflin,	)	Civil Action No. 2013-CP-07-1807
	)	
Plaintiffs,	)	
	)	
vs.	)	**MOTION TO DISMISS AMENDED COMPLAINT BY COUNSELLOR TITLE AGENCY, INC.**
	)	
BMP Development LP, Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
	)	
Defendants.	)	
	)	

Received
APR 2 8 2014
Speights & Runyan

Defendant Counsellor Title Insurance Agency, Inc. ("Counsellor") hereby moves pursuant to S.C.R.Civ.P. 12(b)(6) for an order dismissing the amended complaint against Counsellor on the grounds that a) the amended complaint fails to state facts sufficient to constitute a cause of action against Counsellor for breach of contract; b) the amended complaint fails to state facts sufficient to constitute a cause of action against Counsellor for negligence; c) the amended complaint fails to state facts sufficient to constitute a cause of action against Counsellor under any theory of law; and d) Plaintiffs have not suffered any damage attributable to Counsellor as a matter of law.

LEGAL STANDARD

A motion to dismiss a claim pursuant to Rule 12(b)(6), S.C.R.Civ.P. must be based "solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007); *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). A motion to dismiss should be granted if the facts and inferences derived from the facts would not entitle a Plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C.

297, 300, 457 S.E.2d 601, 603 (1995). "'The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.'" *Doe*, 373 S.C. at 395, 645 S.E.2d at 247-48 (quoting *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)).

FACTS AS ALLEGED IN THE AMENDED COMPLAINT

Plaintiffs' amended complaint alleges that they purchased Lot 108 in the Balsam Mountain Preserve subdivision in Jackson County, North Carolina in 2001 for $495,000. (Am. Compl. ¶¶ 8, 10.) According to the amended complaint, the boundaries and corners of the lot were not staked out at the time Plaintiffs purchased it. (*Id.* at ¶ 8.) The Loflins received a plat of their lot at closing, which showed the area of the lot as 1.837 acres, and also showed that a road went around the boundaries of the lot. (*Id.* ¶ 10.) This plat was incorporated into the deed to Plaintiffs and recorded in Jackson County, North Carolina in Plat Cabinet 11 at Slide 383 as part of the closing of Plaintiffs' purchase of the lot. (*Id.*) The deed that conveyed the lot to Plaintiffs described the lot as shown in the recorded plat, which was incorporated into that deed. *(Id.)* Thus, Plaintiffs allege that the real property Plaintiffs thought they were buying was what was conveyed to them.

The amended complaint then alleges that in 2006, Plaintiffs were informed by Defendant BMP Development L.P. ("Balsam") that Lot 108 contained only 1.4 acres and that Balsam Mountain Rd. traversed the property. (*Id.* ¶ 15.). The amended complaint alleges that an unrecorded plat showing the true configuration of Lot 108 had been prepared before closing but had never been recorded. (*Id.*) Plaintiffs further allege or imply that the road as shown on the unrecorded plat actually exists, runs through their lot and is controlled and maintained by

Balsam. (*Id.* ¶ 16.) Plaintiffs allege that the existence of the road and/or the unrecorded plat creates an encroachment and trespass upon their property. (*Id.*)

In the thirteenth cause of action for breach of contract, Plaintiffs summarily allege that they entered into a contract with Counsellor and Chicago Title "to investigate and insure that lot 108 was protected from all risks set forth herein, including, but not limited to easements, encumbrances, and fraud." (*Id.* ¶ 86.) No specifics of this alleged agreement are provided, however, and there is no allegation that any separate consideration was paid to Counsellor in exchange for such protections. In the fourteenth cause of action, Plaintiffs allege that Counsellor was under a legal duty "to investigate and recommend an insurance policy to protect [Plaintiffs] from reasonably foreseeable risks . . . ." (*Id.* ¶ 92.) The amended complaint also alleges, as a tort cause of action, that "Counsellor negligently failed to select a policy to insure [Plaintiffs] from the risks which Chicago has denied are covered under the [title insurance policy]." (*Id.*) As to damages, Plaintiffs allege that they are entitled to the full value of the property. (*Id.* ¶¶ 89; 92.)

I. THE FACTS ALLEGED ARE INSUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST COUNSELLOR FOR BREACH OF A SPECIAL CONTRACT.

The only contract that is properly alleged in the amended complaint is one for the issuance of a title insurance policy. The plaintiffs acknowledge that this contract was performed. Any other claim in the amended complaint against Counsellor for breach of contract fails as a matter of law. First, the amended complaint does not contain legally sufficient allegations to support the existence of a contract "to investigate and insure that lot 108 was protected from all risks." The required elements of contract under South Carolina law are an offer, acceptance, and valuable consideration. *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368, 377 (Ct. App.

2005). The amended complaint does not allege any of these elements. The Court is therefore not bound to accept as true the conclusory allegation that a special agreement between Plaintiffs and Counsellor existed. The amended complaint does allege in paragraph three that Counsellor was acting as agent for Chicago Title Insurance Company. (Am. Compl. ¶ 3.) Counsellor is not alleged to have acted in any other capacity. Thus, Plaintiffs do not allege any special agreement in the present case that obligated Counselor to do more than provide title examination services and act as title insurance as agent for Chicago.

II. THE FACTS ALLEGED FAIL TO STATE A CAUSE OF ACTION AGAINST A TITLE EXAMINER.

Title insurance, by its very nature, insures against defects in title at the time the policy is issued. *Firstland Village Assocs. v. Lawyers Title Ins. Co*, 277 S.C. 184, 186, 284 S.E.2d 582, 583 (1981) (citing *Nat'l Mortg. Corp. v. Am. Title Ins. Co.*, 261 S.E.2d 844 (1980)). It is not prophylactic insurance that guards against all risks that a purchaser of property may encounter, such as the existence of an unrecorded plat or a subsequent trespass or encroachment. Nor does it insure against future events. *Firstland Village Assocs.*, 277 S.C. at 186, 284 S.E.2d at 583. Counsellor's duty as a title examiner is limited to a review of matters appearing in the public record, absent a specific agreement to do more. *Hill v. Pineland Mem'l Park*, 282 S.E.2d 779 (N.C. 1981) (holding that title protection requires examination of the public registry only); *Burkhead v. Farlow*, 146 S.E.2d 802 (N.C. 1966) (holding that a title abstractor must examine public records).[1]

Title searches are limited to the public record, among other reasons, because North Carolina (like South Carolina) has a statute that renders unrecorded interests in land invalid

[1] Because the real property that is the subject of this action is located in North Carolina, North Carolina law should control the duties of a person conducting a title examination of that property.

against subsequent purchasers of the property. N.C.G.S.A. § 47-18; *Chrysler Credit v. Burton*, 599 F.Supp. 1313 (M.D.N.C. 1984) (holding that the purpose of the North Carolina recording statute is to enable prospective purchasers to rely with safety on the public record concerning the status of land titles). Thus, unless an interest or encumbrance appears in the public record, it is not enforceable against a person who acquires the land. As the court in *Hill* explained, "a purchaser must examine the public registry. If he finds no record [of a defect in title], even if he knows there has been a prior conveyance, he may record his deed with the assurance that his title will prevail." 292 S.E.2d at 782. "The General Assembly, by enacting [§ 47-18] clearly intended that prospective purchasers should be able to safely rely on the public records." *Schuman v. Roger Baker & Assocs., Inc.*, 319 S.E.2d 308, 311 (N.C. App. 1984). As explained by the North Carolina Supreme Court in *Turner v. Glenn*, 18 S.E.2d 197 (N.C. 1942), "[a] purchaser is chargeable with notice of the existence of [an encumbrance] only if a proper search of the public record would have revealed it and it is conclusively presumed that he examined each recorded deed or instrument in his line of title and to know its contents." *Id.* at 201.

In the present case, Plaintiffs are alleging that Counsellor has breached its contract to investigate title by failing to discover a plat that by Plaintiffs' own admission was never made part of the public record and by failing to protect them against unlawful trespass and encroachments that arose after the purchase. Because the duty of title examiners does not extend to matters that are not in the public record at the time of the examination and because the amended complaint does not sufficiently allege any special agreement by which Counsellor undertook to do more than examine the public records, the amended complaint fails to state facts sufficient to constitute a cause of action for breach of contract against Counsellor as a title examiner. This Court should therefore dismiss the amended complaint with prejudice.

III. COUNSELLOR IS NOT LIABLE TO PLAINTIFFS IN NEGLIGENCE BECAUSE THE LAW DOES NOT IMPOSE ANY DUTY ON TITLE INSURANCE AGENTS TO SELECT AND RECOMMEND A POLICY THAT PROTECTS OWNERS FROM UNRECORDED MATTERS.

The fourteenth cause of action alleges that Counsellor was under a duty "to investigate and recommend an insurance policy to protect [Plaintiffs] from reasonably foreseeable risks" and that Counsellor "negligently failed to select a policy to insure the Loflins from the risks which Chicago has denied are covered by the Insurance Contract." (Am. Compl. ¶ 92.) This claim fails because Counsellor was under no such duty as a matter of law.

An insurance agent is under no duty to advise an insured at the point of application unless there is an express or implied agreement to do so. *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 620 S.E.2d 326 (2005); *Sullivan Co. v. New Swirl, Inc.*, 313 S.C. 34, 437 S.E.2d 30 (1993); *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002); *Trotter v. State Farm Mut. Auto Ins. Co.*, 297 S.C. 465, 377 S.E.2d 343 (Ct. App. 1988) (holding that the agent was under no duty to advise an insured about an exclusion in the policy sold to the insured). As discussed above, the amended complaint does not properly allege that there was any agreement by Counsellor to advise Plaintiff regarding the title insurance policy that they were purchasing. No such agreement can be inferred because Plaintiffs fail to allege any of the factors that would support such an inference, such as the payment of additional consideration beyond payment of the premium, a clear request for advice by the insured, a clear agreement by Counsellor to provide that advice, or a course of dealing pursuant to which Counsellor provided that advice to Plaintiffs over a long period of time. *See Trotter*, 377 S.E.2d at 347.

Because Counsellor was not under any duty to provide any advice to Plaintiffs and because Plaintiffs have not alleged circumstances from which such a duty can be inferred, the fourteenth cause of action fails as a matter of law as to Counsellor.

IV. COUNSELLOR IS NOT LIABLE TO PLAINTIFFS AS A MATTER OF LAW UNDER ANY THEORY.

It is equally clear that Plaintiffs may not recover against Counsellor "on any theory of the case." *Stiles*, 318 S.C. at 300, 457 S.E.2d at 603. As the above cases make clear, title to real property is only affected by things that are a part of the public record, and therefore a title searcher's duty to a prospective purchaser, whether arising under a contract or imposed by law, is similarly limited. Title examiners are not required to be private detectives who look for information that is not publicly available. As the North Carolina Supreme Court has noted,

> [i]n this country, where it is deemed so essential to commercial prosperity that property of all kinds should pass freely from one to another, and that, in order to facilitate that object, no lien should attach to real estate that cannot be discovered by a diligent examination of public records, it would be startling to the legal profession and to dealers in real estate to announce that, after a careful searching of such records, a purchaser might in many instances still be unsafe, unless he should trace the proposed vendor, by the aid of detectives, through all of his wanderings in different counties of the state for a score of years, in order ascertain whether the allotment of some other homestead to him in another county had disabled him from making a valid title to that offered for sale.

Stern v. Lee, 20 S.E. 736, 743 (N.C. 1894).

Rather, "[i]n order to give a title opinion, an abstractor must make a careful . . . search of the public records." *Burkhead*, 146 S.E.2d at 805. There is no issue in the present case regarding the adequacy of the search of those records. The issue is entirely whether Counsellor was under any duty of any nature to discover and/or report any matter that is not in those records. Counsellor had no such duty. No unrecorded instrument can affect Plaintiffs' title, and as a result, Plaintiffs cannot state any claim against Counsellor based upon the unrecorded plat or anything that occurred after the examination. The amended complaint against Counsellor should be dismissed with prejudice.

V. BECAUSE THE UNRECORDED PLAT DOES NOT CREATE AN ENCUMBRANCE AS A MATTER OF LAW, PLAINTIFFS HAVE NOT SUFFERED ANY DAMAGES PROXIMATELY CAUSED BY THE TITLE EXAMINATION.

As discussed above, interests in land that are not reflected in the public record are not enforceable against subsequent purchasers for value. In the present case, the allegations in the amended complaint about an unrecorded plat cannot operate to diminish or encumber the estate that Plaintiffs received in their deed, and, therefore, cannot create easements or encumbrances. Therefore as a matter of law, no damages are proximately caused by Counsellor's understandable and proper failure to report a matter that does not affect title.

Additionally, because the unrecorded plat has no legal effect under North Carolina law, Plaintiffs are entitled to relief against any persons or entities that are acting in derogation of Plaintiffs' title. *Shuman, supra; Stephenson v. Jones*, 316 S.E.2d 366 (N.C.App. 1984) (holding that secret, hidden, and unregistered trusts will not defeat a bona fide purchaser for value). Because Plaintiffs are entitled to prevail against those parties, they have not suffered any damage attributable to Counsellor, and cannot maintain a claim against Counsellor.

Further, Plaintiffs do not allege that they contracted with Counsellor to perform a physical inspection of the lot. If, in fact, the road was in place when Mr. Loflin purchased the lot, Plaintiffs cannot recover against Counsellor for failing to disclose information known by Plaintiffs. *Lawson v. Citizens & S. Nat'l. Bank of S.C.*, 259 S.C. 477, 193 S.E.2d 124 (1972 (holding that duty to disclose relates to facts known by one party but unknown to the other). Alternatively, if Plaintiffs allowed the lot to be staked and/or the road to be constructed after the closing and in a manner not consistent with the recorded plat, any damages resulting therefrom and are not the responsibility of the title examiner.

Just as Plaintiffs have not alleged that they engaged Counsellor to perform a physical inspection of the lot, Plaintiffs have not alleged that they engaged Counsellor to confirm the accuracy of the survey incorporated into Plaintiff's deed. *See* Compl. ¶¶ 8, 28. If such survey was inaccurate or incomplete and if Plaintiffs were damaged as a result, such damages were not proximately caused by Counsellor's title examination. Similarly, in reciting the risks covered by the title insurance policy and the scope of the title examination, Plaintiffs do not allege that the title policy insures or that the title examiner made any representation as to the area of the lot. Therefore, Plaintiffs fail to allege a cause of action against Counsellor based on any difference in acreages shown on the recorded plat and on the unrecorded plat.

Finally, Plaintiffs have not alleged that Counsellor agreed to defend or indemnify Plaintiffs against adverse claims, and there is therefore no basis to leave Counsellor in the present action. Therefore, the amended complaint against Counsellor should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, This Court should dismiss the amended complaint against Counsellor with prejudice.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: _____

Robert E. Stepp
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
Attorneys for Counsellor Title Agency, Inc.

Columbia, South Carolina
April 24, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
William Loflin and Leslie Loflin,	)	Civil Action No. 2013-CP-07-1807
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	**CERTIFICATE OF SERVICE**
Balsam Mountain Preserve Community Association, Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
	)	
Defendants.	)	
	)	

I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant Counsellor Title Agency, Inc. do hereby certify that I have served all counsel in this action with a copy of the pleading hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: Motion to Dismiss Amended Complaint

Served: Daniel A. Speights, Esquire
Speights & Runyan
Post Office Box 685
Hampton, South Carolina 29924
Counsel for Plaintiffs

Laura F. Locklair, Esquire
Parker Poe
200 Meeting Street, Suite 301
Charleston, South Carolina 29401
Counsel for Balsam Mountain Preserve Community Association

G. Hamlin O'Kelley, III, Esquire
Maria E. Kiehling, Esquire
Buist Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, South Carolina 29464
Counsel for Chicago Title Insurance Company

Valerie N. Hampton

Columbia, South Carolina
April 24, 2014

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**NOTICE OF MOTION AND MOTION FOR DEFAULT JUDGMENT**
	)	
BMP Development LP, Chicago Title Insurance Company and Counsellor Title Agency, Inc.	)	
	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs, by and through their undersigned counsel, will move before the presiding Judge at the Beaufort County Court of Common Pleas, Beaufort, South Carolina, on the 10th day after service hereof or as soon thereafter as may be scheduled for judgment by default against the Defendant, BMP Development LP, for a sum to be determined at a damages hearing.

This motion is made on the grounds set forth in the attached Affidavit of Default and will be based on the pleadings, said affidavit, and other matters properly presented to the Court.

Daniel A. Speights (SC Bar # 5027)
A. G. Solomons, III (SC Bar# 68291)
SPEIGHTS & RUNYAN
100 Oak Street, Post Office Box 685
Hampton, SC 29924
(803)943-4444
(803)943-4599 (fascimile)

By: _____
ATTORNEYS FOR PLAINTIFFS

Hampton, South Carolina
July 17, 2014

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**AFFIDAVIT OF DEFAULT**
	)	
BMP Development LP, Chicago Title Insurance Company and Counsellor Title Agency, Inc.	)	
	)	
Defendants.	)	

PERSONALLY appeared before me, A. G. Solomons, III, who being first duly sworn, deposes and says:

That he is one of the attorneys for the Plaintiffs in the above-captioned action; that the Summons and Amended Complaint were served personally by Ronald Reynolds, process server, on Craig Lehman, individually and as registered agent for service for Defendant BMP Development LP, on April 14, 2014, and the Affidavit of Service was filed on April 21, 2014, with this court; that more than thirty (30) days have elapsed since service of the said Summons and Amended Complaint; that no Answer, Notice of Appearance or other responsive pleading has been made therein; and that the said Defendant is now in default.

Based on this Affidavit, the Plaintiffs hereby request the Clerk of Court to enter the said default upon the calendar pursuant to Rule 55(a) of the South Carolina Rules of Civil Procedure.

A. G. SOLOMONS, III

SWORN TO before me this
17th day of July, 2014

Notary Public for South Carolina
My Commission Expires: 4-12-15

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF HAMPTON)

Re: William P. Loflin and Leslie Loflin v. BMP Development LP, Chicago Title Insurance Company, and Counsellor Title Agency, Inc.
(Case No. 2013-CP-07-1807)

PERSONALLY APPEARED before me, Susan T. Murdaugh, who being duly sworn, deposes and says: that she is employed in the office of Speights & Runyan, attorney for the Plaintiffs in the above-referenced action; that she served the foregoing Notice of Motion and Motion for Default Judgment this 17th day of July, 2014, by personally depositing in a United States Postal Service mail box a copy of the same, postage prepaid, addressed to the attorney(s) listed below.

Robert E. Stepp, Esquire
Sowell, Gray, Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, SC 29211

G. Hamlin O'Kelley, III, Esquire
Maria E. Kiehling, Esquire
BUIST, BYARS & TAYLOR, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464

Susan T. Murdaugh
SUSAN T. MURDAUGH

SWORN TO before me this
17th day of July, 2014

Rosemarie Lighten (L.S.)
Notary Public for South Carolina
My Commission Expires: 11/6/2022

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT William Loflin and Leslie Loflin, Plaintiffs, vs. BMP Development, LP, Chicago Title Insurance Company, and Counsellor Title Agency, Inc., Defendants.	IN THE COURT OF COMMON PLEAS CASE NUMBER: 2013-CP-07-1807 **THE DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE PLAINTIFF'S AMENDED COMPLAINT**

TO: DANIEL A. SPEIGHTS, ESQ.
SPEIGHTS & RUNYAN
ATTORNEYS FOR THE PLAINTIFF

The Defendant Chicago Title Insurance Company ("Chicago Title") hereby submits its Memorandum in Support of its Motion to Dismiss the Plaintiffs' Amended Complaint filed April 16, 2014. For the reasons stated herein, Chicago Title respectfully requests that its Motion be granted.

STANDARD OF REVIEW

A motion to dismiss a case pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure must be based "solely upon allegations set forth in the complaint." *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005). A motion to dismiss should be granted if the facts and inferences derived would not entitle a Plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). The question is whether in the

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light most favorable to the Plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007).

FACTS IN THE AMENDED COMPLAINT

The Plaintiffs are the owners of Lot 108 in the Balsam Mountain Preserve development located in Jackson County, North Carolina. (Amended Complaint, ¶ 8, ¶10) The Plaintiffs paid $495,000.00 to purchase Lot 108 (*Id.* at ¶ 8) Chicago Title issued title insurance policies for Lot 108. (*Id.* at ¶ 3). Chicago Title issued three insurance policies to the Plaintiffs: one at the time of original purchase and two others when the Plaintiffs refinanced their loans for Lot 108 (*Id.*) At the time of the closing, Lot 108 was not staked. (*Id.* at ¶ 8) During the closing, the Plaintiffs received a deed to Lot 108 and copy of a recorded plat reflecting that Lot 108 consisted of 1.837 acres. (*Id.* at ¶ 10). The recorded plat also showed that the Balsam Mountain Preserve Round went around Lot 108. (*Id.*) The plat was recorded in Jackson County, North Carolina, in Plat Cabinet 11 at Slide 383 and incorporated in the deed to the Plaintiffs which deed was recorded in Jackson County in Book 1227 at Page 202. (*Id.*) The deed conveyed Lot 108 as shown on the recorded plat. (*Id.*) The Plaintiffs allege that they purchased Lot 108 as shown on the recorded plat. (*Id.*)

Chicago Title issued a title insurance policy insuring the Plaintiffs' title to Lot 108 containing 1.87 acres without any road going though it in reference to the recorded plat in Jackson County, North Carolina. (*Id.* at ¶ 11).

Four years after the closing, in 2006, the Plaintiffs claim that BMP Development informed them that, contrary to the duly recorded deed and duly recorded plat, Lot 108 only contained 1.4 acres and that Balsam Mountain Preserve Road went through their property as shown on an unrecorded plat. (*Id.* at ¶ 15). The Plaintiffs claim the unrecorded plat shows both

the reduced acreage and the Balsam Mountain Preserve Road going through their Lot 108. (*Id.*) According to the Complaint, there is no recorded plat or deed showing the reduced acreage or Balsam Mountain Preserve Road going through Lot 108. (*Id.*) The Plaintiffs claim that there is a trespass and encroachment upon their property by way of this unrecorded plat. (*Id.* at ¶ 16)

In 2012, the Plaintiffs informed Chicago Title of the unrecorded plat. (*Id.* at ¶ 20). In response, Chicago Title advised that based upon a title search, the only recorded deed and plat did not show any impairments to the Plaintiff's title and denied the claim. (*Id.*)

The Plaintiffs have asserted breach of contract and negligence actions against Chicago Title and Counsellor Title Agency, Inc. (*Id.* at ¶¶ 85-93) The Plaintiffs claim they entered into contract with Chicago Title to "investigate and insure lot 108 was protected from all risks set forth herein, including, but not limited to, easements, encumbrances and fraud." (*Id.* at ¶ 86). In addition, they allege that Lot 108 contains 1.4 rather than 1.87 acres and there is a road dissecting the property as shown on an unrecorded plat, rather than what is shown on the recorded plat. (*Id.* at ¶ 87) There are no specifics alleged as to how Chicago Title breached its contact when the deed to the Plaintiffs and the recorded plat show that the Plaintiffs received the title for which they bargained and for which insurance was issued. (*Id.*) The claim for negligence states that Chicago Title knew or should have known the risks associated with Lot 108 and either allowed exposure to such risk or negligently failed to ascertain and insure against such risks. (*Id.* at ¶ 91). The Plaintiffs claim they are entitled to the full value of their property and consequential damages. (*Id.* at ¶ 89; *id.* at ¶ 93).

ARGUMENT

I. THE PLAINTIFFS HAVE FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST CHICAGO TITLE FOR BREACH OF CONTRACT

The Plaintiffs have alleged that the contract at issue is the First Insurance Contract of title insurance issued by Chicago Title through its agent, Counsellor Title Agency, Inc. (*Id.* at ¶ 3) The Plaintiffs have acknowledged that the contract was issued and performed. (*Id.*) The Plaintiffs have acknowledged that their deed references the recorded plat showing the correct acreage and the Balsam Mountain Road going around Lot 108. (*Id.* at ¶¶ 10-11). The First Insurance Contract complies with the deed and recorded plat and insures that title which the Plaintiffs have. (*Id.*at ¶ 11). There are no allegations stated in the Amended Complaint that support any breach of the First Insurance Contract as the Plaintiffs received the benefit of their bargain, have the title for which they bargained, and for which there is title insurance. There are no allegations to support the Plaintiffs' claims that Chicago Title had to "investigate and insure that Lot 108 was protected from all risks." The Plaintiff's own allegations state that their deed referenced the recorded plat. There is no other plat to search or rely on by Chicago Title or its agents in issuing a title insurance policy. There is simply no breach as the Plaintiffs' received the title referenced in both their recorded deed and the recorded plat referenced in that deed.

II. THE PLAINTIFFS RECEIVED THE BENEFIT OF THEIR TITLE INSURANCE POLICY AND FAIL TO ALLEGE ANY CAUSE OF ACTION FOR ANY BREACH OF THAT CONTRACT

The Plaintiffs received the benefit of their title issuance and there has been no beach of that contract. Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title **which are in existence at the time the insured takes title.**

Preservation Capital Consultants, LLC v. First American Title Ins. Co., 406 S.C. 309, 751, S.E.2d 256 (2013); *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981)(citing *National Mortgage Corp. v. American Title Ins.. Co.*, 261 S.E.2d 844 (N.C. 1980))(emphasis added). Title insurance is unique in that it is retrospective, not prospective. *Firstland Village Assoc.,, id.* at 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id* Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it. *Id.* The Plaintiffs allege that the title policy, the First Contract of Insurance, insured Lot 108, containing 1.87 acres as described in the deed and recorded plat, which they received title for at their closing in 2002. The Plaintiffs pled that the recorded deed references the recorded plat with the correct acreage and showing the road going around their property. It was not until 2006, four years after the closing, that the Plaintiffs claim to have learned of the alleged unrecorded plat showing a different acreage and a different configuration of Balsam Mountain Preserve Road. At the time the Plaintiffs took title, there were no encumbrances of record and the Plaintiffs received good title to their land.

Neither Chicago Title nor its agents at Counsellor Title Agency, Inc., could have been aware of any unrecorded plat, which is how the Plaintiffs have described this alleged document. To the contrary, the Plaintiffs have alleged in Paragraph 10 of their Amended Complaint that they received a duly executed deed to Lot 108 referencing a recorded plat showing 1.837 acres transferred and Balsam Mountain Preserve Road going around Lot 108. (Plaintiffs' Amended Complaint, ¶ 10) There was no lien, encumbrance, defect or other matter recorded at the time the title insurance policy was issued that could have been discovered at the time of closing. (*Id.*

¶15). Instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, a title policy is designed to save the insured from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it. *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981) In this matter, there were no such defects, liens, or encumbrances of record at the time of the issuance of the policy. The Plaintiffs' own allegations make that clear. This cause of action should be dismissed accordingly.

III THERE IS NO LIABIILITY FOR ANY NEGLIGENCE CLAIM WHERE THE PLAINTIFFS' OWN ALLEGATIONS SET FORTH NO DUTY TO PROTECT THE PLAINTIFFS FROM UNRECORDED MATTERS AND NO TITLE SEARCH WOULD REVEAL UNRECORDED MATTERS

The Plaintiffs have alleged that Chicago Title is negligent since it "knew or should have known the risks associated with Lot 108 and either willingly allowed exposure to such risks despite this knowledge or negligently failed to ascertain and insure against such risks." (Plaintiffs' Amended Complaint, ¶ 91) By their own allegations, no title search could have revealed that there was an urecorded plat. No title search would have revealed an unrecorded plat. There are no allegations that state what risks were known or should have been known at the time the policy of insurance was issued, which is the time at issue as to the coverage under the policy. *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013). The only allegation in the Amended Complaint relating to the time of issuance of the policy is that the deed references the recorded plat and that plat showing Lot 108 containing 1.87 acres and showing Balsam Mountain Road going around the property. (Plaintiffs' Amended Complaint, ¶ 10). There can be no negligence where the Plaintiffs' allegations fail to show how Chicago Title could have breached any duty to the Plaintiffs at the time the policy was issued.

Chicago Title denied the Plaintiffs' claim regarding the unrecorded plat discovered in 2006, a copy of which is not part of the Plaintiffs' Amended Complaint. The Plaintiffs' own pleadings make clear that this is an item discovered four years after the policy was issued. There can be no breach of a duty of care here for a failure to investigate something that was not of public record and issued after the policy. *Preservation Capital Consultants, LLC, id. at*, 406 S.C. 309, 751, S.E.2d 256 (2013) The policy at issue, referenced as the First Insurance Contract, insures Lot 108, with 1.87 acres, without a road going through it based upon the recorded plat from 2002. Title insurance is unique in that it is retrospective, not prospective. *Firstland Village Assoc.,*, *id.* at 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id.* There can be no negligence in failing to ascertain and insure risk when those risks arise four years after the policy was issued and remain unrecorded. Accordingly, the claims against Chicago Title should be dismissed.

CONCLUSION

For the foregoing reasons, Chicago Title Insurance Company requests that this Court dismiss the Plaintiffs' Amended Complaint against Chicago Title Insurance Company with prejudice.

BUIST, BYARS & TAYLOR, LLC

Mount Pleasant, South Carolina

August 20, 2014

By: _____

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(843) 856-4488
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Attorneys for the Defendant Chicago Title Insurance Company

CERTIFICATE OF MAILING

I hereby certify that on August 20, 2014, a copy of the foregoing was mailed, postage prepaid, to all counsel of record in this matter, as follows.

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G. Hamlin O'Kelley, III

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT William Loflin and Leslie Loflin, Plaintiffs, vs. BMP Development, LP, Chicago Title Insurance Company, and Counsellor Title Agency, Inc., Defendants.	IN THE COURT OF COMMON PLEAS CASE NUMBER: 2013-CP-07-1807 **THE DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S ANSWER TO THE PLAINTIFF'S AMENDED COMPLAINT**

TO: DANIEL A. SPEIGHTS, ESQ.
A.G. SOLOMONS, III, ESQ.
SPEIGHTS & RUNYAN
ATTORNEYS FOR THE PLAINTIFF

The Defendant Chicago Title Insurance Company ("Chicago Title") answering the Plaintiffs' Amended Complaint alleges and states as follows:

1. Each and every allegation of the Plaintiffs' Amended Complaint not admitted, denied, or otherwise qualified herein is hereby deemed denied, and Chicago Title demands strict proof thereof.

2. Chicago Title admits the allegations of Paragraph 1 of the Plaintiffs' Amended Complaint.

3. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraph 2 of the Plaintiffs' Amended Complaint, and, therefore, denies same and demands strict proof thereof.

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4. Chicago Title admits only so much of Paragraph 3 of the Plaintiffs' Amended Complaint that alleges it is a foreign corporation that conducts business in South Carolina and that the Plaintiffs entered into a contract or contracts of title insurance with Chicago Title. Chicago Title is without sufficient information to form a belief as to the remaining allegations of said Paragraph, and, therefore, denies same and demands strict proof thereof.

5. In answering Paragraph 4 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 4 above as though repeated herein verbatim.

6. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 5, 6, 7, 8, and 9 of the Plaintiffs' Amended Complaint, and, therefore, denies same and demands strict proof thereof.

7. Chicago Title admits the allegations of Paragraph 10 of the Plaintiff's Amended Complaint.

8. Chicago Title admits only so much of Paragraph 11 of the Plaintiff's Amended Complaint that purports to set forth the terms and conditions of the title insurance contract referenced therein. Chicago Title denies any of the allegations of said Paragraph that in any way contradict the terms and conditions of the title insurance contract referenced therein and demands strict proof thereof. 9. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 12, 13, 14, 15, 16, 17, 18, and 19 of the Plaintiffs' Amended Complaint and demand strict proof thereof.

9. In response to the allegations of Paragraph 20 of the Plaintiffs' Amended Complaint , Chicago Title admits that Plaintiffs tendered a claim on policy no. 34 0063 097 00000014 by letter dated March 23, 2012. Further, Chicago Title admits that by correspondence dated August

21, 2012, it responded to Plaintiffs' claim with a coverage determination which stated in part as follows:

> The Company has obtained a title search of the property. It appears that there is no revised plat of record. Therefore, title appears to be established as insured as the Original Plat was, as of the Policy Date, the correct plat. Furthermore, the Original Plat depicts the property described on Schedule A of the Policy. Therefore, there appears to be no title defect in this matter. Moreover, Scheduled B, Paragraph 8 of the Policy specifically excludes coverage for the amount of acreage. However, in this case, there appears to be no discrepancy with the amount of acreage pursuant to the title records. In the event that the developer records a revised plat which appears in the public record after the Policy Date, any matter arising therefrom would be considered a post policy issue and would therefore be excluded under Paragraph 3 of the Exclusions of the Policy. As discussed above, however, that is not the case at this time as no revised plat is of record. The Company will consider any additional information that Insureds provide and reserves the right to modify this coverage decision in light of any additional information it may receive related to this claim.

(Letter, August 21, 2012)

Chicago Title would further show that the August 21, 2012, letter is a document which speaks for itself.

10. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 21 and 22 of the Plaintiffs' Amended Complaint, and, therefore, denies same and demands strict proof thereof.

11. In answering Paragraph 23 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 11 above as though repeated herein verbatim.

12. Chicago Title is not required to answer the allegations of Paragraphs 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

13. In answering Paragraph 34 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 13 above as though repeated herein verbatim.

14. Chicago Title is not required to answer the allegations of Paragraphs 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, and 53 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

15. In answering Paragraph 54 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 15 above as though repeated herein verbatim.

16. Chicago Title is not required to answer the allegations of Paragraph 55 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

17. In answering Paragraph 56 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 17 above as though repeated herein verbatim.

18. Chicago Title is not required to answer the allegations of Paragraphs 57 and 58 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

19. In answering Paragraph 59 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 19 above as though repeated herein verbatim.

20. Chicago Title is not required to answer the allegations of Paragraphs 60 and 61 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-

Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

21. In answering Paragraph 62 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 21 above as though repeated herein verbatim.

22. Chicago Title is not required to answer the allegations of Paragraphs 63, 64, and 65 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

23. In answering Paragraph 66 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 23 above as though repeated herein verbatim.

24. Chicago Title is not required to answer the allegations of Paragraphs 67 and 68 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

25. In answering Paragraph 69 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 25 above as though repeated herein verbatim.

26. Chicago Title is not required to answer the allegations of Paragraphs 70 and 71 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

27. In answering Paragraph 72 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 23 above as though repeated herein verbatim. For a further Answer to said Paragraph, Chicago Title would allege and show that it is without sufficient

information to form a belief as to the remaining allegations of said Paragraph, and, therefore, denies same and demands strict proof thereof.

28. In answering Paragraph 73 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 28 above as though repeated herein verbatim.

29. Chicago Title admits the allegations of Paragraph 74 of the Plaintiffs Amended Complaint.

30. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraph 75 of the Plaintiffs' Amended Complaint, and, therefore, denies same and demands strict proof thereof.

31. Chicago Title is not required to answer the allegations of Paragraphs 76, 77, and 78 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

32. In answering Paragraph 79 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 32 above as though repeated herein verbatim.

33. Chicago Title is not required to answer the allegations of Paragraphs 80 and 81 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

34. In answering Paragraph 82 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 34 above as though repeated herein verbatim.

35. Chicago Title is not required to answer the allegations of Paragraphs 83 and 84 of the Plaintiffs' Amended Complaint as said allegations relate to a cause of action against a Co-

Defendant. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

36. In answering Paragraph 85 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 36 above as though repeated herein verbatim.

37. Chicago Title denies the allegations of Paragraphs 86, 87, 88, and 89 of the Plaintiffs' Amended Complaint and demands strict proof thereof.

38. In answering Paragraph 90 of the Plaintiffs' Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 34 above as though repeated herein verbatim.

39. Chicago Title denies the allegations of Paragraphs 91, 92, and 93 of the Plaintiffs' Amended Complaint and demands strict proof thereof.

FOR A FURTHER ANSWER
AND BY WAY OF A FIRST AFFIRMATIVE DEFENSE

40. Chicago Title would allege and show that the Plaintiffs' Amended Complaint should be barred in whole and in part by the doctrines of waiver, estoppel, and laches as the Plaintiffs claims to have discovered the matters giving rise to his causes of action, if any, in 2006 but did not file their Complaint until 2013.

FOR A FURTHER ANSWER
AND BY WAY OF A SECOND AFFIRMATIVE DEFENSE

41. Chicago Title would allege and show that the Plaintiffs' Amended Complaint fails to state a cause of action upon which relief can be granted as against Chicago Title, and accordingly, the Plaintiffs' Amended Complaint should be dismissed as to Chicago Title.

FOR A FURTHER ANSWER
AND BY WAY OF A THIRD AFFIRMATIVE DEFENSE

42. Chicago Title would allege and show that acts and omissions giving rise to the Plaintiffs' Amended Complaint were the direct and proximate result of acts and omissions of parties over

whom Chicago Title had no control, and, therefore, the Plaintiffs' Amended Complaint should be dismissed as to Chicago Title.

FOR A FURTHER ANSWER
AND BY WAY OF A FOURTH AFFIRMATIVE DEFENSE

43. Chicago Title would allege and show that the Plaintiffs received the benefit of their bargain as to the title insurance policy issued in the Plaintiffs' favor as described in the Plaintiffs' Amended Complaint, and, therefore, the Plaintiffs' Amended Complaint should be dismissed as to Chicago Title.

FOR A FURTHER ANSWER
AND BY WAY OF A FIFTH AFFIRMATIVE DEFENSE

44. Chicago Title would allege and show that the Plaintiffs' Amended Complaint should be barred by the applicable statutes of limitation as the Plaintiffs knew or should have known of their alleged causes of action in 2006 as set forth in the Plaintiffs' Amended Complaint yet they did not file their Complaint until 2013.

FOR A FURTHER ANSWER
AND BY WAY OF A SIXTH AFFIRMATIVE DEFENSE

45. Chicago Title would allege and show that the Plaintiffs' own negligence in failing to protect their own interest in the property described in their Amended Complaint is comparatively greater than any negligence on the part of Chicago Title, none of which is admitted, and all of which is specifically denied.

FOR A FURTHER ANSWER
AND BY WAY OF A SEVENTH AFFIRMATIVE DEFENSE

46. Chicago Title would allege and show that the Plaintiffs' have filed this Amended Complaint in retaliation and response to a lawsuit filed against them in Jackson County, North Carolina.

FOR A FURTHER ANSWER
AND BY WAY OF AN EIGHTH AFFIRMATIVE DEFENSE

47. Chicago Title would allege and show that the real property giving rise to this matter is located in Jackson County, North Carolina, and, therefore, this Court is the improper venue for the Plaintiff's claims, if any, and none of which are admitted, and this Court does not have subject matter jurisdiction over the Plaintiff's claims, if any, and none of which are admitted.

FOR A FURTHER ANSWER
AND BY WAY OF A NINTH AFFIRMATIVE DEFENSE

48. Chicago Title would allege and show that it adopts by reference herein any other affirmative defenses asserted by any other Defendant in this matter in answering the Plaintiffs' Amended Complaint.

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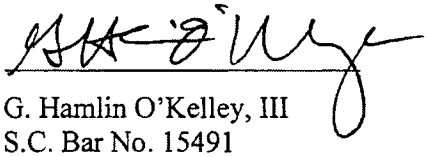
WHEREFORE, having fully answered the Plaintiffs' Amended Complaint, the Defendant Chicago Title Insurance Company prays that this Court enter its Order as follows:

1. Dismissing the Plaintiffs' Amended Complaint;
2. Awarding the Defendant its reasonable attorneys' fees and costs for the defense of this matter;
3. Awarding any and all such further relief as this Court may deem just and proper.

BUIST, BYARS & TAYLOR, LLC

Mount Pleasant, South Carolina

Sept. 9, 2014

By: 

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Attorneys for the Defendant Chicago Title Insurance Company

CERTIFICATE OF MAILING

I hereby certify that on September 9th, 2014, a copy of the foregoing was mailed, postage prepaid, to all counsel of record in this matter, as follows.

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G. Hamlin O'Kelley, III

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	SECOND AMENDED COMPLAINT
	)	
BMP Development LP, Balsam Mountain Group, LLC, COWARD, HICKS & SILER, P.A., J. K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
	)	
Defendants.	)	

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BEAUFORT COUNTY, S.C.
CLERK OF COURT

Plaintiffs, by and through their undersigned counsel, allege as follows:

I. JURISDICTION

1. Plaintiffs, William and Leslie Loflin [hereinafter individually and collectively referred to as the "**Loflins**"], are residents of Beaufort County, South Carolina.

2. Defendant, BMP Development LP, f/n/a Balsam Mountain Preserve LP and Balsam Mountain Preserve, Limited Partnership [hereinafter referred to as "**Balsam**"], is a foreign entity doing systematic and continuous business in Beaufort County and throughout South Carolina. Balsam's registered agent for service, Craig Lehman, resides in Beaufort County, South Carolina. The actions herein complained of against Balsam occurred in large part in Beaufort County, South Carolina. Balsam was organized and formed by Chaffin/Light Associates [hereinafter referred to as "**Chaffin/Light**"] to develop Balsam

Mountain Preserve [hereinafter referred to as the "**Project**"], located in Jackson County, North Carolina. Chaffin/Light's principal place of business was then and is now located in Beaufort County, South Carolina. Chaffin/Light previously had formed and managed three successful community developments in Beaufort County, South Carolina: Spring Island, Callawassie, and Chechessee Creek Club. Balsam's stated purpose was to replicate Spring Island "on higher ground," building on the success of Spring Island, including the Founder Member Program. Balsam assembled a leadership team consisting of James J. Chaffin, Jr.,then and now a resident of Beaufort County, South Carolina, who had led the development of Spring Island; James A. Anthony, Jr., who served as president of Spring Island Company; Mont Blaisdell, then and now a resident of Beaufort County, South Carolina, who served as Chief Financial Officer of both Spring Island and Callawassie; and Ellen D. Savage, now deceased, who was a resident of Beaufort County, South Carolina, and served as the membership director and general manager of the Spring Island Club. Balsam assembled a Consulting Team consisting of experienced teams of professionals, half of whom were residents of South Carolina. At all times complained of herein, Balsam was represented by William L. Bethea, then and now a resident of Beaufort County, South Carolina, and one or more lawyers in his Beaufort County, South Carolina law firm, Bethea, Jordan & Griffin, P.A., which later merged with the McNair Firm, with offices in Beaufort County, South Carolina [hereinafter referred to collectively as the "**Bethea Firm**"], including Sarah F. Robertson, also then and now a resident of Beaufort County, South Carolina. Mr.

Bethea prepared and filed Balsam's Certificate of Domestic Limited Partnership for Balsam Mountain Company, LLC, whose sole members were Mr. Chaffin and James W. Light, as Balsam's general partner [hereinafter referred to as the "**General Partner**], and signed the Certificate as the Secretary for the General Partner, with the acknowledgments to be returned to Ms. Robertson. As Balsam's counsel, Mr. Bethea prepared in Beaufort County, South Carolina, the documents which are central to this dispute [hereinafter referred to collectively as the "**Offering Contract**"], to wit: Balsam's Confidential Offering Memorandum (hereinafter referred to as the "**Offering Memorandum**") setting forth Balsam's Founder Member Program offering up to thirty-five founding limited partnerships (hereinafter referred to as "**Founding Limited Partnerships**") for limited partners (hereinafter referred to as "**Founding Limited Partners**")] to invest in the Project, which attached and incorporated three agreements: the Subscription Agreement – Power of Attorney [hereinafter referred to as the "**Subscription Agreement**"] to be entered into between Balsam and the Founding Limited Partners for admission of the Founding Limited Partners; the Agreement of Limited Partnership [hereinafter referred to as the "**Partnership Agreement**"] to be entered into between the General Partner and the Founding Limited Partners governing the affairs of Balsam and the rights and respective obligations of its partners; and the Founder's Balsam Mountain Preserve Reservation Agreement [hereinafter referred to as the "**Reservation Agreement**"] to be entered into between

Balsam and each Founding Limited Partner for selection of a homestead (commonly called a lot). The Offering Contract identified Mr. Chaffin as the Manager of the Balsam development with support to be provided by officers and staff that the General Partner had assembled in other developments including Spring Island, Callawassie and Chechessee; and that the Founding Limited Partners would provide capital to fund the acquisition of the property and the initial development activities of the Project. The Offering Contract listed thirty-three Founding Limited Partnerships to be owned by persons who had committed to be Founding Limited Partners, including sixteen to be owned in whole or part by South Carolina residents (seven of whom resided in Beaufort County) and three to be owned in whole or part by North Carolina residents. Mr. Blaisdell, who executed the Partnership Agreement in Beaufort County, South Carolina, was listed as the Initial Founding Limited Partner; and Mr. Bethea was listed on behalf of a Beaufort County, South Carolina LLC (Doubletop Mountain Holdings LLC). Balsam met with the Loflins in Beaufort County, South Carolina, and offered them the opportunity to be Founding Limited Partners by purchasing a Founding Limited Partnership unit [hereinafter referred to as a "**Unit**"]. Balsam delivered the Offering Contract to the Loflins and Mr. Chaffin and Mr. Bethea explained the project to them in Beaufort County, South Carolina. Mr. Chaffin and the Loflins executed the Partnership Agreement and the Subscription Agreement in Beaufort County, South Carolina. The Loflins executed the documents for their purchase of Lot 108 in Beaufort County, South

Carolina, including a mortgage securing the financing of their purchase, supervised by the Bethea Firm, which represented Balsam and the Loflins. Pursuant to the Offering Contract, Balsam arranged for issuance coverage for the Loflins and their lender through a South Carolina corporation, whose agent was Mr. Bethea, with its principal place of business in Beaufort County, South Carolina. Balsam is also the alter-ego of Balsam Mountain Preserve Community Association [hereinafter referred to as the "**Association**"], which Mr. Bethea, on behalf of Balsam, formed as the sole incorporator with a Beaufort County, South Carolina address, and which includes a number of members who reside in Beaufort County, South Carolina; and, upon information and belief, the alter-ego of other entities affiliated with Balsam which will be identified in discovery.

3. Defendant, Balsam Mountain Group, LLC [hereinafter referred to as "**BMG**"] is a foreign entity doing systematic and continuous business in Beaufort County and throughout South Carolina. BMG is also the successor to Balsam, whose actions complained of, as set forth herein, occurred in large part in Beaufort County, South Carolina, and the alter-ego of the Association.

4. Defendant, Coward, Hicks & Siler, P.A. [hereinafter referred to as the "**Coward Law Firm**"], is, upon information and belief, a professional association whose members include Defendant, J. K. Coward, Jr. [hereinafter referred to as "**Mr. Coward**"], and whose members at the time of most of the events complained of herein included Mr. Coward, William H. Coward, and Heather C. Baker. The Coward Law Firm and Mr.

Coward [hereinafter referred to collectively as the "**Coward Defendants**"] are, upon information and belief, located in Jackson County, North Carolina, but are subject to the personal jurisdiction of this Court because, among other reasons, the causes of action set forth herein against them arose from their contract to supply services or things to the Loflins in South Carolina, from their contract to supply services or things to Balsam and one or more of its officers in South Carolina, and from their contract to supply services or things to Counsellor and Chicago in South Carolina; their entry into a contract with the Loflins which they performed on behalf of the Loflins in whole or in part in South Carolina; their co-counsel relationship with the Bethea Firm and their participation in the drafting of the Offering Contract in whole or in part in South Carolina; their providing services or things to Counsellor and Chicago in connection with the Loflins and in connection with Balsam in South Carolina; their representation of other South Carolina residents in connection with the purchase of property and the securing of insurance in South Carolina; and, by the commission of one or more tortious acts in whole or in part in South Carolina, including their negligent or intentional failure to inform the Loflins of information material to this lawsuit.

