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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III
Beaufort County Master-In-Equity

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SC Court of Appeals

Case No.: 2011-CP-07-02497

Appellate Case No.: 2015-001568

Quartermaster at Broad Creek Landing
Owner's Association, Inc.....Appellant,

vs.

Broad Creek Landing Horizontal Property Regime,.....Respondent.

RECORD ON APPEAL

VOLUME I

September 1, 2016

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INDEX

VOLUME I

Order of Reference of The Honorable Jerri Ann Roseneau dated May 29, 2013	1
Order Ending Case of the Honorable Marvin H. Dukes, III dated September 30, 2014.....	2
Order Denying Plaintiff's Motion for a New Trial and/or Amendment of Judgment of the Honorable Marvin H. Dukes, III filed on June 19, 2015.....	4
Complaint filed dated June 9, 2011 and filed on June 10, 2011	19
Defendant's Answer to Complaint dated July 29, 2011	23
Defendant Broad Creek Landing Horizontal Property Regime's Notice of Motion and Motion for Summary Judgment dated May 3, 2013 and filed on May 6, 2013	26
Defendant Broad Creek Landing Horizontal Property Regime's Notice of Motion and Supplemental Motion for Summary Judgment dated May 6, 2013 and filed on May 7, 2013	31
Memorandum of Law in Support of Defendant's Motion for Summary Judgment dated May 28, 2013	36
Notice of Motion and Motion for a New Trial and/or Amendment of Judgment dated October 9, 2014 and filed on October 14, 2014.....	82
Notice of Appeal dated July 17, 2015	86
Transcript of Hearing before The Honorable Marvin H. Dukes, III on October 1, 2013	104

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

QUARTERMASTER AT BROAD
CREEK LANDING OWNERS
ASSOCIATION, INC.,)

Plaintiff,)

vs.)

BROAD CREEK LANDING
HORIZONTAL PROPERTY
REGIME,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-2497

ORDER OF REFERENCE

Pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, the above-entitled case is an action for breach of contract and may be referred to a Master-in-Equity or Special Referee in the above-entitled county by order of a circuit court judge or the Clerk of Court.

IT IS ORDERED that this case is referred to The Honorable Marvin H. Dukes as Master-in-Equity for Beaufort County, who, pursuant to Rule 53(c) S.C.R.C.P., shall exercise all power and authority which a Circuit Judge sitting without a jury would have, including, but not limited to, making findings of fact and conclusions of law; directing entry of final judgment in this action under Rule 53(b) S.C.R.C.P.; hearing any issues; including motions, and issuing any and all Orders and Supplemental Orders. Pursuant to Rule 53(e) S.C.R.C.P., any appeal from the final judgment entered by the Master in Equity shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

All hearings shall be held in the Office of the Honorable Marvin H. Dukes, III, as Master-in-Equity for Beaufort County, located at:

Beaufort County Courthouse, 102 Ribaut Road, Second Floor of Courthouse; Room 212, Beaufort, South Carolina 29902.

AND IT IS SO ORDERED.

J. A. Rosenau

Clerk of Court for Beaufort County

Beaufort, South Carolina
May 27, 2013

13 MAY 29 AM 10:21
JERRI ANN ROSENAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-07-2497

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendants.

ORDER

ending case

2014 SEP 02 PM 2:00

This case arises out of a dispute surrounding monthly assessments charged to owners of real property at a development known as "Quartermaster" pursuant to a binding contract called the Reciprocal Easement and Amenity Use Agreement ("Agreement"). This matter is presented as a declaratory judgment seeking an Order regarding the "proper monthly fee charged to Quartermaster owners" and an action seeking a refund for any "overcharged assessments and fees charged" under the Agreement.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage. If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495 (2003) (*internal citations omitted*). It is a question of law for the court whether the language of a contract is ambiguous. McGill v. Moore, 381 S.C. 179, 185 (2009).

QUARTERMASTER

TPGL 5121913v1

The Agreement provides in pertinent part:

Monthly Assessment for Improved Lots. Each improved lot within the Quartermaster property, shall pay unto the Regime a monthly assessment amount equal to its pro rata share, if such dwelling unit were an "Average Unit" within the Regime provided further that the budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime fee for the "Average Unit" and provided further that, two thirds (2/3) of the "Property Insurance" line item from the "Average Unit" monthly regime fee is subtracted.