5. Defendant, Chicago Title Insurance Company [hereinafter referred to as "**Chicago**"], is a foreign corporation doing systematic and continuous business in Beaufort County and throughout South Carolina, and Defendant, Counsellor Title Agency, Inc. [hereinafter referred to as "**Counsellor**"], is a South Carolina corporation with its principal place of business in Beaufort County, South Carolina [Chicago and Counsellor are

hereinafter referred to collectively as the "**Insurance Defendants**"]. At all times complained of herein, Counsellor was acting individually and as Chicago's agent, and Mr. Bethea and Ms. Robertson were agents for Chicago and Counsellor. In connection with their purchase of Lot 108, the Loflins entered into a contract of insurance [hereinafter referred to as the "**First Insurance Contract**"] with the Insurance Defendants in Beaufort County, South Carolina. Subsequently, the Loflins refinanced their purchase of Lot 108 on two occasions, both times in Beaufort County South Carolina, and both times supervised by the Bethea Firm, and entered into two additional contracts of insurance with the Insurance Defendants [hereinafter referred to as the "**Second Insurance Contract**" and the "**Third Insurance Contract**"].

II. FACTUAL ALLEGATIONS

6. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

7. The Offering Contract provided that the Loflins would commit $350,000 as a founder contribution. The Loflins were not required to make any additional capital contributions. In return, the Loflins would receive, among other things, a credit of $200,000 toward the purchase of a homestead or lot and receive a discount of thirty percent on the purchase. In addition, the Loflins were entitled to receive cash quarterly from the sales of homesteads or lots [hereinafter referred to as "**Cash Distributions**"], as opposed to waiting for the project to produce profits or pay off debt, which equated

to 0.2571% of "Net Revenue from Home Sales." Balsam represented that based upon forecast gross sales revenues of 311 Homesteads on which the return would be computed, the sharing of the Net Revenue from Homestead Sales would provide a projected cash return to the Loflins of $335,343.00, and that the value of the homesteads could reasonably be expected to appreciate in value when the golf course and club facilities were functioning. Each Founding Limited Partner was precluded from selling the homestead or lot for a period of 5 years, and except in the event of transfer because of death, the sale or exchange of a Founders Limited Partner's interest in the Partnership would be permitted only with the consent of the General Partner. Based upon Balsam's representations, the Loflins agreed to the Offering Contract and the parties executed the Subscription Agreement, the Partnership Agreement, and the Reservation Agreement.

8. The Subscription Agreement made the Loflins Founding Limiting Partners subject to the terms and conditions thereof and the provisions of the Confidential Offering Memorandum and the Partnership Agreement. The Subscription Agreement specifically provided that the provision providing for the Loflins' right to receive quarterly Cash Distributions from the sales of homesteads or lots could not be modified or amended without their express, written consent. The Subscription Agreement also provided that if the Loflins were required to institute suit to enforce their rights, and obtained a valid judgment, they would be entitled to all reasonable costs, expenses and attorney's fees.

9. The Partnership Agreement provided that Balsam's General Partner owed the Loflins a fiduciary duty to act in good faith in its exercise of its rights and obligations.

10. Pursuant to the Reservation Agreement, the Loflins reserved the right to purchase Balsam Mountain Preserve Homestead No. 108 [hereinafter referred to as "**Lot 108**"], located on the mountain side at Balsam Mountain Preserve, as shown on the Phase 1 Plan prepared by Herron Land Surveying [hereinafter referred to as the "**Development Plan**"], an excerpt of which was attached to the Reservation Agreement as Exhibit "A," following registration of the Property with HUD. Lot 108 was not staked at the time, but Balsam represented to the Loflins that the property consisted of approximately 1.9 acres and that Balsam Mountain Preserve Road circumnavigated Lot 108 as shown on the Development Plan provided to the Loflins. The purchase price for Lot 108 was $495,000.

11. The Reservation Agreement provided that, "At Closing, Seller shall convey good and marketable title to the Property to Purchaser in fee simple by general warranty deed, free from encumbrances except those restrictions and other matters referred to in this Agreement. If requested by Purchaser, Seller will arrange for the issuance by Chicago Title Insurance Company of title insurance coverage for Purchaser and, if applicable, Purchaser's lender, at Purchaser's expense." The Reservation Agreement further provided that Balsam, at Balsam's sole expense, "shall deliver to purchaser at Closing, and shall cause to be recorded prior to the deed to the Property, an individual plat of the Property. That plat will be prepared to scale by a licensed surveyor or engineer and will accurately reflect the

dimensions of the Property, the courses, distances and monuments of the boundaries of the Property, the relationship of the Property to proposed or existing roads, the names of abutting roads, the ownership of abutting land and the general location of the Property in relation to the overall phase of Balsam Mountain Preserve."

12. On February 12, 2002, the Coward Defendants wrote the Loflins at the suggestion of Balsam and informed the Loflins that they had been asked to prepare the deed and related documents for Balsam "in this sale." The Coward Defendants offered to assist the Loflins in their purchase of Lot 108. The Loflins agreed, and an attorney-client relationship was formed. The Coward Defendants did not then or at any other time disclose to the Loflins their full relationship with Balsam.

13. The closing for Lot 108 [hereinafter referred to as the "**Closing**"] was held in February 2002, supervised by the Bethea Law Firm and the Coward Law Firm. In accordance with the Offering Contract, Balsam, by and through the Coward Defendants, prepared and delivered to the Loflins in South Carolina a duly executed deed to Lot 108 [hereinafter referred to as the "**Deed**"] and an individual plat of Lot 108 [hereinafter referred to as the "**Recorded Plat**"]. The Recorded Plat, prepared at Balsam's request by a surveyor of its choosing, reflected that Lot 108 consisted of 1.837 acres, and that Balsam Mountain Preserve Road went around rather than through Lot 108. The Recorded Plat was recorded in the Jackson County Records in Plat Cabinet 11 at Slide 383. Balsam's Deed to the Loflins incorporated the Recorded Plat and was recorded in the Jackson County Records in Book

1227 at 202. The Coward Defendants represented and certified to the Loflins in South Carolina that the Loflins had a marketable title to Lot 108 as described in the Recorded Plat [hereinafter referred to as the **"First Certification"**].

14. At the closing, the Loflins also entered into the First Insurance Contract with the Insurance Defendants in South Carolina based upon work performed by the Bethea Firm and the Coward Firm. The First Insurance Contract insured Lot 108 containing 1.87 acres without any road going through it, as described in the Deed and the Recorded Plant prepared at the request of and on behalf of Balsam in accordance with the Offering Contract. The purpose of the Insurance Contract was to insure the Loflins from a multitude of risks associated with Lot 108, which are more fully set forth in the First Insurance Contract in the possession of the Insurance Defendants, but which, upon information and belief, included but are not limited to fraud, trespass, easements, and encumbrances.

15. Pursuant to the Offering Contract, Balsam established annual assessments to be paid by each property owner, which, among other things, went to the maintenance of roads. Over the years, Balsam deducted the Loflins' Assessments from their quarterly Cash Distributions and forwarded the Loflins the balance.

16. The year after the Closing, Mr. Loflin was diagnosed with cancer, and he requested Balsam to permit the Loflins to sell Lot 108, but Balsam refused, even though the Loflins were informed that Balsam had permitted at least one other Founding Limited Partner to do so.

17. In 2004, the Loflins refinanced their purchase of Lot 108. The Coward Defendants represented the Loflins in this transaction, secured insurance with Chicago through Counsellor, and again represented and certified that the Loflins had a marketable title to Lot 108 as shown on the Recorded Plat [hereinafter referred to as the "**Second Certification**"].

18. In late 2005, Balsam permitted the Founding Limited Partners to sell their properties after four years, apparently in recognition of the success of the Project in selling lots and the opportunity for Founding Limited Partners to reap profits on their investments. The Loflins listed Lot 108 for $650,000.00.

19. In 2006, the Loflins again refinanced the purchase of Lot 108. The Coward Defendants represented the Loflins in this matter, again secured insurance with Chicago through Counsellor, and again represented and certified that the Loflins had a marketable title to Lot 108 as shown on the Recorded Plat [hereinafter referred to as the "**Third Certification**"].

20. [**Discuss Sol w Dan**] In 2006, Balsam informed the Loflins that contrary to the Deed and the Recorded Plat that they delivered to the Loflins in connection with the Closing, which were duly recorded, there was an encroachment on Lot 108, and that the property contained only 1.4 acres, and that Balsam Mountain Preserve Road went through the property. Balsam asked the Loflins to sign a quit claim deed to make their ownership as set forth in another individual plat of Lot 108 [hereinafter referred to as the "**Unrecorded Plat**],

which the Loflins believed from their discussions with Balsam had been recently prepared. The Loflins refused to sign a quit claim deed significantly reducing their lot size and permitting a road to go through their property. Balsam did not disclose to the Loflins that it knew before the Closing that Lot 108 contained only 1.4 acres with a road through it as reflected in the Unrecorded Plat or that the Unrecorded Plat had been prepared before the Closing. Thereafter, Mr. Loflin had a number of conversations with Mr. Chaffin and Balsam's general manager, Mr. Lehman, and Balsam's salesman, Bob Tufts (all of whom are residents of Beaufort County, South Carolina). Balsam acknowledged that the Loflins would not pay their assessments until the matter could be resolved. Despite multiple representations that Balsam would remedy the problem, however, Balsam refused to do so.

21. Balsam and subsequently BMG have exercised control over Balsam Mountain Preserve Road through the Loflins' property and .437 acres owned by the Loflins. The Loflins have objected to this encroachment, but Balsam and BMG have refused to remedy this situation, and have continued to encroach and continuously trespass upon Lot 108. In addition, BMG, through its Association, informed the Loflins that if they attempted to close the road encroaching through their property, it would not defend the Loflins from potential lawsuits filed by other Balsam property owners.

22. At some point, Balsam stopped forwarding the Loflins their quarterly Cash Distributions, and Balsam and BMG have continuously failed and refused to pay the Loflins their Cash Distributions, which the Loflins are entitled to under the Offering Contract.

23. Subsequently, the Loflins discovered that the Unrecorded Plat had been prepared for Balsam two weeks before the original Closing.

24. In 2012, BMG, which under the Offering Contract, as Balsam's successor, was the exclusive listing agent for Lot 108, informed the Loflins that they would no longer list Lot 108 for sale.

25. In 2012, the Loflins informed Chicago of the Unrecorded Plat showing that Balsam Mountain Preserve Road did not circumnavigate but rather dissected Lot 108. Chicago responded that based upon a title search, the only recorded Deed did not show any impairments on the title, and, despite the provisions of the Insurance Contract, the Loflins had no cognizable injury.

26. In 2013, after the Loflins instituted this lawsuit, BMG, acting through its Association, brought a retaliatory lawsuit against the Loflins in North Carolina, seeking all past assessments, even though Balsam previously acknowledged that the Loflins would not be required to pay assessments (which, among other things, went to the maintenance of the road encroaching through their property) until Balsam could resolve the matter, and even though the Loflins' assessments previously had been paid from their Cash Distributions (which Balsam and BMG later converted to their own use). Nevertheless, the Loflins had to hire counsel and expend significant sums to defend and resolve this lawsuit.

27. In 2014, the Loflins learned that at some point after conveying Lot 108 to the Loflins, Balsam entered Lot 108 and added to its trespass and encumbrance by expanding

Balsam Mountain Preserve Road through Lot 108, moving dirt and apparently destroying one or more trees, and installing two culverts which drain water onto the Loflins' property.

28. On November 14, 2014, the Loflins personally served BMG, the Association, the Coward Law Firm, and a Balsam entity known as Anthony Associates [hereafter referred to as "**Anthony**"], whose agent of service is Mr. Coward, with Notices of Deposition of the Custodian of Records and separate Subpoenas issued by the Clerk of this Court and the Clerk of Court of Jackson County, North Carolina, requiring the Custodian of Records for each entity to appear at designated locations in Jackson County, North Carolina, and to produce and permit the inspection and copying of specific documents relating to the Loflins' purchase of real estate at Balsam and the Balsam Mountain Development. The Notices and Subpoenas were returnable on December 1 and 2, 2014, some seventeen and eighteen days after service.

29. On Tuesday, November 25, 2014, eleven days after service of the Notices and Subpoenas, Mr. Coward, as the Custodian of Records for the Coward Law Firm and as the Agent of Service for Anthony, filed a Motion to Quash the Notices and Subpoenas directed at those entities. As grounds for this Motion, Mr. Coward asserted that he had a conflict on December 1, 2014, and that, "the plaintiff [*sic*] has not served the undersigned the pleadings so it is difficult if not impossible to determine the relevancy of the materials subpoenaed." Prior to serving the Motion to Quash, Mr. Coward did not contact his clients, the Loflins, or the Loflins' counsel in this matter, and request the underlying pleadings or a modification of the date. Upon receipt of the Motion to Quash, the Loflins' counsel immediately telephoned

Mr. Coward and left him a voice mail and sent Mr. Coward an email asking that he contact him in an effort to work this matter out. Neither Mr. Coward nor anyone else at the Coward Law Firm responded.

30. On December 1, 2014, Mr. Coward appeared before Judge William H. Coward, Superior Court Judge, and argued his Motion to Quash. Mr. Coward did not inform the Loflins that they had obtained a Court hearing in this matter or otherwise provide them with a notice and opportunity to be heard at this hearing. Upon information and belief, Mr. Coward suggested that he had not been able to contact the Loflins' counsel, although the Loflins' counsel did not receive any notice of the hearing or any response to their voice mail or email attempting to discuss the matter with Mr. Coward.

31. On December 1, 2014, shortly after noon, the Coward Defendants forwarded the Loflins' counsel a copy of an *ex parte* Court Order entered that day by Judge Coward, granting Mr. Coward's Motion to Quash on behalf of the Coward Law Firm and Anthony. Judge Coward's *ex parte* Order was expressly based upon Mr. Coward's representations and concluded that "there is insufficient time for the movant or the Court to notify the Plaintiff of this hearing or this ruling," even though the Notices served on the Coward Defendants seventeen days earlier set forth the address and telephone number of the Loflins' counsel, even though Mr. Coward faxed the Motion to Quash to the Loflins' counsel six days before the *ex parte* hearing, and even though the Loflins' counsel had emailed Mr. Coward and provided him with his cell telephone number six days before the *ex parte* hearing. Moreover,

at the time of the *ex parte* hearing, the Loflins' counsel was physically located less than two hours from the Courthouse.

32. On December 1, 2014, upon receipt of the Court Order issued by Judge Coward, the Loflins' counsel sent Mr. Coward a letter by overnight mail. The Loflins' counsel enclosed a copy of all of the subject pleadings in this matter, and offered to reschedule the matter at a date and time convenient for him. The Loflins' counsel also informed Mr. Coward that he was going to be in his area the next day and suggested coming by his office to discuss this matter in person. The Loflins' counsel requested that Mr. Coward contact him by telephone or email. Over a month has now elapsed, and Mr. Coward has never responded to this letter.

33. On December 12, 2014, the Loflins forwarded Mr. Coward a certified letter requesting "the original or an exact duplicate copy of our entire file in this matter, including any and all drafts and final deeds and plats of Lot 108, and all letters, emails and other communications regarding Lot 108, as well as any additional work you have performed or communications you have had in connection with your representation of us or with respect to any issues that subsequently arose regarding Lot 108." In response, on December 17, 2014, Mr. Coward mailed the Loflins a copy of what he represented to be a copy of the Loflins' file. The file forwarded to the Loflins included a copy of the Unrecorded Plat. Prior to that time, the Coward Defendants had never advised the Loflins of their knowledge of or the existence of the Unrecorded Plat, and the Loflins did not know that the Coward

Defendants had knowledge of, much less had participated in the fraud, and deceit and misrepresentations that had been perpetuated on the Loflins.

FOR A FIRST CAUSE OF ACTION
FRAUD AGAINST BALSAM AND BMG

34. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

35. During the negotiations to purchase Lot 108, Balsam made representations to the Loflins [hereinafter referred to as the "**Initial Misrepresentations**"] that Lot 108 contained approximately 1.9 acres free and clear of all encroachments, encumbrances and easements, and Balsam induced the Loflins to purchase Lot 108 based upon such Initial Misrepresentations, including their showing to the Loflins the Development Plan which did not show any road or other encroachment, encumbrance, or easement through Lot 108, by delivery to the Loflins of the individual Recorded Plat of Lot 108 showing that it contained 1.87 acres, with no road or other encroachment, encumbrance or easement through the property, and by preparation and delivery to the Loflins of the Deed which incorporated the Recorded Plat.

36. The foregoing Initial Misrepresentations were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

37. At the time the Initial Misrepresentations were made, Balsam knew that its Initial Misrepresentations were false and/or recklessly disregarded their falsity in that Balsam had in its possession the Unrecorded Plat that it had commissioned but never recorded

showing that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

38. Balsam's Initial Misrepresentations were material in that the Loflins would not have purchased Lot 108 if Balsam had produced the secret Unrecorded Plat before the Closing or told them that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and these Initial Misrepresentations significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property.

39. The Loflins relied on said Initial Misrepresentations, not only in incurring substantial financial obligations to purchase Lot 108, but also in purchasing a property which they believed would be marketable.

40. Balsam intended for the Loflins to rely on its Initial Misrepresentations.

41. The Loflins were ignorant of the falsity of Balsam's Initial Misrepresentations.

42. The Loflins reasonably relied and had a right to rely on Balsam's Initial Misrepresentations. The Loflins, as investors, also imposed a special trust and confidence in Balsam, which also under the Offering Contract owed them a fiduciary duty.

43. As a direct and proximate result of Balsam's Initial Misrepresentations the Loflins have suffered tremendous financial loss, the Loflins have lost the full enjoyment and use of their property, the Loflins have lost prospective sales of the property, the Loflins own property that is essentially unmarketable at anything close to the amount they paid for the

property, the Loflins have incurred attorney's fees and costs, and the Loflins have suffered and will in the future continue to suffer emotional and mental distress, and other damages.

44. The Loflins are entitled to punitive damages as a result of Balsam's fraud and deceit.

FOR A SECOND CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION AGAINST BALSAM AND BMG

45. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

46. During the negotiations to purchase Lot 108, Balsam represented to the Loflins that Lot 108 contained approximately 1.9 acres free and clear of all encroachments, encumbrances and easements, and Balsam induced the Loflins to purchase Lot 108 based upon such Initial Misrepresentations, including their showing to the Loflins the Development Plan which did not show any road or other encroachment, encumbrance, or easement through Lot 108, by delivery to the Loflins of the individual Recorded Plat of Lot 108 showing that it contained 1.87 acres with no road or other encroachment, encumbrance or easement through the property, and by preparation and delivery to the Loflins of the Deed which incorporated the Recorded Plat.

47. The foregoing Initial Misrepresentations were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

48. At the time the Initial Misrepresentations were made, Balsam should have known that its Initial Misrepresentations were false and/or recklessly disregarded their falsity

in that Balsam had in its possession the Unrecorded Plat that it had commissioned but never recorded showing that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

49. Balsam's Initial Misrepresentations were material in that the Loflins would not have purchased Lot 108 if Balsam had produced the secret Unrecorded Plat before the Closing or told them that showing that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and these Initial Misrepresentations significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property.

50. The Loflins relied on said Initial Misrepresentations, not only in incurring substantial financial obligations to purchase Lot 108, but also in purchasing a property which they believed would be marketable.

51. Balsam intended for the Loflins to rely on its Initial Misrepresentations.

52. The Loflins were ignorant of the falsity of Balsam's Initial Misrepresentations.

53. The Loflins reasonably relied and had a right to rely on Balsam's Initial Misrepresentations, and Balsam knew or should have known of the Loflin's reliance. The Loflins, as investors, also imposed a special trust and confidence in Balsam, which also under the Offering Contract owed them a fiduciary duty.

54. Balsam breached the duty of care by failing to exercise due care in making the Initial Misrepresentations to the Loflins.

55. In 2006, after the Loflins listed Lot 105 for sale, Mr. Lehman and Mr. Tufts told the Loflins that Lot 108 contains only 1.4 acres and that Balsam Mountain Preserve Road goes through rather than around the Loflins' property. Neither Mr. Lehman nor Mr. Tufts disclosed that Balsam had known these material facts before the Closing, and during the ensuing four years, but neither Mr. Lehman nor Mr. Tufts were employed by Balsam in 2002, and the Loflins do not know that Mr. Lehman or Mr. Tufts knew about the history of this matter at that time. By not disclosing these material facts known to Balsam, however, Mr. Lehman and Mr. Tufts either intentionally or unknowingly suggested that this was a recently discovered problem. Mr. Lehman and Mr. Tufts asked the Loflins to execute a quit-claim deed relieving Balsam from all responsibility for these material differences. The Loflins refused.

56. At the time of the 2006 meeting, Balsam knew and or had the ability to know that its failure to disclose was another misrepresentation (hereinafter referred to as the "**Subsequent Misrepresentation**") that was false, misleading, and incomplete, and/or recklessly disregarded its falsity, in that Balsam knew before the Closing (and during the ensuing four years) that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108 as shown on the Unrecorded Plat it had commissioned and obtained before the Closing.

57. At the time Balsam made this Subsequent Misrepresentation, Balsam should have known that its Subsequent Misrepresentation was false, misleading, and incomplete,

and/or recklessly disregarded its falsity, in that Balsam knew before the Closing (and during the ensuing four years) that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108 as shown on the Unrecorded Plat it had commissioned and obtained before the Closing.

58. Balsam's Subsequent Misrepresentation was material in that the Loflins' bargaining position was disadvantaged by Balsam knowing of its fraud and deceit and Loflins believing that its fiduciary was dealing with its Founding Limited Partners in good faith in order to resolve an unfortunate development. Had Balsam disclosed the truth, the Loflins would have insisted, among other things, that the transaction be set aside, and if that failed, would have sought the assistance of legal counsel rather than relying on and proceeding alone with discussions with its fiduciary which had led it to believe that had simply made an innocent mistake which it wanted to correct.

59. Balsam intended for the Loflins to rely on its Subsequent Misrepresentation because it did not want to disclose its fraud and deceit.

60. The Loflins were ignorant of the falsity of Balsam's Subsequent Misrepresentation.

61. The Loflins reasonably relied and had a right to rely on Balsam's Subsequent Misrepresentation. The Loflins, as investors, also imposed a special trust and confidence in Balsam, which under the Offering Contract owed them a fiduciary duty.

62. Balsam's Subsequent Misrepresentation significantly impacted the Loflins'

financial well-being because the Loflins depended on the financial security of the subject property.

63. As a direct and proximate result of Balsam's Initial Misrepresentations and Balsam's Subsequent Misrepresentation [hereinafter referred to collectively as the **"Misrepresentations"**] , the Loflins have suffered tremendous financial loss, the Loflins have lost the full enjoyment and use of their property, the Loflins have lost prospective sales of the property, the Loflins own property that is essentially unmarketable at anything close to the amount they paid for the property, the Loflins have incurred attorney's fees and costs, and the Loflins have suffered and will in the future continue to suffer emotional and mental distress, and other damages.

64. The Loflins are also entitled to punitive damages as a direct and proximate result of Balsam's conduct.

FOR A THIRD CAUSE OF ACTION
RECISION AGAINST BALSAM AND BMG

65. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

66. The Loflins are entitled to have the conveyance of Lot 108 rescinded, with Balsam and BMG returning to the Loflins the full purchase price, plus interest and costs. including attorney's fees, and title of Lot 108 returned to Balsam or BMG.

FOR A FOURTH CAUSE OF ACTION
BREACH OF CONTRACT AGAINST BALSAM AND BMG

67. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

68. Balsam breached the Offering Contract, among other ways, by delivering the Loflins an inaccurate individual plat of Lot 108 in connection with the Closing; by taking and controlling .47 acres from the Loflins' property; by conveying Lot 108 with a road through it contrary to Recorded Plat and the Deed which it delivered to the Loflins at the Closing; by failing to disclose these facts for four years and by never telling the Loflins that they knew of these facts before the Closing; by refusing to correct the situation so that the Loflins might have the full use of the Lot 108 conveyed to them, without a road through it, and by telling the Loflins that they would provide no assistance from potential lawsuits if the Loflins attempted to partially remedy the situation by closing the road and exercising control over Lot 108 as conveyed to them by Balsam and reflected in the Recorded Plat delivered by Balsam to the Loflins at the Closing Deed prepared and recorded by Balsam and delivered to the Loflins and which incorporated by Recorded Plat; and by Balsam's continuously refusing to pay the Loflins their Cash Contributions.

69. As a direct and proximate result of Balsam's breach of contract, the Loflins have suffered actual damages, and the Loflins are entitled to attorneys fees and costs.

FOR A FIFTH CAUSE OF ACTION
BREACH OF CONTRACT WITH FRAUDULENT INTENT
ACCOMPANIED BY FRAUDULENT ACT AGAINST BALSAM AND BMG

70. The Loflins specifically incorporate all other paragraphs contained in this

Second Amended Complaint as if specifically stated herein.

71. In 2011, the Loflins learned that Balsam breached the Offering Contract with an intent to defraud and accompanied by a fraudulent act because Balsam already had the Unrecorded Plat of Lot 108 showing the road dissecting the subject property and that the lot contained 1.4 less acres, but Balsam concealed the existence of the Unrecorded Plat from the Loflins at the Closing and further tried to induce the Loflins to sign a quit-claim deed agreeing that Lot 108 contained 1.4 acres rather than 1.87 acres, and a road through it, without disclosing to the Loflins that they knew before the Closing that Lot 108 contained only 1.4 acres and had a road through it and had in its possession a Plat showing that before the Closing.

72. As a direct and proximate result of Balsam's breach of contract with fraudulent intent and accompanied by fraudulent act, the Loflins are entitled to actual damages and costs and attorney's fees, as well as punitive damages.

FOR A SIXTH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY AGAINST BALSAM AND BMG

73. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

74. Balsam and BMG had and have a fiduciary duty to the Loflins to act in good faith in its exercise of their rights and obligations.

75. Balsam and BMG breached their fiduciary duty as set forth herein, including the following particulars: Balsam's deceits in connection with the sale of Lot 108; Balsam's

and later BMG's failure to pay the Loflins their Cash Distributions as required in the Offering Contract; Balsam's refusal to permit the Loflins to sell the property within five years, while at the same time showing preferential treatment to one or more other Founding Limited Partners by permitting such a sale; Balsam's failure to inform the Loflins for over four years that Lot 108 contained only 1.4 acres and that Balsam Road went through it, and when it did, Balsam's suggestion that it had recently learned of this fact without disclosing that it had knew of the problem before the Closing;; BMG's 2012 refusal to list the Loflins Lot 108 for sale; BMG'S institution, through its Association, of a retaliatory lawsuit against the Loflins for payment of assessments, to maintain, in part, BMG's encroachment through their property, despite Balsam's previously acknowledging that the Loflins would not pay assessments until this matter could be resolved, and after they stopped paying the Loflins their quarterly Cash Distributions from which Balsam had deducted their assessments; and Balsam's failure to disclose for twelve years the facts and circumstances surrounding the Unrecorded Plat; and BMG's failure to disclose the facts and circumstances surrounding the Unrecorded Plat after it became knowledgeable about such facts and circumstances.

76. As a direct and proximate result of the Balsam's and BMG's breach of contract with fraudulent intent and accompanied by fraudulent act, the Loflins are entitled to actual damages and costs and attorney's fees, as well as punitive damages.

FOR A SEVENTH CAUSE OF ACTION
CONVERSION AGAINST BALSAM AND BMG

77. The Loflins specifically incorporate all other paragraphs contained in this

Second Amended Complaint as if specifically stated herein.

78. Balsam stopped paying the Loflins their Cash Distributions and Balsam and BMG continuously to this day refuse to pay the Loflins their Cash Distributions, converting the Loflins' Cash Distributions to their own use.

79. Balsam and BMG have continued to convert the property of the Loflins, refusing to acknowledge that the real property of approximately .4 acres as well as the real property now encumbered by a road is the property of the Loflins.

80. As a direct and proximate result of Balsam's conversion, the Loflins are entitled to their Cash Distributions, payment for the use and enjoyment of the converted property, as well as punitive damages, and costs and attorney's fees.

FOR AN EIGHTH CAUSE OF ACTION
UNJUST ENRICHMENT AGAINST BALSAM AND BMG

81. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

82. Balsam and BMG have been unjustly enriched by taking the Loflins' monies and then failing to deliver the Loflins the benefit of their bargain, including failing to deliver Lot 108 as set forth in their Recorded Plat and Deed and by failing to pay the Loflins their Cash Distributions.

83. As a direct and proximate result of Balsam's actions, the Loflins are entitled to a return of all their monies, as well as costs and attorney's fees.

FOR A NINTH CAUSE OF ACTION

ACCOUNTING AGAINST BALSAM AND BMG

84. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

85. The Loflins are entitled to a full and complete Accounting of all monies Balsam and BMG have received from the sale of homesteads or lots.

FOR A TENTH CAUSE OF ACTION
CONTINUOUS TRESPASS AGAINST BALSAM AND BMG

86. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

87. The Loflins own lot 108 in Balsam Mountain Preserve which consists of 1.837 acres and the Recorded Plat, which is the only recorded plat, is contained at Plat Cabinet 11, Slide 383 in the Jackson County Records in North Carolina.

88. Balsam, and since October 2011, BMG, in contradiction to the Deed, Recorded Plat, Development Plan, and Insurance Defendants own, control and maintain a road dissecting lot 108.

89. The road and the materials making up the road constitute a continuing trespass and an encroachment under the applicable law.

90. As a result of the foregoing continuing trespass and encroachment, the Loflins have been and continue to be injured.

91. The Loflins are entitled to relief including compensation for the injury and an Order directing Balsam and BMG to immediately remove the road from the property and

restore all of the acreage which the Loflins purchased.

FOR A ELEVENTH CAUSE OF ACTION
ENCROACHMENT AGAINST BALSAM AND BMG

92. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

93. A road maintained and/or owned and operated for the benefit of Balsam and BMG, including the Association, contrary to the Recorded Plat, the development plan, and all explanations prior to sale, encroaches upon Lot 108. Balsam and BMG have been notified of the encroachment and have not taken any action to cure the encroachment, if it can be cured at all.

94. As a result of the foregoing encroachment, the Loflins have been and continue to be injured and are entitled to full relief including compensation and removal of the encroachment.

FOR A TWELFTH CAUSE OF ACTION
INDEMNIFICATION AGAINST BALSAM AND BMG

95. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

96. As a direct result of the road through the Loflins' property, and the Loflins' right to close that road, which is a trespass and encumbrance on their property, members of the association and other property owners may in the future initiate legal action against the Loflins to recover damages for closing the road so that they can have full use and enjoyment

of their property.

97. As a result of the aforesaid, the Loflins are informed and believe that they are entitled to a declaratory judgment determining that the Loflins are and will be entitled to full and complete indemnification from Balsam and BMG, of and from all claims or actions of any nature brought against the Loflins for the purpose of seeking injunctive relief or compensatory or punitive damages, resulting from the Loflins' decision to close the road, including attorney's fees to defend any such action.

FOR A THIRTEENTH CAUSE OF ACTION
SUCCESSOR LIABILITY AGAINST BMG

98. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

99. BMG is the successor to Balsam and responsible for all causes of actions alleged against Balsam as set forth herein.

100. As a result of the foregoing, the Loflins have been and continue to be injured and are entitled to full relief as set forth herein, including actual and punitive damages, attorney's fees and costs, and other damages; the Loflins are entitled to have the conveyance of Lot 108 rescinded; the Loflins are entitled to their Cash Distributions; the Loflins are entitled to the return of all their monies; the Loflins are entitled to a full and complete Accounting of all monies Balsam and BMG have received from the sale of homesteads or lots; and the Loflins are entitled to an Order directing BMG to immediately remove the road and all other encroachments from the Loflins' property and restore all of the acreage which

the Loflins purchased.

FOR A FOURTEENTH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY AGAINST THE COWARD DEFENDANTS

101. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

102. Since early 2002, a fiduciary relationship has existed between the Loflins and the Coward Defendants. The Coward Defendants not only accepted but induced the confidence placed in them as the Loflins' counsel. The Coward Defendants have owed a special duty to the Loflins as their clients, including a duty to avoid conflicts of interest, an affirmative duty to protect their clients' interests, a duty to disclose all relevant information to their clients, and a duty to consult with their clients and reasonably disclose any risk or benefits of alternative courses of action.

103. The Loflins not only had a basis to trust and rely upon the advice and counsel of the Coward Defendants, but did in fact place a fiduciary trust in the Coward Defendants to diligently investigate, zealously protect the Loflins best interests and promptly communicate all pertinent information.

104. The Coward Defendants have breached their fiduciary duty to the Loflins, the full extent of which is unknown to the Loflins because the Coward Defendants have, upon information and belief, purposely concealed their conduct, but which includes the Coward Defendants' failure to disclose to the Loflins both the existence and legal implications of the Unrecorded Plat, despite being in the Loflins' file, which concealment, upon information and

belief, benefitted one or more other clients of the Coward Defendants whose interests were and are antagonistic to the Loflins.

105. As a result of the foregoing, the Loflins are entitled to actual and punitive damages, attorney's fees and costs.

FOR A FIFTEENTH CAUSE OF ACTION
FRAUD AND ACTIVE FRAUDULENT CONCEALMENT
AGAINST THE COWARD DEFENDANTS

106. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

107. In 2002, the Coward Defendants delivered to the Loflins the Individual Plat of Lot 108 showing that it contained 1.87 acres, with no road or other encroachment, encumbrance or easement through the property, and prepared and delivered to the Loflins the Deed which incorporated the Recorded Plat. The Coward Defendants then and over a period of years represented to the Loflins that Lot 108 contained approximately 1.9 acres free and clear of all encroachments, encumbrances, and easements; provided the Loflins with their Certifications in which they represented that the Loflins had a marketable title to Lot 108 as shown on the Recorded Plat; and actively concealed the existence of the Unrecorded Plat from the Loflins. The foregoing representations (including the Certifications and the active concealment) [hereinafter referred to as the "**Coward Misrepresentations**"] were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108 and Lot 108 was not marketable for the reasons set forth herein.

108. The Coward Defendants induced the Loflins to purchase and refinance Lot 108, and to exercise full ownership rights to Lot 108, including offering it for sale, based upon the Coward Misrepresentations.

109. The Coward Misrepresentations were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and Lot 108 was not and is not marketable as originally sold for the reasons set forth herein.

110. At the time the Coward made and repeated the Coward Misrepresentations, the Coward Defendants knew that the Coward Misrepresentations were false and/or recklessly disregarded their falsity in that, upon information and belief, the Coward Defendants had in their possession (in their Loflins' file) the Unrecorded Plat that Balsam had commissioned but never recorded showing that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

111. The Coward Misrepresentations were material in that the Loflins would not have purchased Lot 108 if the Coward Defendants had disclosed the secret Unrecorded Plat before the Closing or told them that Lot 108 contained (or may have contained) only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and these Misrepresentations significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property; in the alternative, if the Coward Defendants learned of the Unrecorded Plat after the Closing, the Loflins would have taken such steps to protect their interests if the Coward Defendants had made a full disclosure about the Unrecorded Plat

and advised them of their legal alternatives to protect their financial well-being.

112. The Loflins relied on the Coward Misrepresentations, not only in incurring substantial financial obligations to purchase and refinance Lot 108, but also in purchasing and refinancing property which they believed would be marketable, and in otherwise exercising their full ownership rights to Lot 108, including offering it for sale.

113. The Coward Defendants intended for the Loflins to rely on their Misrepresentations.

114. The Loflins were ignorant of the fact that the Coward Defendants knew about the falsity of their representations until until December 2014, when they learned that the Coward Defendants had a copy of the Unrecorded Plat in their file.

115. The Loflins reasonably relied and had a right to rely on the Coward Misrepresentations. The Loflins imposed a special trust and confidence in the Coward Defendants, who as their counsel owed them a fiduciary duty.

116. As a direct and proximate result of the Coward Misrepresentations, the Loflins have suffered tremendous financial loss, the Loflins have lost the full enjoyment and use of their property, the Loflins have lost prospective sales of the property, the Loflins own property that is essentially unmarketable at anything close to the amount they paid for the property, the Loflins have incurred attorney's fees and costs, and the Loflins have suffered and will in the future continue to suffer emotional and mental distress, and other damages.

117. The Loflins are entitled to punitive damages as a result of the Coward

Misrepresentations, and the Coward Defendants' fraud and deceit and active concealment of the truth.

FOR A SIXTEENTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION AND FRAUDULENT CONCEALMENT AGAINST THE COWARD DEFENDANTS

118. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

119. Over a period of years from 2002 until today, the Coward Defendants made and repeated the Coward Misrepresentations to the Loflins as set forth herein.

120. The Coward Defendants induced the Loflins to purchase and refinance Lot 108, and to exercise full ownership rights to Lot 108, including offering it for sale, based upon the Coward Misrepresentations.

121. The Coward Misrepresentations were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108 and Lot 108 was not and is not marketable for the reasons set forth herein.

122. At the time Coward Defendants made and repeated the Coward Misrepresentations, the Coward Defendants knew or should have known that the representations were false in that the Unrecorded Plat already had been prepared for Balsam, whom they also represented and, at some point, was provided to the Coward Defendants, who chose not to disclose it the Loflins.

123. The Coward Misrepresentations were material in that the Loflins would not

have purchased Lot 108 if the Coward Defendants had disclosed the secret Unrecorded Plat before the Closing or told them that Lot 108 contained (or may have contained) only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and these Misrepresentations significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property. The Coward Defendants continued to represent the Loflins over the years, and on two occasions in the ensuing four years, repeated all of the foregoing Misrepresentations. If the Coward Defendants had made a full disclosure about the Unrecorded Plat and advised them of their legal alternatives to protect their financial well-being, the Loflins would have taken such steps to protect their interests.

124. The Loflins relied on the Coward Misrepresentations, not only in incurring substantial financial obligations to purchase and refinance Lot 108, but also in purchasing and refinancing property which they believed would be marketable, and in otherwise exercising their full ownership rights to Lot 108, including offering it for sale.

125. The Coward Defendants intended for the Loflins to rely on their Misrepresentations.

126. The Loflins were ignorant of the fact that the Coward Defendants knew about the falsity of their representations until until December 2014, when they learned that the Coward Defendants had a copy of the Unrecorded Plat in their file.

127. The Loflins reasonably relied and had a right to rely on the Coward Misrepresentations. The Loflins imposed a special trust and confidence in the Coward

Defendants, who as their counsel owed them a fiduciary duty.

128. As a direct and proximate result of the Coward Misrepresentations, the Loflins have suffered tremendous financial loss, the Loflins have lost the full enjoyment and use of their property, the Loflins have lost prospective sales of the property, the Loflins own property that is essentially unmarketable at anything close to the amount they paid for the property, the Loflins have incurred attorney's fees and costs, and the Loflins have suffered and will in the future continue to suffer emotional and mental distress, and other damages.

129. The Loflins are entitled to punitive damages as a result of the Coward Misrepresentations.

FOR A SEVENTEENTH CAUSE OF ACTION
NEGLIGENCE AGAINST THE COWARD DEFENDANTS

130. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

131. The Coward Defendants knew or should have known of the existence of the Unrecorded Plat, but failed to inform the Loflins of the same until December 17, 2014.

132. As a result of the foregoing, the Loflins are entitled to actual and punitive damages, attorney's fees and costs.

FOR AN EIGHTEENTH CAUSE OF ACTION
BREACH OF CONTRACT AGAINST THE COWARD DEFENDANTS

133. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

134. The Coward Defendants entered into a contract with the Loflins to represent them in connection with all matters pertaining to the Loflins' purchase of Lot 108.

135. The Coward Defendants breached their contract with the Loflins by representing that the Loflins had a marketable title to Lot 108 and by failing to inform the Loflins about the existence of the Unrecorded Plat until December 17, 2014.

136. As a result of the foregoing, the Loflins are entitled to actual and damages, attorney's fees and costs.

FOR A NINETEENTH CAUSE OF ACTION
BREACH OF CONTRACT WITH FRAUDULENT INTENT ACCOMPANIED BY FRAUDULENT ACT AGAINST THE COWARD DEFENDANTS

137. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

138. The Coward Defendants breached their contract with the Loflins as set forth herein, and accompanied that breach with fraudulent intent accompanied by a fraudulent act by their actions in concealing the Unrecorded Plat from the Loflins, which, upon information and belief, was for the benefit of one or more other clients of the Coward Defendants whose interests were antagonistic to those of the Loflins.

139. As a result of the foregoing, the Loflins are entitled to actual and punitive damages, attorney's fees and costs.

FOR A TWENTIETH CAUSE OF ACTION
BREACH OF CONTRACT AGAINST CHICAGO AND COUNSELLOR

140. The Loflins specifically incorporate all other paragraphs contained in this

Second Amended Complaint as if specifically stated herein.

141. The Loflins entered into contract with the Insurance Defendants to investigate and insure that lot 108 was protected from all risks set forth herein, including, but not limited to, easements, encumbrances, and fraud.

142. In contradiction to the Insurance Contract, Lot 108 contains 1.4 rather than 1.87 acres, and is and has been since before the Closing encumbered and encroached upon by a road dissecting the property, rather going around the property on the only Recorded Plat.

143. Despite the Insurance Contract, for which they received consideration from the Loflins, the Insurance Defendants breached the Insurance Contract with the Loflins by refusing to provide the Loflins any relief from the damages caused by the insured risks described herein.

144. As a result of the breach of contract by the Insurance Defendants, the Loflins are entitled to full value of the property as well as any consequential damages which have been incurred.

FOR A TWENTY-FIRST CAUSE OF ACTION
NEGLIGENCE AGAINST CHICAGO AND COUNSELLOR

145. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

146. Chicago, which was in the business of providing insurance all types of property including property in nascent development, was designated by Balsam to provide insurance for the Founding Limited Partners. As such Chicago knew or should have known the risks

associated with Lot 108 and either willingly allowed exposure to such risks despite this knowledge, or negligently failed to ascertain and insure against such risks.

147. Counsellor's duty was to investigate and recommend an insurance policy to protect the Loflins from reasonably foreseeable risks, which Counsellor was particularly qualified to do because its agent and the Loflins' counsel also represented Balsam, had drafted the documents central to this dispute, and was throughly familiar with every aspect of the Project. Counselor negligently failed to select a polity to insure the Loflins from the risks which Chicago has denied are covered by the Insurance Contract.

148. As a result of the Insurance Defendants negligence, the Loflins are entitled to full value of the property as well as any consequential damages which have been incurred.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for a judgment against Defendants as set forth herein, including:

(a) Such relief as to Balsam, which has been adjudged in default by this Court of the First Amended Complaint, as determined by the Master-in-Equity, to whom the issue of damages has been referred following entry of an Order of Default Judgment as to the First Amended Complaint, which is specifically incorporated by reference, and remaining in effect to the extent not amended by this Second Amended Complaint adding additional parties.

(b) An Order as to BMG rescinding the Offering Contact and the conveyance of Lot 108 and returning the parties to their respective positions, including title to Lot 108 being

returned to Balsam, and Balsam returning the Loflins' consideration, together with all interest thereon, and attorney's fees and costs, and actual damages, including Balsam and BMG's encroachment and use of the road through the Loflins' property and the Loflins' loss of their investment for a period of years.

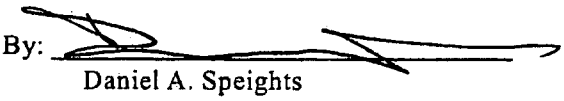
(c) In the alternative, as to BMG, an Order requiring Balsam to remove its continuing trespass and an award of actual damages as may be determined by a jury to have been sustained by the Loflins, as well as punitive damages and costs and attorney's fees;

(d) An award of actual damages as to the Coward Law Firm and Mr. Coward as may be determined by a jury to have been sustained by the Loflins, as well as punitive damages and costs and attorney's fees;

(e) An award of actual damages as to the Chicago and Counsellor as may be determined by a jury to have been sustained by the Loflins, as well as costs and attorney's fees and such other relief provided for in the Insurance Contract which is in the possession of the Chicago and Counsellor.

(f) Such additional relief as to all Defendants which this Court should determine to be proper.

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By: 
Daniel A. Speights

ATTORNEYS FOR PLAINTIFFS

Hampton, South Carolina

January ___, 2015

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

William Loflin and Leslie Loflin,

Plaintiffs,

vs.

BMP Development, LP, Balsam Mountain Group, LLC, COWARD, HICKS & SILER, P.A., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2013-CP-07-1807

THE DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S ANSWER TO THE PLAINTIFFS' SECOND AMENDED COMPLAINT

TO: DANIEL A. SPEIGHTS, ESQ.
A.G. SOLOMONS, III, ESQ.
SPEIGHTS & RUNYAN
ATTORNEYS FOR THE PLAINTIFF

The Defendant Chicago Title Insurance Company ("Chicago Title") answering the Plaintiffs' Second Amended Complaint alleges and states as follows:

1. Each and every allegation of the Plaintiffs' Second Amended Complaint not admitted, denied, or otherwise qualified herein is hereby deemed denied, and Chicago Title demands strict proof thereof.

2. Chicago Title admits the allegations of Paragraph 1 of the Plaintiffs' Second Amended Complaint.

3. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 2, 3, and 4 of the Plaintiffs' Second Amended Complaint, and, therefore, denies same and demands strict proof thereof.

Received

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Speights & Runyan

4. Chicago Title admits only so much of Paragraph 5 of the Plaintiffs' Second Amended Complaint that alleges it is a foreign corporation that conducts business in South Carolina and that the Plaintiffs entered into a contract or contracts of title insurance with Chicago Title. Chicago Title is without sufficient information to form a belief as to the remaining allegations of said Paragraph, and, therefore, denies same and demands strict proof thereof.

5. In answering Paragraph 6 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 4 above as though repeated herein verbatim.

6. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 7, 8, 9, 10, 11, 12, and 13 of the Plaintiffs' Second Amended Complaint, and, therefore, denies same and demands strict proof thereof.

7. Chicago Title admits only so much of Paragraph 14 of the Plaintiff's Second Amended Complaint that purports to set forth the terms and conditions of the title insurance contract referenced therein. To the extent any of the allegations of said Paragraph in any way contradict the terms and conditions of the title insurance contract referenced therein, Chicago Title denies same and demands strict proof thereof.

8. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 15 and 16 of the Plaintiffs' Second Amended Complaint, and, therefore, denies same and demands strict proof thereof.

9. Chicago Title admits only so much of Paragraph 17 of the Plaintiffs' Second Amended Complaint that purports to set forth the terms and conditions of the title insurance contract referenced therein. To the extent any of the allegations of said Paragraph in any way contradict the terms and conditions of the title insurance contract referenced therein, Chicago Title denies same and demands strict proof thereof.

10. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraph 18 of the Plaintiffs' Second Amended Complaint and demands strict proof thereof.

11. Chicago Title admits only so much of Paragraph 19 of the Plaintiffs' Second Amended Complaint that purports to set forth the terms and conditions of the title insurance contract referenced therein. To the extent any of the allegations of said Paragraph in any way contradict the terms and conditions of the title insurance contract referenced therein, Chicago Title denies same and demands strict proof thereof.

12. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraph 20 of the Plaintiffs' Second Amended Complaint, and, therefore, denies same and demand strict proof thereof. Chicago Title would further allege and show that the applicable Statute of Limitations has run as the Plaintiffs claim to have learned of any problems or encroachment on Lot 108 in 2006.

13. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 21, 22, 23, and 24 of the Plaintiffs' Second Amended Complaint and, therefore, denies same and demands strict proof thereof.

14. In answering the allegations of Paragraph 25 of the Plaintiffs' Second Amended Complaint, Chicago Title admits that Plaintiffs tendered a claim on policy no. 34 0063 097 00000014 by letter dated March 23, 2012. Further, Chicago Title admits that by correspondence dated August 21, 2012, it responded to Plaintiffs' claim with a coverage determination which stated in part as follows:

> The Company has obtained a title search of the property. It appears that there is no revised plat of record. Therefore, title appears to be established as insured as the Original Plat was, as of the Policy Date, the correct plat. Furthermore, the Original Plat depicts the property described on Schedule A of the Policy. Therefore, there appears to be no title defect in this matter. Moreover, Scheduled B, Paragraph 8 of the Policy specifically excludes coverage for the

> amount of acreage. However, in this case, there appears to be no discrepancy with the amount of acreage pursuant to the title records. In the event that the developer records a revised plat which appears in the public record after the Policy Date, any matter arising therefrom would be considered a post policy issue and would therefore be excluded under Paragraph 3 of the Exclusions of the Policy. As discussed above, however, that is not the case at this time as no revised plat is of record. The Company will consider any additional information that Insureds provide and reserves the right to modify this coverage decision in light of any additional information it may receive related to this claim.

(Letter, August 21, 2012)

Chicago Title would further show that the August 21, 2012, letter is a document which speaks for itself.

15. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 26 and 27 of the Plaintiffs' Second Amended Complaint, and, therefore, denies same and demands strict proof thereof.

16. Chicago Title admits the allegations of Paragraphs 28 of the Plaintiffs' Second Amended Complaint insomuch as these allegations purport to reference the Notices of Deposition and Subpoenas referenced therein. To the extent the allegations of said Paragraph in any way differ from the Notices of Deposition and Subpoenas referenced therein, Chicago Title denies same and demands strict proof thereof.

17. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 29, 30, 31, 32, and 33 of the Plaintiffs' Second Amended Complaint, and, therefore, denies same and demands strict proof thereof.

18. In answering Paragraph 34 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 17 above as though repeated herein verbatim.

19. Chicago Title is not required to answer the allegations of Paragraphs 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44, of the Plaintiffs' Second Amended Complaint as said allegations relate to

a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

20. In answering Paragraph 45 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 19 above as though repeated herein verbatim.

21. Chicago Title is not required to answer the allegations of Paragraphs 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 55, 56, 57, 58, 59, 60, 61, 62, and 63 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

22. In answering Paragraph 65 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 21 above as though repeated herein verbatim.

23. Chicago Title is not required to answer the allegations of Paragraph 66 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

24. In answering Paragraph 67 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 23 above as though repeated herein verbatim.

25. Chicago Title is not required to answer the allegations of Paragraphs 68 and 69 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

26. In answering Paragraph 70 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 25 above as though repeated herein verbatim.

27. Chicago Title is not required to answer the allegations of Paragraphs 71 and 72 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

28. In answering Paragraph 73 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 27 above as though repeated herein verbatim.

29. Chicago Title is not required to answer the allegations of Paragraphs 74, 75, and 76 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

30. In answering Paragraph 77 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 29 above as though repeated herein verbatim.

31. Chicago Title is not required to answer the allegations of Paragraphs 78, 79, and 80 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

32 In answering Paragraph 81 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 31 above as though repeated herein verbatim.

33. Chicago Title is not required to answer the allegations of Paragraphs 82 and 83 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

34. In answering Paragraph 84 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 33 above as though repeated herein verbatim.

35. Chicago Title is not required to answer the allegations of Paragraph 85 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

36. In answering Paragraph 86 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 35 above as though repeated herein verbatim.

37. Chicago Title is not required to answer the allegations of Paragraphs 87, 88, 89, 90, and 91 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

38. In answering Paragraph 92 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 37 above as though repeated herein verbatim.

39. Chicago Title is not required to answer the allegations of Paragraphs 93 and 94 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

40. In answering Paragraph 95 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 39 above as though repeated herein verbatim.

41. Chicago Title is not required to answer the allegations of Paragraphs 96 and 97 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-

Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

42. In answering Paragraph 98 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 41 above as though repeated herein verbatim.

43. Chicago Title is not required to answer the allegations of Paragraphs 99 and 100 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

44. In answering Paragraph 101 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 43 above as though repeated herein verbatim.

45. Chicago Title is not required to answer the allegations of Paragraphs 102, 103, 104, and 105 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

46. In answering Paragraph 106 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 45 above as though repeated herein verbatim.

47. Chicago Title is not required to answer the allegations of Paragraphs 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, and 117 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

48. In answering Paragraph 118 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 47 above as though repeated herein verbatim.

49. Chicago Title is not required to answer the allegations of Paragraphs 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, and 129 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

50. In answering Paragraph 130 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 47 above as though repeated herein verbatim.

51. Chicago Title is not required to answer the allegations of Paragraphs 131 and 132 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

52. In answering Paragraph 133 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 51 above as though repeated herein verbatim.

53. Chicago Title is not required to answer the allegations of Paragraphs 134, 135, and 136 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

54. In answering Paragraph 137 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 53 above as though repeated herein verbatim.

55. Chicago Title is not required to answer the allegations of Paragraphs 138 and 139 of the Plaintiffs' Second Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

56. In answering Paragraph 140 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 55 above as though repeated herein verbatim.

57. Chicago Title denies the allegations of Paragraphs 141, 142, 143, and 144 of the Plaintiffs' Second Amended Complaint and demands strict proof thereof.

58. In answering Paragraph 145 of the Plaintiffs' Second Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 57 above as though repeated herein verbatim.

59. Chicago Title denies the allegations of Paragraphs 146, 147, and 148 of the Plaintiffs' Second Amended Complaint and demands strict proof thereof.

FOR A FURTHER ANSWER
AND BY WAY OF A FIRST AFFIRMATIVE DEFENSE

60. Chicago Title would allege and show that the Plaintiffs' Second Amended Complaint should be barred in whole and in part by the doctrines of waiver, estoppel, and laches as the Plaintiffs claims to have discovered the matters giving rise to his causes of action, if any, in 2006 but did not file their Complaint until 2013.

FOR A FURTHER ANSWER
AND BY WAY OF A SECOND AFFIRMATIVE DEFENSE

61. Chicago Title would allege and show that the Plaintiffs' Second Amended Complaint fails to state a cause of action upon which relief can be granted as against Chicago Title, and accordingly, the Plaintiffs' Second Amended Complaint should be dismissed as to Chicago Title.

FOR A FURTHER ANSWER
AND BY WAY OF A THIRD AFFIRMATIVE DEFENSE

62. Chicago Title would allege and show that acts and omissions giving rise to the Plaintiffs' Second Amended Complaint were the direct and proximate result of acts and omissions of parties over whom Chicago Title had no control, and, therefore, the Plaintiffs' Second Amended Complaint should be dismissed as to Chicago Title.

FOR A FURTHER ANSWER
AND BY WAY OF A FOURTH AFFIRMATIVE DEFENSE

63. Chicago Title would allege and show that the Plaintiffs received the benefit of their bargain as to the title insurance policy issued in the Plaintiffs' favor as described in the Plaintiffs' Second Amended Complaint, and, therefore, the Plaintiffs' Second Amended Complaint should be dismissed as to Chicago Title.

FOR A FURTHER ANSWER
AND BY WAY OF A FIFTH AFFIRMATIVE DEFENSE

64. Chicago Title would allege and show that the Plaintiffs' Second Amended Complaint should be barred by the applicable statutes of limitation as the Plaintiffs knew or should have known of their alleged causes of action in 2006 as set forth in the Plaintiffs' Second Amended Complaint yet they did not file their Complaint until 2013.

FOR A FURTHER ANSWER
AND BY WAY OF A SIXTH AFFIRMATIVE DEFENSE

65. Chicago Title would allege and show that the Plaintiffs' own negligence in failing to protect their own interest in the property described in their Second Amended Complaint is comparatively greater than any negligence on the part of Chicago Title, none of which is admitted, and all of which is specifically denied.

FOR A FURTHER ANSWER
AND BY WAY OF A SEVENTH AFFIRMATIVE DEFENSE

66. Chicago Title would allege and show that the Plaintiffs' have filed this Second Amended Complaint in retaliation and response to a lawsuit filed against them in Jackson County, North Carolina.

FOR A FURTHER ANSWER
AND BY WAY OF AN EIGHTH AFFIRMATIVE DEFENSE

67. Chicago Title would allege and show that the real property giving rise to this matter is located in Jackson County, North Carolina, and, therefore, this Court is the improper venue for the Plaintiff's claims, if any, and none of which are admitted, and this Court does not have subject matter jurisdiction over the Plaintiff's claims, if any, and none of which are admitted.

FOR A FURTHER ANSWER
AND BY WAY OF A NINTH AFFIRMATIVE DEFENSE

68. Chicago Title would allege and show that it adopts by reference herein any other affirmative defenses asserted by any other Defendant in this matter in answering the Plaintiffs' Second Amended Complaint.

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[SIGNATURES ON FOLLOWING PAGES]

WHEREFORE, having fully answered the Plaintiffs' Second Amended Complaint, the Defendant Chicago Title Insurance Company prays that this Court enter its Order as follows:

1. Dismissing the Plaintiffs' Second Amended Complaint;
2. Awarding the Defendant its reasonable attorneys' fees and costs for the defense of this matter;
3. Awarding any and all such further relief as this Court may deem just and proper.

BUIST, BYARS & TAYLOR, LLC

Mount Pleasant, South Carolina

January 16, 2015

By: _____

G. Hamlin O'Kelley, III
S.C. Bar No. 15491
652 Coleman Boulevard, Suite 200
Mount Pleasant, South Carolina 29464
(843) 856-4488
hamlin.okelley@buistbyars.com

Attorneys for the Defendant Chicago Title Insurance Company

CERTIFICATE OF MAILING

I hereby certify that on January 16, 2015, a copy of the foregoing was mailed, postage prepaid, to all counsel of record in this matter, as follows.

Daniel A. Speights, Esq.
A.G. Solomons, III, Esq.
Speights & Runyan
100 Oak Street, East
P.O. Box 685
Hampton, SC 29924

Robert E. Stepp, Esq.
Sowell, Gray, Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

G. Hamlin O'Kelley, III

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

William Loflin and Leslie Loflin,

Plaintiffs,

vs.

BMP Development, LP, Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2013-CP-07-1807

THE DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Received

JUL 13 2015

Speights & Runyan

TO: DANIEL A. SPEIGHTS, ESQ.
SPEIGHTS & RUNYAN
ATTORNEYS FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant, Chicago Title Insurance Company (hereinafter referred to as "Chicago Title"), by and through its undersigned counsel, will move on the tenth (10^{th}) day after service hereof or as soon as counsel may be heard before the Presiding Judge of the Fourteenth Judicial Circuit for an order granting Chicago Title summary judgment as a matter of law based upon the lack of subject matter jurisdiction over the property described in the Amended Complaint and the failure to state a claim against Chicago Title. Chicago Title will also move for summary judgment as the Plaintiffs have alleged that they received title to Lot 108 at Balsam Mountain Preserve and have continued to own that property during the time complained of in the Amended Complaint so as to have received the benefit of the insurance policy continuously and without interruption since 2001.

This Motion is based upon the pleadings, discovery, memorandum and/or affidavits submitted in this matter.

Pursuant to Rule 11 SCRCP, counsel certifies that there is no duty of consultation connected with the filing of this motion.

Please be present to defend if so minded.

BUIST, BYARS & TAYLOR, LLC

Mount Pleasant, South Carolina

July 9, 2015

By: _____

G. Hamlin O'Kelley, III
S.C. Bar No. 15491
652 Coleman Boulevard, Suite 200
Mount Pleasant, South Carolina 29464
(843) 856-4488
hamlin.okelley@buistbyars.com

Attorney for the Defendant Chicago Title Insurance Company

CERTIFICATE OF MAILING

I hereby certify that on 7/9, 2015, a copy of the foregoing was mailed, postage prepaid, to all counsel of record in this matter, as follows.

Daniel A. Speights, Esq.
Speights & Runyan
100 Oak Street, East
P.O. Box 685
Hampton, SC 29924

Robert E. Stepp, Esq.
Sowell, Gray, Stepp & Laffitte, LLC
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Laura F. Locklair, Esq.
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200 Meeting St., Suite 301
Charleston, SC 29401

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Carlock Copeland & Stair, LLP
40 Calhoun St., Suite 400
Charleston, SC 29401

G. Hamlin O'Kelley, III

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
William Loflin and Leslie Loflin,	)	Civil Action No. 2013-CP-07-1807
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	**DEFENDANT COUNSELLOR TITLE AGENCY, INC.'S MOTION FOR SUMMARY JUDGMENT**
BMP Development LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J. K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
	)	
Defendants.	)	

Defendant Counsellor Title Agency, Inc. ("Counsellor") hereby moves pursuant to Rule 56 of the South Carolina Rules of Civil Procedure for an Order granting summary judgment in its favor as to all claims in Plaintiffs' Complaint on the ground that there are no genuine issues of material fact and Counsellor is entitled to judgment as a matter of law.

As will be set forth in detail in Counsellor's supporting memorandum, this Motion should be granted for the following reasons:

1. Plaintiffs' claims are based upon a plat that by Plaintiffs' admission was unrecorded at the time Plaintiffs acquired title to the property that is the subject of this action. Therefore any loss or damage caused by the unrecorded plat is not covered by the title insurance policy issued by Counsellor on behalf of Chicago Title Insurance Company.

2. Plaintiffs' title to the property in question is as insured by the title insurance policy, and therefore Plaintiffs have not suffered any loss or damage covered by the policy.

Received

JUL 30 2015

Speights & Runyan

3. Any loss or damage claimed to have been suffered by Plaintiffs is the result of a trespass or encroachment that arose subsequent to the date Plaintiffs acquired title to the property that is the subject of this action, and therefore is not covered by the title insurance policy.

4. Any loss or damage claimed to have been suffered by Plaintiffs was incurred with the actual or implied consent of Plaintiffs who took no action to protect the property once they were on notice of the alleged violation of their rights, and therefore is not covered by the title insurance policy.

5. Plaintiffs have complete remedies at law and equity against others for any loss or damage resulting from the unrecorded plat and/or any encroachment of trespass on their property, and therefore have not suffered any damages recoverable against Counsellor.

6. As a matter of law Counsellor was not under any duty to Plaintiff to advise about or warn against the existence of an unrecorded plat.

7. Plaintiffs' claims are barred by the statute of limitations.

8. Plaintiffs failed to give notice of a claim until more than six years following their discovery of facts that are the basis of their claim, and therefore any loss or damage resulting from those facts is not covered by the title insurance policy.

Respectfully submitted,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: _____

Robert E. Stepp
William H. Jordan
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Columbia, South Carolina
July 28, 2015

Attorneys for Defendant Counsellor Title Agency, Inc.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
William Loflin and Leslie Loflin,	)	Civil Action No. 2013-CP-07-1807
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	**CERTIFICATE OF SERVICE**
BMP Development LP, Balsam Mountain Group, LLC, COWARD, HICKS & SILER, P.A., J. K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
	)	
Defendants.	)	

I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant Counsellor Title Agency, Inc. do hereby certify that I have served all counsel in this action with a copy of the pleading hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: Motion for Summary Judgment

Served: Daniel A. Speights, Esquire
Speights & Runyan
Post Office Box 685
Hampton, South Carolina 29924
Counsel for Plaintiffs

G. Hamlin O'Kelley, III, Esquire
Maria E. Kiehling, Esquire
Buist Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, South Carolina 29464
Counsel for Defendant Chicago Title Insurance Company

David W. Overstreet, Esquire
Michael B. McCall, Esquire
William J. Farley, III, Esquire
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40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Counsel for Defendants Coward, Hicks & Siler, P.A. and J. K. Coward, Jr.

David S. Wyatt, Esquire
Gleaton Wyatt
935 S. Main Street, Suite 203
Greenville, South Carolina 29601
Counsel for Defendant Balsam Mountain Group, LLC

Valerie N. Hampton

Columbia, South Carolina
July 28, 2015

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin, Plaintiffs, v. BMP Development LP, Balsam Mountain Group, LLC, COWARD, HICKS & SILER, P.A., J. K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc., Defendants.	)	THIRD AMENDED COMPLAINT

2015 AUG -5 AM 11:34
ANN RUSSELEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Plaintiffs, by and through their undersigned counsel, allege as follows:

I. JURISDICTION

1. Plaintiffs, William and Leslie Loflin [hereinafter individually and collectively referred to as the "**Loflins**"], are residents of Beaufort County, South Carolina.

2. Defendant, BMP Development LP, f/n/a Balsam Mountain Preserve LP and Balsam Mountain Preserve, Limited Partnership [hereinafter referred to as "**Balsam**"], is a foreign entity doing systematic and continuous business in Beaufort County and throughout South Carolina. Balsam's registered agent for service, Craig Lehman, resides in Beaufort County, South Carolina. The actions herein complained of against Balsam occurred in large part in Beaufort County, South Carolina. Balsam was organized and formed by Chaffin/Light Associates [hereinafter referred to as "**Chaffin/Light**"] to develop Balsam

Mountain Preserve [hereinafter referred to as the "**Project**"], located in Jackson County, North Carolina. Chaffin/Light's principal place of business was then and is now located in Beaufort County, South Carolina. Chaffin/Light previously had formed and managed three successful community developments in Beaufort County, South Carolina: Spring Island, Callawassie, and Chechessee Creek Club. Balsam's stated purpose was to replicate Spring Island "on higher ground," building on the success of Spring Island, including the Founder Member Program. Balsam assembled a leadership team consisting of James J. Chaffin, Jr.,then and now a resident of Beaufort County, South Carolina, who had led the development of Spring Island; James A. Anthony, Jr., who served as president of Spring Island Company; Mont Blaisdell, then and now a resident of Beaufort County, South Carolina, who served as Chief Financial Officer of both Spring Island and Callawassie; and Ellen D. Savage, now deceased, who was a resident of Beaufort County, South Carolina, and served as the membership director and general manager of the Spring Island Club. Balsam assembled a Consulting Team consisting of experienced teams of professionals, half of whom were residents of South Carolina. At all times complained of herein, Balsam was represented by William L. Bethea, then and now a resident of Beaufort County, South Carolina, and one or more lawyers in his Beaufort County, South Carolina law firm, Bethea, Jordan & Griffin, P.A., which later merged with the McNair Firm, with offices in Beaufort County, South Carolina [hereinafter referred to collectively as the "**Bethea Firm**"], including Sarah F. Robertson, also then and now a resident of Beaufort County, South Carolina. Mr.

Bethea prepared and filed Balsam's Certificate of Domestic Limited Partnership for Balsam Mountain Company, LLC, whose sole members were Mr. Chaffin and James W. Light, as Balsam's general partner [hereinafter referred to as the "**General Partner**], and signed the Certificate as the Secretary for the General Partner, with the acknowledgments to be returned to Ms. Robertson. As Balsam's counsel, Mr. Bethea prepared in Beaufort County, South Carolina, the documents which are central to this dispute [hereinafter referred to collectively as the "**Offering Contract**"], to wit: Balsam's Confidential Offering Memorandum (hereinafter referred to as the "**Offering Memorandum**") setting forth Balsam's Founder Member Program offering up to thirty-five founding limited partnerships (hereinafter referred to as "**Founding Limited Partnerships**") for limited partners (hereinafter referred to as "**Founding Limited Partners**")] to invest in the Project, which attached and incorporated three agreements: the Subscription Agreement – Power of Attorney [hereinafter referred to as the "**Subscription Agreement**"] to be entered into between Balsam and the Founding Limited Partners for admission of the Founding Limited Partners; the Agreement of Limited Partnership [hereinafter referred to as the "**Partnership Agreement**"] to be entered into between the General Partner and the Founding Limited Partners governing the affairs of Balsam and the rights and respective obligations of its partners; and the Founder's Balsam Mountain Preserve Reservation Agreement [hereinafter referred to as the "**Reservation Agreement**"] to be entered into between

Balsam and each Founding Limited Partner for selection of a homestead (commonly called a lot). The Offering Contract identified Mr. Chaffin as the Manager of the Balsam development with support to be provided by officers and staff that the General Partner had assembled in other developments including Spring Island, Callawassie and Chechessee; and that the Founding Limited Partners would provide capital to fund the acquisition of the property and the initial development activities of the Project. The Offering Contract listed thirty-three Founding Limited Partnerships to be owned by persons who had committed to be Founding Limited Partners, including sixteen to be owned in whole or part by South Carolina residents (seven of whom resided in Beaufort County) and three to be owned in whole or part by North Carolina residents. Mr. Blaisdell, who executed the Partnership Agreement in Beaufort County, South Carolina, was listed as the Initial Founding Limited Partner; and Mr. Bethea was listed on behalf of a Beaufort County, South Carolina LLC (Doubletop Mountain Holdings LLC). Balsam met with the Loflins in Beaufort County, South Carolina, and offered them the opportunity to be Founding Limited Partners by purchasing a Founding Limited Partnership unit [hereinafter referred to as a "**Unit**"]. Balsam delivered the Offering Contract to the Loflins and Mr. Chaffin and Mr. Bethea explained the project to them in Beaufort County, South Carolina. Mr. Chaffin and the Loflins executed the Partnership Agreement and the Subscription Agreement in Beaufort County, South Carolina. The Loflins executed the documents for their purchase of Lot 108 in Beaufort County, South

Carolina, including a mortgage securing the financing of their purchase, supervised by the Bethea Firm, which represented Balsam and the Loflins. Pursuant to the Offering Contract, Balsam arranged for issuance coverage for the Loflins and their lender through a South Carolina corporation, whose agent was Mr. Bethea, with its principal place of business in Beaufort County, South Carolina. Balsam is also the alter-ego of Balsam Mountain Preserve Community Association [hereinafter referred to as the "**Association**"], which Mr. Bethea, on behalf of Balsam, formed as the sole incorporator with a Beaufort County, South Carolina address, and which includes a number of members who reside in Beaufort County, South Carolina; and, upon information and belief, the alter-ego of other entities affiliated with Balsam which will be identified in discovery.

3. Defendant, Balsam Mountain Group, LLC [hereinafter referred to as "**BMG**"] is a foreign entity doing systematic and continuous business in Beaufort County and throughout South Carolina. Upon information and belief, BMG purchased Balsam on or about October 2011, and owned and operated Balsam until sometime after it was added as a party to this lawsuit in 2015. During this period, BMG regularly contacted persons throughout South Carolina in an effort to sell real estate located at Balsam. BMG is also the alter-ego of the Association, as evidenced in the deposition of Bruce M. Fine, taken in this case on November 13, 2013, revealing that BMG and the Association are one and the same, with a common office, common files, common employees, and common management; as well as from additional facts to be revealed during discovery, including, upon information

and belief, the fact that BMG had total control of the Association's Board prior to April 1, 2014. Upon information and belief, BMG is also the successor to Balsam, which allegation is based, in part, on the inferences to be drawn from BMG's failure to provide the Loflins with acquisition and sale documents for its purchase and sale of Balsam despite being directed to do so by the Court.

4. Defendant, Coward, Hicks & Siler, P.A. [hereinafter referred to as the "**Coward Law Firm**"], is, upon information and belief, a professional association whose members include Defendant, J. K. Coward, Jr. [hereinafter referred to as "**Mr. Coward**"], and whose members at the time of most of the events complained of herein included Mr. Coward, William H. Coward, and Heather C. Baker. The Coward Law Firm and Mr. Coward [hereinafter referred to collectively as the "**Coward Defendants**"] are, upon information and belief, located in Jackson County, North Carolina, but are subject to the personal jurisdiction of this Court because, among other reasons, the causes of action set forth herein against them arose from their contract to supply services or things to the Loflins in South Carolina, from their contract to supply services or things to Balsam and one or more of its officers in South Carolina, and from their contract to supply services or things to Counsellor and Chicago in South Carolina; their entry into a contract with the Loflins which they performed on behalf of the Loflins in whole or in part in South Carolina; their co-counsel relationship with the Bethea Firm and their participation in the drafting of the Offering Contract in whole or in part in South Carolina; their providing services or things to

Counsellor and Chicago in connection with the Loflins and in connection with Balsam in South Carolina; their representation of other South Carolina residents in connection with the purchase of property and the securing of insurance in South Carolina; and, by the commission of one or more tortious acts in whole or in part in South Carolina, including their negligent or intentional failure to inform the Loflins of information material to this lawsuit.

5. Defendant, Chicago Title Insurance Company [hereinafter referred to as **"Chicago"**], is a foreign corporation doing systematic and continuous business in Beaufort County and throughout South Carolina, and Defendant, Counsellor Title Agency, Inc. [hereinafter referred to as "**Counsellor**"], is a South Carolina corporation with its principal place of business in Beaufort County, South Carolina [Chicago and Counsellor are hereinafter referred to collectively as the "**Insurance Defendants**"]. At all times complained of herein, Counsellor was acting individually and as Chicago's agent, and Mr. Bethea and Ms. Robertson were agents for Chicago and Counsellor. In connection with their purchase of Lot 108, the Loflins entered into a contract of insurance [hereinafter referred to as the "**First Insurance Contract**"] with the Insurance Defendants in Beaufort County, South Carolina. Subsequently, the Loflins refinanced their purchase of Lot 108 on two occasions, both times in Beaufort County South Carolina, and both times supervised by the Bethea Firm, and entered into two additional contracts of insurance with the Insurance Defendants [hereinafter referred to as the "**Second Insurance Contract**" and the "**Third Insurance Contract**"].

II. FACTUAL ALLEGATIONS

6. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

7. The Offering Contract provided that the Loflins would commit $350,000 as a founder contribution. The Loflins were not required to make any additional capital contributions. In return, the Loflins would receive, among other things, a credit of $200,000 toward the purchase of a homestead or lot and receive a discount of thirty percent on the purchase. In addition, the Loflins were entitled to receive cash quarterly from the sales of homesteads or lots [hereinafter referred to as "**Cash Distributions**"], as opposed to waiting for the project to produce profits or pay off debt, which equated to 0.2571% of "Net Revenue from Home Sales." Balsam represented that based upon forecast gross sales revenues of 311 Homesteads on which the return would be computed, the sharing of the Net Revenue from Homestead Sales would provide a projected cash return to the Loflins of $335,343.00, and that the value of the homesteads could reasonably be expected to appreciate in value when the golf course and club facilities were functioning. Each Founding Limited Partner was precluded from selling the homestead or lot for a period of 5 years, and except in the event of transfer because of death, the sale or exchange of a Founders Limited Partner's interest in the Partnership would be permitted only with the consent of the General Partner. Based upon Balsam's representations, the Loflins agreed to the Offering Contract and the

parties executed the Subscription Agreement, the Partnership Agreement, and the Reservation Agreement.

8. The Subscription Agreement made the Loflins Founding Limiting Partners subject to the terms and conditions thereof and the provisions of the Confidential Offering Memorandum and the Partnership Agreement. The Subscription Agreement specifically provided that the provision providing for the Loflins' right to receive quarterly Cash Distributions from the sales of homesteads or lots could not be modified or amended without their express, written consent. The Subscription Agreement also provided that if the Loflins were required to institute suit to enforce their rights, and obtained a valid judgment, they would be entitled to all reasonable costs, expenses and attorney's fees.

9. The Partnership Agreement provided that Balsam's General Partner owed the Loflins a fiduciary duty to act in good faith in its exercise of its rights and obligations.

10. Pursuant to the Reservation Agreement, the Loflins reserved the right to purchase Balsam Mountain Preserve Homestead No. 108 [hereinafter referred to as "**Lot 108**"], located on the mountain side at Balsam Mountain Preserve, as shown on the Phase 1 Plan prepared by Herron Land Surveying [hereinafter referred to as the "**Development Plan**"], an excerpt of which was attached to the Reservation Agreement as Exhibit "A," following registration of the Property with HUD. Lot 108 was not staked at the time, but Balsam represented to the Loflins that the property consisted of approximately 1.9 acres and that Balsam Mountain Preserve Road circumnavigated Lot 108 as shown on the

Development Plan provided to the Loflins. The purchase price for Lot 108 was $495,000.

11. The Reservation Agreement provided that, "At Closing, Seller shall convey good and marketable title to the Property to Purchaser in fee simple by general warranty deed, free from encumbrances except those restrictions and other matters referred to in this Agreement. If requested by Purchaser, Seller will arrange for the issuance by Chicago Title Insurance Company of title insurance coverage for Purchaser and, if applicable, Purchaser's lender, at Purchaser's expense." The Reservation Agreement further provided that Balsam, at Balsam's sole expense, "shall deliver to purchaser at Closing, and shall cause to be recorded prior to the deed to the Property, an individual plat of the Property. That plat will be prepared to scale by a licensed surveyor or engineer and will accurately reflect the dimensions of the Property, the courses, distances and monuments of the boundaries of the Property, the relationship of the Property to proposed or existing roads, the names of abutting roads, the ownership of abutting land and the general location of the Property in relation to the overall phase of Balsam Mountain Preserve."

12. On February 12, 2002, the Coward Defendants wrote the Loflins at the suggestion of Balsam and informed the Loflins that they had been asked to prepare the deed and related documents for Balsam "in this sale." The Coward Defendants offered to assist the Loflins in their purchase of Lot 108. The Loflins agreed, and an attorney-client relationship was formed. The Coward Defendants did not then or at any other time disclose to the Loflins their full relationship with Balsam.

13. The closing for Lot 108 [hereinafter referred to as the "**Closing**"] was held in February 2002, supervised by the Bethea Law Firm and the Coward Law Firm. In accordance with the Offering Contract, Balsam, by and through the Coward Defendants, prepared and delivered to the Loflins in South Carolina a duly executed deed to Lot 108 [hereinafter referred to as the "**Deed**"] and an individual plat of Lot 108 [hereinafter referred to as the "**Recorded Plat**"]. The Recorded Plat, prepared at Balsam's request by a surveyor of its choosing, reflected that Lot 108 consisted of 1.837 acres, and that Balsam Mountain Preserve Road went around rather than through Lot 108. The Recorded Plat was recorded in the Jackson County Records in Plat Cabinet 11 at Slide 383. Balsam's Deed to the Loflins incorporated the Recorded Plat and was recorded in the Jackson County Records in Book 1227 at 202. The Coward Defendants represented and certified to the Loflins in South Carolina that the Loflins had a marketable title to Lot 108 as described in the Recorded Plat [hereinafter referred to as the "**First Certification**"].

14. At the closing, the Loflins also entered into the First Insurance Contract with the Insurance Defendants in South Carolina based upon work performed by the Bethea Firm and the Coward Firm. The First Insurance Contract insured Lot 108 containing 1.87 acres without any road going through it, as described in the Deed and the Recorded Plant prepared at the request of and on behalf of Balsam in accordance with the Offering Contract. The purpose of the Insurance Contract was to insure the Loflins from a multitude of risks associated with Lot 108, which are more fully set forth in the First Insurance Contract in the

possession of the Insurance Defendants, but which, upon information and belief, included but are not limited to fraud, trespass, easements, and encumbrances.

15. Pursuant to the Offering Contract, Balsam established annual assessments to be paid by each property owner, which, among other things, went to the maintenance of roads. Over the years, Balsam deducted the Loflins' Assessments from their quarterly Cash Distributions and forwarded the Loflins the balance.

16. The year after the Closing, Mr. Loflin was diagnosed with cancer, and he requested Balsam to permit the Loflins to sell Lot 108, but Balsam refused, even though the Loflins were informed that Balsam had permitted at least one other Founding Limited Partner to do so.

17. In 2004, the Loflins refinanced their purchase of Lot 108. The Coward Defendants represented the Loflins in this transaction, secured insurance with Chicago through Counsellor, and again represented and certified that the Loflins had a marketable title to Lot 108 as shown on the Recorded Plat [hereinafter referred to as the "**Second Certification**"].

18. In late 2005, Balsam permitted the Founding Limited Partners to sell their properties after four years, apparently in recognition of the success of the Project in selling lots and the opportunity for Founding Limited Partners to reap profits on their investments. The Loflins listed Lot 108 for $650,000.00.

19. In 2006, the Loflins again refinanced the purchase of Lot 108. The Coward

Defendants represented the Loflins in this matter, again secured insurance with Chicago through Counsellor, and again represented and certified that the Loflins had a marketable title to Lot 108 as shown on the Recorded Plat [hereinafter referred to as the "**Third Certification**"].

20. In 2006, Balsam informed the Loflins that contrary to the Deed and the Recorded Plat that they delivered to the Loflins in connection with the Closing, which were duly recorded, there was an encroachment on Lot 108, and that the property contained only 1.4 acres, and that Balsam Mountain Preserve Road went through the property. Balsam asked the Loflins to sign a quit claim deed to make their ownership as set forth in another individual plat of Lot 108 [hereinafter referred to as the "**Unrecorded Plat**], which the Loflins believed from their discussions with Balsam had been recently prepared. The Loflins refused to sign a quit claim deed significantly reducing their lot size and permitting a road to go through their property. Balsam did not disclose to the Loflins that it knew before the Closing that Lot 108 contained only 1.4 acres with a road through it as reflected in the Unrecorded Plat or that the Unrecorded Plat had been prepared before the Closing. Thereafter, Mr. Loflin had a number of conversations with Mr. Chaffin and Balsam's general manager, Mr. Lehman, and Balsam's salesman, Bob Tufts (all of whom are residents of Beaufort County, South Carolina). Balsam acknowledged that the Loflins would not pay their assessments until the matter could be resolved. Despite multiple representations that Balsam would remedy the problem, however, Balsam refused to do so.

21. Balsam, and subsequently BMG, exercised control over Balsam Mountain Preserve Road through the Loflins' property and .437 acres owned by the Loflins. The Loflins objected to this encroachment, but Balsam and BMG refused to remedy this situation, and have continued to encroach and continuously trespass upon Lot 108. In addition, BMG, through its Association, informed the Loflins that if they attempted to close the road encroaching through their property, it would not defend the Loflins from potential lawsuits filed by other Balsam property owners.

22. At some point, Balsam stopped forwarding the Loflins their quarterly Cash Distributions, and Balsam and BMG continuously failed and refused to pay the Loflins their Cash Distributions, which the Loflins are entitled to under the Offering Contract.

23. Subsequently, the Loflins discovered that the Unrecorded Plat had been prepared for Balsam two weeks before the original Closing.

24. In 2012, BMG, which under the Offering Contract, as Balsam's successor, was the exclusive listing agent for Lot 108, informed the Loflins that they would no longer list Lot 108 for sale.

25. In 2012, the Loflins informed Chicago of the Unrecorded Plat showing that Balsam Mountain Preserve Road did not circumnavigate but rather dissected Lot 108. Chicago responded that based upon a title search, the only recorded Deed did not show any impairments on the title, and, despite the provisions of the Insurance Contract, the Loflins had no cognizable injury.

26. In 2013, after the Loflins instituted this lawsuit, BMG, acting through its Association, brought a retaliatory lawsuit against the Loflins in North Carolina, seeking all past assessments, even though Balsam previously acknowledged that the Loflins would not be required to pay assessments (which, among other things, went to the maintenance of the road encroaching through their property) until Balsam could resolve the matter, and even though the Loflins' assessments previously had been paid from their Cash Distributions (which Balsam and BMG later converted to their own use). Nevertheless, the Loflins had to hire counsel and expend significant sums to defend and resolve this lawsuit.

27. In 2014, the Loflins learned that at some point after conveying Lot 108 to the Loflins, Balsam entered Lot 108 and added to its trespass and encumbrance by expanding Balsam Mountain Preserve Road through Lot 108, moving dirt and apparently destroying one or more trees, and installing two culverts which drain water onto the Loflins' property.

28. On November 14, 2014, the Loflins personally served BMG, the Association, the Coward Law Firm, and a Balsam entity known as Anthony Associates [hereafter referred to as "**Anthony**"], whose agent of service is Mr. Coward, with Notices of Deposition of the Custodian of Records and separate Subpoenas issued by the Clerk of this Court and the Clerk of Court of Jackson County, North Carolina, requiring the Custodian of Records for each entity to appear at designated locations in Jackson County, North Carolina, and to produce and permit the inspection and copying of specific documents relating to the Loflins' purchase of real estate at Balsam and the Balsam Mountain Development. The Notices and Subpoenas

were returnable on December 1 and 2, 2014, some seventeen and eighteen days after service.

29. On Tuesday, November 25, 2014, eleven days after service of the Notices and Subpoenas, Mr. Coward, as the Custodian of Records for the Coward Law Firm and as the Agent of Service for Anthony, filed a Motion to Quash the Notices and Subpoenas directed at those entities. As grounds for this Motion, Mr. Coward asserted that he had a conflict on December 1, 2014, and that, "the plaintiff [*sic*] has not served the undersigned the pleadings so it is difficult if not impossible to determine the relevancy of the materials subpoenaed." Prior to serving the Motion to Quash, Mr. Coward did not contact his clients, the Loflins, or the Loflins' counsel in this matter, and request the underlying pleadings or a modification of the date. Upon receipt of the Motion to Quash, the Loflins' counsel immediately telephoned Mr. Coward and left him a voice mail and sent Mr. Coward an email asking that he contact him in an effort to work this matter out. Neither Mr. Coward nor anyone else at the Coward Law Firm responded.

30. On December 1, 2014, Mr. Coward appeared before Judge William H. Coward, Superior Court Judge, and argued his Motion to Quash. Mr. Coward did not inform the Loflins that they had obtained a Court hearing in this matter or otherwise provide them with a notice and opportunity to be heard at this hearing. Upon information and belief, Mr. Coward suggested that he had not been able to contact the Loflins' counsel, although the Loflins' counsel did not receive any notice of the hearing or any response to their voice mail or email attempting to discuss the matter with Mr. Coward.

31. On December 1, 2014, shortly after noon, the Coward Defendants forwarded the Loflins' counsel a copy of an *ex parte* Court Order entered that day by Judge Coward, granting Mr. Coward's Motion to Quash on behalf of the Coward Law Firm and Anthony. Judge Coward's *ex parte* Order was expressly based upon Mr. Coward's representations and concluded that "there is insufficient time for the movant or the Court to notify the Plaintiff of this hearing or this ruling," even though the Notices served on the Coward Defendants seventeen days earlier set forth the address and telephone number of the Loflins' counsel, even though Mr. Coward faxed the Motion to Quash to the Loflins' counsel six days before the *ex parte* hearing, and even though the Loflins' counsel had emailed Mr. Coward and provided him with his cell telephone number six days before the *ex parte* hearing. Moreover, at the time of the *ex parte* hearing, the Loflins' counsel was physically located less than two hours from the Courthouse.

32. On December 1, 2014, upon receipt of the Court Order issued by Judge Coward, the Loflins' counsel sent Mr. Coward a letter by overnight mail. The Loflins' counsel enclosed a copy of all of the subject pleadings in this matter, and offered to reschedule the matter at a date and time convenient for him. The Loflins' counsel also informed Mr. Coward that he was going to be in his area the next day and suggested coming by his office to discuss this matter in person. The Loflins' counsel requested that Mr. Coward contact him by telephone or email. Over a month has now elapsed, and Mr. Coward has never responded to this letter.

33. On December 12, 2014, the Loflins forwarded Mr. Coward a certified letter requesting "the original or an exact duplicate copy of our entire file in this matter, including any and all drafts and final deeds and plats of Lot 108, and all letters, emails and other communications regarding Lot 108, as well as any additional work you have performed or communications you have had in connection with your representation of us or with respect to any issues that subsequently arose regarding Lot 108." In response, on December 17, 2014, Mr. Coward mailed the Loflins a copy of what he represented to be a copy of the Loflins' file. The file forwarded to the Loflins included a copy of the Unrecorded Plat. Prior to that time, the Coward Defendants had never advised the Loflins of their knowledge of or the existence of the Unrecorded Plat, and the Loflins did not know that the Coward Defendants had knowledge of, much less had participated in the fraud, and deceit and misrepresentations that had been perpetuated on the Loflins.

FOR A FIRST CAUSE OF ACTION
FRAUD AGAINST BALSAM AND BMG

34. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

35. During the negotiations to purchase Lot 108, Balsam made representations to the Loflins [hereinafter referred to as the "**Initial Misrepresentations**"] that Lot 108 contained approximately 1.9 acres free and clear of all encroachments, encumbrances and easements, and Balsam induced the Loflins to purchase Lot 108 based upon such Initial Misrepresentations, including their showing to the Loflins the Development Plan which did

not show any road or other encroachment, encumbrance, or easement through Lot 108, by delivery to the Loflins of the individual Recorded Plat of Lot 108 showing that it contained 1.87 acres, with no road or other encroachment, encumbrance or easement through the property, and by preparation and delivery to the Loflins of the Deed which incorporated the Recorded Plat.

36. The foregoing Initial Misrepresentations were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

37. At the time the Initial Misrepresentations were made, Balsam knew that its Initial Misrepresentations were false and/or recklessly disregarded their falsity in that Balsam had in its possession the Unrecorded Plat that it had commissioned but never recorded showing that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

38. Balsam's Initial Misrepresentations were material in that the Loflins would not have purchased Lot 108 if Balsam had produced the secret Unrecorded Plat before the Closing or told them that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and these Initial Misrepresentations significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property.

39. The Loflins relied on said Initial Misrepresentations, not only in incurring substantial financial obligations to purchase Lot 108, but also in purchasing a property which

they believed would be marketable.

40. Balsam intended for the Loflins to rely on its Initial Misrepresentations.

41. The Loflins were ignorant of the falsity of Balsam's Initial Misrepresentations.

42. The Loflins reasonably relied and had a right to rely on Balsam's Initial Misrepresentations. The Loflins, as investors, also imposed a special trust and confidence in Balsam, which also under the Offering Contract owed them a fiduciary duty.

43. As a direct and proximate result of Balsam's Initial Misrepresentations the Loflins have suffered tremendous financial loss, the Loflins have lost the full enjoyment and use of their property, the Loflins have lost prospective sales of the property, the Loflins own property that is essentially unmarketable at anything close to the amount they paid for the property, the Loflins have incurred attorney's fees and costs, and the Loflins have suffered and will in the future continue to suffer emotional and mental distress, and other damages.

44. The Loflins are entitled to punitive damages as a result of Balsam's fraud and deceit.

45. The Loflins are also entitled to actual and punitive damages against BMG because BMG continued the fraud and deceit against the Loflins after it purchased Balsam in 2011 and because, as Balsam's successor, it is responsible for the aforesaid fraud and deceit against the Loflins.

FOR A SECOND CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION AGAINST BALSAM AND BMG

46. The Loflins specifically incorporate all other paragraphs contained in this

Second Amended Complaint as if specifically stated herein.

47. During the negotiations to purchase Lot 108, Balsam represented to the Loflins that Lot 108 contained approximately 1.9 acres free and clear of all encroachments, encumbrances and easements, and Balsam induced the Loflins to purchase Lot 108 based upon such Initial Misrepresentations, including their showing to the Loflins the Development Plan which did not show any road or other encroachment, encumbrance, or easement through Lot 108, by delivery to the Loflins of the individual Recorded Plat of Lot 108 showing that it contained 1.87 acres with no road or other encroachment, encumbrance or easement through the property, and by preparation and delivery to the Loflins of the Deed which incorporated the Recorded Plat.

48. The foregoing Initial Misrepresentations were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

49. At the time the Initial Misrepresentations were made, Balsam should have known that its Initial Misrepresentations were false and/or recklessly disregarded their falsity in that Balsam had in its possession the Unrecorded Plat that it had commissioned but never recorded showing that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

50. Balsam's Initial Misrepresentations were material in that the Loflins would not have purchased Lot 108 if Balsam had produced the secret Unrecorded Plat before the Closing or told them that showing that Lot 108 contained only 1.4 acres and Balsam

Mountain Preserve Road dissected Lot 108, and these Initial Misrepresentations significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property.

51. The Loflins relied on said Initial Misrepresentations, not only in incurring substantial financial obligations to purchase Lot 108, but also in purchasing a property which they believed would be marketable.

52. Balsam intended for the Loflins to rely on its Initial Misrepresentations.

53. The Loflins were ignorant of the falsity of Balsam's Initial Misrepresentations.

54. The Loflins reasonably relied and had a right to rely on Balsam's Initial Misrepresentations, and Balsam knew or should have known of the Loflin's reliance. The Loflins, as investors, also imposed a special trust and confidence in Balsam, which also under the Offering Contract owed them a fiduciary duty.

55. Balsam breached the duty of care by failing to exercise due care in making the Initial Misrepresentations to the Loflins.

56. In 2006, after the Loflins listed Lot 105 for sale, Mr. Lehman and Mr. Tufts told the Loflins that Lot 108 contains only 1.4 acres and that Balsam Mountain Preserve Road goes through rather than around the Loflins' property. Neither Mr. Lehman nor Mr. Tufts disclosed that Balsam had known these material facts before the Closing, and during the ensuing four years, but neither Mr. Lehman nor Mr. Tufts were employed by Balsam in 2002, and the Loflins do not know that Mr. Lehman or Mr. Tufts knew about the history of

this matter at that time. By not disclosing these material facts known to Balsam, however, Mr. Lehman and Mr. Tufts either intentionally or unknowingly suggested that this was a recently discovered problem. Mr. Lehman and Mr. Tufts asked the Loflins to execute a quit-claim deed relieving Balsam from all responsibility for these material differences. The Loflins refused.

57. At the time of the 2006 meeting, Balsam knew and or had the ability to know that its failure to disclose was another misrepresentation (hereinafter referred to as the "**Subsequent Misrepresentation**") that was false, misleading, and incomplete, and/or recklessly disregarded its falsity, in that Balsam knew before the Closing (and during the ensuing four years) that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108 as shown on the Unrecorded Plat it had commissioned and obtained before the Closing.

58. At the time Balsam made this Subsequent Misrepresentation, Balsam should have known that its Subsequent Misrepresentation was false, misleading, and incomplete, and/or recklessly disregarded its falsity, in that Balsam knew before the Closing (and during the ensuing four years) that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108 as shown on the Unrecorded Plat it had commissioned and obtained before the Closing.

59. Balsam's Subsequent Misrepresentation was material in that the Loflins' bargaining position was disadvantaged by Balsam knowing of its fraud and deceit and

Loflins believing that its fiduciary was dealing with its Founding Limited Partners in good faith in order to resolve an unfortunate development. Had Balsam disclosed the truth, the Loflins would have insisted, among other things, that the transaction be set aside, and if that failed, would have sought the assistance of legal counsel rather than relying on and proceeding alone with discussions with its fiduciary which had led it to believe that had simply made an innocent mistake which it wanted to correct.

60. Balsam intended for the Loflins to rely on its Subsequent Misrepresentation because it did not want to disclose its fraud and deceit.

61. The Loflins were ignorant of the falsity of Balsam's Subsequent Misrepresentation.

62. The Loflins reasonably relied and had a right to rely on Balsam's Subsequent Misrepresentation. The Loflins, as investors, also imposed a special trust and confidence in Balsam, which under the Offering Contract owed them a fiduciary duty.

63. Balsam's Subsequent Misrepresentation significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property.

64. As a direct and proximate result of Balsam's Initial Misrepresentations and Balsam's Subsequent Misrepresentation [hereinafter referred to collectively as the "**Misrepresentations**"] , the Loflins have suffered tremendous financial loss, the Loflins have lost the full enjoyment and use of their property, the Loflins have lost prospective sales

of the property, the Loflins own property that is essentially unmarketable at anything close to the amount they paid for the property, the Loflins have incurred attorney's fees and costs, and the Loflins have suffered and will in the future continue to suffer emotional and mental distress, and other damages.