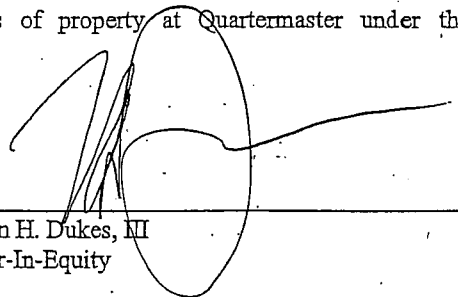
Monthly Assessment for Unimproved Lots Owned by Third Party Purchaser from Quartermaster Within Quartermaster Property. Monthly assessment of unimproved lots owned by third party purchaser from Quartermaster within Quartermaster property shall be 25% of the monthly assessment for improved lots.

"Average Unit" is defined in the Agreement as the "total combined assessment for all regime property owners divided by the number of regime property owners."

This matter was tried before me on October 1, 2013. At trial the parties presented testimony as well as other evidence. After consideration of all evidence, I hereby find that the Agreement is valid and binding as well as clear and unambiguous regarding calculation of assessments. Specifically, the Agreement is clear and unambiguous that: a.) "Average Unit" does not include Quartermaster property as by definition it only includes property that is part of the Broad Creek Landing horizontal property regime, and b.) assessments are to be calculated using the same budget as the calculation of the monthly assessment for the "Average Unit."

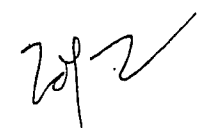
Further, I find no persuasive evidence that Defendant has at any time miscalculated assessments or inappropriately charged owners of property at Quartermaster under the Agreement.

AND IT IS SO ORDERED.



Marvin H. Dukes, III
Master-In-Equity

Tuesday, September 30, 2014


TPGL 5121913v1

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

2015 JUL 19

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-07-2497

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendant.

**ORDER DENYING PLAINTIFF'S
MOTION FOR A NEW TRIAL AND/OR
AMENDMENT OF JUDGMENT**

This matter is before the Court on Plaintiff's Motion for a New Trial and/or Amendment of Judgment filed October 14, 2014. According to the Motion filed by Plaintiff, "The ground for the Motion is that the Lower Court [SIC] failed to rule on certain material issues, all of which were raised in the trial that occurred on October 1, 2013."

In its Order Ending the Case, this court held *inter alia*:

Specifically, the Agreement is clear and unambiguous that: a.) "Average Unit" does not include Quartermaster property as by definition it only includes property that is part of the Broad Creek Landing horizontal property regime, and b.) assessments are to be calculated using the same budget as the calculation of the monthly assessment for the "Average Unit." Further, I find no persuasive evidence that Defendant has at any time miscalculated assessments or inappropriately charged owners of property at Quartermaster under the Agreement.

These rulings are dispositive of the issues raised by the pleadings and the specific issues raised by Plaintiff's current motion are moot. The Court has carefully reviewed the evidence and testimony submitted at the trial of this case, and has considered all filings related to this Motion (except new evidence offered after the Court's Order Ending the Case filed September 30, 2014) and finds no reason to reconsider its earlier ruling on the merits for the reasons set forth in its

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earlier Order and as further explained herein. Therefore, the Motion for a New Trial and/or Amendment of Judgment must be denied. The Court takes this opportunity, however, to further explain its ruling, and specifically address the issues raised by Plaintiff's Motion.

FINDINGS OF FACTS

1. Broad Creek Landing is a development made up of condominiums as well as fee simple properties known as "Quartermaster."

2. The Plaintiff Quartermaster at Broad Creek Landing Owners Association, Inc. ("Plaintiff or Association") was administratively dissolved on December 28, 1998.

3. The condominiums are organized into a regime known as the Broad Creek Landing Horizontal Property Regime ("Regime" or "Defendant").

4. Owners of the fee simple properties of Quartermaster ("Quartermaster Owners") pay to the Defendant Regime monthly assessments pursuant to an agreement known as the Reciprocal Easement and Amenity Use Agreement ("Reciprocal Agreement").

5. The Reciprocal Agreement (dated December 20, 1990) provides for the calculation of monthly assessments for Quartermaster Owners pursuant to Article IV which states in pertinent part:

- a. Section 4.2 provides "...each owner of a lot within Quartermaster shall pay to the Regime or its authorized agent, a monthly assessment of \$100 per each dwelling unit and \$25 per each unimproved lot, both expressed in December 1990 Inflation Indexed Dollars...."
- b. Section 4.2(b) provides, "In determining the amount of the monthly assessment payable by a lot owner within Quartermaster to the Regime for any current year,

2 of 15 n

the Regime may, in its discretion, set an amount different from the immediately preceding year's assessment in accord with the following standards:

1. Monthly Assessments for Improved Lots. Each improved lot within the Quartermaster property, shall pay unto the Regime a monthly assessment amount equal to its prorata share, if such dwelling unit were an "Average Unit" within the Regime provided further that the budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime fee for the "Average Unit" and provided further that two-thirds (2/3) of the "Property Insurance" line item from the "Average Unit" monthly regime fee is subtracted.
2. Monthly Assessment for Unimproved Lots Owned by Third Party Purchaser from Quartermaster. Monthly assessment for unimproved lots owned by third party purchaser from Quartermaster within Quartermaster property shall be 25% of the monthly assessment for improved lots.
6. "Average Unit" is defined in the Agreement as the "total combined assessment for all regime property owners divide by the number of regime property owners."
7. IMC Resort Services ("IMC") is the association manager for the Broad Creek Landing Development and is an expert in the field of Association Management.
8. IMC calculates the assessments for Quartermaster Owners pursuant to the Reciprocal Agreement and has done so for the past seventeen (17) years.
9. Quartermaster Owners have been made aware of how their Quartermaster fees are calculated in writing every year since 1997.

This matter came before the court for trial of the issues raised in Plaintiff's Complaint brought pursuant to the South Carolina Declaratory Judgments Act seeking a judicial interpretation of the Reciprocal Agreement and claiming damages for alleged incorrectly charged assessments.

ANALYSIS

I. The assessments for Quartermaster Owners have been properly calculated pursuant to the Reciprocal Agreement.

The First Cause of Action seeks a declaratory judgment interpreting the Reciprocal Agreement "An action to construe a contract is an action at law," *McGill v. Moore*, 381 S.C. 179, 185 (2009). The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. *Id.* at 495, at 134. A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. *Id.* It is a question of law for the court whether the language of a contract is ambiguous. *McGill*, at 185.

The Reciprocal Agreement clearly and unambiguously provides that "... each owner of a lot within Quartermaster, shall pay to the Regime or its authorized agent, a monthly assessment of \$100 per dwelling unit and \$25 per each unimproved lot, both expressed in December 1990 inflation indexed dollars." (Reciprocal Agreement, Section 4.2, Exhibit B). The Reciprocal Agreement further provides that the Regime may in its discretion calculate the assessment for Quartermaster Owners pursuant to the following formula:

Each improved lot within the Quartermaster property shall pay unto the Regime a monthly assessment amount equal to its prorata share, if such dwelling unit were an "Average Unit" within the Regime provided further that the

4 of 15

budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime fee for the "Average Unit" and provided further that two-thirds (2/3) of the "Property Insurance" line item from the "Average Unit" monthly regime fee is subtracted.

(Reciprocal Agreement, Section 4.2(b)(1)). The assessment for Quartermaster fees has been calculated pursuant to the formulas as set forth in Section 4.2(b)(1) and (2) of the Agreement by IMC Resort Services ("IMC") since at least 1997. There can be no dispute that Quartermaster assessments have been appropriately calculated in the Reciprocal Agreement at all times relevant to this matter based on the formula set forth clearly in the Agreement. The assessments are calculated every year as follows:¹

How Your Quartermaster fee is calculated
(per reciprocal agreement)
2012-2013 Budget Year

Total budgeted expenses @ Broad Creek Landing	\$ 967,920.00
Minus maintenance expense line item	\$(106,845.00)
Minus any termite bonds	\$(7,700.00)
Minus 2/3 property insurance	\$(234,182.00)
	\$619,193.00
\$619,193.00 divided by 278 unit (# of units in Broad Creek Landing)	\$ 2,227.31 avg/unit/year
\$2,227.31 divided by 12 months (\$70,656.00 annual improved)	\$185.61 monthly fee improved
An unimproved pays 25% of \$185.61 (\$9,384.00 annual unimproved)	\$46.40 monthly fee unimproved

¹ This is an example from a document entitled "How your Quartermaster Fees are Calculated" for the 2012 -2013 budget year.