65. The Loflins are also entitled to punitive damages as a direct and proximate result of Balsam's conduct.

66. The Loflins are also entitled to actual and punitive damages against BMG because BMG continued the aforesaid conduct after it purchased Balsam in 2011 and because, as Balsam's successor, it is responsible for the aforesaid conduct.

FOR A THIRD CAUSE OF ACTION
RECISION AGAINST BALSAM AND BMG

67. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

68. The Loflins are entitled to have the conveyance of Lot 108 rescinded as to Balsam, with Balsam returning to the Loflins the full purchase price, plus interest and costs, including attorney's fees, and title of Lot 108 returned to Balsam or BMG or their designee or to such person or entity designated by the Court.

69. The Loflins are also entitled to have the conveyance of Lot 108 rescinded as to BMG, because BMG continued to benefit from the aforesaid transaction after it purchased Balsam in 2011.

70. As Balsam's successor, BMG should also return to the Loflins the full purchase

price, plus interest and costs. including attorney's fees, and title of Lot 108 returned to Balsam or BMG or their designee, or to such person or entity designated by the Court.

FOR A FOURTH CAUSE OF ACTION
BREACH OF CONTRACT AGAINST BALSAM AND BMG

71. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

72. Balsam breached the Offering Contract, among other ways, by delivering the Loflins an inaccurate individual plat of Lot 108 in connection with the Closing; by taking and controlling .47 acres from the Loflins' property; by conveying Lot 108 with a road through it contrary to Recorded Plat and the Deed which it delivered to the Loflins at the Closing; by failing to disclose these facts for four years and by never telling the Loflins that they knew of these facts before the Closing; by refusing to correct the situation so that the Loflins might have the full use of the Lot 108 conveyed to them, without a road through it, and by telling the Loflins that they would provide no assistance from potential lawsuits if the Loflins attempted to partially remedy the situation by closing the road and exercising control over Lot 108 as conveyed to them by Balsam and reflected in the Recorded Plat delivered by Balsam to the Loflins at the Closing Deed prepared and recorded by Balsam and delivered to the Loflins and which incorporated by Recorded Plat; and by Balsam's continuously refusing to pay the Loflins their Cash Contributions.

73. As a direct and proximate result of Balsam's breach of contract, the Loflins have suffered actual damages, and the Loflins are entitled to attorneys fees and costs.

74. The Loflins are also entitled to actual damages and attorneys fees and costs against BMG because BMG received the benefit of the contract and continued to breach the contract after it purchased Balsam in 2011 and, because BMG, as Balsam's successor, is responsible for the aforesaid breach of contract.

FOR A FIFTH CAUSE OF ACTION
BREACH OF CONTRACT WITH FRAUDULENT INTENT
ACCOMPANIED BY FRAUDULENT ACT AGAINST BALSAM AND BMG

75. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

76. In 2012, the Loflins learned that Balsam breached the Offering Contract with an intent to defraud and accompanied by a fraudulent act because Balsam already had the Unrecorded Plat of Lot 108 showing the road dissecting the subject property and that the lot contained 1.4 less acres, but Balsam concealed the existence of the Unrecorded Plat from the Loflins at the Closing and further tried to induce the Loflins to sign a quit-claim deed agreeing that Lot 108 contained 1.4 acres rather than 1.87 acres, and a road through it, without disclosing to the Loflins that they knew before the Closing that Lot 108 contained only 1.4 acres and had a road through it and had in its possession a Plat showing that before the Closing.

77. As a direct and proximate result of Balsam's breach of contract with fraudulent intent and accompanied by fraudulent act, the Loflins are entitled to actual damages and costs and attorney's fees, as well as punitive damages.

78. The Loflins are also entitled to actual and punitive damages and costs and attorney's fees against BMG because BMG received the benefit of the contract and continued to breach the contract with fraudulent intent and accompanied by fraudulent act after it purchased Balsam in 2011, and because BMG, as Balsam's successor, is responsible for the aforesaid breach of contract with fraudulent intent and accompanied by fraudulent act.

FOR A SIXTH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY AGAINST BALSAM AND BMG

79. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

80. Balsam and BMG had and have a fiduciary duty to the Loflins to act in good faith in its exercise of their rights and obligations.

81. Balsam and BMG breached their fiduciary duty as set forth herein, including the following particulars:

(a) Balsam's deceits in connection with the sale of Lot 108; Balsam's failure to pay the Loflins their Cash Distributions as required in the Offering Contract; Balsam's refusal to permit the Loflins to sell the property within five years, while at the same time showing preferential treatment to one or more other Founding Limited Partners by permitting such a sale; and Balsam's failure to inform the Loflins for over four years that Lot 108 contained only 1.4 acres and that Balsam Road went through it, and when it did, Balsam's suggestion that it had recently learned of this fact without disclosing that it had known of the problem before the Closing. BMG, as Balsam's successor, is responsible for

the aforesaid actions.

(b) BMG's 2012 refusal to list the Loflins Lot 108 for sale; BMG's failure to pay the Loflins their Cash Distributions as required in the Offering Contract; BMG'S institution, through its Association, of a retaliatory lawsuit against the Loflins for payment of assessments, to maintain, in part, BMG's encroachment through their property, despite Balsam's previously acknowledging that the Loflins would not pay assessments until this matter could be resolved, and after they stopped paying the Loflins their quarterly Cash Distributions from which Balsam had deducted their assessments; and BMG's failure to disclose the facts and circumstances surrounding the Unrecorded Plat after it became knowledgeable about such facts and circumstances.

82. As a direct and proximate result of the Balsam's and BMG's breach of contract with fraudulent intent and accompanied by fraudulent act, the Loflins are entitled to actual damages and costs and attorney's fees, as well as punitive damages.

FOR A SEVENTH CAUSE OF ACTION
CONVERSION AGAINST BALSAM AND BMG

83. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

84. Balsam stopped paying the Loflins their Cash Distributions and Balsam continuously to this day refuses to pay the Loflins their Cash Distributions, converting the Loflins' Cash Distributions to their own use. BMG, as Balsam's successor, is responsible for the aforesaid actions.

85. After their purchase of Balsam in 2011, BMG refused to pay the Loflins their Cash Distributions and continuously to this day refuses to pay the Loflins their Cash Distributions, converting the Loflins' Cash Distributions to their own use.

86. Balsam and BMG have continued to convert the property of the Loflins, refusing to acknowledge that the real property of approximately .4 acres as well as the real property now encumbered by a road is the property of the Loflins.

87. As a direct and proximate result of Balsam's conversion, for which BMG as Balsam's successor is responsible, and BMG's separate conversion, the Loflins are entitled to their Cash Distributions, payment for the use and enjoyment of the converted property, as well as punitive damages, and costs and attorney's fees.

FOR AN EIGHTH CAUSE OF ACTION
UNJUST ENRICHMENT AGAINST BALSAM AND BMG

88. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

89. Balsam and BMG, as Balsam's successor, and BMG separately, have been unjustly enriched by taking the Loflins' monies and then failing to deliver the Loflins the benefit of their bargain, including failing to deliver Lot 108 as set forth in their Recorded Plat and Deed and by failing to pay the Loflins their Cash Distributions; and BMG has been unjustly enriched by selling Balsam without addressing the Loflin issues.

90. As a direct and proximate result of these actions, the Loflins are entitled to a return of all their monies, as well as costs and attorney's fees.

FOR A NINTH CAUSE OF ACTION
ACCOUNTING AGAINST BALSAM AND BMG

91. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

92. The Loflins are entitled to a full and complete Accounting of all monies Balsam and BMG have received from the sale of homesteads or lots.

FOR A TENTH CAUSE OF ACTION
CONTINUOUS TRESPASS AGAINST BALSAM AND BMG

93. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

94. The Loflins own lot 108 in Balsam Mountain Preserve which consists of 1.837 acres and the Recorded Plat, which is the only recorded plat, is contained at Plat Cabinet 11, Slide 383 in the Jackson County Records in North Carolina.

95. Balsam and BMG, as Balsam's successor, and since October 2011, BMG, in contradiction to the Deed, Recorded Plat, Development Plan, and Insurance Contracts, own, control and maintain a road dissecting lot 108.

96. The road and the materials making up the road constitute a continuing trespass and an encroachment under the applicable law.

97. As a result of the foregoing continuing trespass and encroachment, the Loflins have been and continue to be injured.

98. The Loflins are entitled to relief including compensation for the injury and an

Order directing Balsam and BMG to immediately remove the road from the property and restore all of the acreage which the Loflins purchased.

FOR A ELEVENTH CAUSE OF ACTION
ENCROACHMENT AGAINST BALSAM AND BMG

99. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

100. A road maintained and/or owned and operated for the benefit of Balsam and BMG, including the Association, contrary to the Recorded Plat, the development plan, and all explanations prior to sale, encroaches upon Lot 108. Balsam and BMG have been notified of the encroachment and have not taken any action to cure the encroachment, if it can be cured at all.

101. As a result of the foregoing encroachment, the Loflins have been and continue to be injured and are entitled to full relief including compensation and removal of the encroachment.

FOR A TWELFTH CAUSE OF ACTION
INDEMNIFICATION AGAINST BALSAM AND BMG

102. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

103. As a direct result of the road through the Loflins' property, and the Loflins' right to close that road, which is a trespass and encumbrance on their property, members of the association and other property owners may in the future initiate legal action against the

Loflins to recover damages for closing the road so that they can have full use and enjoyment of their property.

104. As a result of the aforesaid, the Loflins are informed and believe that they are entitled to a declaratory judgment determining that the Loflins are and will be entitled to full and complete indemnification from Balsam and BMG, of and from all claims or actions of any nature brought against the Loflins for the purpose of seeking injunctive relief or compensatory or punitive damages, resulting from the Loflins' decision to close the road, including attorney's fees to defend any such action.

FOR A THIRTEENTH CAUSE OF ACTION
SUCCESSOR LIABILITY AGAINST BMG

105. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

106. BMG is the successor to Balsam and responsible for all causes of actions alleged against Balsam as set forth herein.

107. As a result of the foregoing, the Loflins have been and continue to be injured and are entitled to full relief as set forth herein, including actual and punitive damages, attorney's fees and costs, and other damages; the Loflins are entitled to have the conveyance of Lot 108 rescinded; the Loflins are entitled to their Cash Distributions; the Loflins are entitled to the return of all their monies; the Loflins are entitled to a full and complete Accounting of all monies Balsam and BMG have received from the sale of homesteads or lots; and the Loflins are entitled to an Order directing BMG to immediately remove the road

and all other encroachments from the Loflins' property and restore all of the acreage which the Loflins purchased.

FOR A FOURTEENTH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY AGAINST THE COWARD DEFENDANTS

108. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

109. Since early 2002, a fiduciary relationship has existed between the Loflins and the Coward Defendants. The Coward Defendants not only accepted but induced the confidence placed in them as the Loflins' counsel. The Coward Defendants have owed a special duty to the Loflins as their clients, including a duty to avoid conflicts of interest, an affirmative duty to protect their clients' interests, a duty to disclose all relevant information to their clients, and a duty to consult with their clients and reasonably disclose any risk or benefits of alternative courses of action.

110. The Loflins not only had a basis to trust and rely upon the advice and counsel of the Coward Defendants, but did in fact place a fiduciary trust in the Coward Defendants to diligently investigate, zealously protect the Loflins best interests and promptly communicate all pertinent information.

111. The Coward Defendants have breached their fiduciary duty to the Loflins, the full extent of which is unknown to the Loflins because the Coward Defendants have, upon information and belief, purposely concealed their conduct, but which includes the Coward Defendants' failure to disclose to the Loflins both the existence and legal implications of the

Unrecorded Plat, despite being in the Loflins' file, which concealment, upon information and belief, benefitted one or more other clients of the Coward Defendants whose interests were and are antagonistic to the Loflins.

112. As a result of the foregoing, the Loflins are entitled to actual and punitive damages, attorney's fees and costs.

FOR A FIFTEENTH CAUSE OF ACTION
FRAUD AND ACTIVE FRAUDULENT CONCEALMENT
AGAINST THE COWARD DEFENDANTS

113. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

114. In 2002, the Coward Defendants delivered to the Loflins the Individual Plat of Lot 108 showing that it contained 1.87 acres, with no road or other encroachment, encumbrance or easement through the property, and prepared and delivered to the Loflins the Deed which incorporated the Recorded Plat. The Coward Defendants then and over a period of years represented to the Loflins that Lot 108 contained approximately 1.9 acres free and clear of all encroachments, encumbrances, and easements; provided the Loflins with their Certifications in which they represented that the Loflins had a marketable title to Lot 108 as shown on the Recorded Plat; and actively concealed the existence of the Unrecorded Plat from the Loflins. The foregoing representations (including the Certifications and the active concealment) [hereinafter referred to as the **"Coward Misrepresentations"**] were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108

and Lot 108 was not marketable for the reasons set forth herein.

115. The Coward Defendants induced the Loflins to purchase and refinance Lot 108, and to exercise full ownership rights to Lot 108, including offering it for sale, based upon the Coward Misrepresentations.

116. The Coward Misrepresentations were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and Lot 108 was not and is not marketable as originally sold for the reasons set forth herein.

117. At the time the Coward made and repeated the Coward Misrepresentations, the Coward Defendants knew that the Coward Misrepresentations were false and/or recklessly disregarded their falsity in that, upon information and belief, the Coward Defendants had in their possession (in their Loflins' file) the Unrecorded Plat that Balsam had commissioned but never recorded showing that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108.

118. The Coward Misrepresentations were material in that the Loflins would not have purchased Lot 108 if the Coward Defendants had disclosed the secret Unrecorded Plat before the Closing or told them that Lot 108 contained (or may have contained) only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and these Misrepresentations significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property; in the alternative, if the Coward Defendants learned of the Unrecorded Plat after the Closing, the Loflins would have taken such steps to protect

their interests if the Coward Defendants had made a full disclosure about the Unrecorded Plat and advised them of their legal alternatives to protect their financial well-being.

119. The Loflins relied on the Coward Misrepresentations, not only in incurring substantial financial obligations to purchase and refinance Lot 108, but also in purchasing and refinancing property which they believed would be marketable, and in otherwise exercising their full ownership rights to Lot 108, including offering it for sale.

120. The Coward Defendants intended for the Loflins to rely on their Misrepresentations.

121. The Loflins were ignorant of the fact that the Coward Defendants knew about the falsity of their representations until until December 2014, when they learned that the Coward Defendants had a copy of the Unrecorded Plat in their file.

122. The Loflins reasonably relied and had a right to rely on the Coward Misrepresentations. The Loflins imposed a special trust and confidence in the Coward Defendants, who as their counsel owed them a fiduciary duty.

123. As a direct and proximate result of the Coward Misrepresentations, the Loflins have suffered tremendous financial loss, the Loflins have lost the full enjoyment and use of their property, the Loflins have lost prospective sales of the property, the Loflins own property that is essentially unmarketable at anything close to the amount they paid for the property, the Loflins have incurred attorney's fees and costs, and the Loflins have suffered and will in the future continue to suffer emotional and mental distress, and other damages.

124. The Loflins are entitled to punitive damages as a result of the Coward Misrepresentations, and the Coward Defendants' fraud and deceit and active concealment of the truth.

FOR A SIXTEENTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION AND FRAUDULENT CONCEALMENT AGAINST THE COWARD DEFENDANTS

125. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

126. Over a period of years from 2002 until today, the Coward Defendants made and repeated the Coward Misrepresentations to the Loflins as set forth herein.

127. The Coward Defendants induced the Loflins to purchase and refinance Lot 108, and to exercise full ownership rights to Lot 108, including offering it for sale, based upon the Coward Misrepresentations.

128. The Coward Misrepresentations were false in that Lot 108 contained only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108 and Lot 108 was not and is not marketable for the reasons set forth herein.

129. At the time Coward Defendants made and repeated the Coward Misrepresentations, the Coward Defendants knew or should have known that the representations were false in that the Unrecorded Plat already had been prepared for Balsam, whom they also represented and, at some point, was provided to the Coward Defendants, who chose not to disclose it the Loflins.

130. The Coward Misrepresentations were material in that the Loflins would not have purchased Lot 108 if the Coward Defendants had disclosed the secret Unrecorded Plat before the Closing or told them that Lot 108 contained (or may have contained) only 1.4 acres and Balsam Mountain Preserve Road dissected Lot 108, and these Misrepresentations significantly impacted the Loflins' financial well-being because the Loflins depended on the financial security of the subject property. The Coward Defendants continued to represent the Loflins over the years, and on two occasions in the ensuing four years, repeated all of the foregoing Misrepresentations. If the Coward Defendants had made a full disclosure about the Unrecorded Plat and advised them of their legal alternatives to protect their financial well-being, the Loflins would have taken such steps to protect their interests.

131. The Loflins relied on the Coward Misrepresentations, not only in incurring substantial financial obligations to purchase and refinance Lot 108, but also in purchasing and refinancing property which they believed would be marketable, and in otherwise exercising their full ownership rights to Lot 108, including offering it for sale.

132. The Coward Defendants intended for the Loflins to rely on their Misrepresentations.

133. The Loflins were ignorant of the fact that the Coward Defendants knew about the falsity of their representations until until December 2014, when they learned that the Coward Defendants had a copy of the Unrecorded Plat in their file.

134. The Loflins reasonably relied and had a right to rely on the Coward

Misrepresentations. The Loflins imposed a special trust and confidence in the Coward Defendants, who as their counsel owed them a fiduciary duty.

135. As a direct and proximate result of the Coward Misrepresentations, the Loflins have suffered tremendous financial loss, the Loflins have lost the full enjoyment and use of their property, the Loflins have lost prospective sales of the property, the Loflins own property that is essentially unmarketable at anything close to the amount they paid for the property, the Loflins have incurred attorney's fees and costs, and the Loflins have suffered and will in the future continue to suffer emotional and mental distress, and other damages.

136. The Loflins are entitled to punitive damages as a result of the Coward Misrepresentations.

FOR A SEVENTEENTH CAUSE OF ACTION
NEGLIGENCE AGAINST THE COWARD DEFENDANTS

137. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

138. The Coward Defendants knew or should have known of the existence of the Unrecorded Plat, but failed to inform the Loflins of the same until December 17, 2014.

139. As a result of the foregoing, the Loflins are entitled to actual and punitive damages, attorney's fees and costs.

FOR AN EIGHTEENTH CAUSE OF ACTION
BREACH OF CONTRACT AGAINST THE COWARD DEFENDANTS

140. The Loflins specifically incorporate all other paragraphs contained in this

Second Amended Complaint as if specifically stated herein.

141. The Coward Defendants entered into a contract with the Loflins to represent them in connection with all matters pertaining to the Loflins' purchase of Lot 108.

142. The Coward Defendants breached their contract with the Loflins by representing that the Loflins had a marketable title to Lot 108 and by failing to inform the Loflins about the existence of the Unrecorded Plat until December 17, 2014.

143. As a result of the foregoing, the Loflins are entitled to actual and damages, attorney's fees and costs.

FOR A NINETEENTH CAUSE OF ACTION
BREACH OF CONTRACT WITH FRAUDULENT INTENT ACCOMPANIED BY FRAUDULENT ACT AGAINST THE COWARD DEFENDANTS

144. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

145. The Coward Defendants breached their contract with the Loflins as set forth herein, and accompanied that breach with fraudulent intent accompanied by a fraudulent act by their actions in concealing the Unrecorded Plat from the Loflins, which, upon information and belief, was for the benefit of one or more other clients of the Coward Defendants whose interests were antagonistic to those of the Loflins.

146. As a result of the foregoing, the Loflins are entitled to actual and punitive damages, attorney's fees and costs.

FOR A TWENTIETH CAUSE OF ACTION
BREACH OF CONTRACT AGAINST CHICAGO AND COUNSELLOR

147. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

148. The Loflins entered into contract with the Insurance Defendants to investigate and insure that lot 108 was protected from all risks set forth herein, including, but not limited to, easements, encumbrances, and fraud.

149. In contradiction to the Insurance Contracts, Lot 108 contains 1.4 rather than 1.87 acres, and is and has been since before the Closing encumbered and encroached upon by a road dissecting the property, rather going around the property on the only Recorded Plat.

150. Despite the Insurance Contract, for which they received consideration from the Loflins, the Insurance Defendants breached the Insurance Contract with the Loflins by refusing to provide the Loflins any relief from the damages caused by the insured risks described herein.

151. As a result of the breach of contract by the Insurance Defendants, the Loflins are entitled to full value of the property as well as any consequential damages which have been incurred.

FOR A TWENTY-FIRST CAUSE OF ACTION
NEGLIGENCE AGAINST CHICAGO AND COUNSELLOR

152. The Loflins specifically incorporate all other paragraphs contained in this Second Amended Complaint as if specifically stated herein.

153. Chicago, which was in the business of providing insurance all types of property including property in nascent development, was designated by Balsam to provide insurance

for the Founding Limited Partners. As such Chicago knew or should have known the risks associated with Lot 108 and either willingly allowed exposure to such risks despite this knowledge, or negligently failed to ascertain and insure against such risks.

154. Counsellor's duty was to investigate and recommend an insurance policy to protect the Loflins from reasonably foreseeable risks, which Counsellor was particularly qualified to do because its agent and the Loflins' counsel also represented Balsam, had drafted the documents central to this dispute, and was throughly familiar with every aspect of the Project. Counselor negligently failed to select a polity to insure the Loflins from the risks which Chicago has denied are covered by the Insurance Contract.

155. As a result of the Insurance Defendants negligence, the Loflins are entitled to full value of the property as well as any consequential damages which have been incurred.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for a judgment against Defendants as set forth herein, including:

(a) Such relief as to Balsam, which has been adjudged in default by this Court of the First Amended Complaint, as determined by the Master-in-Equity, to whom the issue of damages has been referred following entry of an Order of Default Judgment as to the First Amended Complaint, which is specifically incorporated by reference, and remaining in effect to the extent not amended by this Second Amended Complaint adding additional parties.

(b) An Order as to BMG rescinding the Offering Contact and the conveyance of Lot 108 and returning the parties to their respective positions, including title to Lot 108 being returned to Balsam, and Balsam returning the Loflins' consideration, together with all interest thereon, and attorney's fees and costs, and actual damages, including Balsam and BMG's encroachment and use of the road through the Loflins' property and the Loflins' loss of their investment for a period of years.

(c) In the alternative, as to BMG, an Order requiring Balsam to remove its continuing trespass and an award of actual damages as may be determined by a jury to have been sustained by the Loflins, as well as punitive damages and costs and attorney's fees;

(d) An award of actual damages as to the Coward Law Firm and Mr. Coward as may be determined by a jury to have been sustained by the Loflins, as well as punitive damages and costs and attorney's fees;

(e) An award of actual damages as to the Chicago and Counsellor as may be determined by a jury to have been sustained by the Loflins, as well as costs and attorney's fees and such other relief provided for in the Insurance Contract which is in the possession of the Chicago and Counsellor.

(f) Such additional relief as to all Defendants which this Court should determine to be proper.

Daniel A. Speights (SC Bar # 5027)
A. G. Solomons, III (SC Bar# 68291)
SPEIGHTS & RUNYAN
100 Oak Street

Post Office Box 685
Hampton, South Carolina 29924
(803)943-4444
(803)943-4599 (fascimile)

By: 
Daniel A. Speights

ATTORNEYS FOR PLAINTIFFS

Hampton, South Carolina

August 5, 2015

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF HAMPTON)

Re: William P. Loflin and Leslie Loflin v. BMP Development LP, Chicago Title Insurance Company, and Counsellor Title Agency, Inc.
(Case No. 2013-CP-07-1807)

PERSONALLY APPEARED before me, Susan T. Murdaugh, who being duly sworn, deposes and says: that she is employed in the office of Speights & Runyan, attorney for the Plaintiffs in the above-referenced action; that she served the foregoing Third Amended Complaint this 5th day of August, 2015, by personally depositing in a United States Postal Service mail box a copy of the same, postage prepaid, addressed to the attorney(s) listed below.

Robert E. Stepp, Esquire
William H. Jordan, Esquire
Sowell, Gray, Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, SC 29211

David S. Wyatt, Esquire
Gleaton Wyatt
935 S. Main Street, Suite 203
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David W. Overstreet, Esquire
Willliam B. McCall, Esquire
William J. Farley, III, Esquire
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401

Susan T. Murdaugh
SUSAN T. MURDAUGH

SWORN TO before me this
5th day of August, 2015

Tammy W. Shaffer (L.S.)
Notary Public for South Carolina
My Commission Expires: 3/3/2019

2015 AUG -5 AM 11:34
ANN ROSELLE AU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

William Loflin and Leslie Loflin,

Plaintiffs,

vs.

BMP Development, LP, Balsam Mountain Group, LLC, COWARD, HICKS & SILER, P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2013-CP-07-1807

THE DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S ANSWER TO THE PLAINTIFFS' THIRD AMENDED COMPLAINT

Received

AUG 14 2015

Speights & Runyan

TO: DANIEL A. SPEIGHTS, ESQ.
A.G. SOLOMONS, III, ESQ.
SPEIGHTS & RUNYAN
ATTORNEYS FOR THE PLAINTIFF

The Defendant Chicago Title Insurance Company ("Chicago Title") answering the Plaintiffs' Third Amended Complaint alleges and states as follows:

1. Each and every allegation of the Plaintiffs' Third Amended Complaint not admitted, denied, or otherwise qualified herein is hereby deemed denied, and Chicago Title demands strict proof thereof.

2. Chicago Title admits the allegations of Paragraph 1 of the Plaintiffs' Third Amended Complaint.

3. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 2, 3, and 4 of the Plaintiffs' Third Amended Complaint, and, therefore, denies same and demands strict proof thereof.

4. Chicago Title admits only so much of Paragraph 5 of the Plaintiffs' Third Amended Complaint that alleges it is a foreign corporation that conducts business in South Carolina and that the Plaintiffs entered into a contract or contracts of title insurance with Chicago Title. Chicago Title is without sufficient information to form a belief as to the remaining allegations of said Paragraph, and, therefore, denies same and demands strict proof thereof.

5. In answering Paragraph 6 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 4 above as though repeated herein verbatim.

6. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 7, 8, 9, 10, 11, 12, and 13 of the Plaintiffs' Third Amended Complaint, and, therefore, denies same and demands strict proof thereof.

7. Chicago Title admits only so much of Paragraph 14 of the Plaintiff's Third Amended Complaint that purports to set forth the terms and conditions of the title insurance contract referenced therein. To the extent any of the allegations of said Paragraph in any way contradict the terms and conditions of the title insurance contract referenced therein, Chicago Title denies same and demands strict proof thereof.

8. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 15 and 16 of the Plaintiffs' Third Amended Complaint, and, therefore, denies same and demands strict proof thereof.

9. Chicago Title admits only so much of Paragraph 17 of the Plaintiffs' Third Amended Complaint that purports to set forth the terms and conditions of the title insurance contract referenced therein. To the extent any of the allegations of said Paragraph in any way contradict the terms and conditions of the title insurance contract referenced therein, Chicago Title denies same and demands strict proof thereof.

10. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraph 18 of the Plaintiffs' Third Amended Complaint and demands strict proof thereof.

11. Chicago Title admits only so much of Paragraph 19 of the Plaintiffs' Third Amended Complaint that purports to set forth the terms and conditions of the title insurance contract referenced therein. To the extent any of the allegations of said Paragraph in any way contradict the terms and conditions of the title insurance contract referenced therein, Chicago Title denies same and demands strict proof thereof.

12. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraph 20 of the Plaintiffs' Third Amended Complaint, and, therefore, denies same and demand strict proof thereof. Chicago Title would further allege and show that the applicable Statute of Limitations has run as the Plaintiffs claim to have learned of any problems or encroachment on Lot 108 in 2006.

13. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 21, 22, 23, and 24 of the Plaintiffs' Third Amended Complaint and, therefore, denies same and demands strict proof thereof.

14. In answering the allegations of Paragraph 25 of the Plaintiffs' Third Amended Complaint, Chicago Title admits that Plaintiffs tendered a claim on policy no. 34 0063 097 00000014 by letter dated March 23, 2012. Further, Chicago Title admits that by correspondence dated August 21, 2012, it responded to Plaintiffs' claim with a coverage determination which stated in part as follows:

> The Company has obtained a title search of the property. It appears that there is no revised plat of record. Therefore, title appears to be established as insured as the Original Plat was, as of the Policy Date, the correct plat. Furthermore, the Original Plat depicts the property described on Schedule A of the Policy. Therefore, there appears to be no title defect in this matter. Moreover, Scheduled B, Paragraph 8 of the Policy specifically excludes coverage for the

> amount of acreage. However, in this case, there appears to be no discrepancy with the amount of acreage pursuant to the title records. In the event that the developer records a revised plat which appears in the public record after the Policy Date, any matter arising therefrom would be considered a post policy issue and would therefore be excluded under Paragraph 3 of the Exclusions of the Policy. As discussed above, however, that is not the case at this time as no revised plat is of record. The Company will consider any additional information that Insureds provide and reserves the right to modify this coverage decision in light of any additional information it may receive related to this claim.

(Letter, August 21, 2012)

Chicago Title would further show that the August 21, 2012, letter is a document which speaks for itself.

15. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 26, and 27 of the Plaintiffs' Third Amended Complaint, and, therefore, denies same and demands strict proof thereof.

16. Chicago Title admits the allegations of Paragraphs 28 of the Plaintiffs' Third Amended Complaint insomuch as these allegations purport to reference the Notices of Deposition and Subpoenas referenced therein. To the extent the allegations of said Paragraph in any way differ from the Notices of Deposition and Subpoenas referenced therein, Chicago Title denies same and demands strict proof thereof.

17. Chicago Title is without sufficient information to form a belief as to the allegations of Paragraphs 29, 30, 31, 32, and 33 of the Plaintiffs' Third Amended Complaint, and, therefore, denies same and demands strict proof thereof.

18. In answering Paragraph 34 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 17 above as though repeated herein verbatim.

19. Chicago Title is not required to answer the allegations of Paragraphs 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44, and45 of the Plaintiffs' Third Amended Complaint as said allegations

relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

20. In answering Paragraph 46 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 19 above as though repeated herein verbatim.

21. Chicago Title is not required to answer the allegations of Paragraphs 47, 48, 49, 50, 51, 52, 53, 54, 55, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, and 66 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

22. In answering Paragraph 67 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 21 above as though repeated herein verbatim.

23. Chicago Title is not required to answer the allegations of Paragraphs 68, 69, and 70 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

24. In answering Paragraph 71 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 23 above as though repeated herein verbatim.

25. Chicago Title is not required to answer the allegations of Paragraphs 73, 73, and 74 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

26. In answering Paragraph 75 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 25 above as though repeated herein verbatim.

27. Chicago Title is not required to answer the allegations of Paragraphs 76, 77, and 78 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

28. In answering Paragraph 79 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 27 above as though repeated herein verbatim.

29. Chicago Title is not required to answer the allegations of Paragraphs 80, 81, and 82of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

30. In answering Paragraph 83 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 29 above as though repeated herein verbatim.

31. Chicago Title is not required to answer the allegations of Paragraphs 84, 85, 86, and 87 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

32 In answering Paragraph 88 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 31 above as though repeated herein verbatim.

33. Chicago Title is not required to answer the allegations of Paragraphs 89 and 90 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

34. In answering Paragraph 91 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 33 above as though repeated herein verbatim.

35. Chicago Title is not required to answer the allegations of Paragraph 92 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

36. In answering Paragraph 93 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 35 above as though repeated herein verbatim.

37. Chicago Title is not required to answer the allegations of Paragraphs 94, 95, 96, 97, and 98 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

38. In answering Paragraph 99 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 37 above as though repeated herein verbatim.

39. Chicago Title is not required to answer the allegations of Paragraphs 100 and 101 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

40. In answering Paragraph 102 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 39 above as though repeated herein verbatim.

41. Chicago Title is not required to answer the allegations of Paragraphs 103 and 104 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-

Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

42. In answering Paragraph 105 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 41 above as though repeated herein verbatim.

43. Chicago Title is not required to answer the allegations of Paragraphs 106 and 107 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

44. In answering Paragraph 108 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 43 above as though repeated herein verbatim.

45. Chicago Title is not required to answer the allegations of Paragraphs 109, 110, 111, and 112 of the of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

46. In answering Paragraph 113 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 45 above as though repeated herein verbatim.

47. Chicago Title is not required to answer the allegations of Paragraphs 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, and 124 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

48. In answering Paragraph 125 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 47 above as though repeated herein verbatim.

49. Chicago Title is not required to answer the allegations of Paragraphs 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, and 136 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

50. In answering Paragraph 137 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 49 above as though repeated herein verbatim.

51. Chicago Title is not required to answer the allegations of Paragraphs 138 and 139 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

52. In answering Paragraph 140 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 51 above as though repeated herein verbatim.

53. Chicago Title is not required to answer the allegations of Paragraphs 141, 142, and 143 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

54. In answering Paragraph 144 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 53 above as though repeated herein verbatim.

55. Chicago Title is not required to answer the allegations of Paragraphs 145 and 146 of the Plaintiffs' Third Amended Complaint as said allegations relate to a cause of action against Co-Defendants. To the extent an Answer is warranted from Chicago Title, Chicago Title denies same and demands strict proof thereof.

56. In answering Paragraph 147 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 55 above as though repeated herein verbatim.

57. Chicago Title denies the allegations of Paragraphs 147, 148, 149, 150, and 151 of the Plaintiffs' Third Amended Complaint and demands strict proof thereof.

58. In answering Paragraph 152 of the Plaintiffs' Third Amended Complaint, Chicago Title repeats and realleges Paragraphs 1 through 57 above as though repeated herein verbatim.

59. Chicago Title denies the allegations of Paragraphs 153, 154, and 155 of the Plaintiffs' Third Amended Complaint and demands strict proof thereof.

FOR A FURTHER ANSWER
AND BY WAY OF A FIRST AFFIRMATIVE DEFENSE

60. Chicago Title would allege and show that the Plaintiffs' Third Amended Complaint should be barred in whole and in part by the doctrines of waiver, estoppel, and laches as the Plaintiffs claims to have discovered the matters giving rise to his causes of action, if any, in 2006 but did not file their Complaint until 2013.

FOR A FURTHER ANSWER
AND BY WAY OF A SECOND AFFIRMATIVE DEFENSE

61. Chicago Title would allege and show that the Plaintiffs' Third Amended Complaint fails to state a cause of action upon which relief can be granted as against Chicago Title, and accordingly, the Plaintiffs' Third Amended Complaint should be dismissed as to Chicago Title.

FOR A FURTHER ANSWER
AND BY WAY OF A THIRD AFFIRMATIVE DEFENSE

62. Chicago Title would allege and show that acts and omissions giving rise to the Plaintiffs' Third Amended Complaint were the direct and proximate result of acts and omissions of parties over whom Chicago Title had no control, and, therefore, the Plaintiffs' Third Amended Complaint should be dismissed as to Chicago Title.

FOR A FURTHER ANSWER
AND BY WAY OF A FOURTH AFFIRMATIVE DEFENSE

63. Chicago Title would allege and show that the Plaintiffs received the benefit of their bargain as to the title insurance policy issued in the Plaintiffs' favor as described in the Plaintiffs' Third Amended Complaint, and, therefore, the Plaintiffs' Third Amended Complaint should be dismissed as to Chicago Title.

FOR A FURTHER ANSWER
AND BY WAY OF A FIFTH AFFIRMATIVE DEFENSE

64. Chicago Title would allege and show that the Plaintiffs' Third Amended Complaint should be barred by the applicable statutes of limitation as the Plaintiffs claim to have known, knew, or should have known of their alleged causes of action in 2006 as set forth in the Plaintiffs' Third Amended Complaint yet they did not file their Complaint until 2013.

FOR A FURTHER ANSWER
AND BY WAY OF A SIXTH AFFIRMATIVE DEFENSE

65. Chicago Title would allege and show that the Plaintiffs' own negligence in failing to protect their own interest in the property described in their Third Amended Complaint is comparatively greater than any negligence on the part of Chicago Title, none of which is admitted, and all of which is specifically denied.

FOR A FURTHER ANSWER
AND BY WAY OF A SEVENTH AFFIRMATIVE DEFENSE

66. Chicago Title would allege and show that the Plaintiffs' have filed this Third Amended Complaint in retaliation and response to a lawsuit filed against them in Jackson County, North Carolina, as set forth in the Plaintiffs' Third Amended Complaint.

FOR A FURTHER ANSWER
AND BY WAY OF AN EIGHTH AFFIRMATIVE DEFENSE

67. Chicago Title would allege and show that the real property giving rise to this matter is located in Jackson County, North Carolina, and, therefore, this Court is the improper venue for the Plaintiff's claims, if any, and none of which are admitted, and this Court does not have subject matter jurisdiction over the Plaintiff's claims, if any, and none of which are admitted.

FOR A FURTHER ANSWER
AND BY WAY OF A NINTH AFFIRMATIVE DEFENSE

68. Chicago Title would allege and show that it adopts by reference herein any other affirmative defenses asserted by any other Defendant in this matter in answering the Plaintiffs' Third Amended Complaint.

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[SIGNATURES ON FOLLOWING PAGES]

WHEREFORE, having fully answered the Plaintiffs' Third Amended Complaint, the Defendant Chicago Title Insurance Company prays that this Court enter its Order as follows:

1. Dismissing the Plaintiffs' Third Amended Complaint;
2. Awarding the Defendant its reasonable attorneys' fees and costs for the defense of this matter;
3. Awarding any and all such further relief as this Court may deem just and proper.

BUIST, BYARS & TAYLOR, LLC

Mount Pleasant, South Carolina

Aug. 10, 2015

By: _____

G. Hamlin O'Kelley, III
S.C. Bar No. 15491
652 Coleman Boulevard, Suite 200
Mount Pleasant, South Carolina 29464
(843) 856-4488
hamlin.okelley@buistbyars.com

Attorneys for the Defendant Chicago Title Insurance Company

CERTIFICATE OF MAILING

I hereby certify that on August 10, 2015, a copy of the foregoing was mailed, postage prepaid, to all counsel of record in this matter, as follows.

Daniel A. Speights, Esq.
A.G. Solomons, III, Esq.
Speights & Runyan
100 Oak Street, East
P.O. Box 685
Hampton, SC 29924

Robert E. Stepp, Esq.
Sowell, Gray, Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

David S. Wyatt, Esq.
Gleaton Wyatt
935 South Main St., Ste. 203
Greenville, SC 29601

David W. Overstreet, Esq.
William B. McCall, Esq.
Carlock Copeland & Stair
40 Calhoun St.,Ste. 400
Charleston, SC 29401

G. Hamlin O'Kelley, III

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	**PLAINTIFFS' NOTICE OF**
v.	)	**DEPOSITION**
	)	
BMP Development LP, Balsam Mountain Group, LLC, COWARD HICKS & SILER, P.A., J.K. Coward, Jr., Chicago Title Insurance Company and Counsellor Title Agency, Inc.	)	
	)	
Defendants.	)	

TO: DEFENDANTS ABOVE-NAMED AND THEIR ATTORNEYS

Please take notice that on January 5, 2016, at 11:00 a.m., pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, Plaintiffs will take the deposition of the Representative of Chicago Title Insurance Company, c/o Buist, Byars & Taylor, LLC as designated in Chicago Title's Answers to the Plaintiffs' First Interrogatories, at the office of Speights & Runyan, 2015 Boundary Street, Suite 239, Beaufort, SC 29902, before an official court reporter, or before some other person authorized by law to administer oaths.

Daniel A. Speights (SC Bar # 5027)
A. G. Solomons, III (SC Bar# 68291)
SPEIGHTS & RUNYAN
100 Oak Street, Post Office Box 685
Hampton, SC 29924
(803)943-4444 (telephone)
(803)943-4599 (fascimile)

By: Daniel A. Speights

ATTORNEYS FOR PLAINTIFFS

Hampton, South Carolina

December 16, 2015

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF HAMPTON)

Re: William Loflin and Leslie Loflin v. BMP Development, LP, Balsam Mountain Group, LLC, COWARD, HICKS & SILER, P.A., J.K. Coward, Jr., Chicago Title Insurance Company and Counsellor Title Agency, Inc., C/A No. 2013-CP-07 -1807

PERSONALLY APPEARED before me Rhonda L. Bowers, who being duly sworn, deposes and says: that she is employed in the office of Speights & Runyan, attorney for the Plaintiffs in the above-referenced action; that she served **Plaintiffs' Notice of Deposition** this 16th day of December, 2015, by personally depositing in a United States Postal Service mail box a copy of the same, postage prepaid, addressed to the attorney(s) listed below.

David W. Overstreet, Esquire
Michael B. McCall, Esquire
William J. Farley, III, Esquire
CARLOCK, COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401

Robert E. Stepp, Esquire
Sowell, Gray, Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211

David S. Wyatt, Esquire
GLEATON WYATT
935 S. Main Street, Suite 203
Greenville, South Carolina 29601

G. Hamlin O'Kelley, III, Esquire
BUIST, BYARS & TAYLOR, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464

Rhonda L. Bowers
RHONDA L. BOWERS

SWORN TO before me this
16th day of December, 2015

Rosmarie L. Lightsey (L.S.)
Notary Public for South Carolina
My Commission Expires: 11/6/2022

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2013-CP-07-1807

William Loflin and Leslie Loflin,

Plaintiffs,

vs.

BMP Development, LP, Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,

Defendants.

CHICAGO TITLE INSURANCE COMPANY'S MOTION TO QUASH PLAINTIFFS' NOTICE OF DEPOSITION

TO: DANIEL A. SPEIGHTS, ESQ.
SPEIGHTS & RUNYAN
ATTORNEYS FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant, Chicago Title Insurance Company (hereinafter referred to as "Chicago Title"), by and through its undersigned counsel, will move on the tenth (10th) day after service hereof or as soon as counsel may be heard before the Presiding Judge of the Fourteenth Judicial Circuit for an order quashing Plaintiffs' notice of deposition dated December 16, 2015, pursuant to Rule 30(b)(6) SCRCP. The Plaintiffs blindly set notice of the time and place of the deposition without contacting counsel and without complying with the Rule 30 notice required to take the deposition of a corporation. The notice does not describe with reasonable particularity the matters on which examination is requested which is required for the deposition of a corporation, public or private.

Counsel certifies that he contacted the Plaintiffs' counsel prior to filing this motion and no resolution of this matter could be had.

Received

DEC 30 2015

Speights & Runyan

Please be present to defend if so minded.

BUIST, BYARS & TAYLOR, LLC

By: _____
G. Hamlin O'Kelley, III
S.C. Bar No. 15491
652 Coleman Boulevard, Suite 200
Mount Pleasant, South Carolina 29464
(843) 856-4488
hamlin.okelley@buistbyars.com
Attorneys for the Defendant Chicago Title Insurance Company

Mount Pleasant, South Carolina

December 29 2015

CERTIFICATE OF MAILING

I hereby certify that on December 29, 2015, a copy of the foregoing was mailed, via overnight delivery, prepaid, to all counsel of record in this matter, as follows.

Daniel A. Speights, Esq.
Speights & Runyan
100 Oak Street, East
P.O. Box 685
Hampton, SC 29924

Robert E. Stepp, Esq.
Sowell, Gray, Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

David W. Overstreet, Esq.
Carlock Copeland & Stair, LLP
40 Calhoun St., Suite 400
Charleston, SC 29401

David S. Wyatt, Esq.
Gleaton Wyatt
935 S. Main Street
Greenville, SC 29601

G. Hamlin O'Kelley, III

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF HAMPTON)

Re: William Loflin and Leslie Loflin v. BMP Development, LP, Balsam Mountain Group, LLC, COWARD, HICKS & SILER, P.A., J.K. Coward, Jr., Chicago Title Insurance Company and Counsellor Title Agency, Inc., C/A No. 2013-CP-07 -1807

PERSONALLY APPEARED before me Rhonda L. Bowers, who being duly sworn, deposes and says: that she is employed in the office of Speights & Runyan, attorney for the Plaintiffs in the above-referenced action; that she served **Plaintiffs' Notice of Deposition** this 16th day of December, 2015, by personally depositing in a United States Postal Service mail box a copy of the same, postage prepaid, addressed to the attorney(s) listed below.

David W. Overstreet, Esquire
Michael B. McCall, Esquire
William J. Farley, III, Esquire
CARLOCK, COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401

Robert E. Stepp, Esquire
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G. Hamlin O'Kelley, III, Esquire
BUIST, BYARS & TAYLOR, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464

Rhonda L. Bowers
RHONDA L. BOWERS

SWORN TO before me this
16th day of December, 2015

Rosemarie Lightsey (L.S.)
Notary Public for South Carolina
My Commission Expires: 11/6/2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
William Loflin and Leslie Loflin,	)	Civil Action No. 2013-CP-07-1807
	)	
Plaintiffs,	)	
	)	
vs.	)	**ANSWER TO THIRD AMENDED COMPLAINT BY COUNSELLOR TITLE AGENCY, INC. AND CROSS-CLAIM AGAINST DEFENDANTS COWARD, HICKS & SILER, P.A. AND J.K. COWARD, JR.**
	)	
BMP Development LP, Balsam Mountain Group, LLC, COWARD, HICKS & SILER, P.A., J. K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
	)	
Defendants.	)	
	)	

Defendant Counsellor Title Agency, Inc. ("Counsellor") hereby answers Plaintiff's Third Amended Complaint and denies each and every allegation thereof not specifically admitted herein. Further responding to the Third Amended Complaint, Counsellor alleges as follows.

FOR A FIRST DEFENSE

1. Counsellor admits the allegations of paragraph one of the Third Amended Complaint upon information and belief.

2. Counsellor admits those portions of paragraph two of the Third Amended Complaint that allege that William L. Bethea and Sarah Robertson are residents of Beaufort County, and that the firm of Bethea Jordan & Griffin, with offices in Beaufort County, merged with McNair Law Firm, P.A. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph two therefore denies them.

3. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph three of the Third Amended Complaint and therefore denies them.

Received
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Speights & Runyan

4. Responding to the allegations of paragraph four of the Third Amended Complaint, Counsellor admits that Coward, Hicks & Siler, P.A. is a law firm located in Jackson County, North Carolina. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph four and therefore denies them,

5. Responding to the allegations of paragraph five of the Third Amended Complaint, Counsellor admits only that it is a South Carolina corporation with its principal place of business in Beaufort County, that it serves as agent for Chicago Title Insurance Company ("Chicago Title"), that Bill Bethea and Sarah Robertson are or were agents of Counsellor and Chicago Title, and that Chicago Title does business in Beaufort County. Counsellor denies that portion of paragraph five that alleges or implies that the Loflins entered into any agreements with Counsellor in which Counsellor was to act as an insurer. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph five and therefore denies them.

6. Counsellor incorporates the allegations of paragraphs one through five above in response to the allegations of paragraph six of the Third Amended Complaint.

7.

ounsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph seven of the Third Amended Complaint and therefore denies them.

8. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph eight of the Third Amended Complaint and therefore denies them.

9. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph nine of the Third Amended Complaint and therefore denies them.

10. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph ten of the Third Amended Complaint and therefore denies them.

11. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph eleven of the Third Amended Complaint and therefore denies them.

12. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph twelve of the Third Amended Complaint and therefore denies them.

13. Counsellor admits that the deed ("the Deed") conveying Lot 108, as such term is defined in the Third Amended Complaint, contained a legal description of Lot 108 which incorporated the Recorded Plat, as such term is defined in the Third Amended Complaint. Counsellor denies those portions of paragraph thirteen of the Third Amended Complaint as stated that refer to information on the public record and refers to the public record itself for information regarding the plat referred to. Counsellor lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph thirteen of the Third Amended Complaint and therefore denies them.