It is also clear from the Reciprocal Agreement that rather than basing the monthly assessment on the formula in Section 4.2(b)(1) and (2), the Regime may assess Quartermaster Owners "\$100 per each dwelling unit and \$25 per each unimproved lot, both expressed in December 1990 inflation indexed dollars." Under this provision (which is not based upon any budgetary calculation), the monthly assessment for 2013 would be \$177.91 per dwelling unit as expressed in December 1990 inflation indexed dollars.² Using the formula set forth in the Reciprocal Agreement, the assessment for Quartermaster Owners for budget year 2012-2013 is \$185.61 per improved lot.

Plaintiff proposes the Court should engage in a re-writing of the Reciprocal Agreement and superimpose Plaintiff's view of the cost to maintain the Common Areas (nowhere set forth in the unambiguous formula contained in the Reciprocal Agreement which is based off the defined term "Average Unit") and suggests that the assessment for 2012-2013 year should be \$60.28, less than 2/3 of the base assessment agreed upon by the parties in 1990. To reach this result would require the Court to completely re-write the contract under consideration (Reciprocal Agreement), which the Court is without authority to do. *Dobyns v. S.C. Dept. Parks Rec. and Tourism*, 325 S.C. 97, 480 S.E.2d 81 (1996) (The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract. Citing *Patterson v. Aetna Life Ins. Co.*, 248 S.C. 374, 149 S.E.2d 915 (1966)).

² See, United States Bureau of Labor statistics accessed at http://www.bls.gov/data/inflation_calculator.htm on 5/28/2013.

6 of 15

II. Plaintiff Quartermaster at Broad Creek Landing Owners Association, Inc. has no standing to bring this lawsuit.

Plaintiff Association was administratively dissolved in 1998. Plaintiff filed the present lawsuit in 2011. South Carolina Code § 33-14-210, provides in pertinent part:

(d) A corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under Section 33-14-105 and notify claimants under Sections 33-14-106 and 33-14-107.

South Carolina Code Section § 33-14-105 provides in pertinent part: "A dissolved corporation continues its corporate existence but may not carry on any business *except that is appropriate to wind up its affairs . . .*" (emphasis added).

Both the significant time lapse and the substance of this action demonstrate that it is not one that is permissible under South Carolina law. The filing of this lawsuit thirteen (13) years after Plaintiff's dissolution clearly cannot be considered business that is "appropriate to wind up" Plaintiff's affairs. Plaintiff seeks in its First Cause of Action a declaration of rights and in its Second Cause of Action "a refund of all overcharged assessments and fees charged to it under the Agreement" dating back to 1999.³ As such, all of the Plaintiff's alleged damages were incurred *after* the dissolution, thereby precluding any argument that this lawsuit is in any way "winding up" the affairs of the association. Simply put, the Plaintiff association does not exist and has absolutely no right nor authority whatsoever to bring the present action.⁴

Not only did the Plaintiff Association not exist during the period of time relevant to this lawsuit, it had no board of directors and thus no decision-making body to authorize the bringing of a lawsuit. Accordingly, this suit is an ultra vires action (if same is possible given that the

³ Plaintiff has no standing to assert a claim for damages in this action (see Section III of this Memorandum) and this claim is barred by the statute of limitations (see Section IV of this Memorandum).

⁴ Plaintiff filed articles of incorporation on May 16, 2013. This created a new entity and did not have the effect of reinstating the right of the plaintiff to do business.

entity does not exist). It appears a few disgruntled "members" of the non-existent Plaintiff Association are pursuing this action for their own benefit in the name of the non-existent entity.

Plaintiff has no standing and no authority to bring the claims presented in this lawsuit and therefore the claims asserted herein

III. Plaintiff Quartermaster at Broad Creek Landing Owners Association, Inc. has no standing to bring claims for damages.

As noted, Plaintiff Association seeks in its Second Cause of Action damages for allegedly overcharged assessments. The Plaintiff Association does not have standing to bring a claim for damages in this action because the Association has suffered no damages. The Association does not and has never paid assessments to the Defendant Regime. All assessments have been billed to and paid by individual property owners.