14. Counsellor admits that, in its capacity as agent for Chicago Title, on or about February 19, 2002, it issued an owner's title insurance policy that insured, with the term and exceptions stated therein, title to Lot 108 using the same legal description therefore as was contained in the Deed. Responding further to the allegations of paragraph fourteen of the Third Amended Complaint, Counsellor denies any allegation or inference therein that it entered into any agreement with the Loflins by which Counsellor was to act as insurer and further denies that any agreement was entered into with regard to future events. Counsellor denies the remaining allegations of paragraph fourteen as stated and craves reference to the title insurance policy issued by Counsellor as agent for Chicago Title for a complete and accurate statement of its terms.

15. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph fifteen of the Third Amended Complaint and therefore denies them.

16. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph sixteen of the Third Amended Complaint and therefore denies them.

17. Counsellor admits those portions of the allegations of paragraph seventeen of the Third Amended Complaint that allege that the Loflins refinanced Lot 108 in 2004, that they were represented by Coward, Hicks, & Siler in that transaction, and that Coward, Hicks & Siler executed a Preliminary Opinion of Title in favor of Chicago Title Insurance Company. Counsellor denies any allegation or inference in paragraph seventeen that a new title insurance policy insuring the Loflins as owners was issued in connection with that transaction. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph seventeen and therefore denies them.

18. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph eighteen of the Third Amended Complaint and therefore denies them.

19. Counsellor admits those portions of the allegations of paragraph nineteen of the Third Amended Complaint that allege that the Loflins refinanced Lot 108 in 2006, that they were represented by Coward, Hicks, & Siler in that transaction, and that Coward, Hicks & Siler executed Preliminary and Final Opinions of Title in favor of Chicago Title Insurance Company. Counsellor denies any allegation or inference in paragraph nineteen that a new title insurance policy insuring the Loflins as owners was issued in connection with that transaction. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph nineteen and therefore denies them.

20. Counsellor admits the Deed and the Recorded Plat were duly recorded. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph twenty of the Third Amended Complaint and therefore denies them.

21. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph twenty-one of the Third Amended Complaint and therefore denies them.

22. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph twenty-two of the Third Amended Complaint and therefore denies them.

23. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph twenty-three of the Third Amended Complaint and therefore denies them.

24. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph twenty-four of the Third Amended Complaint and therefore denies them.

25. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph twenty-five of the Third Amended Complaint and therefore denies them.

26. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph twenty-six of the Third Amended Complaint and therefore denies them.

27. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph twenty-seven of the Third Amended Complaint and therefore denies them.

28. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph twenty-eight of the Third Amended Complaint and therefore denies them.

29. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph twenty-nine of the Third Amended Complaint and therefore denies them.

30. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph thirty of the Third Amended Complaint and therefore denies them.

31. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph thirty-one of the Third Amended Complaint and therefore denies them.

32. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph thirty-two of the Third Amended Complaint and therefore denies them.

33. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph thirty-three of the Third Amended Complaint and therefore denies them.

34. Counsellor incorporates the allegations of paragraphs one through thirty-three above in response to the allegations of paragraph thirty-four of the Third Amended Complaint.

35. Responding to the allegations of paragraph thirty-five of the Third Amended Complaint, Counsellor admits that the Deed contained a legal description of Lot 108 that incorporated the Recorded Plat. Counsellor denies that portion of paragraph thirty-five of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph thirty-five of the Third Amended Complaint and therefore denies them.

36. Counsellor denies that portion of paragraph thirty-six of the Third Amended Complaint that alleges that Lot 108 contains only 1.4 acres and is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph thirty-six of the Third Amended Complaint and therefore denies them.

37. Counsellor denies that portion of paragraph thirty-seven of the Third Amended Complaint that alleges that Lot 108 contains only 1.4 acres and is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph thirty-seven of the Third Amended Complaint and therefore denies them.

38. Counsellor denies that portion of paragraph thirty-eight of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph thirty-eight of the Third Amended Complaint and therefore denies them.

39. Counsellor denies that portion of paragraph thirty-nine of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected"

by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph thirty-nine of the Third Amended Complaint and therefore denies them.

40. Counsellor denies that portion of paragraph forty of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph forty of the Third Amended Complaint and therefore denies them.

41. Counsellor denies that portion of paragraph forty-one of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph forty-one of the Third Amended Complaint and therefore denies them.

42. Counsellor denies that portion of paragraph forty-two of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph forty-two of the Third Amended Complaint and therefore denies them.

43. Counsellor denies that portion of paragraph forty-three of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor denies the portions of paragraph forty-three of the Third Amended Complaint that allege that the Loflins are damaged by the configuration of Lot 108. Counsellor

lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph forty-three and therefore denies them.

44. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph forty-four of the Third Amended Complaint and therefore denies them.

45. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph forty-five of the Third Amended Complaint and therefore denies them.

46. Counsellor incorporates the allegations of paragraphs one through forty-five above in response to the allegations of paragraph forty-six of the Third Amended Complaint.

47. Responding to the allegations of paragraph forty-seven of the Third Amended Complaint, Counsellor admits that the Deed contained a legal description of Lot 108 which incorporated the Recorded Plat. Counsellor denies that portion of paragraph forty-seven of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph forty-seven of the Third Amended Complaint and therefore denies them.

48. Counsellor denies that portion of paragraph forty-eight of the Third Amended Complaint that alleges that Lot 108 contains only 1.4 acres and is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph forty-eight of the Third Amended Complaint and therefore denies them.

49. Counsellor denies that portion of paragraph forty-nine of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected"

by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph forty-nine of the Third Amended Complaint and therefore denies them.

50. Counsellor denies that portion of paragraph fifty of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph fifty of the Third Amended Complaint and therefore denies them.

51. Counsellor denies that portion of paragraph fifty-one of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph fifty-one of the Third Amended Complaint and therefore denies them.

52. Counsellor denies that portion of paragraph fifty-two of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the reaming allegations of paragraph fifty-two of the Third Amended Complaint and therefore denies them.

53. Counsellor denies that portion of paragraph fifty-three of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph fifty-three of the Third Amended Complaint and therefore denies them.

54. Counsellor denies that portion of paragraph fifty-four of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected"

by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph fifty-four of the Third Amended Complaint and therefore denies them.

55. Counsellor denies the allegations of paragraph fifty-five of the Third Amended Complaint to the extent that they allege or imply that Lot 108 contains less than 1.8 acres and is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph fifty-five of the Third Amended Complaint and therefore denies them.

56. Counsellor denies that portion of paragraph fifty-six of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph fifty-six of the Third Amended Complaint and therefore denies them.

57. Counsellor denies the allegations of paragraph fifty-seven of the Third Amended Complaint to the extent that they allege or imply that Lot 108 contains less than 1.8 acres and is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph fifty-seven of the Third Amended Complaint and therefore denies them.

58. Counsellor denies the allegations of paragraph fifty-eight of the Third Amended Complaint to the extent that they allege or imply that Lot 108 contains less than 1.8 acres and is dissected by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph fifty-eight of the Third Amended Complaint and therefore denies them.

59. Counsellor denies that portion of paragraph fifty-nine of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph fifty-nine of the Third Amended Complaint and therefore denies them.

60. Counsellor denies that portion of paragraph sixty of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph sixty of the Third Amended Complaint and therefore denies them.

61. Counsellor denies that portion of paragraph sixty-one of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph sixty-one of the Third Amended Complaint and therefore denies them.

62. Counsellor denies that portion of paragraph sixty-two of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph sixty-two of the Third Amended Complaint and therefore denies them.

63. Counsellor denies that portion of paragraph sixty-three of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the

remaining allegations of paragraph sixty-three of the Third Amended Complaint and therefore denies them.

64. Counsellor denies that portion of paragraph sixty-four of the Third Amended Complaint that alleges or implies that Lot 108 contains less than 1.8 acres and/or is "dissected" by a road. Counsellor denies the portions of paragraph sixty-four of the Third Amended Complaint that allege that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph sixty-four and therefore denies them.

65. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph sixty-five of the Third Amended Complaint and therefore denies them.

66. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph sixty-six of the Third Amended Complaint and therefore denies them.

67. Counsellor incorporates the allegations of paragraphs one through sixty-six above in response to the allegations of paragraph sixty-seven of the Third Amended Complaint.

68. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph sixty-eight of the Third Amended Complaint and therefore denies them.

69. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph sixty-nine of the Third Amended Complaint and therefore denies them.

70. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph seventy of the Third Amended Complaint and therefore denies them.

71. Counsellor incorporates the allegations of paragraphs one through seventy above in response to the allegations of paragraph seventy-one of the Third Amended Complaint.

72. Responding to the allegations of paragraph seventy-two of the Third Amended Complaint, Counsellor admits that the Deed contained a legal description of Lot 108 which incorporated the Recorded Plat. Counsellor denies the allegations of paragraph seventy-two of the Third Amended Complaint to the extent that they allege or imply that Lot 108 contains less than 1.8 acres and is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph seventy-two of the Third Amended Complaint and therefore denies them.

73. Counsellor denies the portions of paragraph seventy-three of the Third Amended Complaint that allege or imply that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph seventy-three and therefore denies them.

74. Counsellor denies the portions of paragraph seventy-four of the Third Amended Complaint that allege or imply that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph seventy-four and therefore denies them.

75. Counsellor incorporates the allegations of paragraphs one through seventy-four above in response to the allegations of paragraph seventy-five of the Third Amended Complaint.

76. Counsellor denies the allegations of paragraph seventy-six of the Third Amended Complaint to the extent that they allege or imply that Lot 108 contains less than 1.8 acres and is

"dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph seventy-six and therefore denies them.

77. Counsellor denies the portions of paragraph seventy-seven of the Third Amended Complaint that allege or imply that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph seventy-seven and therefore denies them.

78. Counsellor denies the portions of paragraph seventy-eight of the Third Amended Complaint that allege or imply that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph seventy-eight and therefore denies them.

79. Counsellor incorporates the allegations of paragraphs one through seventy-eight above in response to the allegations of paragraph seventy-nine of the Third Amended Complaint.

80. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph eighty of the Third Amended Complaint and therefore denies them.

81. Counsellor denies the allegations of paragraph eighty-one of the Third Amended Complaint to the extent that they allege or imply that Lot 108 contains less than 1.8 acres and is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph eighty-one and therefore denies them.

82. Counsellor denies the portions of paragraph eighty-two of the Third Amended Complaint that allege or imply that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph eighty-two and therefore denies them.

83. Counsellor incorporates the allegations of paragraphs one through eighty-two above in response to the allegations of paragraph eighty-three of the Third Amended Complaint.

84. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph eighty-four of the Third Amended Complaint and therefore denies them.

85. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph eighty-five of the Third Amended Complaint and therefore denies them.

86. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph eighty-six of the Third Amended Complaint and therefore denies them.

87. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph eighty-seven of the Third Amended Complaint and therefore denies them.

88. Counsellor incorporates the allegations of paragraphs one through eighty-seven above in response to the allegations of paragraph eighty-eight of the Third Amended Complaint.

89. Counsellor denies the allegations of paragraph eighty-nine of the Third Amended Complaint to the extent that they allege or imply that Lot 108 contains less than 1.8 acres and is "dissected" by a road. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph eighty-nine and therefore denies them.

90. Counsellor denies the portions of paragraph ninety of the Third Amended Complaint that allege or imply that the Loflins are damaged by the configuration of Lot 108.

Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph ninety and therefore denies them.

91. Counsellor incorporates the allegations of paragraphs one through ninety above in response to the allegations of paragraph ninety-one of the Third Amended Complaint.

92. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph ninety-two of the Third Amended Complaint and therefore denies them.

93. Counsellor incorporates the allegations of paragraphs one through ninety-two above in response to the allegations of paragraph ninety-three of the Third Amended Complaint.

94. Counsellor admits the portions of paragraph ninety-four of the Third Amended Complaint that allege that, upon completion of Plaintiffs' purchase of Lot 108 in or about February 2002, Plaintiffs' owned Lot 108 as described in the Deed and in the Recorded Plat, and that the Recorded Plat is contained in Plat Cabinet 11, Slide 383, in the Jackson County Records in North Carolina; and that the Unrecorded Plat was not recorded in such Records at that time. Counsellor denies the remaining allegations in paragraph ninety-four of the Third Amended Complaint.

95. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph ninety-five of the Third Amended Complaint and therefore denies them.

96. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph ninety-six of the Third Amended Complaint and therefore denies them.

97. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph ninety-seven of the Third Amended Complaint and therefore denies them.

98. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph ninety-eight of the Third Amended Complaint and therefore denies them.

99. Counsellor incorporates the allegations of paragraphs one through ninety-eight above in response to the allegations of paragraph ninety-nine of the Third Amended Complaint.

100. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred of the Third Amended Complaint and therefore denies them.

101. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred one of the Third Amended Complaint and therefore denies them.

102. Counsellor incorporates the allegations of paragraphs one through one hundred one in response to the allegations of paragraph one hundred two of the Third Amended Complaint.

103. Counsellor admits upon information and belief that portion of paragraph one hundred three of the Third Amended Complaint that alleges that the Loflins have the right to close any road that actually crosses their property. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred three of the Third Amended Complaint and therefore denies them.

104. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred four of the Third Amended Complaint and therefore denies them.

105. Counsellor incorporates the allegations of paragraphs one through one hundred four above in response to the allegations of paragraph one hundred five of the Third Amended Complaint.

106. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred six of the Third Amended Complaint and therefore denies them.

107. Counsellor denies the portions of paragraph one hundred seven of the Third Amended Complaint that allege or imply that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred seven and therefore denies them.

108. Counsellor incorporates the allegations of paragraphs one through one hundred seven above in response to the allegations of paragraph one hundred eight of the Third Amended Complaint.

109. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred nine of the Third Amended Complaint and therefore denies them.

110. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred ten of the Third Amended Complaint and therefore denies them.

111. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred eleven of the Third Amended Complaint and therefore denies them.

112. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred twelve of the Third Amended Complaint and therefore denies them.

113. Counsellor incorporates the allegations of paragraphs one through one hundred twelve above in response to the allegations of paragraph one hundred thirteen of the Third Amended Complaint.

114. Counsellor denies that portion of the allegations of paragraph one hundred fourteen of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred fourteen and therefore denies them.

115. Counsellor denies that portion of the allegations of paragraph one hundred fifteen of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred fifteen of the Third Amended Complaint and therefore denies them.

116. Counsellor denies that portion of the allegations of paragraph one hundred sixteen of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a

belief as to the truth or falsity of the remaining allegations of paragraph one hundred sixteen and therefore denies them.

117. Counsellor denies that portion of the allegations of paragraph one hundred seventeen of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred seventeen and therefore denies them.

118. Counsellor denies that portion of the allegations of paragraph one hundred eighteen of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor further denies that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred eighteen and therefore denies them.

119. Counsellor denies that portion of the allegations of paragraph one hundred nineteen of the Third Amended Complaint that alleges or implies that the Loflins' title to Lot 108 is not marketable. Counsellor further denies that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred nineteen and therefore denies them.

120. Counsellor denies that portion of the allegations of paragraph one hundred twenty of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred twenty of the Third Amended Complaint and therefore denies them.

121. Counsellor denies that portion of the allegations of paragraph one hundred twenty-one of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred twenty-one of the Third Amended Complaint and therefore denies them.

122. Counsellor denies that portion of the allegations of paragraph one hundred twenty-two of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred twenty-two of the Third Amended Complaint and therefore denies them.

123. Counsellor denies that portion of the allegations of paragraph one hundred twenty-three of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor further denies the portions of paragraph one hundred twenty-three of the Third Amended Complaint that allege or imply that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred twenty-three and therefore denies them.

124. Counsellor denies that portion of the allegations of paragraph one hundred twenty-four of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor further denies that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred twenty-four of the Third Amended Complaint and therefore denies them.

125. Counsellor incorporates the allegations of paragraphs one through one hundred twenty-four above in response to the allegations of paragraph one hundred twenty-five of the Third Amended Complaint.

126. Counsellor denies that portion of the allegations of paragraph one hundred twenty-six of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred twenty-six of the Third Amended Complaint and therefore denies them.

127. Counsellor denies that portion of the allegations of paragraph one hundred twenty-seven of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred twenty-seven of the Third Amended Complaint and therefore denies them.

128. Counsellor denies those portions of the allegations of paragraph one hundred twenty-eight of the Third Amended Complaint that allege that Lot 108 only contains 1.4 acres, is dissected by a road, and that the Loflins' title to Lot 108 is unmarketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred twenty-eight and therefore denies them.

129. Counsellor denies that portion of the allegations of paragraph one hundred twenty-nine of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred twenty-nine of the Third Amended Complaint and therefore denies them.

130. Counsellor denies those portions of the allegations of paragraph one hundred thirty of the Third Amended Complaint that allege that Lot 108 only contains 1.4 acres, is dissected by a road, and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred thirty and therefore denies them.

131. Counsellor denies that portion of the allegations of paragraph one hundred thirty-one of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor further denies that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred thirty-one of the Third Amended Complaint and therefore denies them.

132. Counsellor denies that portion of the allegations of paragraph one hundred thirty-two of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred thirty-two of the Third Amended Complaint and therefore denies them.

133. Counsellor denies that portion of the allegations of paragraph one hundred thirty-three of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred thirty-three of the Third Amended Complaint and therefore denies them.

134. Counsellor denies that portion of the allegations of paragraph one hundred thirty-four of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that

the Loflins' title to Lot 108 is not marketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred thirty-four of the Third Amended Complaint and therefore denies them.

135. Counsellor denies that portion of the allegations of paragraph one hundred thirty-five of the Third Amended Complaint that alleges that Lot 108 only contains 1.4 acres and that the Loflins' title to Lot 108 is not marketable. Counsellor further denies the portions of paragraph one hundred thirty-five of the Third Amended Complaint that allege or imply that the Loflins are damaged by the configuration of Lot 108. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred thirty-five and therefore denies them.

136. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred thirty-six of the Third Amended Complaint and therefore denies them.

137. Counsellor incorporates the allegations of paragraphs one through one hundred thirty-six above in response to the allegations of paragraph one hundred thirty-seven of the Third Amended Complaint.

138. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred thirty-eight of the Third Amended Complaint and therefore denies them.

139. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred thirty-nine of the Third Amended Complaint and therefore denies them.

140. Counsellor incorporates the allegations of paragraphs one through one hundred thirty-nine above in response to the allegations of paragraph one hundred forty of the Third Amended Complaint.

141. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred forty-one of the Third Amended Complaint and therefore denies them.

142. Counsellor denies that portion of the allegations of paragraph one hundred forty-two of the Third Amended Complaint that allege or imply that the Loflins' title to Lot 108 is unmarketable. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph one hundred forty-two of the Third Amended Complaint and therefore denies them.

143. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred forty-three of the Third Amended Complaint and therefore denies them.

144. Counsellor incorporates the allegations of paragraphs one through one hundred forty-three above in response to the allegations of paragraph one hundred forty-four of the Third Amended Complaint.

145. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred forty-five of the Third Amended Complaint and therefore denies them.

146. Counsellor lacks information sufficient to form a belief as to the truth or falsity of the allegations of paragraph one hundred forty-six of the Third Amended Complaint and therefore denies them.

147. Counsellor incorporates the allegations of paragraphs one through one hundred forty-six in response to the allegations of paragraph one hundred forty-seven of the Third Amended Complaint.

148. Counsellor denies the allegations of paragraph on hundred forty-eight of the Third Amended Complaint.

149. Counsellor denies the allegations of paragraph one hundred forty-nine of the Third Amended Complaint.

150. Counsellor denies the allegations of paragraph one hundred fifty of the Third Amended Complaint.

151. Counsellor denies the allegations of paragraph one hundred fifty-one of the Third Amended Complaint.

152. Counsellor incorporates the allegations of paragraphs one through one hundred fifty-one in response to the allegations of paragraph one hundred forty-two of the Third Amended Complaint.

153. Responding to the allegations of paragraph one hundred fifty-three of the Third Amended Complaint, Counsellor admits that Chicago provides title insurance under certain circumstances and subject to certain conditions and exceptions. Counsellor lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of fact in paragraph one hundred fifty-three of the Third Amended Complaint and, therefore, denies the same. Counsellor denies the remaining allegations of paragraph one hundred fifty-three of the Third Amended Complaint.

154. Responding to the allegations of paragraph one hundred fifty-four of the Third Amended Complaint, Counsellor admits that one of its title agents is a lawyer who provided

legal services to Balsam from time to time. Counsellor denies the remaining allegations of paragraph one hundred fifty-four of the Third Amended Complaint.

155. Counsellor denies the allegations of paragraph one hundred fifty-five of the Third Amended Complaint.

FOR A SECOND DEFENSE

149. Any damages or losses suffered by Plaintiffs were the result of the acts or omissions of others for which Counsellor is not responsible as a matter of law.

FOR A THIRD DEFENSE

150. Any acts or omissions of Counsellor were not the proximate cause of any losses or damages alleged to have been suffered by Plaintiffs.

FOR A FOURTH DEFENSE

151. Any damages or losses alleged to have been suffered by Plaintiffs were the result of the intervening and superseding negligence of third parties for which Counsellor is not responsible as a matter of law.

FOR A FIFTH DEFENSE

152. Any and all damages or losses alleged to have been suffered by Plaintiffs were caused by the comparative negligence, comparative fault, recklessness, assumption of the risk and/or other culpable conduct of Plaintiffs and thus Plaintiffs cannot recover anything against Counsellor.

FOR A SIXTH DEFENSE

153. Any and all damages or losses alleged to have been suffered by Plaintiffs were caused, in whole or in part, by the comparative negligence, comparative fault, recklessness, assumption of the risk and/or other culpable conduct of Plaintiffs, and the amount of damages

recovered, if any, shall therefore be diminished in that proportion which said culpable conduct attributable to Plaintiffs bears to the culpable conduct which caused said damages or losses.

FOR A SEVENTH DEFENSE

154. Plaintiffs' claims are barred because Plaintiffs failed to mitigate their alleged damages.

FOR AN EIGHTH DEFENSE

155. Plaintiffs' claims are barred because Plaintiffs acquiesced in the conduct about which they complain.

FOR A NINTH DEFENSE

156. Plaintiffs are not entitled to an award of punitive damages because such an award would violate the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

i. The judiciary's ability to correct a punitive damages award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;

ii. Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

iii. Any award of punitive damages based upon the wealth of the defendant violates due process guarantees;

iv. The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

v. Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;

vi. Plaintiffs' claim for punitive damages violates the Equal Protect Clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the defendant; and

vii. Plaintiffs' claim for punitive damages violates the federal doctrine of separation of powers and Article I, Section 8 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

FOR A TENTH DEFENSE

157. Plaintiffs' claims are barred in whole or in part by the statute of limitations, and/or the doctrine of laches.

FOR AN ELEVENTH DEFENSE

158. Plaintiffs' claims are barred in whole or in part by the statue of frauds.

FOR A TWELFTH DEFENSE

159. If and to the extent that Plaintiffs prove that a road crosses Lot 108, as described in the Deed and that Plaintiffs did not consent to or acquiesce in the construction of the road as a matter of law, the road constitutes a trespass and/or encroachment for which Plaintiffs are entitled to relief against any party constructing and/or maintaining any portion thereof.

FOR A THIRTEENTH DEFENSE

160. Plaintiffs lack standing to sue, and the claims against Counsellor are barred as a result.

FOR A FOURTEENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST DEFENDANTS COWARD, HICKS & SILER, P.A. AND J.K. COWARD, JR.

161. Counsellor incorporates the allegations of paragraphs one through one hundred sixty above herein.

162. Counsellor expressly denies that Plaintiffs' title to Lot 108 is not as reflected on the Deed and the Recorded Plat.

162. Counsellor further expressly denies that Plaintiffs have any valid claim against Counsellor or against Chicago Title Insurance Company.

163. As shown in the Attorney's Final Opinion of Title for Owner's and/or Mortgagee Policy attached hereto as **Exhibit A** and incorporated herein by reference (the "Title Opinion"), Coward, Hicks & Siler, P.A. and J.K. Coward, Jr. ("Coward Defendants") certified that Plaintiffs had, as of the completion of the closing, good title to Lot 108.

164. Coward Defendants delivered the Title Opinion to Counsellor with the intention that Counsellor, as agent for Chicago Title, rely thereon in issuing an appropriate owner's title insurance policy insuring, subject to certain terms and exceptions, title to Lot 108. The Coward Defendants did not report any additional information to Counsellor relevant to the issuance or terms of the title policy.

165. In reliance on the Title Opinion, Counsellor issued an appropriate owners' title insurance policy based upon the information communicated by Coward Defendants.

166. Counsellor expressly denies that the Title Opinion is incorrect in any material manner.

167. To the extent, however, that Plaintiffs are successful on any claim against Counsellor, such claim would be based solely upon the conduct of Coward Defendants.

168. The relationship between Counsellor, on the one hand, and Coward Defendants, on the other hand, with respect to the matters alleged in the Third Amended Complaint was such that Counsellor may be exposed to liability without fault on the part of Counsellor, solely as a result of the acts or omissions of Coward Defendants.

169. To the extent that Counsellor is found to be liable to Plaintiffs, Counsellor is informed and believes that it is entitled to be indemnified by Coward Defendants to the full extent of any liability of Counsellor to Plaintiffs.

WHEREFORE having fully answered the Third Amended Complaint, Counsellor prays that it be dismissed with prejudice and that Counsellor be awarded its fees and costs. If the Third Amended Complaint is not dismissed as to Counsellor, Counsellor prays for such other and further relief as may be just and proper, including entry of judgment in favor of Counsellor against Coward, Hicks & Siler, P.A. and J.K. Coward, Jr. in such amount as may be established and to the fullest extent permitted by law.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: _____

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Attorneys for Counsellor Title Agency, Inc.

Columbia, South Carolina
March 2, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
William Loflin and Leslie Loflin,	)	Civil Action No. 2013-CP-07-1807
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	**CERTIFICATE OF SERVICE**
BMP Development LP, Balsam Mountain Group, LLC, COWARD, HICKS & SILER, P.A., J. K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,	)	
	)	
Defendants.	)	

I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendant Counsellor Title Agency, Inc. do hereby certify that I have served all counsel in this action with a copy of the pleading hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: Answer to Third Amended Complaint and Cross-Claim Against Defendants Coward, Hicks & Siler, P.A. and J.K. Coward, Jr.

Served: Daniel A. Speights, Esquire
Speights & Runyan
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Hampton, South Carolina 29924
Counsel for Plaintiffs

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Maria E. Kiehling, Esquire
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Charleston, South Carolina 29401
Counsel for Defendants Coward, Hicks & Siler, P.A. and J. K. Coward, Jr.

David S. Wyatt, Esquire
Gleaton Wyatt
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Greenville, South Carolina 29601
Counsel for Defendant Balsam Mountain Group, LLC

Valerie N. Hampton

Columbia, South Carolina
January 20, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2013-CP-07-1807
	)	
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**DEFENDANTS COWARD, HICKS & SILER, P.A. AND J.K. COWARD, JR.'S ANSWER TO COUNSELLOR TITLE'S CROSS-CLAIM**
	)	
BMP Development, LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company and Counsellor Title Agency, Inc.	)	
	)	
Defendants.	)	

Defendants Coward, Hicks & Siler, P.A. and J.K. Coward, Jr. hereby respond to Defendant Counsellor Title Agency, Inc.'s Answer to Third Amended Complaint and Cross-Claim ("Counsellor's Cross-Claim") as follows:

1. Defendants deny each and every allegation of Counsellor's Cross-Claim not specifically admitted herein.

2. Paragraphs 1 through 160 of Counsellor's Cross-Claim are not directed toward these Defendants and no response is required of them. To the extent the allegations state or imply any liability on the part of these Defendants, the allegations are denied.

3. Paragraphs 161, 162, and 163 of Counsellor's Cross-Claim do not call for a response from these Defendants.

4. In response to the allegations contained in Paragraph 163 of Counsellor's Cross-Claim, Defendants crave reference to the cited exhibit.

5. Defendants admit only so much of the allegations contained in Paragraph 164 of Counsellor's Cross-Claim as indicate Defendants delivered the Title Opinion to Counsellor for the purpose of issuing a policy of title insurance.

Received

APR - 4 2016

Speights & Runyan

6. Defendants are without sufficient knowledge and information to form an opinion as to the allegations contained in Paragraph 165 of Counsellor's Cross-Claim.

7. Defendants admit the allegations contained in Paragraph 166 of Counsellor's Cross-Claim.

8. Defendants deny the allegations contained in Paragraphs 167, 168, and 169 of Counsellor's Cross-Claim.

FURTHER RESPONDING TO THE CROSS-CLAIM AND AS AN AFFIRMATIVE DEFENSE THERETO:

9. Counsellor's Cross-Claim fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FURTHER RESPONDING TO THE CROSS-CLAIM AND AS AN AFFIRMATIVE DEFENSE THERETO:

10. Counsellor's Cross-Claim is or may be barred by the applicable statute of limitations.

FURTHER RESPONDING TO THE CROSS-CLAIM AND AS AN AFFIRMATIVE DEFENSE THERETO:

11. Counsellor's Cross-Claim against these Defendants is governed by the laws of the State of North Carolina.

FURTHER RESPONDING TO THE CROSS-CLAIM AND AS AN AFFIRMATIVE DEFENSE THERETO:

12. Counsellor's Cross-Claim is are barred by the applicable statute of repose.

FURTHER RESPONDING TO THE CROSS-CLAIM AND AS AN AFFIRMATIVE DEFENSE THERETO:

13. The damages sustained by Counsellor, if any, were due to and caused by and were the direct and proximate result of Counsellor's contributory negligence, including Counsellor's

negligence, gross negligence, willful or wanton negligence, recklessness, or intentional misconduct, or engaging in conduct knowing that it was substantially certain to cause itself injury or damages, and Counsellor's recovery, if any, should be barred as provided by law.

FURTHER RESPONDING TO THE CROSS-CLAIM AND AS AN AFFIRMATIVE DEFENSE THERETO:

14. The damages sustained by Counsellor, if any, were due to and caused by and were the direct and proximate result of Counsellor's own comparative negligence and/or the intervening and superseding negligence of others, and Counsellor's recovery, if any, should be barred or reduced as provided by law.

FURTHER RESPONDING TO THE CROSS-CLAIM AND AS AN AFFIRMATIVE DEFENSE THERETO:

15. At all relevant times, these Defendants exercised the necessary degree of care and skill maintained by other attorneys under similar conditions and in like circumstances.

FURTHER RESPONDING TO THE CROSS-CLAIM AND AS AN AFFIRMATIVE DEFENSE THERETO:

16. No act or omission of these Defendants was the cause of any damages to Counsellor.

FURTHER RESPONDING TO THE CROSS-CLAIM AND AS AN AFFIRMATIVE DEFENSE THERETO:

17. Defendants reserve the right to raise additional and further defenses that may be revealed from information obtained during the course of investigation and discovery as consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the allegations of Counsellor's Cross-Claim, Defendants pray that Counsellor's Cross-Claim be dismissed with prejudice, for all costs of the

action to be cast upon Plaintiffs and Counsellor, and for such other and further relief as this Court deems just and proper.

This 1st day of April, 2016.

Respectfully submitted,

EARHART OVERSTREET LLC

By: _____

DAVID W. OVERSTREET
State Bar No.: 16965

MICHAEL B. McCALL
State Bar No.: 73028

Attorneys for Defendants Coward, Hicks & Siler, P.A. and J.K. Coward, Jr.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2013-CP-07-1807
	)	
William Loflin and Leslie Loflin,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
BMP Development, LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company and Counsellor Title Agency, Inc.	)	
	)	
Defendants.	)	

I hereby certify that I have this day served a copy of the within and foregoing ***Answer*** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

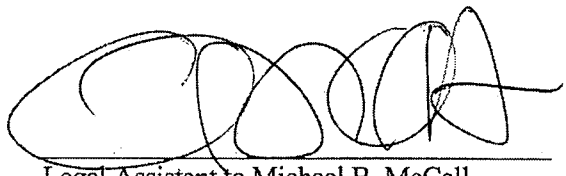
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Counsel for Counsellor Title Agency, Inc.

This 1ST day of April, 2016.



Legal Assistant to Michael B. McCall

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT William Loflin and Leslie Loflin, Plaintiffs, vs. BMP Development, LP, Chicago Title Insurance Company, and Counsellor Title Agency, Inc., Defendants.	IN THE COURT OF COMMON PLEAS CASE NUMBER: 2013-CP-07-1807 **THE DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

TO: DANIEL A. SPEIGHTS, ESQ.
SPEIGHTS & RUNYAN
ATTORNEYS FOR THE PLAINTIFF

The Defendant Chicago Title Insurance Company ("Chicago Title") hereby submits its Memorandum in Support of its Motion for Summary Judgment filed July 9, 2015. For the reasons stated herein, Chicago Title respectfully requests that its Motion be GRANTED.

STANDARD OF REVIEW

Summary judgment is proper when it is clear that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SCRCivP 56 (c); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." *Moore v. Weinberg*, 733 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007), *aff'd by* 383 S.C. 583, 681 S.E.2d 875 (2009).

Summary judgment should be granted when plain, palpable, and undisputed facts exist upon which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co., Inc.*, 314 S.C. 542, 544, 431 S.E.2d 565, 555 (1993). Where there is no dispute over the operative facts, summary judgment is proper as a matter of law. *Citizens & Southern Nat'l Bank of S.C. v. Langford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994). Here, the material facts are not in dispute and, based upon those undisputed facts, Chicago Title is entitled to judgment as a matter of law.

FACTS

The Plaintiffs are the owners of Lot 108 in the Balsam Mountain Preserve development located in Jackson County, North Carolina. (Third Amended Complaint, ¶ 13) The Plaintiff William Loflin purchased this property in 2002 for $495,000.00. (*Id.* at ¶ 10) Chicago Title issued the Plaintiff a title insurance policy (the "Policy") for Lot 108. [1] (Third Amended Complaint. at ¶ 5). At the time of the closing in 2002, Lot 108 was not staked. (*Id.* at ¶ 10) During the closing, the Plaintiffs received a deed to Lot 108 and a copy of the only recorded plat reflecting that Lot 108 consisted of 1.837 acres. (*Id.* at ¶ 13). The only recorded plat also showed that the Balsam Mountain Preserve Round went around Lot 108. (Third Amended Complaint, *id.* at 10) The plat was recorded in Jackson County, North Carolina, in Plat Cabinet 11 at Slide 383 and incorporated in the deed to the Plaintiffs which deed was recorded in Jackson County in Book 1227 at Page 202. (*Id.* at ¶13.) The plat recorded in Plat Cabinet 11 at Slide 383 is the only recorded plat for Lot 108 (the "Recorded Plat")(*Id.* at 13). The deed conveyed Lot 108 as shown on the Recorded Plat. (*Id.*) The Plaintiffs allege that they purchased Lot 108 as shown on the Recorded Plat. (*Id.*) The Policy issued to Plaintiffs by Chicago Title insured the Plaintiffs' title

[1] Chicago Title issued lenders' policies of title insurance for refinances of the property at later dates. (*Id.*)

to Lot 108 containing 1.837 acres as referenced in the Recorded Plat in Jackson County, North Carolina. (*Id.* at ¶ 13).

Four years after the closing, in 2006, the Plaintiffs claim that BMP Development informed them that, contrary to the duly recorded deed and duly recorded plat, Lot 108 only contained 1.4 acres and that Balsam Mountain Preserve Road went "through" their property as shown on an unrecorded plat. (*Id.* at ¶ 20). Although allegedly discovered in 2006, the Loflins did not file suit until 2013. (Complaint, July 18, 2013). The Plaintiffs claim the unrecorded plat shows both the reduced acreage and the Balsam Mountain Preserve Road going through their Lot 108. (Third Amended Complaint, *id.* at ¶20) According to the Complaint, there is no recorded plat or deed showing the reduced acreage or Balsam Mountain Preserve Road going through Lot 108. (*Id.*) The Plaintiffs claim that there is a trespass and encroachment upon their property by way of this unrecorded plat, which they discovered in 2006. (*Id.* at ¶ 16)

In 2012, six years after discovering this unrecorded plat, the Plaintiffs informed Chicago Title of the unrecorded plat. (*Id.* at ¶ 20). In response, Chicago Title advised that based upon a title search, the only recorded deed and the Recorded Plat did not show any impairments to the Plaintiff's title and denied the claim. (*Id.*)

The Plaintiffs have asserted breach of contract and negligence actions against Chicago Title and Counsellor Title Agency, Inc. (*Id.* at ¶¶ 147-151) The Plaintiffs claim they entered into a contract with Chicago Title to "investigate and insure lot 108 was protected from all risks set forth herein, including, but not limited to, easements, encumbrances and fraud." (*Id.* at ¶ 148). In addition, they allege that Lot 108 contains 1.4 rather than 1.837 acres and there is a road dissecting the property as shown on an unrecorded plat, rather than what is shown on the recorded plat. (*Id.* at ¶ 149) There are no specifics alleged as to how Chicago Title breached its

contract when the deed to the Plaintiffs and the Recorded Plat show that the Plaintiffs received the title for which they bargained and for which insurance was issued. (*Id.*) The claim for negligence states that Chicago Title knew or should have known the risks associated with Lot 108 and either allowed exposure to such risk or negligently failed to ascertain and insure against such risks. (*Id.* at ¶ 153-155). The Plaintiffs claim they are entitled to the full value of their property and consequential damages. (*Id.* at ¶155). These are the only claims against Chicago Title.

ARGUMENT

I. THE PLAINTIFFS CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS AS TO ALL CAUSES OF ACTION

The Plaintiffs' claims are barred by the applicable statute of limitations. The Plaintiffs have asserted claims against Chicago Title are for breach of contract and for negligence. (Third Amended Complaint, ¶¶ 147-155). The applicable statute of limitations for both causes of action is three years. S.C. Code Ann. §15-3-530. The "discovery rule" governs and runs on the date the party first knew or should have known by the exercise of reasonable diligence that a cause of action has arisen. *Dean v. Ruscon*, 321 S.C. 360, 468 S.E.2d 645 (1996). At the time a party should realize his injury is attributable to someone else's actions, the statute begins to run. *Republic Contr. Corp. v. South Carolina Dep't of Highways & Pub. Transp.*, 332 S.C 197, 503 S.E.2d 761 (1998). As established in their Third Amended Complaint, the Plaintiffs learned in 2006 that contrary to their deed and recorded plat there was a potential encroachment on their property, that there was less acreage than they thought they had, and that Balsam Mountain Road went through instead of around their property. (Third Amended Complaint, ¶20). Yet, the Plaintiffs failed to file suit until July, 2013, well beyond the three year statute of limitations. Accordingly, the Chicago Title is entitled to judgment as a matter of law.

II. THE PLAINTIFFS HAVE NO CLAIMS FOR DAMAGE DUE TO AN UNRECORDED PLAT AS THEY HAVE TITLE TO THE PROPERTY AS INSURED AND CONVEYED PURSUANT TO THE RECORDED PLAT IN JACKSON COUNTY, NORTH CAROLINA

The Plaintiffs took title to their property based upon the only plat recorded in Jackson County, North Carolina, recorded in in Plat Cabinet 11 at Slide 383 and incorporated in the deed to the Plaintiffs which deed was recorded in Jackson County in Book 1227 at Page 202. (Third Amended Complaint, *id.* at 10) The plat recorded in Plat Cabinet 11 at Slide 383 is the only recorded plat for Lot 108 (*Id.* at 13). As this property is in North Carolina, North Carolina substantive law as to recording must apply. According to North Carolina Code Section 47-18, unrecorded interests in land are invalid against subsequent purchasers of property. *See* N.C.G.S.A. §47-18. Unless an interest is "of record", it cannot be enforced against any subsequent purchaser. *Id.*; *see Hill v. Pinelaw Memorial Park*, 292 S.E.2d 779 (N.C. 1981). By enacting Section 47-18, the intent of the North Carolina General Assembly was that prospective purchasers should be able to rely only on the public record. *Schuman v. Roger Baker & Assoc., Inc.*, 319 S.E.2d 208 (N.C. Ct. App. 1984). It is only when a search of the public records reveals an encumbrance that a purchaser is chargeable with the notice of its existence. *Turner v. Glenn*, 18 S.E.2d 197 (N.C. 1942). If no interest is recorded, it is not enforceable against subsequent purchasers. In this matter, the unrecorded plat cannot create any encumbrance and cannot create any damages for the Plaintiffs as it has no impact upon the Plaintiffs' title to their property. Accordingly, Chicago Title is entitled to judgment as a matter of law.

III. THE PLAINTIFFS CLAIMS MUST FAIL AS A MATTER OF LAW AS TO THEIR CAUSE OF ACTION AGAINST CHICAGO TITLE FOR BREACH OF CONTRACT AS SET FORTH IN THE TWENTIETH CAUSE OF ACTION

The Plaintiffs have alleged that the contract at issue is the policy of title insurance issued by Chicago Title through its agent, Counsellor Title Agency, Inc., in 2002 (the "Policy) (*Id.* at ¶ 5) The Plaintiffs have acknowledged that the Policy was issued (*Id.*) The Plaintiffs have acknowledged that their deed references the Recorded Plat showing the correct acreage and the Balsam Mountain Road going around Lot 108. (*Id.* at ¶¶ 13-14) The Policy complies with the deed and recorded plat and insures that title which the Plaintiffs have. (*Id.* at ¶ 13-14). There are no allegations stated in the Third Amended Complaint that support any breach of the contract as the Plaintiffs received the benefit of their bargain, have the title for which they bargained, and for which there is title insurance. There are no allegations to support the Plaintiffs' claims that Chicago Title had to "investigate and insure that Lot 108 was protected from all risks." Chicago Title relies on its agents and does no investigations. There has been no evidence or testimony produced to support those allegations The Plaintiff's own allegations state that their deed referenced the recorded plat. In the deposition of Cynthia Baines, claims counsel for Chicago Title, counsel for the Plaintiffs asked the following questions:

> Q. Okay. Do you understand that Mr. and Ms. Loflin claim responsibility of a Chicago title even if there's no problem with record title?
> A. That seems to be their allegation.

(Baines Depo, pp. 11, ll. 22-25).

> Q. Are you personally familiar with a lawsuit brought by an insured against Fidelity in which the insured claims that there should have been coverage but the record title was good – even though the record title was good?
> A. This case.

(Baines Depo; p. 14)(copies of these pages attached).

By this very questioning of the Plaintiffs' counsel, it is acknowledged that the title of record in this matter is good as recorded. To this very day, there is no other plat to search or rely on by Chicago Title or its agents in issuing a title insurance policy. There is simply no breach as the Plaintiffs' received the title referenced in both their recorded deed and the Recorded Plat referenced in that deed.

None of the enumerated "Covered Title Risks" in the Policy are triggered by the Plaintiffs' allegations related to the unrecorded plat. The Policy states:

This Policy overs the following title risks, if they affect your title on the Policy Date

1. *Someone else owns an interest in your title.*
2. *A document is not properly signed, sealed, acknowledged, or delivered.*
3. *Forgery, fraud, duress, incompetency, incapacity, or impersonation.*
4. *Defective recording of any document.*
5. *You do not have legal right of access to and from the land.*
6. *There are restrictive covenants limiting your use of the land.*
7. *There is a lien on your title because of: (a) a mortgage or deed of trust; (b) a judgment, tax or special assessment; (c) a charge by a homeowner's or condominium association.*
8. *There are liens on your title arising now or late for labor and material furnished before the Policy Date – unless you agreed to pay for the labor and material.*
9. *Others have rights out of leases, contracts, or options.*
10. *Someone else has an easement on your land.*
11. *Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease, or to make a mortgage loan.*
12. *You are forced to remove your existing structure – other than a boundary wall or fence- because:*
    - *it extends on to adjoining land or on to any easement*
    - *it violates a restriction shown in Schedule B*
    - *it violates an existing zoning law.*
13. *You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.*
14. *Other defects, liens, or encumbrances.*

(Policy, Owner's Coverage Statement)

The Policy also contains Exclusions that states the insured is not insured against loss, costs, attorneys' fees and expenses resulting from the following:

3. Title Risks:
• that are created, allowed or agreed to by you
• that are known to you, but not to us, on the Policy Date – unless they appeared in the public records
*• **that first affect your title after the Policy Date** - this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks.*

(Policy, Exclusions)(emphasis added)

None of the "title risks" set forth in the Owner's statement of coverage are triggered, and, perhaps more importantly, the allegations of the unrecorded plat affect title after the Policy Date, meaning they are specifically excluded from coverage under the Policy. As stated above and here again, the Plaintiffs' title is as shown on the Recorded Plat and only on the Recorded Plat. Therefore, there is no coverage, and, accordingly no breach of contract.

IV. THE PLAINTIFFS RECEIVED THE BENEFIT OF THEIR TITLE INSURANCE POLICY AND FAIL TO ALLEGE ANY CAUSE OF ACTION FOR ANY BREACH OF THAT CONTRACT

Title insurance is retrospective, not prospective. The Plaintiffs received the benefit of their title issuance and there has been no breach of that contract. Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title **which are in existence at the time the insured takes title.** *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013); *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981)(citing *National Mortgage Corp. v. American Title Ins.. Co.*, 261 S.E.2d 844 (N.C. 1980))(emphasis added). Title insurance is unique in that it is retrospective, not prospective. *Firstland Village Assoc.*, *id.* at 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id* Title insurance, instead of protecting the insured against matters that may arise during a stated period after the

issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it. *Id.*

Here, the Plaintiffs allege that the title Policy insured Lot 108, containing 1.837 acres as described in the deed and recorded plat, which they received title for at their closing in 2002. The Plaintiffs admit that the recorded deed references the recorded plat with the correct acreage and showing the road going around their property. It was not until 2006, four years after the closing, that the Plaintiffs claim to have learned of the alleged unrecorded plat showing a different acreage and a different configuration of Balsam Mountain Preserve Road. At the time the Plaintiffs took title, there were no encumbrances of record and the Plaintiffs received good title to their land. Further, there is no reference to the so-called unrecorded plat, meaning there can be no coverage to have been breached. *See Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996) (holding Chicago Title could not have breached a contract where there was no coverage for a fourteen acre tract of land). As in *Christensen*, where there is no coverage, there is no breach.

Neither Chicago Title nor its agents at Counsellor Title Agency, Inc., could have been aware of any unrecorded plat, which is how the Plaintiffs have described this alleged document. To the contrary, the Plaintiffs have alleged in Paragraph 10 of their Amended Complaint that they received a duly executed deed to Lot 108 referencing a recorded plat showing 1.837 acres transferred and Balsam Mountain Preserve Road going around Lot 108. (Plaintiffs' Third Amended Complaint, ¶ 13) There was no lien, encumbrance, defect or other matter recorded at the time the Plaintiffs' Policy was issued that could have been discovered at the time of closing. (*Id.* ¶13). Instead of protecting the insured against matters that may arise during a stated period *after* the issuance of the policy, a title policy is designed to save the insured from any loss

through defects, liens, or encumbrances that may affect or burden his title when he takes it. *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981)

In this matter, there were no such defects, liens, or encumbrances of record at the time of the issuance of the policy. The Plaintiffs' own allegations make that clear. Accordingly, there is no breach of contract and Chicago Title is entitled to judgment as a matter of law.

III THERE IS NO LIABILITY FOR ANY NEGLIGENCE CLAIM WHERE THE PLAINTIFFS' OWN ALLEGATIONS SET FORTH NO DUTY TO PROTECT THE PLAINTIFFS FROM UNRECORDED MATTERS AND NO TITLE SEARCH WOULD REVEAL UNRECORDED MATTERS AND NO EXPERT HAS ESTABLISHED ANY DUTY OR BEACH THEREOF

The Plaintiffs have alleged that Chicago Title is negligent since it "knew or should have known the risks associated with Lot 108 and either willingly allowed exposure to such risks despite this knowledge or negligently failed to ascertain and insure against such risks." (Plaintiffs' Third Amended Complaint, ¶ 153) By their own allegations, no title search could have revealed that there was an unrecorded plat. No title search would have revealed an unrecorded plat. There are no allegations that state what risks were known or should have been known at the time the policy of insurance was issued, which is the time at issue as to the coverage under the policy. *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013). There has been no expert witness named nor testimony provided that Chicago Title has been negligent in the denial of any claims. The only allegation in the Third Amended Complaint relating to the time of issuance of the policy is that the deed references the recorded plat and that plat showing Lot 108 containing 1.87 acres and showing Balsam Mountain Road going around the property. (Plaintiffs' Third Amended Complaint, ¶ 13). There can be no negligence where the Plaintiffs' allegations fail to show how Chicago Title could have breached any duty to the Plaintiffs at the time the policy was issued as

was required by the recorded documents on file in Jackson County, North Carolina.

Chicago Title denied the Plaintiffs' claim regarding the unrecorded plat discovered in 2006, a copy of which is not part of the Plaintiffs' Amended Complaint. The Plaintiffs' own pleadings make clear that this is an item discovered four years after the policy was issued. There can be no breach of a duty of care here for a failure to investigate something that was not of public record and issued after the policy. *Preservation Capital Consultants, LLC, id. at*, 406 S.C. 309, 751, S.E.2d 256 (2013) The policy at issue, referenced as the First Insurance Contract, insures Lot 108, with 1.87 acres, without a road going through it based upon the recorded plat from 2002. Title insurance is unique in that it is retrospective, not prospective. *Firstland Village Assoc.*, *id.* at 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id.* There can be no negligence in failing to ascertain and insure risk when those risks arise four years after the policy was issued and remain unrecorded. Accordingly, the claims against Chicago Title should be granted judgment as a matter of law.

CONCLUSION

For the foregoing reasons, Chicago Title Insurance Company requests that this Court grant the Defendant Chicago Title Insurance Company judgment as a matter of law.

Respectfully,

Mt. Pleasant, SC
June 10, 2016

BUIST, BYARS & TAYLOR, LLC

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CERTIFICATE OF MAILING

I hereby certify that on June 10th, 2016, a copy of the foregoing was emailed to all counsel of record in this matter, as follows.

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2016 JUL -5 PM 2:32
JERRI ANN DOSEMEAU
CLERK OF COURT
BEAUFORT, S.C.

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	C.A. No.: 2013-CP-07-1807
William Loflin and Leslie Loflin,	)	
Plaintiffs,	)	
v.	)	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO CERTAIN DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**
BMP Development, LP, Balsam Mountain Group, LLC, COWARD HICKS & SILER, P.A., J.K. Coward, Jr., Chicago Title Insurance Company and Counsellor Title Agency, Inc.,	)	
Defendants.	)	

On June 13, 2016, this Court heard arguments on Motions for Summary Judgment filed by four defendants ("**Movants**"), to wit: Chicago Title Insurance Company ("**Chicago**"); Counsellor Title Agency, Inc. ("**Counsellor**"); and Coward Hicks & Siler, P.A. ("**Coward Law Firm**") and J.K. Coward, Jr. ("**Mr. Coward**") [collectively "**Coward Defendants**"]. Shortly before the hearing, the Movants served Memoranda in support of their Motions.[1] At the conclusion of the hearing, the Court granted Plaintiffs ("**Loflins**") an opportunity to respond to these Memoranda.

[1]Chicago and Coward filed their Memoranda on Friday, June 10, 2016, one business day before the hearing. Counsellor filed its Memorandum on Thursday, June 9, 2016, two business days before the hearing.

In making this response, the Loflins are mindful of the Court's admonition during the hearing that it wants counsel to provide it with the facts.

I. INTRODUCTION

The Loflins are long time residents of Beaufort County who in 2002 purchased Lot 108 in Balsam Mountain Preserve ("**Balsam Preserve**"), a mountain community located in Jackson County, North Carolina. Balsam Preserve was developed by a Beaufort County company, Chaffin/Light Associates ("**Chaffin/Light**").

II. THE DEFENDANTS

Defendant, BMP Development, LP ("**Balsam**"), was a North Carolina Limited Partnership formed by Chaffin/Light to own and develop Balsam Mountain.[2] Balsam consisted of a General Partner, Balsam Mountain Company, LLC ("**Balsam Company**"), whose sole members were James J. Chaffin, Jr. and James W. Light, and thirty-three Founding Limited Partners ("**Founders**") [3RD Amended Complaint ¶ 2].[3]

Defendant, Balsam Mountain Group, LLC ("**BMG**"),which is not a party to the instant Motions, purchased Balsam Preserve in October 2011 (at some point after it was sold at foreclosure) and owned and operated Balsam Preserve until sometime

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[2]Balsam was formerly known as Balsam Mountain Preserve LP and Balsam Mountain Preserve, Limited Partnership [Ex. 2 (NC Secretary of State Document)].

[3]On January 6, 2015, this Court (Judge Kinard) entered an Order of Default as Balsam The Court has not yet conducted a damages hearing.

after it was added as a party to this lawsuit in 2015 [3RD Amended Complaint ¶ 3].

Chicago is a foreign corporation doing systematic and continuous business in South Carolina, through Counsellor, its Beaufort County agent, [3RD Amended Complaint ¶ 5]. In 2002, Chicago, through Counsellor, issued its Policy of Insurance on Lot 108 ("**Policy**"), which was later renewed on two occasions [*Id.*].

Counsellor is a South Carolina corporation, owned by and located at the Beaufort County Law Firm of Bethea, Jordan & Griffin, P.A., which in 2004 merged with the McNair Law Firm (collectively "**Bethea Firm**")[4] [Ex. 3 (Robertson deposition at 4]. Lawyers working for the Bethea Firm, including William L. Bethea, Esquire ("**Mr. Bethea**"), and Sarah F. Robertson, Esquire ("**Ms. Robertson**"), were agents for Chicago and Counsellor [Ex. 3 (Robertson deposition at 11-12, 48); Counsellor's Answer to 3RD Amended Complaint ¶ 5]. Mr. Bethea was Counsellor's Vice President. [Ex. 4 (Application for Certificate of Authority)].

The Coward Law Firm is a professional association which represented Balsam and the Loflins, and whose members at the time of the events in question included Mr. Coward and Heather C. Baker ("**Ms. Baker**") [Ex. 5 (Coward deposition at 33); Ex. 9 (9/5/01Letter from Bethea to Coward)].

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[4]Following the merger, all the lawyers who had worked for the Bethea Firm, including Mr. Bethea and Ms. Robertson, became employees of the McNair Firm, and the McNair Firm became the owner of Counsellor [Ex. 3 (Robertson deposition at 6, 12)].

III. SUMMARY OF ARGUMENT

There are two core issues presented in the Motions for Summary Judgment:

First, Movants argue that in 2006, the Loflins were informed that a road had been constructed through Lot 108 *after* their 2002 closing. In fact, it was not until 2012 that the Loflins discovered that the road through their property existed before the closing. While it is arguable that in 2006 the Loflins were put on notice of a possible lawsuit against the developer for this encroachment (but not as other causes of action, including fraud), as explained below, they had no basis to file a claim against Chicago and Counsellor.

Second, Chicago and Counsellor argue that, as a matter of law, the Contract of Insurance applies only to matters of record. There are four short answers to this proposition: that is not the law; Chicago's own witness admitted that the policy is not so limited; Chicago easily could have included such language in one sentence if that is what it intended;[5] and the policy itself, particularly when read in the light most favorable to Plaintiffs, demonstrates that there is coverage in this matter.

IV. STATEMENT OF FACTS

A. Background

Beginning in the early 1990's, Chaffin/Light developed a number of upper end

[5]For example, as real estate lawyers customarily do, the policy simply could have provided that, its coverage was limited to a search of the public record.

residential communities, including Spring Island, located in Beaufort County [3RD Amended Complaint ¶ 2]. Chaffin/Light developed Balsam Preserve with the stated purpose of replicating Spring Island "on higher ground" [3RD Amended Complaint ¶ 2].

Chaffin/Light was represented from the outset by the Bethea Firm (primarily Mr. Bethea) [Ex. 6 (Bethea deposition at 5-6)]. Prior to the development of Balsam Preserve, the Bethea Firm, including Mr. Bethea and Ms. Robertson, also regularly represented the Loflins in real estate matters [Loflin Supplemental Affidavit ¶ 2]. Plaintiffs knew that the Bethea Firm represented Chaffin/Light, but they did not know that the Bethea Firm owned Counsellor, nor did they know that the Bethea Firm's office was also Counsellor's office [*Id.*].

B. <u>Balsam Formation</u>

In 2000, Mr. Bethea prepared and filed Balsam's Certificate of Limited Partnership with the North Carolina Secretary of State [Ex. 7 (Certificate of Limited Partnership)]. The Certificate was executed by Mr. Bethea, as Secretary for the General Partner, Balsam Company, with a request that Acknowledgments be returned to Ms. Robertson [*Id.*]. The Bethea Firm also filed the Articles of Incorporation for Balsam Company, executed by Ms. Robertson, and Articles of Incorporation for Balsam Mountain Property Owners' Association ("**HOA**"), executed by Mr. Bethea

[Ex. 8 (Articles of Incorporation)].[6] Mr. Bethea's spouse was also a Limited Partner in Balsam [Ex. 6 (Bethea deposition at 5)].

At the same time in 2000, Mr. Bethea filed Counsellor's Application for Certificate of Authority to operate in North Carolina with the North Carolina Secretary of State. [Ex. 4 (Application)].

At least by 2001, the Bethea Firm (primarily Mr. Bethea) had associated the Coward Firm (primarily Mr. Coward) in the representation of Balsam and related entities [Ex. 6 (Bethea deposition at 12); Ex. 9 (Letter from Bethea to Coward)]. Mr. Coward and Ms. Baker traveled to Beaufort County and met with Mr. Bethea and stayed at Spring Island for two days to acquaint themselves himself with the Spring Island development [Ex. 5 (Coward deposition at 7-9)][7]

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[6]Both of these companies underwent minor name changes over the years, to wit: Balsam Mountain Company, LLC became Balsam Mountain Management Company, LLC; and Balsam Mountain Property Owners' Association became the Balsam Mountain Preserve Community Association.

[7]At his deposition, Mr. Coward tried to distance himself from the formation of Balsam by suggesting that he merely represented Balsam with respect to lot sales. However, Mr. Bethea was unequivocal that Mr. Coward drafted the crucial formation documents with him, which is confirmed by documents. Moreover, not only would it be illogical to believe that a South Carolina lawyer draft documents for the formation of a North Carolina entities for the development of North Carolina real estate without the assistance of North Carolina counsel, but it defies reason that two members of the Coward Firm would travel to Beaufort County and spend two days at Spring Island if all they were going to do was to perform routine real estate work. In any event, for purposes of the instant Motions, all factual disputes (and inferences) must be drawn in favor of the Loflins.

In 2001, Mr. Bethea and Mr. Coward prepared the documents for the formation of Balsam [Ex. 6 (Bethea deposition at 12); Ex. 9 (September 5, 2001 Letter from Bethea to Coward)]. These documents included the Agreement of Limited Partnership ("**Partnership Agreement**") to be entered into between the General Partner, Balsam Company, and the Founders; the documents forming the HOA;[8] and the Balsam Preserve Reservation Agreement ("**Reservation Agreement**") to be entered into between Balsam and any Founder who selected a homestead (commonly called a lot) [3RD Amended Complaint ¶ 2; Ex. 6 (Bethea deposition at 12); Ex. 9 (September 5, 2001 Letter from Bethea to Coward)].[9]

At the time the Loflins purchased Lot 108, James Anthony was its President [Ex. 11 (Lehman deposition at 57); Ex. 12 (Letter from Coward to Loflins). Mr. Anthony was also a major property owner in Balsam through Anthony Investments, LLC ("**Anthony Investments**") [Ex. 6 (Bethea deposition at 21)]. Messrs. Bethea and Coward formed Anthony Investments, and Mr. Bethea owned an interest in that company [Ex. 6 (Bethea deposition at 21-23)]. Mr. Coward was the Registered Agent

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[8]Mr. Bethea was the sole incorporator of the HOA [Ex. 8 (Articles of Incorporation)].

[9]The foregoing are only some of the entities that Balsam's counsel created. For example, Mr. Bethea and Mr. Coward later created another North Carolina LLC called Anthony Investments that ended up owning a number of lots that it obtained in a bulk purchase from Balsam Mountain Preserve [Ex. 6 (Bethea deposition at 20)]. Although Mr. Coward is listed as the agent of service for Mr. Anthony, he testified that he had never met him [Ex. 10 (NC Secretary of State); Ex. 5 (Coward deposition at 5)].

for Anthony Investments [Ex. 10 (Secretary of State Document)].

C. **Loflins' Execution of Balsam's Documents**

After Mr. Bethea and Mr. Coward finalized these documents, Mr. Bethea met with the Loflins in Beaufort County regarding the project. The Loflins agreed to be Founders and executed the Partnership Agreement and the Subscription Agreement. [3RD Amended Complaint ¶ 2]. The Partnership Agreement provided that Balsam's General Partner – and by extension its counsel – owed the Loflins a fiduciary duty to act in good faith in its exercise of its rights and obligations [3RD Amended Complaint ¶ 9; Ex. 13 (Partnership Agreement at 14)].

On October 19, 2001, the Loflins executed the Reservation Agreement, under which they reserved the right to purchase Lot 108 [Ex. 14 (Reservation Agreement)]. Lot 108 was described as being located on the mountain side at Balsam Preserve, as shown on the Phase 1 Plan prepared by Herron Land Surveying ("**Development Plan**"), an excerpt of which was attached to the Reservation Agreement as Exhibit "A" [Ex. 14 (Reservation Agreement)]. Lot 108 was not staked at the time, but Balsam represented to the Loflins that the property consisted of approximately 1.9 acres and that Balsam Mountain Preserve Road circumnavigated Lot 108 as shown on the Development Plan provided to the Loflins [3RD Amended Complaint ¶ 10; Ex. 15 (Herron Deposition Ex. 3A)(Blow Up of Lot 108)]. The purchase price for Lot 108

was $495,000 [3RD Amended Complaint ¶ 10].

The Reservation Agreement provided that, "At Closing, Seller shall convey good and marketable title to the Property to Purchaser in fee simple by general warranty deed, free from encumbrances except those restrictions and other matters referred to in this Agreement.

The Reservation Agreement drafted by Messrs. Bethea and Coward further provided that Balsam "shall deliver to purchaser at Closing, and shall cause to be recorded prior to the deed to the Property, an individual plat of the Property. That plat will be prepared to scale by a licensed surveyor or engineer and will accurately reflect the dimensions of the Property, the courses, distances and monuments of the boundaries of the Property, the relationship of the Property to proposed or existing roads, the names of abutting roads, the ownership of abutting land and the general location of the Property in relation to the overall phase of Balsam Mountain Preserve." [Ex. 14 (Reservation Agreement at 3); 3RD Amended Complaint ¶ 11].

D. <u>The Loflins' Purchase of Lot 108</u>

The Loflins financed their purchase of Lot 108 through a loan from Lighthouse Community Bank, located in Beaufort County, secured by a North Carolina deed of trust (i.e. mortgage) on Lot 108 and a South Carolina mortgage on their Beaufort County residence.

On February 11, 2002, the Loflins went to the Bethea Law Firm and executed the closing documents for their mortgage on their residence, supervised by Ms. Robertson. Presumably the Bethea Firm provided a certificate of title to the Lender. [Ex. 16 (Spring Island Closing)].

The following day, on February 12, 2002, Mr. Coward wrote the Loflins as follows:

> Jim Anthony of Balsam Mountain Preserve has provided us with copies of your Founder's contract for the purchase of your Homestead in Balsam Mountain Preserve. Jim has asked us to prepare the deed and closing statement on behalf of Balsam Mountain Preserve, Limited Partnership. He has also indicated his belief that you would like to have us assist you with this transaction. I would certainly be pleased to do so and would also like to take this opportunity to welcome you to our community. I look forward to meeting you personally, hopefully in the near future.
>
> Our firm has also been asked to prepare the deed and related documents for the Seller in this sale. This creates a dual representation situation. Dual representation is permissible as long as both parties are aware of it and consent to it. My function is to insure that the contract, with which the Buyer and the Seller both agree, is closed to your mutual satisfaction. **While conflicts in a transaction of this nature are relatively rare, should one arise, we would have to withdraw our representation of either party**. If you have any questions or concerns regarding the dual representation, please let me know right away.

[Ex. 12 (Letter from Mr. Coward to the Loflins)(emphasis supplied)].

Although Mr. Coward disclosed a potential conflict because he represented Balsam in the preparation of "the deed and related documents," he did not disclose his other work on behalf of Balsam. Neither did Mr. Coward disclose his relationship

with Counsellor and the Bethea Firm.

Mr. Coward enclosed several documents for the Loflins to execute and return, including the Settlement Statement and Loan Documents from Lighthouse Community Bank [*Id.*] Mr. Coward then stated:

> Also enclosed is a copy of your Deed, the original of which will be executed by Balsam Mountain Preserve, Limited Partnership, a copy of the plat describing your property and a copy of the septic permit. We will record the plat and the original deed in the Jackson County Register of Deeds. When that recording has been completed, we will return the original deed to you. **At that time, we will also send you an Owner's Title Insurance Policy for your lot.**
>
> * * * *
>
> We would like to thank you for allowing us to work with you on this closing. If you have any questions about any of the aspects of this letter or the closing process, please feel free to contact me. If I am unavailable when you call, my associate, Heather Baker, also a real estate attorney with the firm, will be happy to help you.

[*Id.*].

Mr. Coward did not discuss title insurance with the Loflins, although the Loflins certainly wanted the best policy available. The Loflins believe that title insurance would protect risks other than matters of public record. Mr. Coward agreed: when asked why he recommended that the Loflins obtain title insurance, Mr. Coward testified as follows:

Q. Do you believe that they should have gotten title insurance?

A. I do.

Q. Why?

A. It's like any insurance. It's good to have later on if there's problems. [Ex. 5 (Coward's deposition at 29].

Mr. Coward testified that he represented a large number of title insurance companies in North Carolina [Ex. 5 (Coward deposition at 27-28, 141-142)]. However, without discussing the matter with his clients, and giving them an option of choices and his recommendation for the best insurance, he chose to send the application to the Bethea Firm in South Carolina to obtain insurance from Chicago through Counsellor.

As noted above, Mr. Bethea and Mr. Coward prepared the Reservation Agreement. Buried in the Reservation Agreement is a provision that, "If requested by Purchaser, Seller will arrange for the insurance by Chicago Title Insurance Company of Title Insurance for Purchaser and, if applicable, Purchaser's lender at Purchaser's expense" [Ex. 14 (Reservation Agreement at 3)]. When asked why insurance on a North Carolina property would be issued by a South Carolina agency (Counsellor), Mr. Bethea testified as follows:

Q. . . . why would Mr. Coward have used Counsellor rather than whoever he might normally use in North Carolina?

A. Well -- well, North Carolina -- North Carolina has a different system than South Carolina does as far as the way they treat their -- their agents. In North Carolina the companies have their own offices. We decided to

qualify Counsellor in North Carolina so that we could write title insurance in North Carolina through Counsellor simply because it was **-- it was a way of creating some profitability**.

Q. I appreciate that, but why did Mr. Coward choose Counsellor rather than a number of other companies up there?

A. Well, he was -- he was local counsel for -- for Balsam and therefore thought it was the right thing to do.

Q. And I assume Counsellor was used on more than one lot purchase?

A. Oh, yeah. Yeah.

[Ex. 6 (Bethea deposition at 25-26) (emphasis supplied)].

The bottom line is that the Bethea Firm– which represented Chaffin/Light, Balsam, and the Loflins, and which owned Counsellor and served as Chicago's agent – and the Coward Firm – which represented the Loflins and Balsam – drafted a document (the Reservation Agreement) under which the Seller (Balsam represented by Messrs. Bethea and Coward) chose the Loflin's insurance company so that the Coward Firm could funnel all insurance to Counsellor, which the Bethea Firm owned, and Chicago, which was Counsellor's principal. The Coward Firm never evaluated the policies of the other companies it often used to see if the coverage would have been superior to what that Chicago provided.

On February 15, 2012, the Loflins returned to the Bethea Firm, and executed a North Carolina Deed of Trust (Mortgage) at the Bethea Law Firm secured by Lot

108. The Deed of Trust was witnessed by Ms. Robertson. [Ex. 17 (Deed of Trust). That same date, Mr. and Mrs. Loflin executed a Compliance Agreement also witnessed by Ms. Robertson. [Ex. 18 (Compliance Agreement). Ms. Robertson acknowledged that she represented the Loflins with respect to Counsellor's issue of insurance through Chicago [Ex. 3 (Robertson deposition at 22)]. Mr. and Mrs. Loflin executed the Settlement Statement which provided attorneys' fees to Mr. Coward in the sum of $1,400, as well as title insurance to Counsellor in the sum of $793.09.

The Coward Defendants thereafter delivered to the Loflins in South Carolina a duly executed deed to Lot 108 ("**Deed**") and an individual plat of Lot 108 ("**Recorded Plat**"). The Recorded Plat reflected that Lot 108 consisted of 1.837 acres, and that Balsam Mountain Preserve Road went around rather than through Lot 108. The Coward Defendants represented and certified to the Loflins in South Carolina that the Loflins had a marketable title to Lot 108 as described in the Recorded Plat [3RD Amended Complaint ¶ 13].

Counsellor/the Bethea Firm provided insurance from Chicago for Lot 108 containing 1.87 acres without any road going through it, as described in the Deed and the Recorded Plant prepared at the request of and on behalf of Balsam. As discussed below, the purpose of the Insurance Policy was to insure the Loflins from a multitude of risks associated with Lot 108, which, included but are not limited to fraud,

trespass, easements, and encumbrances [3RD Amended Complaint ¶ 14]. Again, as explained by Mr. Coward, "It's like any insurance. It's good to have later on if there's problems" [Ex. 5 (Coward's deposition at 29].

On March 25, 2002, Mr. Coward wrote the Loflins regarding "Homestead No. 108, Balsam Mountain Preserve." Mr. Coward enclosed the recorded Deed and Title Insurance policy. Mr. Coward then stated:

> Now that we have now completed your closing services let me assure you that on behalf of the firm that **we'll be happy to assist you in any follow-up you may require**. Please feel free to contact us. We look forward to meeting you.

[Ex. 19 (Letter from Mr. Coward to the Loflins)].

E. Refinancing

Subsequently, the Loflins refinanced their purchase of Lot 108 in 2004 and 2006, both times in Beaufort County, and both times supervised by the Bethea Firm. At the same time, Counsellor issued two additional contracts of insurance with Chicago [3RD Amended Complaint ¶ 5].

F. Mr. Lehman Arrives

In 2005, Craig Lehman took over from Mr. Anthony as Balsam's President and CEO [Ex. 11 (Lehman deposition at 7)]. Mr. Lehman had no first hand knowledge of what had happened in 2002 [Ex. 11 (Lehman deposition at 99-100)]. He was told by Balsam, including Mr. Bethea, that there were boundary problems with a number

of Balsam lots. Mr. Bethea had a copy of all the plats [Ex. 6 (Bethea deposition at 23)].

At Mr. Lehman's request, the Coward Firm began preparing Corrective Deeds and/or Quit Claim Deeds [Ex. 11 (Lehman deposition at 20)]. A cursory view of the public records substantiates this testimony as it shows that both Mr. Coward and Ms. Baker prepared Quit-Claim Deeds from 2005 until at least some time in 2007 [Ex. 23 (Quit-Claim Deeds)].

G. Balsam's Disclosure

In 2006, Mr. Lehman informed the Loflins that contrary to the Deed and the Recorded Plat that they delivered to the Loflins in connection with the Closing, which were duly recorded, there was an encroachment on Lot 108, and that the property contained only 1.4 acres, and that a road went through the property [Ex. 1 (Loflin Supplemental Affidavit) ¶ 3]. Mr. Lehman believed that the road had been constructed on Lot 108 *after* the closing [Ex. 11 (Lehman deposition at 86].

H. Mr. Coward's Silence

In early 2007, Mr. Loflin telephoned Mr. Coward and sought his assistance [Ex. 1 (Loflin Supplemental Affidavit at ¶ 4)]. Mr. Coward did not disclose – as he suggested he would in his initial letter to the Loflins – that he already represented Balsam in efforts to resolve other boundary problems, nor did he offer the Loflins any

help.

I. Discussions

Prior to the foreclosure of Balsam, Mr. Loflin had a number of conversations about the problem with Mr. Chaffin, Mr. Lehman, and Balsam's salesman, Bob Tufts. At no time did Balsam tell the Loflins that it knew before the Closing that Lot 108 contained only 1.4 acres with a road through it. Balsam acknowledged that the Loflins would not pay their assessments until the matter could be resolved. Despite multiple representations that Balsam would remedy the problem, however, Balsam did not do so before its foreclosure occurred [3RD Amended Complaint ¶ 20].

J. The Unrecorded Plat

In early 2012, the Loflins discovered that two weeks before the original Closing an Unrecorded Plat had been prepared for Balsam which showed that the road went through their property before the closing [3RD Amended Complaint ¶ 23]. Based upon this fact, not only did the Loflins believe that they had been defrauded, or at a minimum were entitled to recision, but they recognized for the first time that Chicago's Policy was applicable to the transaction.

On March 23, 2012, the Loflins' counsel informed Chicago of the Unrecorded Plat showing that at the time they purchased Lot 108, Balsam Mountain Preserve Road did not circumnavigate but rather dissected Lot 108. [Ex. 20 (Letter from

Solomons to Chicago)]. Five months later, Chicago responded that based upon a title search, the only recorded Deed did not show any impairments on the title, and, despite the provisions of the Policy, the Loflins had no cognizable injury [Ex. 21 (Letter from Chicago to Solomons)].

K. The Coward Deposition

On November 14, 2014, the Loflins served the Coward Law Firm with a Notice of Deposition of the Custodian of Record and a Subpoena issued by the Clerk of this Court and the Clerk of Court of Jackson County, North Carolina, requiring the Custodian of Record to appear at a designated location in Jackson County, North Carolina, and to produce and permit the inspection and copying of specific documents relating to the Loflins' purchase of real estate at Balsam and the Balsam Mountain Development. The Notice and Subpoena were returnable on December 1 and 2, 2014, some seventeen and eighteen days after service [3RD Amended Complaint ¶ 28].

On Tuesday, November 25, 2014, eleven days after service of the Notices and Subpoenas, Mr. Coward, as the Custodian of Records for the Coward Law Firm, filed a Motion to Quash the Notices and Subpoenas directed at those entities. As grounds for this Motion, Mr. Coward asserted that he had a conflict on December l, 2014, and that, "the plaintiff [sic] has not served the undersigned the pleadings so it is difficult if not impossible to determine the relevancy of the materials subpoenaed." Prior to

serving the Motion to Quash, Mr. Coward did not contact his clients, the Loflins, or the Loflins' counsel in this matter, and request the underlying pleadings or a modification of the date. Upon receipt of the Motion to Quash, the Loflins' counsel immediately telephoned Mr. Coward and left him a voice mail and sent Mr. Coward an email asking that he contact him in an effort to work this matter out. Neither Mr. Coward nor anyone else at the Coward Law Firm responded [3RD Amended Complaint ¶ 29].

On December 1, 2014,Mr. Coward appeared before his brother, Judge William H. Coward, Superior Court Judge, who was a member of the Coward Firm until late 2014. Mr. Coward did not inform the Loflins that they had obtained a Court hearing in this matter or otherwise provide them with a notice and opportunity to be heard at this hearing. Upon information and belief, Mr. Coward suggested that he had not been able to contact the Loflins' counsel, although the Loflins' counsel did not receive any notice of the hearing or any response to their voice mail or email attempting to discuss the matter with Mr. Coward [3RD Amended Complaint ¶ 30].

On December 1, 2014, shortly after noon, the Coward Defendants forwarded the Loflins' counsel a copy of an *ex parte* Court Order entered that day by Judge Coward, granting Mr. Coward's Motion to Quash on behalf of the Coward Law Firm. Judge Coward's *ex parte* Order was expressly based upon Mr. Coward's

representations and concluded that "there is insufficient time for the movant or the Court to notify the Plaintiff of this hearing or this ruling," even though the Notices served on the Coward Defendants seventeen days earlier set forth the address and telephone number of the Loflins' counsel, even though Mr. Coward faxed the Motion to Quash to the Loflins' counsel six days before the *ex parte* hearing, and even though the Loflins' counsel had emailed Mr. Coward and provided him with his cell telephone number six days before the ex parte hearing. Moreover, at the time of the *ex parte* hearing, the Loflins' counsel was physically located less than two hours from the Courthouse [3RD Amended Complaint ¶ 31]. Mr. Coward prepared the Order [Ex. 5 (Coward deposition at 52)].

On December 1, 2014, upon receipt of the Court Order issued by Judge Coward, the Loflins' counsel sent Mr. Coward a letter by overnight mail. The Loflins' counsel enclosed a copy of all of the subject pleadings in this matter, and offered to reschedule the matter at a date and time convenient for him. The Loflins' counsel also informed Mr. Coward that he was going to be in his area the next day and suggested coming by his office to discuss this matter in person. The Loflins' counsel requested that Mr. Coward contact him by telephone or email. Mr. Coward never responded to this letter [3RD Amended Complaint ¶ 32].

L. <u>Refinancing</u>

Subsequently, the Loflins refinanced their purchase of Lot 108 on two occasions, both times in Beaufort County South Carolina, and both times supervised by the Bethea Firm, and entered into two additional contracts of insurance with the Insurance Defendants ("**Second Insurance Policy** " and "**Third Insurance Policy**") [3RD Amended Complaint ¶ 5].

M. The Status

Since the foreclosure, Balsam's successors have exercised control over Balsam Mountain Preserve Road through the Loflins' property and .437 acres owned by the Loflins. The Loflins have objected to this encroachment, but Balsam and its successors have refused to remedy this situation, and have continued to encroach and continuously trespass upon Lot 108. In addition, the HOA informed the Loflins that if they attempted to close the road encroaching through their property, it would not defend the Loflins from potential lawsuits filed by other Balsam property owners [3RD Amended Complaint ¶ 21)].

In 2016, the Association paved the road through the Lot 108 [Ex. 22 (Loflin Affidavit)].

V. ARGUMENT

A. As to Chicago

1. Statute of Limitations

The Loflins made a claim pursuant to the contract. The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). Chicago refused to perform under the contract of insurance on August 21, 2012 [Ex. 21 (Letter from Chicago to Solomons)]. Before that period of time, no performance had been demanded and no breach had occurred. "Under the discovery rule, a breach of contract action accrues on the date the injured party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence." *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007). There was no breach to discover until August 21, 2012. The action was filed on July 18, 2013.

Notwithstanding this standard, Chicago argues that, "In 2012, six years after discovering this unrecorded plat, the Plaintiffs informed Chicago of the unrecorded plat." [Memorandum at 3]. In support of this assertion, Chicago cites ¶ 20 of Plaintiff's Third Amended Complaint. In fact, ¶ 20 states the exact opposite: "Balsam did not disclose to the Loflins that it knew before the Closing that Lot 108 contained only 1.4 acres with a road through it as reflected in the Unrecorded Plat or that the Unrecorded Plat had been prepared before the Closing."

It is undisputed that it was not until 2012 that the Loflins discovered that the

road which goes through their property was reflected on the Unrecorded Plat which predated the Closing. Plaintiffs instituted this lawsuit within three years of discovering that fundamental fact.[10]

2. **The Insurance Policies Provide Coverage**[11]

The gravamen of this entire conflict can be boiled down to the following question, is Chicago, by selling the Loflins a policy of insurance on Lot 108 in Balsam Preserve, only responsible for providing coverage for a deficiency in the public property record. The plain text of the contract and deposition testimony show otherwise.

a. **Uncontroverted Facts**

The following are uncontroverted facts:

- The Loflins have a road going through their Lot 108.
- The road appears adjacent to Lot 108 on the recorded plat which predates the sale of his property and dissects the property on an unrecorded plat which also predates the sale of their property.

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[10]If the road did not exist at the Closing, Chicago (and Counsellor) would argue that the Policy provided no coverage.

[11]As Plaintiffs pointed out at the recent hearing, Chicago's Motion is virtually identical to its Motion to Dismiss which the Court (Judge Kinard) denied. Both Motions were based upon Plaintiffs' Third Amended Complaint. The standard for a Motion to Dismiss and a Motion for Summary Judgment are virtually the same. (Rule 12) *Benedict College v. National Credit Systems, Inc.* (S.C.App. 2012) 400 S.C. 538, 735 S.E.2d 518; (Rule 56) *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014), *reh'g denied* (June 13, 2014), *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

- Randy Herron testified that Balsam received the unrecorded plat on the day it was created (9 days before the Closing) [Ex. 25 (Herron deposition at 44)].
- The Loflins did not know that the road went through their property prior to the Closing.
- The Loflins purchased an insurance policy from Chicago Title.
- Chicago Title drafted the insurance policy.
- Upon learning that the road went through their property, the Loflins filed a claim with Chicago on March 23, 2012.
- Chicago refused to honor the contract, denying the claim on August 21, 2012.
- The Loflins have attempted to shut the road and the steel posts were pulled up and the road paved.
- In the numbered risks, the contract specifically provides coverage for (1) someone else owning an interest in your land, (3) fraud, (4) defective recording of any document, (9) others having rights arising out of leases, contracts or options, (10) someone else having an easement and (14) other defects liens or encumbrances.
- The Definitions section of the Policy defines easement as "the right of someone else to use your land for a special purpose."
- The Definitions section of the Policy defines Title as "the ownership of your interest in the land, as shown in Schedule A."

b. <u>The Policy</u>

i. Drafted by Chicago Title

Chicago Title is the drafter of the contract. "Ambiguous language in a contract

should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." *Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007); *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (quoting 17A C.J.S. *Contracts* § 324). Chicago could have very easily put in a simple sentence that stated clearly that the only covered risks are deficiencies in the public record. Instead Chicago provided numbered risks that, by necessity, must be discovered outside the public record. Fraud, adverse possession,[12] mistaken recordings, encroachments, easements by necessity, as well as many common easements are not issues of public record.

ii. The Context of the Transaction

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." *Southern Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80–81, 562 S.E.2d 482, 484–85 (Ct.App.2002); accord *D.A. Davis Constr. Co.,*

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[12]North Carolina recognizes adverse possession of land. *Rushing v. Aldridge*, 214 N.C. App. 23, 713 S.E.2d 566 (2011). Adverse possession of land is not on public record. Adverse possession would certainly qualify as someone else owning an interest in the land. Strong argument can be made that the road meets the requirements of adverse possession.

Inc. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984); *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976). The intention of the parties here was to provide insurance for the unknown risks of ownership beyond what can be ascertained by a simple title opinion. The contract language extends beyond and does not confine itself to merely those matters of record title. If it was Chicago Title's secret understanding of the contract that they were only obligated to matters of public record, Chicago certainly did not convey that to the Loflins through their agent (who also had served as the Loflin's attorney, the agent of Balsam Mountain and fiduciary to the Loflins, and as attorney for Balsam Mountain) or in writing. However, parties are governed by their outward expressions not their secret intentions. *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93–94, 594 S.E.2d 485, 493–94 (Ct.App.2004). Chicago's attempt to relegate its liability to merely a redundant insurance provider with secondary coverage to a real estate attorney's E & O coverage is not an expressed intention to homeowners and contradicts the plain language of the policy. Further, our Courts have been consistent that if there is any question about the intent of the parties, the determination of the parties' intent is then a question of fact for the jury to determine. *South Carolina Dep't of Natural Resources*, 345 S.C. at 623, 550 S.E.2d at 303.

iii. The Specific Policy Provisions

The policy begins with the following sentence. "This policy insures your title to the land described in Schedule A." In the Definitions section of the Policy Chicago elected to define Title as "the ownership of your interest in the land, as shown in Schedule A." Two things can be gleaned from this: (1) ownership is more expansive than possessing a title; and (2) the Schedule A sentence fragment is merely an identifier of the property. Chicago maintained in argument that the use of Schedule A in the definition shows that Chicago is only concerned with record title, but the reading of the opening sentence and the definition in their most plain way, the term merely seems to be a descriptive of what property the contract is concerned with, not a limitation of liability. At best for Chicago, this creates an ambiguity. A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." *Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 499, 649 S.E.2d 494, 502 (Ct. App. 2007); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct.App.1997).

Whether the Court agrees that the plain reading shows title means ownership or construing the ambiguity against the drafter dictates the same result, by the first sentence and the defined term used in the first sentence, the policy covers ownership, not just possession of title.

- The first covered risk is that "someone else owns an interest in your land." Notwithstanding the reality that according to every subsequent survey that has been done on the property since the survey resulting in the recorded plat, Lot 108 is not shaped and does not contain what the Loflins insured, the Loflins have to deal with Balsam and its successors exerting ownership of the land covered by the road. Mr. Loflin submitted an affidavit that he took steps consistent with ownership of property, planting steel posts. Inconsistent with that ownership, those steel posts were destroyed and a road paved over his objection.
- The third covered risk is fraud or forgery. The documents show that the seller knew of a plat that showed the road dissecting his property before the sale and did not record the plat, but rather went forward with the sale. Then years later, the seller tried to slip one past the goalie by asking the Loflins to execute quit claim deeds. This is fraud. It is specifically covered by the policy. The Defendant who committed the fraud is in default. Those allegations are established as a matter of law.
- The fourth covered risk is defective recording of any document. Craig Lehman, the former President of Balsam stated that the reason the recorded plat was wrong was that the correct plat was not delivered [Ex.

11 (Lehman deposition at 55)]. If the wrong plat was filed, this is specifically covered.

- The ninth covered risk is if "other have rights arising out of leases, contracts or options." To the extent that the HOA at Balsam exerts rights to the road and the other excluded property rightfully belonging to the Loflins through contracts of succession with the original owners, those rights are rights arising out of a contract or option and impact the ownership of Lot 108.
- The tenth covered risk is that "someone else has an easement on your land." Chicago elected to define easement as "the right of someone else to use your land for a special purpose." Chicago's loose definition does not require any impact on record title. The right to use a road crossing Lot 108 meets this definition.
- The fourteenth covered risk is for "other defects, liens or encumbrances." First this description is unclear by nature. ("A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear.") It is not knowable to a purchaser what other encumbrances or defects Chicago may cover. Second, Craig Lehman stated that, "I knew we (Balsam) had encroached on the property and

what they (the Loflins) purchased wasn't in agreement with the master plan or their plat" [Ex. 11 (Lehman deposition at 31)].

It is clear that the harm done to the Loflins triggers at least one of these provisions. Even if the Court does not feel it is clear, there is a disagreement concerning the conclusions to be drawn from the known facts. *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014), *reh'g denied* (June 13, 2014)(emphasis supplied)("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "**should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts.**")

iv. The Testimony of Chicago

In response to Plaintiffs' request to depose a company representative, Chicago produced Cynthia Baines. Ms. Baines is senior claims counsel for Fidelity National, the owner of Chicago. While Chicago has asked this Court to rule that it's policy coverage is confined to only matters of record title, senior counsel produced as Chicago's representative acknowledges otherwise.

Q. Is Chicago's position that it does not provide coverage so long as the record title is correct?

A. I would say that the coverage is governed by the terms and conditions of the policy so there are possibly circumstances where there would be coverage for things that are not of record title.

[Ex. 24 (Baines Deposition at 12)].

Chicago asks this court to grant summary judgment without any supporting facts other than citing to the Complaint, asking for a ruling that contradicts the admission of its own representative.

3. Damages

Chicago asserts that the Loflins have no claims for damage because they have title to the property as insured and conveyed. That is not only refuted by common sense (no one would want a home site with a paved road running through it), but Mr. Lehman's testimony that Balsam has not been able to sell this property because of the reduced acreage and a road running through it.

Nonetheless, Chicago argues that under North Carolina Code Section 47-18, unrecorded interests in land are invalid against subsequent purchasers of property." [Memorandum at 5]. The quoted statute has nothing to do with this dispute. All its does is to say that a subsequent purchaser of property is protected. The Loflins are not subsequent purchasers.

However, if the Loflins sold the subject property, a subsequent purchaser may well be protected under § 47-18. If the Loflins pointed out to the subsequent purchaser that the plat does not reflect what is on the ground – as they would be required to do in good faith – they would get far less for the property (if they could

sell it at all). If the Loflins did not disclose this problem, they would subject themselves to a lawsuit for fraud and deceit.

4. The Alleged Benefit

Chicago next asserts that the Loflins Breach of Contract cause of action must fail because they received the benefit of their title insurance policy [Memorandum at 9]. Respectfully, this argument is preposterous. The Loflins have been stuck with a half million dollar piece of property which they cannot use and cannot sell. They have spent large sums in response to a lawsuit against them for assessments, which include the maintenance of a road through their property. They have been involved in this litigation for over four years. The Loflins have received no benefit from the Policy.

5. Duty

According to Chicago, "Neither Chicago Title nor its agents at Counsellor Title Agency, Inc., could have been aware of any unrecorded plat, which is how the Plaintiffs have described this alleged document." [*Id.* at 9]. The Loflins are not required to show that Chicago and Counsellor should have been aware of the Unrecorded Plan in order to recover on their breach of contract and negligence counts. The Loflins' lawsuit against Chicago and Counsellor arises out of an insurance contract.

The Loflins were no more required to show that Chicago and Counsellor should have known that there was a problem in 2002 than they would have to show that a company which issued fire insurance on their residence was immune from a lawsuit unless they knew that their house was going to burn down. Insurance is all about risk. Chicago calculates the risk and charges a premium, which its customers pay to protect them from that risk.[13]

B. <u>As to Counsellor and the Coward Defendants</u>

Although Counsellor is Chicago's agent – and shares in its liability for many of the reasons set forth herein – it's responsibility in other ways is more akin to that of the Coward Defendants. In particular, Plaintiffs contend that both Counsellor and the Coward Defendants are liable if it should be finally determined that Chicago is entitled to judgment under the Policy. In that event, as Plaintiffs' Second Amended Complaint asserts – and the facts set forth above support – Counsellor and Coward are liable for failing to obtain adequate insurance, and if that could not be obtained, to inform their clients that Chicago's Policy would not insure the Loflins against matters outside the public record which existed as of the time of the Closing.

Indeed, the time period for pursuing that cause of action arguably has not yet

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[13]Moreover, as shown below, Chicago, by and through its agent, had knowledge through its agents, Counsellor, the Bethea Firm (including Mr. Bethea) and the Coward Law Firm (including Mr. Coward).

been triggered. Absent unique circumstances that are not present, actions may not be brought before all elements of a cause exist. "[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review." *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County,* 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006). Unless and until this Court determines that Chicago Title is not obligated to pay under the policy, the majority of the Loflins assertions of damages against Coward and Counsellor have not yet matured. For these reasons, Plaintiffs do not oppose a bifurcation of the trial of this matter so that Chicago's liability can be first determined. If Chicago is held liable under the contract, all matters against the other Defendants may well be resolved.

In any event, most of the arguments made by Counsellor, and several made by the Coward Defendants are the same as those made by Chicago and addressed by Plaintiffs above. For the same reasons, Counsellor is not entitled to summary judgment under the Policy, and Counsellor and the Coward Defendants are not entitled to summary judgment on the statute of limitations or the absence of damages.

1. Counsellor'S Additional Arguments

a. Acquiescence

Counsellor asserts that somehow the Loflins consented to, acquiesced in, or failed to mitigate damages because they learned of the encroachment in 2006, but

took no action to remedy it until they brought this lawsuit in 2012 [Memorandum at 7]. In fact, as shown above, Plaintiffs had no lawsuit against Chicago and Counsellor unless the encroachment pre-existed the Closing. It is undisputed that the Loflins did not know that the road pre-existed the Closing until discovering that the Unrecorded Plat predated the Closing in early 2012. Moreover, Balsam's CEO in 2006 (Mr. Lehman) believed that the road was constructed and took part of the Loflins' property after the Closing. Indeed, when pushed by Counsellor, despite plats which show otherwise, Mr. Lehman testified that while he did not know, he still assumed that this was the case.

Finally, Counsellor argues that Plaintiffs "failed to take any action until instituting this suit nearly seven years later" [Memorandum at 8]. In fact, the Loflins did not know they had a lawsuit against Counsellor until 2012. After bringing this lawsuit, as discussed herein, Plaintiffs learned that they had additional causes of action against Counsellor as well.

b. <u>The Insurance Policy</u>

Counsellor asserts that, "Plaintiffs seek to recover benefits under the contract of title insurance they entered into with Chicago Title." [Memorandum at 9]. Counsellor then argues that they do not have a breach of contract cause of action against Counsellor pursuant to the insurance policy.

Counsellor mis-perceives Plaintiffs lawsuit against it. Plaintiffs are not claiming that Counsellor is responsible pursuant to the Contract. Plaintiffs' Second Amended Complaint asserts that Counsellor is responsible because it failed to perform services and investigate and advise Plaintiffs. In other words, Counsellor (and the Coward Defendants) failed to inform Plaintiffs that the title insurance policy they chose did not, as they claim, provide any insurance except as to record title.

Did Counsellor have an agreement to do that? Counsellor's responsibility to the Loflins should be read not in the theoretical obligation of an insurance agency, but the particular facts in this case. First, Counsellor, was the alter ego of the Bethea Law Firm, which not only historically represented the Loflins, but in fact closed one of the transactions for the Loflins to obtain a loan to finance this transaction. Second, Mrs. Robertson testified that Counsellor represented the Loflins in this action. Third, Counsellor (the Bethea Firm who served as the Loflins' counsel) set up a program to funnel all of the Balsam title work from North Carolina to Counsellor. Additionally, by doing that, Counsellor limited Plaintiffs' title insurance to Chicago rather than the full range of title insurance companies which Mr. Coward normally used. Next, the Bethea Firm did not disclose to the Plaintiffs that they owned Counsellor, and that they were advising them and meeting with them solely as Counsellor's owner.

Additionally, it is undisputed that in 2005, Mr. Bethea informed Balsam (but

not the Plaintiffs) of the problems with the boundaries. One of these problems was the Loflins' problem. However, Mr. Bethea/Counsellor did not inform the Loflins of the problem, including the fact that the Unrecorded Plat was delivered to Balsam before the Closing.

Had Plaintiffs been informed about this at the time, they could have immediately sought recision of the Contract. Years later, after foreclosure of Balsam, Plaintiffs learned that the road pre-existed the Closing.

c. Negligence Claim

Counsellor asserts that, "An insurance agent is under no duty to advise an insured at the point of application, absent an express or implied undertaking to do so" [Memorandum at 14]. As set forth above, however, Counsellor was far more than an insurance agent. Counsellor was a law firm which represented Plaintiffs, which represented Balsam, which designed the documents which funneled the Loflins to Chicago, which, in conjunction with Coward, created the documents that created a Fiduciary duty running from Balsam to the Loflins, which then served as Balsam's agent while at the same time representing the Loflins.