Even if the Plaintiff Association existed and had authority to bring an action, cannot bring an action for damages in a representative capacity. The South Carolina Supreme Court and the United States Supreme Court have both adopted the following three part test to determine if an association has standing to bring suit: "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Georgetown County League of Women Voters v. Smith Land Company, Inc.*, 393 S.C. 350, 713 S.E.2d 287 (2011), citing *Beaufort Realty*, 346 SC 298, 301 (Ct. App. 2001); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). "[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it

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can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (U.S. 1977) (*superceded on other grounds*). Per the United States Supreme Court: "An organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof." *Warth v. Seldin*, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). "Where an association seeks to recover damages on behalf of its members, the extent of injury to individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 167 (N.C. Ct. App. 2001) (*Creek Pointe Homeowner's Ass'n* cited by South Carolina Supreme Court in *Georgetown County League of Women Voters*, at 18). "Indeed, damages claims usually require significant individual participation, which fatally undercuts a request for associational standing." *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278, 284 (2002). The requirement of individual participation has been understood to preclude associational standing when an organization seeks damages on behalf of its members. *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544 (U.S. 1996). *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 167-168 (N.C. Ct. App. 2001) (finding that plaintiff homeowner's association's pursuit of monetary damages required the participation of individual homeowners, therefore homeowner's association lacked standing to bring suit under *Hunt* test).

The Plaintiff Association seeks monetary damages in form of "a refund of all overcharged assessments and fees charged to it under the Agreement." (Complaint, ¶ 15). The Quatermaster Owners, not the Plaintiff Association, pay assessments to the Regime. Thus, the damage claims are not common to the entire (non-existent) Association, nor shared equally, and the existence and extent of injury requires individualized proof of damage. Alleged damages to an individual Quatermaster Owner would necessarily vary in an infinite number of ways, including but not limited to, how long the individual owner has owned the fee simple property, whether or not the property was improved or unimproved⁵, whether the property was owned by one or more individuals and/or entities, whether the property was rented, whether the owner actually paid the assessments due (as opposed to being in arrears), whether the individual owned one or more fee simple properties. The assessments Quatermaster owners pay to the Regime varies from year to year. Based on Plaintiff's record of property transactions, the properties at issue have changed hands nearly 150 times since 1999. Not only do Quatermaster owners change every year, the assessments change every year that the budget changes, which has been at least six times since 1999. Lots may change from unimproved to improved at any time, thereby changing the assessments due mid-year, or even mid-month (assessments are pro-rated from time of groundbreaking). Any award of damages for over-assessments to the Plaintiff's association would not only go toward an association that does not exist, does not and has not paid the assessments complained of, but also whose "membership" is constantly changing, and which would require individualized proof of damages in a multitude of different ways.

⁵ The calculation of assessments for improved and unimproved lots varies depending if the lot is improved or unimproved. An improved lot is one with a house on it, while an unimproved lot is just the land with no structure. The assessment for unimproved lots is 25% of the assessment for improved lots (Reciprocal Agreement Section 4.2(b)(2), Exhibit B).

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Plaintiff seeks hundreds of thousands of dollars in "damages" for alleged over assessments. Notwithstanding the fact that Plaintiff Association has never paid any assessments, an award of "damages" as sought in this action would necessarily result in a large special assessment to the owners of Broad Creek Landing, potentially force units into foreclosure, and adversely impact the well-being of the entire community, including Quartermaster.

IV. Plaintiff's claims are barred by the statute of limitations.

The statute of limitations for breach of contract is three years. S.C. Code Ann. § 15-3-530 (2005). 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 (2007). A breach of contract action generally accrues at the time the contract is breached. *Id.*, citing, *State v. McClinton*, 369 S.C. 167, 173, 631 S.E.2d 895, 898 (2006). Accordingly, Plaintiff's claim for declaratory relief is barred, and even if the court were inclined to grant an award of damages, the earliest the Court could consider for the calculation thereof would be three years from the date of filing of the Complaint.

Plaintiff urges the Court to apply a 20 year statute of limitations on the theory that the Reciprocal Agreement is allegedly a "contract under seal." S.C. Code Ann. § 15-3-520(b). An instrument need not have an actual seal affixed to it in order to be considered a sealed instrument. Section 19-1-60 of the South Carolina Code provides:

Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

Courts in South Carolina construe this statute narrowly. *Orlando Residence, Ltd. v. Hilton Head Hotel Investors, et al.*, 2013 U.S. Dist. LEXIS 36087 (D.S.C. 2014).