2. Coward Defendants' Other Argument

Understandably, Coward relies upon *Rogers v. Lee*, 414 S.C. 225, 777 S.E.2d 402 (Ct. App. 2015), *reh'g denied* (Oct. 23, 2015) to assert that North Carolina law

controls. However, this case is significantly different than *Rogers* in several critical areas. In *Rogers*, Mr. Malloy (the client) went to a North Carolina lawyer to bring a worker's compensation action in North Carolina. The meeting occurred in Spartanburg and the Plaintiff resided in Spartanburg. However, there was no other basis for South Carolina law to apply. All of the actions giving rise to the litigation occurred in North Carolina. After the underlying litigation, Mr. Malloy and his wife agreed to settle at mediation. Importantly, in *Rogers*, the contract of representation between the client and the lawyer contained a choice of law provision stating North Carolina governed the contract of representation.

Unlike *Rogers*, this action involved a web of business relationships that were continuous with Beaufort. In fact, Mr. Coward travelled to Beaufort County to help create documents that give rise to certain rights of the Loflins at issue. Coward entered into an agreement to funnel all title work back to South Carolina to be handled by Counsellor. The development company and key personnel resided in Beaufort County with document generation specifically for lot adjustments being handled by Bethea, Coward, and Chaffin. This included an attempt to adjust the Loflins deed by way of quit claim deed. The closing on Lot 108 occurred in South Carolina. Unlike *Rogers*, there was no choice of law provision in the contract of representation with Mr. Loflin.

a. North Carolina's Statute of Repose

The Cowards first argue that the Loflins' claims are barred by the North Carolina statute of repose. Assuming *arguendo* that the statute of repose applies, it would not bar this action because the last act of the Defendant giving rise to the cause of action occurred less than four years from the last act of the Coward Defendants giving rise to the cause of action.

The North Carolina four year statute of repose does not begin to run until the last act in the representation has occurred. In this case, the last act occurred when the Loflins requested their attorney to assist in protecting their property interest by providing his file to aid in the prosecution of their claim against Chicago and Counsellor. Instead of assisting in an action that is most often brought by the attorney who represented the buyers in a real estate transaction, in 2014, the Loflins' lawyer obtained an *ex parte* Order from his brother, a sitting judge, to escape even providing his file and testimony to his own client. See *Sunbow Indus., Inc. v. London*, 58 N.C. App. 751, 753, 294 S.E.2d 409, 410 (1982).

Plaintiffs amended their Complaint to add the Coward Defendants on January 6, 2015. As stated repeatedly, however, Plaintiffs did not know they had a lawsuit until early 2012, when they discovered that the road and the reduced acreage existed before the Closing. Before that time, essentially what they had was a trespass and

encroachment case against Balsam.

b. South Carolina Statute of Limitations

As discussed above, Plaintiffs did not know the facts to put them on notice of the allegations contained in this lawsuit until 2012. Upon learning the material facts, the Loflins now know of the following events that took place since then. First, Mr. Coward refused to give the file to his clients (note the days between the lawsuit and the file) even though Mr. Coward had full knowledge of the lot disparities. Second, Mr. Coward was notified by Counsellor within the four years of the problem, but Mr. Coward never contacted the Loflins. Third, in response to the Loflins' contact, and knowing that there were problems with boundaries, Mr. Coward never did anything to try to assist the Loflins in this problem. This was contrary to their representation to the Loflins upon their retention.

The conduct of Mr. Coward and Counsellor, both will full knowledge of the problems with the lots in 2005, but not conveying that knowledge to the Loflins, can be seen as both estoppel to asserting the statute of limitations and as waiver of the statute of limitations. As stated in *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 197, 644 S.E.2d 730, 734 (2007):

> A party can waive a statute of limitations defense. *McLendon v. S.C. Dep't of Hwys. Pub. Transp.*, 313 S.C. 525, 525-26, 443 S.E.2d 539, 540 (1994). " 'Waiver of [the statute of] limitations may be shown by words or conduct. Thus, waiver may result from express agreement, ... from failure to claim the

defense, or by any action or inaction manifestly inconsistent with an intention to insist on the statute.' " *Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (citing 54 C.J.S. Limitation of Actions § 22 (1987)). Waiver is a question of fact for the finder of fact. *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994).

At a minimum, issues of fact remain as to whether the Defendants may assert the statute of limitations.

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By: _____
DANIEL A. SPEIGHTS

ATTORNEYS FOR PLAINTIFFS

Hampton, South Carolina

July 1, 2016

STATE OF SOUTH CAROLINA)

) AFFIDAVIT OF SERVICE BY MAIL

COUNTY OF HAMPTON)

Re: William Loflin and Leslie Loflin v. BMP Development, LP, Balsam Mountain Group, LLC, COWARD, HICKS & SILER, P.A., J.K. Coward, Jr., Chicago Title Insurance Company and Counsellor Title Agency, Inc., C/A No. 2013-CP-07-1807

PERSONALLY APPEARED before me Rhonda L. Bowers, who being duly sworn, deposes and says: that she is employed in the office of Speights & Runyan, attorney for the Plaintiffs in the above-referenced action; that she served **Plaintiffs' Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment** this 1st day of July, 2016, by personally depositing in a United States Postal Service mail box a copy of the same, postage prepaid, addressed to the attorney(s) listed below.

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JERRI ANN BOINEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

2016 JUL -5 PM 2:32

Rhonda L. Bowers
RHONDA L. BOWERS

SWORN TO before me this
1st day of July, 2016

Rosemarie Lightsey (L.S.)
Notary Public for South Carolina
My Commission Expires: 11/6/2022

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT William Loflin and Leslie Loflin, Plaintiffs, vs. BMP Development, LP, Chicago Title Insurance Company, and Counsellor Title Agency, Inc., Defendants.	IN THE COURT OF COMMON PLEAS CASE NUMBER: 2013-CP-07-1807 **THE DEFENDANT CHICAGO TITLE INSURANCE COMPANY'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

TO: THE HONORABLE CARMEN T. MULLEN
JUDGE OF THE FOURTEENTH JUDICIAL CIRCUIT

The Defendant Chicago Title Insurance Company ("Chicago Title") hereby submits this Supplemental Memorandum in Support of its Motion for Summary Judgment filed July 9, 2015, pursuant to the hearing of this matter held on June 13, 2016. This Supplemental Memorandum is in response to the Plaintiffs' Memorandum in Opposition to Certain Defendants' Motions for Summary Judgment ("Plaintiffs' Memorandum"). Based upon the lack of persuasive legal in the Plaintiffs' Memorandum, the failure to address the law regarding title insurance policies in South Carolina, and, for the reasons stated herein, Chicago Title respectfully requests that its Motion be GRANTED.

STANDARD OF REVIEW

Summary judgment is proper when it is clear that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SCRCivP 56 (c); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Vermeer Carolina's*

Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Summary judgment should be granted when plain, palpable, and undisputed facts exist upon which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co., Inc.,* 314 S.C. 542, 544, 431 S.E.2d 565, 555 (1993). Where there is no dispute over the operative facts, summary judgment is proper as a matter of law. *Citizens & Southern Nat'l Bank of S.C. v. Langford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994). Here, the material facts are not in dispute and, based upon those undisputed facts, Chicago Title is entitled to judgment as a matter of law as set forth in the hearing on June 13, 2016, in the original Memorandum, and in this Supplemental Memorandum.

The Plaintiffs claim that the standard of review is "virtually identical" to the standard of review of a motion to dismiss. This is an oversimplification, and, frankly, not the law. *See Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)(motion for failure to state a cause of action is based solely upon allegations in the complaint). Motions to dismiss only look to the complaint; motions for summary judgment look to the evidence in the record. Matters considered outside of the pleadings require a different standard of review pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999).

ARGUMENT

I. THE PLAINTIFFS FAIL TO CITE ANY CASE THAT WOULD SUPPORT THEIR POSITION THAT THERE IS COVERAGE UNDER THE TITLE POLICY AT ISSUE

Nowhere in the Forty One pages of their Memorandum do the Plaintiffs cite, refer, or claim that there is any law applicable to their possibly asserting that there is coverage under this title policy. They cannot as such law does not exist.

Title insurance is retrospective, not prospective. The Plaintiffs fundamentally fail to understand title insurance as demonstrated by their arguments in the Plaintiffs' Memorandum. The Plaintiffs received the benefit of their title issuance, and there has been no breach of that contract. Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title **which are in existence at the time the insured takes title.** *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013); *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981)(citing *National Mortgage Corp. v. American Title Ins.. Co.*, 261 S.E.2d 844 (N.C. 1980))(emphasis added). Title insurance is unique in that it is retrospective, not prospective. *Firstland Village Assoc.*, *id.* at 184, 284 S.E.2d 582. Nowhere in the Plaintiffs' Memorandum do the Plaintiffs address the clear, unequivocal rulings of the South Carolina Supreme Court and Court of Appeals advising that title insurance differs from all other types of insurance and does not cover items that are discovered post-policy date or which are not of record at the time of issuance of the policy. Instead, they compare the policy at issue to fire insurance. Had they cited any applicable law as relates to title issuance, the Plaintiffs would have to concede that the "Unrecorded Plat" giving rise to their alleged title claim is specifically excluded from coverage. The risks of title insurance end where the risks of other kinds begin. *Id* Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, such as an automobile or commercial general liability policy, is designed to save the insured harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it. *Id.*

As discussed at the hearing, there is no reference to the so-called Unrecorded Plat anywhere in the chain of title to the Loflins' property in North Carolina, meaning there can be no

coverage to have been breached. *See Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996) (holding Chicago Title could not have breached a contract where there was no coverage for a fourteen acre tract of land). As in *Christensen*, where there is no coverage, there is no breach. Instead of protecting the insured against matters that may arise during a stated period *after* the issuance of the policy, a title policy is designed to save the insured from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it. *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981) The Plaintiffs continue to fail to recognize the unique nature of title insurance. In this matter, there were no such defects, liens, or encumbrances of record at the time of the issuance of the policy. The Plaintiffs' own allegations make that clear. Accordingly, there is no breach of contract and Chicago Title is entitled to judgment as a matter of law.

II. THE PLAINTIFFS CLAIMS MUST FAIL AS A MATTER OF LAW AS TO THEIR CAUSE OF ACTION AGAINST CHICAGO TITLE FOR BREACH OF CONTRACT AS SET FORTH IN THE TWENTIETH CAUSE OF ACTION

The Plaintiffs have alleged that the contract at issue is the policy of title insurance issued by Chicago Title through its agent, Counsellor Title Agency, Inc., in 2002 (the "Policy) (*Id.* at ¶ 5) The Plaintiffs have acknowledged that the Policy was issued (*Id.*) The Plaintiffs have acknowledged that their deed references the Recorded Plat showing the correct acreage and the Balsam Mountain Road going around Lot 108. (*Id.* at ¶¶ 13-14) The Policy complies with the deed and Recorded Plat and insures that title which the Plaintiffs have. (*Id.* at ¶ 13-14). There are no allegations stated in the Third Amended Complaint that support any breach of the contract as the Plaintiffs received the benefit of their bargain, have the title for which they bargained, and for which there is title insurance. There are no allegations to support the Plaintiffs' claims that Chicago Title had to "investigate and insure that Lot 108 was protected from all risks." Chicago

Title relies on its agents and does no investigations. There has been no evidence or testimony produced to support those allegations The Plaintiff's own allegations state that their deed referenced the recorded plat.

None of the enumerated "Covered Title Risks" in the Policy are triggered by the Plaintiffs' allegations related to the unrecorded plat. The Policy states:

This Policy overs the following title risks, if they affect your title on the Policy Date

1. *Someone else owns an interest in your title.*
2. *A document is not properly signed, sealed, acknowledged, or delivered.*
3. *Forgery, fraud, duress, incompetency, incapacity, or impersonation.*
4. *Defective recording of any document.*
5. *You do not have legal right of access to and from the land.*
6. *There are restrictive covenants limiting your use of the land.*
7. *There is a lien on your title because of: (a) a mortgage or deed of trust; (b) a judgment, tax or special assessment; (c) a charge by a homeowner's or condominium association.*
8. *There are liens on your title arising now or late for labor and material furnished before the Policy Date – unless you agreed to pay for the labor and material.*
9. *Others have rights out of leases, contracts, or options.*
10. *Someone else has an easement on your land.*
11. *Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease, or to make a mortgage loan.*
12. *You are forced to remove your existing structure – other than a boundary wall or fence-because:*
    - *it extends on to adjoining land or on to any easement*
    - *it violates a restriction shown in Schedule B*
    - *it violates an existing zoning law.*
13. *You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.*
14. *Other defects, liens, or encumbrances.*

(Policy, Owner's Coverage Statement)

The Policy also contains Exclusions that states the insured is not insured against loss, costs, attorneys' fees and expenses resulting from the following:

3. Title Risks:

- *that are created, allowed or agreed to by you*
- *that are known to you, but not to us, on the Policy Date – unless they appeared in the public records*
- ***that first affect your title after the Policy Date** - this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks.*

(Policy, Exclusions)(emphasis added)

None of the "title risks" set forth in the Owner's statement of coverage are triggered, and, perhaps more importantly, the allegations of the unrecorded plat affect title after the Policy Date, meaning they are specifically excluded from coverage under the Policy. As stated above and here again, the Plaintiffs' title is as shown on the Recorded Plat and only on the Recorded Plat. Therefore, there is no coverage, and, accordingly no breach of contract.

As acknowledged by the Plaintiffs, the primary objective in construing a contract, is to give effect to the intention of the parties. *Southern Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 562 S.E2.d 483 (Ct. App. 2002). The plain, unambiguous language in the title policy demonstrates the intent. There is no testimony of any "secret understanding" of the title policy regarding coverage for matters of public record. That is the plan language of the policy as any unrecorded plat could never be discovered or affect title to the land. The Recorded Plat is referenced in the deed to the Loflins, and, is the only plat recorded in Jackson County, North Carolina, that someone searching title could find. Again, the Plaintiffs fail to address the clear language of the policy, including the clear exclusions for matters discovered after the policy date. Further, the Unrecorded Plat does not affect title any more than an unrecorded deed or unrecorded easement.

III. THE PLAINTIFFS RECEIVED THE BENEFIT OF THEIR TITLE INSURANCE POLICY AND FAIL TO ALLEGE ANY CAUSE OF ACTION FOR ANY BREACH OF THAT CONTRACT AND FAILED TO REFERENCE ANY CASES TO THE CONTRARY

Title insurance is retrospective, not prospective. The Plaintiffs received the benefit of their title issuance and there has been no breach of that contract. Generally, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title **which**

are in existence at the time the insured takes title. *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751, S.E.2d 256 (2013); *Firstland Village Assoc. v. Lawyers Title Ins. Co.*, 277 S.C. 184; 284 S.E. 2d 582 (1981)(citing *National Mortgage Corp. v. American Title Ins.. Co.*, 261 S.E.2d 844 (N.C. 1980))(emphasis added). Title insurance is unique in that it is retrospective, not prospective. *Firstland Village Assoc.*, *id.* at 184, 284 S.E.2d 582. The risks of title insurance end where the risks of other kinds begin. *Id* Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it. *Id.* Once again, the Plaintiffs have failed to address the unique qualities of title insurance. They liken title insurance to a fire insurance policy, which, once again, ignores the applicable case law on point and the clear language in the policy. Accordingly, Chicago Title is entitled to judgment as a matter of law.

IV. THERE IS NO LIABILITY FOR ANY NEGLIGENCE CLAIM WHERE THE PLAINTIFFS' OWN ALLEGATIONS SET FORTH NO DUTY TO PROTECT THE PLAINTIFFS FROM UNRECORDED MATTERS AND NO TITLE SEARCH WOULD REVEAL UNRECORDED MATTERS AND NO EXPERT HAS ESTABLISHED ANY DUTY OR BEACH THEREOF

The Plaintiffs have alleged that Chicago Title is negligent since it "knew or should have known the risks associated with Lot 108 and either willingly allowed exposure to such risks despite this knowledge or negligently failed to ascertain and insure against such risks." (Plaintiffs' Third Amended Complaint, ¶ 153) By their own allegations, no title search could have revealed that there was an unrecorded plat. No title search would have revealed an unrecorded plat. There are no allegations that state what risks were known or should have been known at the time the policy of insurance was issued, which is the time at issue as to the coverage under the policy. *Preservation Capital Consultants, LLC v. First American Title Ins.*

Co., 406 S.C. 309, 751, S.E.2d 256 (2013). There has been no expert witness named nor testimony provided that Chicago Title has been negligent in the denial of any claims. The only allegation in the Third Amended Complaint relating to the time of issuance of the policy is that the deed references the recorded plat and that plat showing Lot 108 containing 1.87 acres and showing Balsam Mountain Road going around the property. (Plaintiffs' Third Amended Complaint, ¶ 13). There can be no negligence where the Plaintiffs' allegations fail to show how Chicago Title could have breached any duty to the Plaintiffs at the time the policy was issued as was required by the recorded documents on file in Jackson County, North Carolina.

V. THE PLAINTIFFS HAVE NO CLAIMS FOR DAMAGE DUE TO AN UNRECORDED PLAT AS THEY HAVE TITLE TO THE PROPERTY AS INSURED AND CONVEYED PURSUANT TO THE RECORDED PLAT IN JACKSON COUNTY, NORTH CAROLINA

The Plaintiffs took title to their property based upon the only plat recorded in Jackson County, North Carolina, recorded in in Plat Cabinet 11 at Slide 383 and incorporated in the deed to the Plaintiffs which deed was recorded in Jackson County in Book 1227 at Page 202. (Third Amended Complaint, *id.* at 10) The plat recorded in Plat Cabinet 11 at Slide 383 is the only recorded plat for Lot 108 (*Id.* at 13). As this property is in North Carolina, North Carolina substantive law as to recording must apply. According to North Carolina Code Section 47-18, unrecorded interests in land are invalid against subsequent purchasers of property. *See* N.C.G.S.A. §47-18. Unless an interest is "of record", it cannot be enforced against any subsequent purchaser. *Id.*; *see Hill v. Pinelaw Memorial Park*, 292 S.E.2d 779 (N.C. 1981). By enacting Section 47-18, the intent of the North Carolina General Assembly was that prospective purchasers should be able to rely only on the public record. *Schuman v. Roger Baker & Assoc., Inc.*, 319 S.E.2d 208 (N.C. Ct. App. 1984). It is only when a search of the public records reveals an encumbrance that a purchaser is chargeable with the notice of its existence. *Turner v. Glenn*,

18 S.E.2d 197 (N.C. 1942). If no interest is recorded, it is not enforceable against subsequent purchasers. In this matter, the unrecorded plat cannot create any encumbrance and cannot create any damages for the Plaintiffs as it has no impact upon the Plaintiffs' title to their property. Accordingly, Chicago Title is entitled to judgment as a matter of law. There has been no evidence presented of damages by the Loflins.

CONCLUSION

For the foregoing reasons, Chicago Title Insurance Company requests that this Court grant the Defendant Chicago Title Insurance Company judgment as a matter of law.

Respectfully,

Mt. Pleasant, SC
July 11, 2016

BUIST, BYARS & TAYLOR, LLC

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CERTIFICATE OF MAILING

I hereby certify that on July 11, 2016, a copy of the foregoing was sent via overnight delivery to all counsel of record in this matter, as follows.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2013-CP-07-1807

William Loflin and Leslie Loflin,

Appellants,

v.

BMP Development LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,

Respondents.

NOTICE OF APPEAL

William Loflin and Leslie Loflin appeals the Order of the Honorable Carmen T. Mullen dated August 15, 2016 granting Chicago Title Insurance Company's Motion for Summary Judgment. Appellant received written notice of entry of this order on August 30, 2016.

September 1, 2016

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STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF HAMPTON)

Re: William P. Loflin and Leslie Loflin v. BMP Development LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc. (Case No. 2013-CP-07-1807)

PERSONALLY APPEARED before me, Susan T. Murdaugh, who being duly sworn, deposes and says: that she is employed in the office of Speights & Runyan, attorney for the Plaintiffs in the above-referenced action; that she served the foregoing Notice of Appeal of Order granting Chicago Title Insurance Company's Motion for Summary Judgment this 1st day of September, 2016, by personally depositing in a United States Postal Service mail box a copy of the same, postage prepaid, addressed to the attorney(s) listed below.

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Susan T. Murdaugh
SUSAN T. MURDAUGH

SWORN TO before me this
1st day of September, 2016

Rosemarie Lightsey (L.S.)
Notary Public for South Carolina
My Commission Expires: 11/6/2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appeal No. 2016-001840

Case No. 2013-CP-07-1807

William Loflin and Leslie Loflin,

Appellants,

v.

BMP Development LP, Balsam Mountain Group, LLC, Coward, Hicks & Siler, P.A., J.K. Coward, Jr., Chicago Title Insurance Company, and Counsellor Title Agency, Inc.,

Defendants,

OF WHICH

Chicago Title Insurance Company,

Respondent.

SECOND AMENDED NOTICE OF APPEAL

William Loflin and Leslie Loflin appeals the Order of the Honorable Carmen T. Mullen dated August 15, 2016 granting Chicago Title Insurance Company's Motion for Summary Judgment. Appellant received written notice of entry of this order on August 30, 2016.

September 19, 2016

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STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF HAMPTON)

Re: William Loflin v. BMP Development, LP
Appellate Case No. 2016-001840

PERSONALLY APPEARED before me, Susan T. Murdaugh, who being duly sworn, deposes and says: that she is employed in the office of Speights & Runyan, attorney for the Plaintiffs in the above-referenced action; that she served the foregoing Second Amended Notice of Appeal of Order granting Chicago Title Insurance Company's Motion for Summary Judgment this 19th day of September, 2016, by personally depositing in a United States Postal Service mail box a copy of the same, postage prepaid, addressed to the attorney(s) listed below.

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Susan T. Murdaugh
SUSAN T. MURDAUGH

SWORN TO before me this
19th day of September, 2016

Rosemarie Lighty (L.S.)
Notary Public for South Carolina
My Commission Expires: 11/16/2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2013-CP-07-01807
WILLIAM LOFLIN and LESLIE LOFLIN,	)	
	)	
PLAINTIFFS,	)	
	)	
v.	)	TRANSCRIPT OF RECORD
	)	
BMP DEVELOPMENT, LP; BALSAM MOUNTAIN GROUP, LLC; COWARD, HICKS AND SILER, P.A.; J.K. COWARD, JR., CHICAGO TITLE INSURANCE COMPANY; AND COUNSELLOR TITLE AGENCY, INC.	)	
	)	
DEFENDANTS.	)	
	)	

JUNE 13th, 2016
COMMENCING AT
BEAUFORT COUNTY COURTHOUSE
BEAUFORT, SOUTH CAROLINA
BEFORE THE HONORABLE CARMEN T. MULLEN, JUDGE.

APPEARANCES:

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A. G. "GIBSON" SOLOMONS, III, ESQUIRE
Attorneys for the Plaintiffs

MR. GEORGE H. O'KELLEY, III, ESQUIRE
Attorney for the Defendant Chicago Title

MR. MICHAEL B. McCALL, ESQUIRE
Attorney for the Defendant Coward, Hicks & Siler, P.A.

MR. ROBERT E. STEPP, ESQUIRE
Attorney for the Defendant Counsellor Title Agency

Rebecca H. Hill
Official Court Reporter

INDEX

MOTION FOR SUMMARY JUDGMENT:
BY MR. O'KELLEY FOR CHICAGO TITLE 7
AMENDED MOTION FOR SUMMARY JUDGMENT
BY MR. STEPP FOR DEFENDANT COUNSELLOR TITLE 13

CERTIFICATE OF REPORTER 71

EXHIBITS

NO.	DESCRIPTION
ONE	COPY OF RECORDED PLAT
TWO	COPY OF UNRECORDED PLAT

THE COURT: This case has a number of motions.

MR. SPEIGHTS: Your Honor, if I can address what I brought up before.

THE COURT: Yes, sir.

MR. SPEIGHTS: First of all, I want to thank you for taking this case; it's complex. I hope you won't regret that after today. Secondly, I want to say that it's a personal privilege. I'm getting on this plane to argue another asbestos case against a bunch of Northeastern lawyers, which I've done too often over the years, and I want to assure you that we have the best professional relationship imaginable; although we disagree on the merits of this.

I say that because I'm going to do a little bit of fussing on this, and that is late Thursday and Friday, I got three briefs and I have done the same thing in my practice because South Carolina Circuit Court Rules don't prevent that.

I want to make it clear from the outset that in the event Your Honor feels inclined in any way in their direction, I want to have an opportunity to brief these issues, because obviously I didn't have time to do that before today. And with that, I turn to what I didn't want to turn to. I believe that we should proceed, number one, in the order of the motions as they were filed, which would

be Hamlin's and then Bobby's.

MR. O'KELLEY: I think Bobby's was first.

MR. SPEIGHTS: I think yours was in 2015. But in any event, I will look at the dates in a minute, at the core of this dispute as the plaintiff sees it, is the contract with Chicago. That's who Hamlin represents. And we think that should be the first matter argued, his motion for summary judgment, because my arguments on both Counsellor and on Coward will largely deal with that core issue; it's the hub of the lawsuit. And I believe that's the way we should proceed. I'm going to check while Hamlin addresses that to see if he's right or I'm right about which was the first motion filed.

MR. O'KELLEY: Thank you, Your Honor. It's always a pleasure to work with Mr. Speights as well. He's correct. We've always been very professional and gotten along very well in this case, which has been pending since 2013.

Your Honor, the motions that were filed, Counsellor Title filed its motion for summary judgment on March 7th, 2015. Chicago Title was July 14th, 2015. There was a motion to compel filed on 4-29 of this year by Mr. Speights, and then, Mr. McCall's crowd filed its motion on 4-15 of this year.

I'm happy to hear these motions however Your Honor wishes to hear them. I would like to address one thing that

Mr. Speights brought up. These motions have been pending, at least mine and Mr. Stepps, for almost a year. Any briefing that should have been done should have been done way before now.

In response to our motions, we got a very thin affidavit of nine sentences from Mr. Loflin last Thursday, as Your Honor knows, and Your Honor acknowledged it during the roster meeting that we have all submitted briefs and Your Honor has read everything. But in terms of how Your Honor wants to go, it matters not to me.

THE COURT: Let me just -- what I'll do, Mr. Speights, is if I think I need something further from you, then I will ask you for it; how about that?

MR. SPEIGHTS: Yes, Your Honor. Like you say, in response to that, of course, I didn't file a brief, because I'm not the moving party. They filed the briefs because they're the moving party. I'd like to say that both Hamlin and I are right -- that's a good way to start off. Counsellor's present motion before the Court is its amended motion for summary judgment, which was filed after Hamlin's motion for summary judgment, so in the pleadings that are being heard today, hopefully you will be persuaded to argue Chicago first.

THE COURT: Is that right?

MR. O'KELLEY: Absolutely, Your Honor, and I'm happy --

THE COURT: I've never seen you shy away.

MR. O'KELLEY: No, ma'am. No, ma'am. Thank you, Your Honor, and may it please the Court. Your Honor has received our motion. And just for the record, I represent Chicago Title, and Chicago Title issued a title policy for property in Jackson County, North Carolina, Balsam Mountain Preserve, and that was back in 2002, for Lot Number 108, which was to contain 1.837 acres on the plat that was recorded in Jackson County. That plat was recorded in plat cabinet 11, slide 383, and a deed was issued to the Loflins that was recorded in book 1227, page 202, also in Jackson County, North Carolina.

The policy that was issued -- and I've got a copy for Your Honor. There is also a copy attached to our motion, but I'll just hand this up.

THE COURT: Go ahead and pass it up.

MR. O'KELLEY: Thank you, Your Honor. The titled policy at issue, Your Honor, references the recorded plat. It shows that Mr. and Mrs. Loflin received title to 1.837 acres, and it says that Chicago would defend their title to that 1.837 acres.

Four years after the closing, Your Honor, and this is in the plaintiff's complaint, the plaintiffs allege that "There is an unrecorded plat, and the road, the Balsam Mountain Road, no longer goes around our property, but cuts

off a part of our property." Again, this is nothing that could have been discovered or seen in the records at the courthouse in Jackson County, North Carolina, which is located in the beautiful town of Sylva.

According to the complaint, there's been no deed, there's been no plat. We've taken depositions in this case. There's been nobody who says, "Hey, I've looked at this recorded plat and it shows what Chicago Title insured."

Plaintiff has asserted two causes of action against Chicago Title: One for breach of contract and the other for negligence. And I'll be happy to talk about them each, Your Honor, because we contend, and my co-defendants also contend, that the plaintiff's claims are barred, first of all, by the applicable statute of limitations, by the very language in their complaint. We got title in 2002. We learned about the problem in 2006. We didn't sue until 2013.

They filed a title claim in 2012, which was denied, which is one of their bases for suing my client, but they have a duty to timely file a title claim as well. They should have filed the title claim in 2006. So, our first argument is the three year statute of limitations under South Carolina Law.

Yes, this property is in North Carolina, but they brought suit here. We also claim ---

THE COURT: Okay. Let's just go ahead and address each issue, because certainly it can be granted on one or on all of the bases. Mr. Speights or whomever wants to answer, talk to me about the statute of limitations and why either under -- I never saw the argument where North Carolina law, which is four years, or South Carolina law, which is three years. How has the statute not run?

MR. SPEIGHTS: May I approach, Your Honor?

THE COURT: Yes, please. And just so I'm clear, there's no one here from BMP Development or Balsam Mountain Group is there?

MR. SPEIGHTS: No, they're in default, Your Honor, and that's a matter we should discuss. There's been no damages hearing.

THE COURT: All right. And just so I understand ---

MR. SPEIGHTS: I'm sorry, Your Honor. I misspoke. We have two Balsams. The original Balsam in the complaint is in default. The subsequent owner is represented by David Wyatt, and Mr. Wyatt and I discussed the matter and he doesn't have, in colloquial terms, a dog in this fight today.

THE COURT: Okay. And he represents -- is it -- who is the new company? Is it BMP Development or is it Balsam Mountain Group?

MR. SPEIGHTS: I need to look at the caption, Your

Honor.

THE COURT: And I'm looking at it, too. I just don't know which one it is.

MR. SPEIGHTS: Yeah, there's a myriad of Balsams.

MR. O'KELLEY: Your Honor, I think the successor is the Balsam Mountain Group, LLC.

THE COURT: That's the successor. And it's BMP Development that is in default, okay. Thank you.

MR. SPEIGHTS: And I'm going to respond to your question, Your Honor. This is the motion, not the memorandum, but the motion. This is what's before you. Not until either Thursday or Friday, when I saw Chicago's brief, did I see they were raising statute of limitations. There's no question that the other defendants do. This motion does not raise statute of limitations. I'm not saying that Hamlin can't later file a motion based on statute of limitations, but this is the motion itself, what it's based on.

I don't believe Chicago has before you today a statute of limitations motion. And of course, under Rule 56, it has to give 10 days notice, and filing a brief on Thursday or Friday, it does not provide 10 days notice.

Now, I'm not just being super technical, although I'm capable of that, we will argue statute of limitations with the other two defendants, but I think there are different

statute of limitation issues that Chicago might argue if it does file a motion for summary judgment on that ground. And I'm prepared to answer your question in light of the other two, but I just don't think statute of limitations is before you on Chicago's motion.

MR. O'KELLEY: Your Honor, in response to that, paragraph 64 of our answer to the third amended complaint in this matter, we assert that Chicago Title would allege and show the plaintiff's third amended complaint should be barred by the applicable statutes of limitation as the plaintiffs claim to have known, knew, or should have known of their alleged causes of action in 2006. So we filed that on August 10th of last year, so they've known for quite some time that we were going to assert this as a claim.

I'm happy to sit back and let these other folks argue the statute of limitations argument, and if it gets tossed on out, that's fine, Your Honor. But they've known this has been pending a long time. We've asserted this in our answer to the first complaint, the first amended complaint, the second amended complaint, and now the third amended complaint.

MR. SPEIGHTS: No question it's in the amended complaint, Your Honor. I'm not arguing that. Every defendant that files every answer in America lists the statute of limitations. I'm just simply saying that it's

not in his motion for summary judgment.

MR. O'KELLEY: And Your Honor, our motion has been pending for over a year and he's correct about that. So I'm not saying that we filed it based on that, but Your Honor, we're joining in all of the arguments. It certainly has been pending for quite some time. I'll be happy to sit back and let Mr. McCall or Mr. Stepp argue the statute of limitations if Your Honor chooses to what Mr. Speights called the hyper-technical approach to this.

THE COURT: What I have, as far as -- didn't you forward me a brief, Hamlin?

MR. O'KELLEY: Yes, ma'am, last Thursday.

THE COURT: And it included your argument as to statute of limitations.

MR. O'KELLEY: I mean, on Friday, not Thursday. Yes, ma'am.

THE COURT: Are just talking about the technicality of -- I'm looking at the original. It's a motion. And you said there is an amended motion for summary judgment, as well?

MR. O'KELLEY: I thought ---

MR. STEPP: That's my motion.

THE COURT: That's yours?

MR. O'KELLEY: That's Mr. Stepp's, yes, ma'am.

MR. STEPP: My motion does raise statute of

limitations, my original motion and my amended motion.

THE COURT: I read that extensively. And you're saying that you only learned for the first time when he filed his memorandum that that was the basis?

MR. SPEIGHTS: That was one of the bases. I knew he was going to argue the contract issue.

THE COURT: Right.

MR. SPEIGHTS: Which I think should be the first issue argued today. But he didn't raise statute of limitations, and in my opinion, his trigger for the statute of limitations is the breach of contract, which it did not occur until years later when Chicago denied coverage, but that's an issue that's not before you today, with respect to Chicago. The bottom line is we're going to argue statute of limitations later. I just don't think that's Chicago's argument today.

THE COURT: Okay. What I'm going to do is this, I'm going to let Mr. McCall argue and in the end, I do think y'all are ready to answer the statute of limitations' issue as to Chicago Title as well. So to the effect that you don't think you've had enough time, if you want more time to respond to it, not having had notice, since you got notice of this on Thursday, apparently, I don't think it was the first notice, I'll give you an opportunity to respond further if you would like to in written form. Okay?

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: All right. So why don't we start and let Mr. McCall kick off, or Mr. Stepp, whoever wants to begin with their motion. I'm happy to hear from y'all.

MR. STEPP: Your Honor, if it pleases the Court, I'm Bobby Stepp. I'll be happy to address that issue. We've raised it consistently. First, Your Honor, thank you for reading our memorandum and virtually everything I would say is in the memorandum, so I call the Court's attention to that.

It is clear that the plaintiffs have known the circumstances that have given rise to their claim of a tunnel defect in all of their claims since 2006, and that's indisputable since the plaintiffs put it in their own complaint. So we know from the pleadings before the Court if they had been aware that this road encroaches on their line, or their lot, whatever way you want to look at their claim, they've been aware of this since 2006.

THE COURT: Mr. Stepp, I don't mean to interrupt you, but may I ask you? So obviously we all know that it's been since 2006, but when did they actually pave the road?

MR. STEPP: According to Mr. Loflin's affidavit, just recently, apparently.

THE COURT: Okay.

MR. STEPP: I don't know.

THE COURT: But again, I understand what your argument is, is that they knew as of 2006 that there was this problem?

MR. STEPP: They did. And it's really more than that, Your Honor -- a little bit more than that, because in paragraph twenty of the third amended complaint, the plaintiffs actually alleged that upon discovering this circumstance in 2006, they stopped paying their assessments. So not only were they aware of a condition that was an invasion of what they believed to be their rights, they also actually acknowledged that they had incurred damage and then suffered a loss and understood they were entitled to take some sort of action. The action they took at that point was to withhold their assessment. So, I think that's a pretty significant acknowledgement of all of the circumstances necessary to make the statute start running.

With respect to Counsellor, you know, it 2013 before any claim is made. There's no allegations, no information of anything that would provide a basis for tolling the circumstances to the extent THAT the discovery rule applies we're relying on their complaint.

So there is no issue of fact. This case was just filed seven years after a person of more than ordinary and reasonable intelligence and proves what the Loflin's experience led them to. Understood there was a problem and

there's simply no justification for it. We think all the claims, certainly against Counsellor, ought to be dismissed on that basis; if there is some different issue about Chicago, that's neither here nor there for my client.

THE COURT: Okay. Thank you. Yes, sir?

MR. SPEIGHTS: May it please the Court?

THE COURT: Yes, sir.

MR. SPEIGHTS: I'll have to provide a little context, because Counsellor is arguing, I particularly have to provide context when Counsellor is involved. There is no question that there was a closing in 2002. There is no question that in 2006 Balsam informed Mr. Loflin that there was a problem and they wanted him to execute a quit claim deed and give up part of his property, but that's not where it stops. It's also undisputed, based upon the record, Mr. Craig Lehman's deposition in this matter, which I will offer at the appropriate time.

Mr. Lehman was the man in charge at Balsam in 2006 that had a conversation with Mr. Loflin. There is no question that Mr. Lehman called Mr. Bethea, the principal at Counsellor, either before or after that and had discussions with him about this.

Then, there's no question that Balsam was trying, working with Mr. Bethea -- and I'll explain why Mr. Bethea was being called, but there is no question that Balsam was

attempting to work with Mr. Loflin to try to remedy the situation. And there is no question from Mr. Lehman's deposition that Mr. Loflin was forgiven from paying any HOA assessments, which was a big deal during the interim.

And there is no question that some time within the three years of bringing the lawsuit, the Loflin's learned something else. The Loflin's learned that it was not just some mistake that was made, but there was actually a previous plat, a plat that was in existence before the closing of this matter. And that plat, which Mr. Loflin would never have agreed to ---

THE COURT: It was unrecorded.

MR. SPEIGHTS: --- the unrecorded plat. And is what Balsam would say, "That gives us the right to pave a road through Mr. Loflin's property," which is now Loflin's affidavit, which I will also offer, shows that they have recently done, despite notice, they put a road through his property, a paved road. That's the facts of that.

Now, why did Balsam, Mr. Lehman, call Mr. Bethea? Well, let's go back. When he bought the lot, Mr. Coward was his closing attorney, that's Mr. McCall's client. Balsam was developed by Chaffin and Light, which developed Spring Island and Chechessie, etc. Mr. Bethea, who had represented Mr. Loflin -- Mr. Bethea has many hats here. I'm not trying to jump on Mr. Bethea. I've known him for years. But the

facts are the facts. Mr. Bethea and his associate at that time, Ms. Robinson, had previously represented Mr. Loflin. They represented Chaffin Light. They represented them in the development. Mr. Bethea had worked extensively with Mr. Coward in the development of the Balsam properties. Mr. Bethea was a lawyer for Balsam, in addition to working for Mr. Coward, who both represented Balsam and represented Mr. Loflin.

Now, when Mr. Coward goes to get insurance, Chicago Title Insurance, he didn't walk down the hall or place a phone call to somebody in North Carolina, he calls Bill Bethea and gets Bill Bethea, who is going to be supervising the documents that Mr. Loflin signed at his office, to have Mr. Bethea in South Carolina via, as it turns out a South Carolina, Beaufort County Company, to issue a title insurance policy. That is, Counsellor would issue a policy as the Agent for Chicago.

Now, there is nothing in the record -- Hamlin slightly misspoke a minute ago, innocently, I know. He said we have taken depositions. Well, we have taken depositions is if "we" includes me. It doesn't include the defendants. The defendants have taken no depositions. The defendants have produced no affidavits here. They've been my discovery trying to get to the bottom of this convoluted mess.

But in any event, Counsellor, Mr. Stepp, has not put

anything in the record to say who is Counsellor and what were the hats they were wearing and what they did when? I took Mr. Bethea briefly on a narrow issue very much at the beginning of the lawsuit, because now we know from Sara Robertson's deposition, I'm going to offer all of these depositions, that the McNair Firm owns Counsellor.

Mr. Loflin, when he goes in there, there is nothing in the record to suggest that Mr. Loflin when he walked in the doors in 2002 to sign the papers for this and got his title insurance, knew of the connection between Counsellor and the McNair Firm, or at that time, actually, it was the Bethea firm, which later merged with the McNair Firm. So here's Mr. Loflin, he goes down to the law office, which he's been in many times, signs the papers, et cetera, et cetera.

So I know it's statute of limitations, but I feel like some context is necessary before addressing Counsellor's arguments.

So first of all, we believe -- and this is one of those core issues, we believe the policy covers fraud. Mr. Loflin was not aware of the fraud in this, maybe even inducement, until within three years of bringing this case when he realized for the first time that the plat, the unrecorded plat, was actually in existence before he closed this matter in 2002. We have that fraud complaint. A fraud is covered by the policy. Counsellor is the agent, and it does not get

off the hook under the statute of limitations for that.

Secondly, Your Honor, we believe there is a continuing tort involved here. Every day we don't have this property, including having a pavement down, every day that this happens, there is an encroachment, there is a trespass. In effect, the statute of limitations is retriggered every day since he bought the property, but especially since he learned of that additional plat with the fraud cause of action.

There are issues of fact involving this, and of course, the burden of proof is on the defendants on the statute of limitations. It's an affirmative defense raised by all of them in the answer, including Chicago in the answer, and I knew it was coming, I just didn't know it was coming Thursday from Chicago. They have the burden of proof of saying there is no issue of fact. Chicago and Counsellor itself is the last person who should complain about partiness because Mr. Loflin was working with Balsam, represented by Mr. Bethea, principal of Counsellor, trying to work this situation out during this process in which Counsellor now comes up here and says, "Well, you let the statute of limitations run," which may also raise equitable defenses to the statute of limitations in that regard. If you, Counsellor, note and know you are trying to work it out and trying to get you something else and this runs.

One moment, Your Honor. (Brief pause.)

Mr. Solomons says I did not say that well. Both Counsellor and Coward were contacted in 2006 at the very time of this hearing. So Your Honor, the bottom line is we think there are issues of fact regarding Counsellor's motion. Again, there are different issues involving, to some extent, involving the other two defendants. And again, Counsellor, as agent of Chicago, to the extent we have breach of contract cases against Counsellor arising out of that agency agreement, we did not notice -- we did not have a cause of action against Chicago Title until August 21 of 2012 when Chicago Title -- I will hand this up. It's a letter from Chicago Title of August 21, 2012, and Mr. Solomons in which they denied coverage for this property. We believe that's the triggering event for any contractual allegations in our complaint as well.

THE COURT: Thank you.

MR. STEPP: May I respond, Your Honor?

THE COURT: Yes, sir.

MR. STEPP: First of all, I want to respond to Mr. Speights' contention that we have not filed any affidavits. We don't need any affidavits. This argument is based entirely upon what these plaintiffs, acting through Mr. Speights, have come into this Court and told this Court.

They told this Court that we discovered in 2006. The

court records will reflect that they didn't file until 2013. I don't need an affidavit with respect to any of that. Secondly, I welcome Mr. Speights putting any deposition testimony in this case before you, because there will not be one iota of evidence. There's none before you right now, which I believe is the most important time that Counsellor Title did anything ever at any time to toll the statute of limitations or to suggest to the Loflins that they didn't need to file suit or that they didn't need to do anything.

Bill Bethea left the McNair Firm and went to work for Chaffin and Light, and all these conversations took place when he was with Chaffin and Light, not when he was with the McNair Firm or even with Counsellor, so none of that is going to pan out. Happy for you to read all of the depositions. I hope you don't have to, but none of that is going to apply.

Secondly, Mr. Speights says Loflin was not aware of the fraud until later. Well, it doesn't matter exactly what claim you're going to bring. Once you know some right of yours has been invaded, the clock starts ticking and they certainly knew that. The fact that they didn't put all the bells and whistles on or have a full theory of recovery, Your Honor, it doesn't matter.

Finally, they say that the statute is retriggered for encroachment or trespass every day. Counsellor is not

encroaching on their property. Counsellor is not trespassing on their property. So those claims given to the extent that makes the statute retrigger, it doesn't apply to the breach of contract and negligence claim that are before the Court against Counsellor.

Finally, they say that they're suing on a breach of agency agreement between Counsellor and Chicago. Well, number one, that's not what is pleaded. Secondly, they would not have standing to sue on that contract, because they're not a party to the contract. Thank you, Your Honor.

THE COURT: No rearguing. Anything new?

MR. SPEIGHTS: He says all concern Mr. Bethea after he went with Chaffin and Light. I do not -- I'm sure Mr. Stepp said that in Bethea -- I do not believe that is correct, but the bottom line is that I don't believe that's in the record. There's no question that he later went with Chaffin and Light, but I don't believe it's in the record that any conversation regarding this occurred after he went with Chaffin and Light.

MR. STEPP: Your Honor, nothing that Mr. Speights says is in the record. None of that is in the record.

MR. SPEIGHTS: But the complaint is in the record, which he relies on and I rely on that complaint. It's the longest complaint I have ever drawn in my life, and I hope I got all the specific facts in there, but leaving that aside,

the second thing ---

THE COURT: Is Balsam Mountain, for the most part, undeveloped? I know it has a few homes on it; is that correct?

MR. SPEIGHTS: It's basically developed. It's now, I don't know which generation of owners, but it's still active. It's gone through a lot of ---

THE COURT: It has roads, right?

MR. SPEIGHTS: It has roads.

THE COURT: Okay.

MR. O'KELLEY: Apparently, they're not paving them.

THE COURT: Pardon me?

MR. SPEIGHTS: Apparently, they're not paving them.

THE COURT: Okay. And I will just say I've driven through Balsam Mountain, a year or so ago is what I'm guessing.

MR. SPEIGHTS: And the policy, which we will discuss with Chicago, does cover, we believe, encroachments and trespasses and those continue to start every day. That's what triggers coverage every day. Thank you.

THE COURT: Okay. So you've taken care of, obviously, Counsellor. Can we go to Mr. McCall now, and his client, Coward, who was the closing attorney; is that correct?

MR. MCCALL: That's correct, Your Honor. And obviously some of our grounds overlap, but two I want to focus on are

the two that are defendants. And the first one really goes to the heart of why my clients were invited to this party back in January of 2015.

THE COURT: Apparently, the unrecorded plat ended up in the file that you turned over in discovery. And I understand from reading your brief that you said that Mr. Coward called and said, "What's this all about? What's the problem?" and asked for a copy of this unrecorded plat was and got a copy of it and stuck it in his file, and when he turned it over, they believe now that he must have had that a long time ago. That's pretty much it, right?

MR. MCCALL: That's exactly right, Your Honor.

THE COURT: Okay. Just so I'm clear.

MR. MCCALL: It wound up on the first page of Mr. Loflin's file and they didn't get a copy of it until 2013. But when they copied their file and sent it to the Loflins, there it was, the unrecorded plat on the very first page of the documents they produced. And I don't blame Mr. Speights for not just taking our word for it, that we didn't have it all along and wanted to do some discovery. But we've now done that discovery and it's undisputed that we didn't have it all along. That we didn't get it until 2013, and that's significant because literally every one of their six causes of action against my clients are all based on the allegations that they knew about this unrecorded plat all

along and either failed to disclose it to them, or even worse, they actively concealed it from them. So that is our first ground for summary judgment.

The second one is based on the fact that my clients are a North Carolina attorney and a North Carolina law firm and the claims against them arise out of their representation of the Loflins and their purchase of property in North Carolina, North Carolina law applies.

THE COURT: I think it's so ironic, and Professor Spitz is sitting back there today. With that said, keep going.

MR. MCCALL: So, of course, North Carolina has a four year statute of repose for claims against attorneys and this choice of law question and the statute of repose was the subject of a recent Court of Appeals decision that I was involved in, in September. That is Rogers v. Lee, 777 S.E. 2d, 402, and that is frankly, Your Honor, it's a case that's all on fours with what we're dealing with here.