The circumstances in which a contract will be considered to be a "sealed instrument" were recently examined by Judge David Norton in the *Orlando Residence* case, *supra*. Judge Norton explained the status of South Carolina law on this issue as follows:

Inclusion of standard attestation language, such as "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals," is not enough to indicate the parties' intent to create a sealed instrument. *Lasch*, 609 S.E.2d at 551-52. Rather, courts will find an intent to create a sealed instrument only where the standard attestation language is accompanied by additional indicia. Compare *Treadaway v. Smith*, 325 S.C. 367, 479 S.E.2d 849, 855 (S.C. Ct. App. 1996) (finding sealed instrument where agreement included standard attestation language plus the language "SIGNED SEALED AND DELIVERED IN THE PRESENCE OF [signatures of parties and witnesses]"), and *S. Carolina Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464, 467 (S.C. Ct. App. 1984) (finding sealed instrument where the agreement included standard attestation language plus the notation "L.S.," the abbreviation for *Locus sigilli* or "the place of the seal," by the parties' signatures), with *Clifton, LLC v. Tadlock*, No. 11-cv-01234, 2012 U.S. Dist. LEXIS 35659, 2011 WL 909826, at *5 (D.S.C. Mar. 16, 2012) (finding no sealed instrument where the only indicia of an intent to seal was the phrase "Signed, sealed and delivered" immediately above the parties' signatures and the agreement did *not* include standard attestation language), and *Lasch*, 609 S.E.2d at 551-52 (finding no sealed instrument where only indicia of intent to seal was standard attestation language).

The settlement agreement in this case includes the following standard attestation language immediately preceding the parties' signatures: "IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals as of this 1st day of November, 1994." Settlement Agreement 19. This language closely mirrors the language at issue in *Lasch* and, as in *Lasch*, the settlement agreement in this case includes neither the language "SIGNED SEALED AND DELIVERED" nor the abbreviation "L.S." Nelson's confession of judgment similarly contains no language that indicates that it is a sealed instrument. South Carolina judicial precedent dictates that the settlement agreement and confession of judgment cannot be considered sealed instruments, and therefore are not subject to the twenty-year statute of limitations for sealed instruments. To hold otherwise "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state." *Lasch*, 609 S.E.2d at 552. South Carolina's three-year statute of limitations for contract actions controls in this case.

Id.

This case presents the identical scenario to that examined in Orlando and the cases cited therein. Here, the Reciprocal agreement concludes with the words "IN WITNESS WHEREOF, the parties herby set their hands and seals," but no other indicia that the parties to this action intended the instrument to be sealed. In fact, the "Probate" sections of the document attesting to the signatures of both parties to this action⁶ glaringly omit any reference to a seal, and the signatures of the parties are not followed by any indicial such as "L.S." or "Seal" as required by South Carolina precedent. Accordingly, Plaintiff's unsupported assertion that the document was signed "under seal" is rejected, and the three year statute of limitations is applied to this claim.

V. All remaining arguments set forth by Plaintiff are without merit and/or moot.

To the extent not specifically addressed herein, the Court has considered all remaining specific issues identified by Plaintiff in its motion which the Plaintiff contends the Court failed to rule upon in the Order Ending the Case and finds them to be without merit.

Having already ruled that the formula at issue in the Reciprocal Agreement is clear and unambiguous, it would be improper for the court to go beyond the plain language of the agreement to discern the intent of the parties.

Furthermore, because the covenant is clear and unambiguous, we look only to the language of the covenant and not to extrinsic evidence to determine the intent of the parties. See *C.A.N. Enters., Inc., v. South Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988) (when a contract is clear and unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms).

⁶ Of particular interest and as further evidence these parties did not intend to affix a seal to the instrument, the other signatory to the Reciprocal Agreement, F.J.S.G.P. II (the property developer) contains a Probate that states: "she saw the within named F.J.S.G.P. II by its duly authorized representative, sign, seal and as the act and deed of the Partnership, deliver. . . ." The omission of this language from the signatures of the other two signatories, who happen to be the parties to this action, is further evidence that those parties did not intend the instrument to be "sealed."

Moser v. Gosnell, 334 S.C. 425 (S.C. Ct. App. 1999).