It was a claim against -- actually the attorney there is a South Carolina attorney but who is also licensed in North Carolina. He was representing his client in a North Carolina matter. The client sues him in South Carolina and the trial court applies the North Carolina substantive law and it arose out of a settlement that happened 11 years earlier. The claims were based on acts that occurred more than four years to the day they filed suit, like we contend

is the same here. And the trial court granted summary judgment based on the statute of repose, the Court of Appeals affirmed. So we would submit that, that same case provide the very clear guidance for this Court to find that the Loflin's claims against my clients are barred by the statute of repose.

THE COURT: Mr. Speights?

MR. SPEIGHTS: Well, I don't blame Mr. McCall for arguing a case he won in the Court of Appeals. I do think it's not on all fours. If I were Mr. McCall, I would argue that case as well, but I think it can be distinguished. I think it can be distinguished legally, and I think even if North Carolina law applies, that's not the end of the ballgame.

Let me say that whether North Carolina law applies, the Rogers' case had before it an agreement, a contract, a retainer agreement, which said North Carolina law would apply, and that's not the situation involved here. In fact, in some of the cases, and this would be the subject of a brief, if we get to that point, and some of the cases that the Court of Appeals relied on, they distinguished those cases based upon the fact that they had a retainer agreement which said that North Carolina law would apply. Obviously, we can brief that.

But let me go back to the more fundamental issue, and

it affects both the statute of repose and it affects the statute of limitations, insofar as Mr. McCall raises it.

The Court of Appeals said that the last act, which is what they were concerned with, occurred in four years, and therefore, it was barred by the North Carolina Statute of Repose. Well, in our situation, first of all, I have another exhibit here I can pull out. We have a situation in which when Mr. Loflin was represented by Mr. Coward in 2002, he writes him a letter and says, "We will be glad to help you in the future regarding any matters that come up," or something to that effect.

Well, certain matters did come up in 2006, and I believe the record will show that Mr. Coward knew in 2006 that there was a problem in addition to Mr. Bethea knowing there was a problem. What did Mr. Coward do? He's got a client who has a real prob -- oh, excuse me, in 2006, the record is undisputed that Mr. Loflin called Mr. Coward. That's undisputed in the record. Mr. Coward does not deny that he got a call from Mr. Loflin. What does Mr. Coward do? Nothing. Now, this is his lawyer. I've got a problem. I'm down here in Beaufort, South Carolina, and I've got this problem. Nothing.

Then, in 2013, Counsellor, and this is reflected in Mr. Coward's deposition, Counsellor calls Mr. Coward and says, "Hey, there's a lawsuit going on down in South Carolina, and

they're raising questions about this." What does Mr. Coward do then? He investigates the matter. He goes and gets a copy of the plat and he says, and I have nothing to refute this, because as a member of the bar I accept that that is what occurred. He gets a copy of the plat and puts it in his file. He also goes, according to Mr. Coward's deposition, he also goes and walks the property. He was very curious about this property, this matter which he closed. And the retention letter says, you know, that he would represent Mr. Loflin on this. What did Mr. Coward do in 2013, Mr. and Mrs. Loflin's lawyer, about his clients? Nothing. I mean, he jumps when Counsellor calls. Why didn't he pick up the phone and call Mr. Loflin and say, "Hey, there's a problem here. I'm aware of it. What can I do to help? I know you've got a big mess in North Carolina. I'm a North Carolina Lawyer. I represent you. I represented you in this transaction. Apparently, there's a problem." Where is the call emanating from the lawyer to Mr. Loflin in 2013? And that is within the statute and the statute of repose.

In addition, in 2014, we're talking last acts, and we're talking about statute of limitations in 2014. The Loflin's had to proceed and serve a subpoena and a notice of deposition et cetera, on Mr. Coward to find out what's going on up there. And Your Honor, I think will probably remember

this -- I know you have a lot of hearings, but this is sort of unusual. That's when Mr. Coward went to his brother, the judge, and got an ex parte Order and Counsellor at the hearing on how our ability to get his files concerning his representation of the Loflins. That's an undisputed thing. Now, Mr. Coward says he was at the beach, et cetera, et cetera, but the ex parte Order, which the judge signed said "This is over. You can file a new petition," but it wasn't just, "Hey, give the man 10 more days." It was just missing Mr. Loflin's attempts in this lawsuit to find out what was going on with Mr. Coward.

So I think all of these events that occurred, first of all, get around the statute of repose because they are the last acts. The last acts did not occur back in 2002 or 2006. And in any event, I think there is an issue of fact whether Mr. Coward had some duty, some obligation, to help out his client in this matter to once being put on notice as early as 2006.

THE COURT: Do you have any case law that says there is a continuing duty of a lawyer after they do a closing or a transaction or how long they have a duty? Is there any case law to that effect?

MR. SPEIGHTS: Well, I will tell you, Your Honor, this last week I used a real estate lawyer, the best one in Hampton County, Mr. Algae Solomons; this young man's daddy.

I bought a house in Hampton. I will assure you in 10 years if I have a problem, I can call Algae and say, "Algae, you remember that loan you closed? What's going on?" And I have Mr. Coward's letter here somewhere. I will find it when I sit down in a minute. It's not the greatest warranty in the world about "I'll do anything and everything in the world." But it's not "File is closed. Good luck. See you later."

It's like, he is a lawyer that represented him with regard to this matter up there, and I think he had some obligation to him. That's something that could be argued. That could be another motion for summary judgment on that. That could be a trial, whatever. But it's not just something that could be discounted that when he's put on notice of a problem, and jumping at counsel, investigating it, and going out there, he doesn't call his clients and talk to them about it and advise them of it.

MR. MCCALL: Your Honor, I think there's just a fundamental difference between having an attorney close on your purchase of property and you know, ten years later consider using that same attorney when something else comes up with that property versus having a continuing duty over the course of those ten years to deal with any and everything having to do with that property just because you closed it.

And Your Honor asked for some law on it, and since we are talking about the last act, for purposes of the North Carolina statute of repose, the site that I have is a North Carolina case. Jordan v. Crew, 482, S.E.2d, 735. It's a Court of Appeals decision from 1997. It specifically involves a real estate closing and hails as the last act for purposes of North Carolina statute of repose is the drafting and delivery of the deeds, not the subsequent refusal to correct errors in those deeds. So they rejected his proposition for some continuing duty to correct some error that happened; that the last act for purposes of the statute of repose is the actual drafting of the delivery of the deeds.

THE COURT: Can I ask y'all one other little question? Looking through the file, where is your -- when you brought Coward, et al, in, I'm assuming you had your affidavit of legal negligence in this case.

MR. SPEIGHTS: No, Your Honor, you ruled that we didn't have to do that because the statute only applies to South Carolina lawyers.

THE COURT: And it was a North Carolina lawyer. I got it. Okay.

MR. MCCALL: And if I could address a few of the other arguments here; trying to figure out where to start with them. You know, it's admitted that my clients did not get

off on the right foot in this case when they had to quash the subpoena, but they ultimately did produce a copy of the file when they asked for it, they had a signed client authorization, and we would ask that the Court certainly set aside those allegations in the complaint and consider what we think are some very meritorious legal arguments on why we should be out of the case now.

Mr. Speights mentioned that in the Rogers' case there was a contractual provision that provided the application of North Carolina law, and frankly, that was just icing on the cake in that case. The real issue, if you read through the decision, is whether the injury and tort occurred in North Carolina and they said that a case arising out of an attorney's representation of a client in North Carolina is governed by North Carolina law because the injury or the tort occurs in North Carolina.

As far as my clients actually receiving a copy of the unrecorded plat in 2013, I don't think that has any bearing on the statute of limitations or the statute of repose, because at that point, based on the allegations in the complaint, the Loflin's actually knew about the unrecorded plat for seven years before my clients ever knew about it. They'd known about it all along. They never even told my clients about it. But at the point in 2013 when my clients got a copy of the unrecorded plat, they had already filed a

lawsuit, the lawsuit about the unrecorded plat, against Counsellor and Chicago Title and Balsam, so we don't think that has any bearing on those two defenses.

MR. SPEIGHTS: Two things. I'll slow down and maybe I can be a little more precise. Mr. Loflin called Mr. Coward in 2006. Mr. Coward knew about the problem at the same time Mr. Loflin knew about the problem. Secondly, this is a letter I will hand up, Your Honor, dated March 25th, 2002, "We'll be happy to assist you in any follow up you may require." As a lawyer, lawyers are careful about what they write. Mr. Loflin took him up on that. Nothing. 2013, he knows there is a huge mess. Nothing. In 2014, he stiffs him. I think there is enough there, Your Honor.

On the case I disagree with also -- when we get to the point of briefing the case I will try to distinguish. I understand Mr. McCall knows more about that case than I will ever know, but I can read what the Court said and I do believe that the case can be distinguished and everything about this case is in Beaufort County. The property is there. Everything but the piece of property, the damages he chose -- Mr. Coward chose, the Beaufort County Title Insurance, agency, worked with a Beaufort County lawyer, et cetera, et cetera. In any event, I'm not going to argue the case now.

THE COURT: All right. So that takes care of Mr.

Coward's motion. I think we can finally get around to Chicago Title.

MR. O'KELLEY: Yes, Your Honor. And we have two more motions -- well, two other aspects to our motion. One about the breach of contract for Title Insurance and one about the claim for negligence.

Your Honor, I didn't hand up this letter from August 21st of 2012, Mr. Speights did. But I'm happy to have the Court look at this letter from my client, Chicago Title, by a fellow named Alistair Fisher, who was assistant vice counsel at the time. The Loflin's submitted a claim in 2012, six years after they claimed to know about this unrecorded plat, and the second paragraph in this letter is key, and it also relates to the language that is on pages seven and eight of our brief.

Chicago Title got a claim in, they went out and hired somebody to do a title search in the records in Jackson County. And they did a title search and what happened, and everyone agrees that this is factually determined by everyone in this case, there is no revised plat of record in North Carolina.

Therefore, title appears to be established as insured as the original plat was as of the policy date, the correct plat. Furthermore, the original plat depicts the property described in Schedule A of the policy and the policy has

been handed up to Your Honor. Therefore, there appears to be no title defect in this matter. Moreover, Schedule B, paragraph eight of the policy, specifically excludes coverage for the amount of acreage. However, in this case, there appears to be no discrepancy with the amount of acreage, pursuant to the title records.

In the event the developer records a revised plat which appears in the public record after the policy date, any matter arising there from will be considered a post-policy issue and therefore be excluded under paragraph three of the exclusions of the policy. They go on to deny the coverage.

And Your Honor, that's the key. There is a large list of enumerated title risks under this policy and Mr. Speights said, "Well, we think number three applies, because we think there is fraud here." Great. If there's fraud, you can file a title claim, except you have to go on to the exclusions. And Your Honor, our courts have said that title insurance is a little different from normal insurance. Title insurance covers that which is in those defects and encumbrances of title which are in existence at the time the insurer takes title. That's the preservation capital case which we cite in our brief. It's the first American case that we cite.

In paragraph three, the exclusions say, "That first affect your title after the policy date are specifically not

covered." Your Honor, that should get us out of here. We should say thank you, pack our bags and go home. But Your Honor, I think we go even a step further. If Your Honor looks at a case called Christianson v. Michael, which is also in our brief. It's a 1996 case. That case held that Chicago Title could not have breached a contract where there was no coverage for some 14 acres of land that was described in that case. It was an acreage dispute case. We've got an acreage dispute case here. We have a case that says, "Oh, if there's no coverage, then there's no breach of contract." So we think we're out on that ground.

We also think we're out on the grounds of negligence, Your Honor, because if there's no coverage, where is there a duty to come in and say you somehow violated this policy. We've had -- and Your Honor asked a very important question about Mr. McCall's client. Where's the expert affidavit? And apparently Your Honor ruled ---

THE COURT: Apparently, I did.

MR. O'KELLEY: You did while we were here for that motion to amend and you said well, that statute only applies to South Carolina lawyers.

But Your Honor, the way to establish a breach or a duty or a violation is through an expert witness. And we've had no expert witness say that Chicago Title as a title insurance company, you have somehow breached your duty to

the Loflins and that breach has proximately caused damages to the Loflins. This case, again, has been pending since 2013, Your Honor.

Without that expert testimony, I think there is some common background, too. So Your Honor read our briefs. Those are the two arguments we have as to the two allegations against us, and the last two causes of action in Mr. Speight's complaint, which he described as being the lengthiest complaint he has ever read. And it is very well written. It is very well drafted. It is factually dense and there is a lot of meat on those bones. But there is not a lot of meat as to Chicago Title. We're mentioned in paragraph 20 of the amended third complaint; you issued a title insurance policy. And then there's this great leap of faith, "Well, you've reached your contract because we think there's some fraud somewhere, so we've got enough to keep you in this case. Oh, and by the way, you're negligent. Thanks so much. See you in Court."

Your Honor, we think we get out for the reasons I've just described.

THE COURT: Okay. Thank you. Mr. Speights?

MR. SPEIGHTS: I'm aware that Buster is sitting behind me. I didn't have the honor of being in his class. I had David Means, who I'm sure he knows. But I'll try to be careful and not misstate any law.

Your Honor, I think - well, let me step back, and then I think I have a simple answer for what has been proposed. We lost a great American this year, Yogi Berra. Yogi Berra said, "This is deja vu all over again." And it really is for reasons I will explain, deja vu all over again, with respect to this summary judgment motion.

Back in the old days, I can say that now, someone would go to a lawyer and get a title opinion. And I used to do a little title work when I was young, and we would write a letter and say, "This is subject to just what I saw on the record. I can't guarantee what's on the ground. I can't guarantee about unrecorded easements, or encumbrances, or anything." You can take any Beaufort County or Hampton County lawyer who did title work over the years, and even today, they will put that in there. I thought that Mr. Coward put that in his title opinion letter. He's a good lawyer. And that's where the lawyers' obligation stops. But a good lawyer also says, "If you want to get something in addition to this to cover the risks which my letter does not cover, you can always go out and get title insurance. So in this instance, you go to Chicago Title Insurance to cover risks that are not covered by just what is on the record.

So, if Hamlin is right, and he says this most of the time, but not always, that all he's doing is covering what's

on the record, there really is a great scam going on here. You're not getting anything other than what you would get if you just took Mr. Solomon's letter or Mr. Coward's letter or whatever.

In short, this is an insurance policy and we're not talking about some title abstract out there; that's a whole other issue. We're talking about an insurance company and an insurance company insures risks. There must be risks if they insure beyond what the lawyer does.

I took the deposition of the Chicago Title person, who I also believe is in Court today. I took her deposition, and contrary to what I understood Chicago Title's position to be, she admitted that in her deposition, which I will also submit. I'm going to bring a wheelbarrow here when I submit all of this, Your Honor. I will also submit, or I will attach it as exhibits if I have an opportunity to file a brief, that there are circumstances when the insurance goes beyond what's on the record title. Specifically, this was her testimony. "It's Chicago's position that it does not provide coverage so long as the record title is correct. Answer: I would say that the coverage is governed by the terms and conditions of the policy, so there are possibly circumstances where there would be coverage for things that are not of record title." That's his witness. I think I closed shop and went home after she testified to that. I

think, actually, I said I'd go to lunch. I came back and said I had no more questions.

So I want to -- I think we get over the hurdle of is a title insurance policy just limited to what's record title by the testimony. But Your Honor, there's a more fundamental -- and then we get to the interpretation of the contract and it's hornbook law. That any ambiguities of the insurance contract must be read in the light most favorable to Mr. Loflin in this case.

But I want to go back to Yogi Berra. We've been here. We've done this. Chicago filed a motion to dismiss in 2014. That motion to dismiss came to be heard before Judge Kinard. Judge Kinard heard all of the arguments that you've heard today, except I didn't have the deposition yet of the Chicago person. Mr. Solomons argued the matter before Judge Kinard. I was not there, and if we need to get to the contract construction, I'm going to defer to Mr. Solomons to reargue what we argued before Judge Kinard. But Judge Kinard heard us and Judge Kinard ruled. He denied the motions to dismiss.

THE COURT: They were motions to dismiss, Mr. Speights.

MR. SPEIGHTS: I know where you're headed, Your Honor.

THE COURT: I've got to tell you, y'all heard that first motion I heard this morning on a motion to dismiss by what was probably the worst crafted complaint I've ever

seen? I'm going to go ahead and tell you right now, at a minimum, the defamation cause of action still stands.

So again, y'all get the pre-ruling and I think I've had time to e-mail you. That's the simple fact. Again, it was written by a pro se plaintiff. So again, as much as I -- and I loved Judge Kinard. He was my saving grace I can tell you. When we were really snowed under here, he bought a house here and he came and was willing to do anything. He was a great, great judge, and I dearly love him. He heard so much non-jury for us. It's so wonderful.

But I can tell you this, on a motion to dismiss, that's exactly what I expect Judge Kinard to do. So that doesn't have all that much significance.

MR. SPEIGHTS: I clearly understand you telling me that you don't believe that dog will hunt, but I've got to make this point.

THE COURT: Okay.

MR. SPEIGHTS: For the record and when hope springs eternal that once I make this point, you will say, "Oh." I want to hand you -- I handed you earlier the motion for summary judgment, just the body of it. I now have that on the bottom. I have on the top the motion to dismiss. I'd like to ---

MR. O'KELLEY: Your Honor, I think you've ruled on this. The motion to dismiss was heard by Judge Kinard.

This is a motion that's not even before the Court and there was a Form Four with Judge Kinard. I was at that hearing and Mr. Speights was not. Judge Kinard said, and he said to Mr. Solomons ---

MR. SPEIGHTS: Well, wait a minute. I'm going to object to him quoting somebody.

THE COURT: All right. You brought it up. You brought it up, so here we go.

MR. SPEIGHTS: Well, I'm in the argument, though, Your Honor.

THE COURT: Just let me see what you want to show me, but the motion is ---

MR. O'KELLEY: --- Your Honor ---

MR. SPEIGHTS: --- I just want to make the argument ---

COURT REPORTER: One at a time, please.

MR. SPEIGHTS: --- and he will stand up and say anything he wants. I didn't understand that you had ruled against me. I understand you were giving me clear concern that I wasn't going to get very far with this argument, but I did not understand that you were telling me to be quiet, to sit down, and that you had already ruled.

THE COURT: I didn't. You can go ahead. It's a motion to dismiss, that's all anyone needs to say. Okay.

MR. SPEIGHTS: Now, as reflected there, good lawyers know how to cut and paste, it's the same words on the motion

to dismiss that we find in the motion for summary judgment. A couple of words change, but it's the same thing. Your Honor, I'm not stopping there. I understand your concern. I agree with the Court one hundred percent that that did not prevent them from coming and filing a motion for summary judgment. You go out, you do your discovery, you file a motion for summary judgment, we decide it on the merits. I'm not saying that every motion to dismiss keeps somebody from filing a motion for summary judgment.

Here's the problem, Judge, they have based their motion for summary judgment on the exact thing that was before Judge Kinard. They have based it on the complaint and the contract. There is nothing new. It's the same thing. I have the cases; you know the cases. The law of the case doctrine. I think there is a law of case doctrine here. With the absence of one semicolon difference on what's before you and what was before Judge Kinard, you would in effect, and I understand what you're saying, but you would in effect be overruling Judge Kinard's decision on this, based on the identical record and identical law.

Now, having made that point, I want Mr. Solomons to address the merits, because I sense that you want to hear the merits of given the interpretation that's afforded this contract, whether we can survive summary judgment; and Mr. Solomons is going to make the same argument to you that he

made to Judge Kinard.

MR. O'KELLEY: Your Honor, just briefly about that motion to dismiss, different standard.

THE COURT: I understand.

MR. O'KELLEY: Different body of law. Looking only at the complaint, I was here arguing that motion what Mr. Speights just handed to you showing that very same motion is filed this date and that date; it's Mr. Stepp's motion to dismiss, my motion to dismiss.

We were in this very courtroom and Judge Kinard sat in that chair and I will be happy to produce the transcript if Your Honor would like it where he told Mr. Solomons he was staying in this case by the skin of his teeth and explained title insurance; looked at me and Mr. Stepp and said, "Y'all may get out at summary judgment or directed verdict on down the line, but I'm keeping you in because I have to, and as Your Honor pointed out about the first case you heard this morning, only because there was enough in the complaint to get around the very hard hurdle that we had to jump over to get it dismissed.

And Mr. Speights is exactly right. We did address the exact same issues, because it is a motion for summary judgment. Mr. Speights has to come forward with more than a mere scintilla. He's arguing a contract. He says, "Well, there might be some sort of contra proferentem argument."

He hasn't alleged this contract is an ambiguous contract in any way. So that goes out the window.

He also has an alleged something -- you know, negligent misrepresentation that would bring him parole evidence as to my client to say that really what I was getting was X, Y Z. We have to look at the contract. So he's exactly right, the motion is the same because nothing has changed, Your Honor.

And now the burden shifts a little bit. It's up to them to come forward and say, "Oh, the contract applies because of this," or "Mr. Loflin thinks it applies because of that." An affidavit that Mr. Loflin sent in last week says, "Oh, they've now paved the road." There is nothing to do with the contract or any of the substance that Mr. Solomons may argue right now because he argued it in front of Judge Kinard. But it doesn't change the fact that we're talking about a post-policy matter which is specifically excluded, and again, no affidavit from any expert saying that my client has been negligent.

THE COURT: Okay. Before you respond, Mr. Solomons, we're going to go ahead and take a five minute break. And it really will be five minutes, y'all. So please go ahead and refresh yourselves and come back and we will continue. Mr. Speights, I am aware that you have a plane to catch.

MR. SPEIGHTS: I'm fine, Your Honor.

THE COURT: So I want to keep it going, okay? All

right. Thank you.

(Whereupon, 11:45 a.m., a brief recess is taken, and thereafter, at 11:55 a.m., the following is held on the record.)

THE COURT: Yes, sir?

MR. SPEIGHTS: Just a little housekeeping before Mr. Solomons talks about the contract. Just so the record is straight, Your Honor, I'm going to go ahead and submit a copy of the two plats; one I call the recorded plat and the unrecorded plat, the affidavit of Mr. Loflin, which we referred to showing the road has been paved, and the depositions of Sarah Frances Robertson dated January 6th, 2014, and Cynthia Baines, dated January 21, 2016.

THE COURT: Who is Cynthia Baines with?

MR. O'KELLEY: Your Honor, that's my client

THE COURT: Okay.

MR. SPEIGHTS: She is with Chicago.

THE COURT: Okay. And the first one was?

MR. SPEIGHTS: Sarah Robertson practices with Mr. Bethea.

THE COURT: With Mr. Bethea, okay.

MR. SPEIGHTS: Craig Allen Lehman, February 19, 2016, who was a general manager at Balsam in 2006. J. W. Coward, one of the defendants, September 28th, 2015, and Randy Herron, H-E-R-R-O-N, January 23rd, 2015. He was a surveyor

of the plats in question. Thank you very much.

MR. STEPP: Your Honor, if I may?

THE COURT: Yes, sir.

MR. STEPP: I would object to the Court receiving those materials to the extent that is evidentiary material being submitted in opposition to these motions. We should have had it two days before this hearing. These motions have been on file for over a year, and for Mr. Speights to come in -- and my motion, certainly, I won't speak for anybody else. It's very specific as to grounds; there's no surprises. There was no ambush. All I did was file a memorandum of law that I don't think raised any issues -- I'm sure it didn't raise any issues that wasn't in the motion.

So we come in here to the hearing, and we've had all kinds of representations about what is in those depositions, and now they are just being submitted in bulk. I can't really deal with that. I mean, this should have given to us ahead of time so we could analyze it and consider it. And to the extent that the Court receives it now, I think it's incumbent on Mr. Speights to try to identify for the benefit of counsel what parts of those depositions he suggests are consistent with his representations of what is in the record.

For example, he argued that there was communications

with my client, Counsellor Title Insurance, that if I understood him correctly, suggested that the statute should be equitably tolled against Counsellor. Well, where is that? I'm not aware of it. I'd like to know what he is talking about so that I can respond. But generally, I object to all of it being entered.

MR. O'KELLEY: And Your Honor, I join in the same objection for the same reasons that Mr. Stepp just set forth under Rule 56. We got the affidavit of Mr. Loflin timely as required and there is nothing in here connected to any of the depositions that are submitted. The unrecorded plat is unrecorded and still not of record, so I don't think the Court can take judicial notice of it. And my motion is about the policy and the complaint and the language in the policy, and then the failure to comply with showing how we've been negligent. So Your Honor, I can understand if Your Honor wants to take those on, but I join in the objection.

THE COURT: I can just tell you, I don't know any objections of you giving me deposition testimony. Presumably, you all were there. I should be able to take that. And I'm sure just like Mr. Stepp, I would enjoy it if you would go through and highlight what you're -- as much as, you know, I like reading depositions or dislike reading depositions these days, I would also like, without any

objection from you all, draws to where you all are talking about. If you really need to respond, certainly I will give you all an opportunity. But it sounds like he just put in either five or six depositions, and I don't know, I'm probably going to hear about almost 80, 90 or 100 motions this week. So I don't think the deposition transcripts, unless you've got specific portions you want me to look at, which I'm happy to do. If you could highlight those or ---

MR. SPEIGHTS: I absolutely understand. Let me back up and deal with the objection and then I will deal with the solution. Our rule requires two days for affidavits. I served Mr. Loflin's affidavit in two days. Their beef is with the discovery. Their motions they say are based on discovery. I got their briefs Thursday and Friday. They are the author of their own doing. If I'm going to have an opportunity to brief these issues, I will take all that discovery back right now and I will attach to my brief what I want to point out in response to their brief, but I'm sitting here in no man's land.

I'm not entitled to know what's in Your Honor's thinking in where you're heading on this. And if Your Honor is not going to rule on this matter today, no problem. It is imminently reasonable that you want me to point out specific pages that I referred to. But having given me a brief, two of them on Friday and one on Thursday, I think

that I should be allowed to brief these issues and attach just the narrow pages; probably give you 15 pages rather than several hundred pages.

THE COURT: That would be greatly appreciated by me. If you need to, once you've received those, you can respond as well. But once again, let's not beat a dead horse. This case has been around a long time. Okay. Yes, sir?

MR. SOLOMONS: I hate that you've had to wait. I don't know if I will brief, but I'll try to merit the wait. I'm going to deal with the policy itself, and one of the things I'm going to have the Court look at while we're looking at the policy itself.

THE COURT: Let me just get my hands on it.

MR. SOLOMONS: I have something, in addition to what has been attached. I have something produced to us on May 27th of this year in response to a motion to compel. And so I'm not there yet, but we're going to get there. So that's what I just passed up, Your Honor.

If you take a look just for ease of reference at Chicago's Title memorandum and go back to their Exhibit A. It is the applicable policy in this case. And if you turn off of the first page, you will get to a page that looks like this, Your Honor. It says "Owners Coverage Statement." This is where I would like to spend a little bit of time if Your Honor will indulge me.

I first want, for context, so we're setting sort of the ground rules, that this is indisputably a contract, so the rules of contract will govern. The construction of a contract is ambiguous if it's capable of more than one construction.

THE COURT: Mr. Solomons, I'm going to let you cut to the chase.

MR. SOLOMONS: Sure.

THE COURT: I understand contract law, and this contract with Balsam. I think you need to talk about specific facts of this case. I think you need to show me where the ambiguity is.

MR. SOLOMONS: You got it. Your Honor, I will do it.

THE COURT: Thank you. Also, I'm having a hard time putting my hand on a copy of it. So if anyone has an extra one that they don't need and can lend me for just a moment.

MR. O'KELLEY: I passed one up and here's another copy. I have more where that came from.

THE COURT: I know you did. Thank you.

MR. SOLOMONS: So Your Honor, one of the things you just asked Mr. Speights is I'm going to need some funnel??? on the record you're submitting. The deposition of Craig Lehman on page 31, he states -- now Craig Lehman was, at the time of either the President or the boss of the entity, was cleaning up all of these plat problems, and he said, "What I

knew is we had encroached on the property and what they had purchased wasn't in the agreement with the master plan or their plat." That's the words of Balsam, the encroaching party.

That's not them, but they're insuring against that risk. So it doesn't matter. It's a ridiculous position to say Chicago only insures against things done by Chicago. That isn't what a title insurance policy is. Craig Lehman also says, "What did you understand" -- we asked, "What did you understand the situation with the Loflins to be?" He says, "Well, there is an inaccurate survey. We encroached on the property and it was impacted. I also understood, after the fact, I found out, as I told" -- skipping down, "that it wasn't the actual survey or plat, that was recorded.

In other words, they didn't see another survey or correct plat, and so I think the problem is, they bought, from what I understand from the first thing, they were trying to fix the fact that we were encroaching on the acreage. The lot was impacted and then we found out that we didn't deliver the correct plat." That's Balsam Mountain when they were deposed, Craig Lehman, pages 54 and 55. The earlier excerpt is on page 31. That's the undisputed record.

So we get to the policy language, what is covered, and

we are now here. Someone else owns an interest in your title. Now, we -- Your Honor, if you want to put checkmarks. We believe that numbers 1, numbers 3, numbers 4, numbers 9, numbers 10 and number 14 are all covered. They all are triggered in the facts that are brought about in the record now.

Number one, someone else owns an interest in your title. Now, interestingly, this is where it gets really interesting. If you take a look at the next page, Your Honor, and that's the page that looks like this, and has exclusions, conditions.

Conditions, the first section is title -- no, definitions, definition E, title. The ownership of your interest in the land. It doesn't say record title. It says the ownership of the interest in your land. Not as recorded in the record title, not only as recorded in the record title. It just says the ownership of your land.

Well, Mr. Loflin found out a couple of weeks ago that somebody was paving a road across his land. Someone else seems to own an interest in his ownership of his land. So we go to number three: forgery, fraud, duress, whatever, and we've actually talked this one to death.

We kind of know all of the facts about that, except you don't, because when I was looking through the Randy Herron depo, which we will also make as a part of the record, one

of the things I discovered was the way this -- the timeline is this. They took a master plat, and they took a picture from the sky and then they just chopped it up using an AutoCAD. They didn't do it on the ground, and so that's where he got his 1.837; that's how the road ended up going around.

He then goes, before February of 2002, he goes in September of 2001, and does an on the ground and he figures out that it isn't 1.837, this is 1.61, and he gives that to Balsam Mountain. Then, in December of 2001, after he already knows the 1.837 is wrong, they say, "Let's go record the 1.837, because we like that one better," and that's what they do.

Then after that, before the Loflins have closed, they go and do another survey and it shows 1.4 acres with the road going right through the middle of the property. That's all before the closing; that's the sequence of plats. That's what occurred. Again, not the actions of them, but its insured against. It is fraud that is insured against. It doesn't have to be their fraud; it's fraud. It's an insured risk.

THE COURT: So wait a minute, from what you just told me, that unrecorded plat that showed it was 1.4 was done before the Loflin's closed?

MR. SOLOMONS: Yes.

THE COURT: And did they have it?

MR. SOLOMONS: No, they didn't have it. They didn't have that until 2011 or 2012. They were never given the plat, I don't believe. I don't think they realized until we filed a claim. So no, that unrecorded plat was not shared with the Loflins.

THE COURT: So then, they went to the closing with Mr. Coward, and still, the only plat they were going off of was the recorded one with the 1.87?

MR. SOLOMONS: Correct.

THE COURT: Well, how was Mr. Coward supposed to know that?

MR. SOLOMONS: I'll get to that, but I probably am going to punt, because I'm the policy guy and Mr. Speights is the Mr. Coward guy.

THE COURT: I guess my problem is, is that how could a title insurance company, title agency, Counsellor, how can they all be responsible for something that isn't recorded? Unless you can show somehow that they were all a part of this fraud, knew it and intentionally did this -- I mean, fraud has to be pled with some particularity, as you know, and specificity. I'm just concerned about ---

MR. SOLOMONS: Well, that's for the fraud, Your Honor.

THE COURT: I'll just go ahead and say the other question out there, too. If that is the case, if you can

take an unrecorded plat and have them be responsible for it, I don't know how in the world you're going to get anyone to write a title policy in the future. That's what I'm trying to figure out. Unless you're telling me that this is all one big huge cahoots?

MR. SOLOMONS: And, Your Honor, I appreciate that question. What I would do in response is I would flip that around on you and throw it right back at you. If all you do is insure the record title, then why do we have insurance? Because lawyers do that in the title opinion. Lawyers do what you're saying. They do that with a title opinion.

THE COURT: With respect though, a lawyer's opinion is only as good as the lawyer giving it. They're often wrong. You know, not to disparage lawyers, but.

MR. SOLOMONS: Sure. They have the INO policies, Your Honor.

THE COURT: I understand.

MR. SOLOMONS: And so I'm trying to figure out -- but let me continue and we'll deal with that.

THE COURT: Okay.

MR. SOLOMONS: So also -- actually, we deal with that in the very next one. It says defective recording of any document.

THE COURT: That includes not recording?

MR. SOLOMONS: Defective recording. If it's recorded

one way, how do we know without looking outside the title that it's defective? I ask you that question because -- the position you would say is, well, it says what it says, and therefore, it's self-evident. Well, defective recording means that whatever is recorded is defective and it doesn't reflect the facts and we have to go outside of the title to figure out whether the recording is, in fact, defective.

Now, we have the testimony of Mr. Lehman that says apparently the wrong plat got delivered. That's an issue of fact, Your Honor. We're at a summary judgment stage. It seems to me like we have at least raised the issue on not only one, not only three, but also four defective recordings.

Mr. Lehman says, "Looks like the wrong plat got recorded to me." Let's keep going. "Others have rights" -- arising out of number 9, "Others have rights arising out of leases, contracts or options." Well, the Home Owners Association asserts their right to go across his road arising out of a lease, contract or an option.

THE COURT: Has this HOA been turned over to Homeowners or is it still Developer Controlled?

MR. SPEIGHTS: It has been turned over.

THE COURT: When was it turned over?

MR. SPEIGHTS: May of last year.

THE COURT: Thank you.

MR. SPEIGHTS: Now, number 10 is very interesting. Someone else has an easement on your land. Now, we, as lawyers, think of easements as something very specific, but Chicago Title, if you go back to the definitions page, they decided to define easements, so it's not the specific recorded easement.

They define easement as "The right of someone else to use your land for a special purpose." Doesn't say recorded. That's their definition. So, if I look at 10 and it says, "We insure against someone else having easement on your land," and they define easement in the definitions under 'A' as "The right of someone else to use your land," I don't know how we haven't raised a record where someone else is using his land, on a road, and doesn't say anything about being recorded. That's a covered risk. I can't help if what I'm saying makes their title cover things that are expansive and unable to be known. I didn't write their title insurance for them.

And then "Other defects, leans or encumbrances." That's so vague. I really don't know what that means, but I know it doesn't mean anything having to do with the title. We've already covered title. Now, here's where it gets even more interesting, Your Honor. So we have those policies, and that's why I passed those up. We had those policies produced actually after we had deposed the people from

Chicago Title. We didn't get these until after that or we would have asked some questions about this, but we really don't have to.

If you take a look at the last page, they're numbered 1 of 8 through 125. We're going to start on 125 and then thumb up until you get to what looks like what we've been looking at, you know, the same conditions, definitions and the same cover page, which is 120. So 120 should look exactly like the front page, which is the one in question. This is the 1987 policy, 6-1-87. And all these are drafted by this group called Alta. And then if you flip up from the '87 policy, the next one up the stack, which looks like this, is the '92 policy.

Now, if Your Honor doesn't mind, please turn to the '92 policy, which is numbered 114. We took Ms. Bang's deposition and she's here with us today.

THE COURT: Again, she's with Chicago Title?

MR. SOLOMONS: Yes, Your Honor. And she says -- we ask, "There are standard title insurance policies promulgated by Alta," and she says, "Alta has standard owner's policies, standard lender's policies, and we look at the different forms. I'm trying to think; yeah, there's a '92, and that's what you have in front of you, and then there are some others." And then she says, "The 14 residential policy follows along the same general provisions

as other standard forms, but however, different jurisdictions have different requirements." And then she goes on to say, but the policy in Loflin is not one that she's used to looking at as much as the '92." All right. And here's why that's significant. If we look back up at the '92, the '92 only covers the title. If you compare the '87 to the '92, the '87 has all these different provisions that the '92 doesn't have. The '92 is clear. It looks like all it was meant to cover was the title and then legal access. And that's all it says. If you compare the '92 which she says "That's the one I'm used to seeing more often," to even the most recent, which is '98; the '98 has all kinds of provisions that are not just the title. So not only the '87, but the '98 -- they show what it means to expand beyond the title, because we know from the '92, if they want to confine this to the argument they made to this Court, they know exactly how to do it, but they didn't do that. They had all these other policies.

Now, the other part of this is, Ms. Bangs said, "Yeah, but these things kind of mean the same thing. We have the same standard language. And I imagine Hamlin, they stand up and say, "Well, they're all applied sort of the same."

In some ways I kind of want him to say that, because in the covered risk of the '98, it says -- under covered risk 25, "Your neighbor builds any structure after the policy

date, other than boundary walls or fences, which encroach onto the land." That's what it says in the covered risks. We took their deposition and they said, "Look, these all are kind of the same language." If the difference between '87 and '92 doesn't mean anything, then the difference between '87 and '98 doesn't mean anything. In other words, I'm covered both ways.

And so, I won't talk about contract law, because you've already warned me, but if you have any questions factually specific, I want to answer those.

THE COURT: Actually, before we do that, I appreciate the depositions y'all have given me directing me straight to what you want and highlighted. Mr. Speights said he could narrow it down to about 15 documents, if necessary, so I appreciate that.

Yes, Mr. O'Kelley?

MR. O'KELLEY: Briefly, in reply, Your Honor.

THE COURT: Yes, sir.

MR. O'KELLEY: The document that Mr. Solomons just handed you, we did produce. They asked after Ms. Bangs' deposition to show us some copies of different types of policies, which we did, but it doesn't matter, Your Honor, because we're talking about the policy at issue, which is in front of you.

And it's very interesting that Mr. Solomons pointed out

something very specific in the condition section, and that is on page 2 of the policy, definition mentioned title. And what he says is, "Well, let's looks at E Title: The ownership of your interest and land," and that's where he ended it. He left out the comment that says "as shown in Schedule A."

So, let's turn to schedule A. And that is, if the bottom says plaintiff, and it has 209 at the bottom. Schedule A, bottom of 3, middle of number 3. "That certain lot or homestead, number 108, containing 1.837 acres as shown on the plat, slide 83." And Your Honor has heard from all of us, that that's the only plat of record.

The most interesting thing about what Mr. Solomons just talked about was that he did not discuss the exclusion that we have pointed out to the Court that says, "We do not cover title risks that arise post policy." That's title risk number 3 and there are four bullets under risk number 3, Your Honor, and it's the one at the bottom that matters that says the first affect your title after the policy date," and that's what our Supreme Court says, title insurance is different. And, Your Honor, Mr. Solomons also said, "Well, then why do we need that title insurance? We'll just rely on what an attorney said."

Well, mortgages are missed every day by attorneys; title insurance covers that. Someone comes in and says here's

this easement that you missed in the title search. Title searches miss things, but in this case, no one missed anything in the title search. And again, we have to look at the contract that's before you.

Your Honor, I ask, why are all of these people in cahoots. Well it'd be a heck of a conspiracy, Your Honor. There's been no allegation about that and there's been no allegation that this contract is in any way ambiguous. The first time I've heard about ambiguity is when you asked Mr. Solomons to point something out and he didn't say, "Well, look we don't know what the definition of easement is," or "We don't know what the definition of title is." It's all set forth in the contract. And, Your Honor, Mr. Speight's quoted my client in the deposition, and she said -- and I wrote this down because I remember he asked it and then he broke for lunch then left. She said, "We are governed by the terms and conditions of the policy, and under the terms and conditions of the policies, I've said, and I'll say until I'm blue in the face here, there's no coverage, there's no breach, and there's no negligence."

THE COURT: No breach and no what?

MR. SPEIGHTS: No negligence.

MR. SOLOMONS: I can address those, Your Honor. I'll address them in reverse order. Actually, what she said was we're governed by the terms and conditions of the policy, so

there are some circumstances that would fall outside record title. That's what she said, that's what the record reflects. I'm not mincing any words there.

The pre-existing condition, the thing they hang their hat on when they say, "Oh, well, he never addresses this. The road has always existed." We have always said that the road has always existed. The problem is it wasn't marked. And so when he went out there and he couldn't tell where his lot is and what his road is, he had no way of knowing that. The deposition testimony actually creates an issue of fact.

Now, Mr. Stepp, he was deposing Mr. Lehman, he wanted very much for him to say that road didn't exist, and he asked him, and I think Mr. Lehman may have even given inconsistent positions in his deposition, which is an issue of fact. So, it is inappropriate for determination of summary judgment.

The last thing I wanted to point out is ambiguity. I'm glad Hamlin brought that up about land, because here's what I can see. It says, "The land as shown in schedule A," is that limiting the ownership to schedule A or is that -- hey, the land we're talking about is the one shown in Exhibit A. I don't know. It looks ambiguous. I don't know how whether you apply that one way, where you would say as shown in schedule A; is that the land we're talking about or is that the property of ownership we're talking about? Is that a

descriptor or something that limits? And I can't tell that by what they've written here. The one thing I do know is it doesn't say anything about the record title as shown in Exhibit A or recorded title as shown in Exhibit A.

MR. O'KELLEY: Actually, it says that exactly, Your Honor, as recorded in the Jackson County records.

THE COURT: Mr. Speights?

MR. SPEIGHTS: I don't want to get into contract interpretation. I want to respond to your theological question, and it's been the issue in this case since day one, and that is the role of the title insurance company. Lawyers make mistakes; we all know that, and I do think -- I agree that Hamlin's right as lawyers make mistakes, they have title insurance. Immediately, if a lawyer misses a mortgage, we get paid and it immediately sues the lawyer or sends them a letter. They are not out a penny. That covers that situation.

But here we have a situation, and I don't think there's any dispute about this, that Chicago Title takes my money. The lawyer takes my money and he does work for it, Mr. Coward made money. Okay? And he does his title search and he supplies an opinion, et cetera, et cetera. That's how he makes his money.

The title insurance company, he takes a check, issues the policy, and in 99.9 percent of the cases, he gets to

keep the money without having to do the first ounce of work. Right? That's what insurance is all about, and that's what I keep arguing with these guys back and forth on. That's why you have insurance, to cover other risks.

Now, I leave it to the younger lawyers to argue about whether these risks are covered by the policy. Mr. Solomons has convinced me, but in any event, the theological question is yes, insurance must mean something more than just what is entitled and that's why I celebrated when Chicago's witness admitted that to me. Thank you.

THE COURT: Let me ask y'all a question. It looks like you mediated this case in front of Bill Lyles back on December 4th, 2015, and I'm seeing in here the people that were there and I just wanted to know if others were there. Hamlin, you were there, obviously. Mr. Speights, you were there. My question, was David Wyatt there on behalf of Balsam, he was there as well?

MR. SPEIGHTS: Yes, Your Honor.

MR. O'KELLEY: Yes, Your Honor.

THE COURT: Okay.

MR. SPEIGHTS: I cannot discuss the mediation, Your Honor. I'm prohibited. If I go over the boundary, you kick me hard. But I think this last issue which we're arguing is the fundamental issue that must be resolved -- we had a great mediator.

THE COURT: I assumed that. I'm kind of wondering why we forced you to mediate before none of these motions were heard, but I understand that. That's why I wanted to know where David Wyatt was in all this and what they were doing?

Can I ask you another question? I can't remember why, but why did this road have to be there? Is this for EMS? What is it for?

MR. SPEIGHTS: Well, it serves a whole community.

THE COURT: Literally, are there further homes and properties up higher?

MR. SPEIGHTS: Yes, Your Honor. If we respond in motion for summary judgment, but the problem is -- if we close the road, which we started to stake out, it's in the affidavit, then Mr. Loflin's going to be a defendant up there on a lawsuit brought by the homeowners who would understandably are going to be very upset, because they can't get to their homes.

THE COURT: I'm just trying to figure out if Balsam is only trying to just only make one person mad or another 25 people on top of it. I'm just wondering how many lawsuits will be coming on what's happening with it all. I'm going to assume that I can be wrong, but oftentimes when there's issues like this, I'm surprised that Balsam hasn't tried in some way, shape or form to do some kind of land swap or something, because there's a lot of undeveloped land up

there from what I know. Like I said, a year, it might even be two years ago, although I do think it was a year ago, because it was after I took my daughter to camp so, okay.

And just so I understand, just the whole flavor of it, none of this matters for your motions, just to let you know. Sometimes I just like to be a little practical. Does this go right to the middle of this lot?

MR. SOLOMONS: As to my understanding it doesn't.

THE COURT: How many further lots does it service that are above Mr. Loflin's lot?

MR. SPEIGHTS: A hundred or so. Now, they do have access going in around-about-way to get there, but this is the direct way.

THE COURT: Got it. And again, none of it matters.

MR. SPEIGHTS: Mr. Lehman's deposition, he does testify to work out a land swap. So there is some history there provided by Mr. Lehman. It's foreclosed.

THE COURT: Mr. Stepp?

MR. STEPP: Thank you, Your Honor. There are other issues that are raised. We've been here a long time. I don't want to belabor those points. I'll certainly call your attention to our client, but I would just point out very briefly. It's our position that the Loflin's have title to the property that's described in their deed. They are legally entitled to that land. They own it. That's a

matter of North Carolina law. South Carolina doesn't even have what we call race notice. North Carolina is pure race, you get into the courthouse first, you win, period. It does not matter if it's not of record, it does not matter.

So the Loflin's own everything that was conveyed to them and that's important, because if they do, then they're not really -- we shouldn't be worried about coverage under the title insurance policy, because there's nothing that has occurred that would be covered. Secondly, Counsellor, how can Counsellor be liable in any respect if the Loflin's own what was insured. On the breach of contract matter, there is no evidence before the Court with any kind of contract with Counsellor. Period. The end. And Counsellor is not a party to the title policy. I support Mr. O'Kelley's arguments, but we're not a party to that contract anyway. So, those issues are all addressed in our memo and I simply didn't want us to adjourn without calling that to your attention.

THE COURT: I appreciate that and I certainly understand that, yes, sir.

MR. SPEIGHTS: Well, I'm not sure where you're headed Judge.

THE COURT: We're not going to re-argue any agency, because we've already been there and done that, so I think I'm fine. I need to know timelines or if anyone feels

compelled to respond, and don't ask me based on which way I'm leading. If you feel like you need to respond, I am happy to give you ten days, Mr. Speights, and then I'm happy to give you all five days to respond to whatever he files.

And again, I don't care if it's a memo. I don't care if it's a letter. If you start sending me documents or something along those lines, I'm going to start objecting all over the place. So, let's just leave it to what the narrow issues are and try to keep it that way. Do you want ten days, Mr. Speights?

MR. SPEIGHTS: Actually, Your Honor, I'd like fifteen, only because I'm about to leave town for eight days.

THE COURT: Okay. You got fifteen days. Gentleman, how long do you need once he submits something?

MR. O'KELLEY: Your Honor, five in response is fine.

MR. MCCALL: That's fine.

THE COURT: Okay. All right. And send everything directly to my office. My e-mail, cmullenj@sccourts.org and that way I'll have it. You need to file a copy as well in the Clerk's office, but I want my own separate copies. Okay?

MR. SPEIGHTS: Thank you, Your Honor.

MR. SOLOMONS: Thank you, Your Honor.

MR. O'KELLEY: Thank you, Your Honor.

MR. MCCALL: Thank you, Your Honor.

THE COURT: Thank you gentleman. I appreciate it.

END OF RECORD

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

CERTIFICATE

I, REBECCA H. HILL, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had in the hearing of the captioned case, in the Court of General Sessions for Beaufort County, South Carolina, on the 13th day of June 2016.

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

August 12, 2016

Rebecca H. Hill
Rebecca H. Hill,
Official Court Reporter