The terms the Plaintiff asks the Court to define and interpret are not used in the formula at issue, therefore it would be improper for the Court to attempt to define these terms in an effort to vary the terms of the unambiguous written agreement. *Id.*

As noted above, the formula called for by the Reciprocal Agreement is build off the assessment of an "Average unit," defined as the "total combined assessment for all regime property owners divide by the number of regime property owners." The parties have, therefore, agreed that the budget for the "Average unit" in Broad Creek Landing is the measuring stick for determining the assessment amount for Quartermaster. To find otherwise would be in direct conflict with the unambiguous terms of the agreement. Further, the Court has already specifically ruled that there is "no persuasive evidence that Defendant has at any time miscalculated assessments or inappropriately charged owners of property at Quartermaster under the Agreement." This issue has been dealt with in the original order and Plaintiff's assertions are without merit.

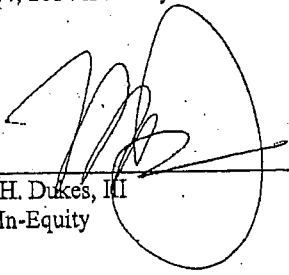
VI. Plaintiff is not entitled to recovery of attorney's fees as a matter of law.

Attorney's fees are not recoverable unless authorized by contract or statute. *Baumann v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 139 (S.C. Ct. App. 2008). Attorney's fees are not authorized by either the Reciprocal Agreement nor any applicable statute. Therefore, the Plaintiff's claim for attorney's fees is denied.

CONCLUSION

Having previously ruled that the contract at issue is clear and unambiguous and that there have been no errors in the calculation of the assessments under the terms of the agreement, and

further having addressed the issues raised by Plaintiff's current motion, the Motion for a New Trial and/or Amendment of Judgment filed October 14, 2014 is hereby denied.
AND IT IS SO ORDERED.



Marvin H. Dukes, III
Master-In-Equity

Beaufort, South Carolina

6/17 2015

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
QUARTERMASTER AT BROAD)
CREEK LANDING OWNERS)
ASSOCIATION, INC.,)
Plaintiff,)
vs.)
BROAD CREEK LANDING)
HORIZONTAL PROPERTY)
REGIME,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-_____

COMPLAINT
(Non-Jury)

2011 JUN 10 PM 2:47
CLERK OF COURT
BEAUFORT COUNTY, S.C.

The Plaintiff, Quartermaster at Broad Creek Landing Owners Association, Inc., by way of Complaint of the Defendant named above, would allege that:

FOR A FIRST CAUSE OF ACTION

1. The Plaintiff, Quartermaster at Broad Creek Landing Owners Association, Inc. (hereinafter referred to as "Quartermaster") is a South Carolina non-profit corporation composed of members owning property in Quartermaster located at Broad Creek Landing, Hilton Head Island, Beaufort County, South Carolina.

2. The Broad Creek Landing Horizontal Property Regime (hereinafter referred to as "Broad Creek") is a condominium Regime formed and existing pursuant to the South Carolina Horizontal Property Act.

3. This action is brought pursuant to the South Carolina Declaratory Judgments Act in that there is a case in controversy existing between the parties and their respective rights need to be judicially determined.

4. The parties entered into a Reciprocal Easement and Amenity Use Agreement (hereinafter referred to as the "Agreement") on December 20, 1990, recorded on December 27, 1990 in the Office of the Register of Deeds (hereinafter referred to as the "ROD") for Beaufort County in Book 567 at Page 1392.

5. The Agreement was amended on May 28, 1993, said Amendment being recorded in the ROD office for Beaufort County on June 9, 1994. in Book 711 at Page 179.

6. All owners within Quartermaster own their properties in fee simple and said properties are not a Horizontal Property Regime. The Agreement was designed to establish the rights of the respective parties and the owners within Quartermaster and Broad Creek to share certain road, amenities, and open spaces, and to further share the use and maintenance costs of certain roads, amenities, and open space charges.

7. The Quartermaster property included a lagoon which Broad Creek desired to utilize as a common amenity.

8. The Agreement provided that Quartermaster owners were to pay a pro rata share for Regime road maintenance, roadside landscaping, insect control, security, and for maintenance, improvement, and operation of the common area. The funds paid by Quartermaster owners were to be used exclusively for landscape maintenance and improvement, security, pool supplies and maintenance, pest control, and common area electric, common area sewer, garbage and trash collection, management fee, reserve and general office expenses of the Regime.

9. Broad Creek has been improperly billing and invoicing owners in Quartermaster for a substantial period of time for an amount in excess of that authorized by the Agreement. Unauthorized charges include, but are not limited to, insurance, reserves, the improper allocation of charges that are

not authorized or warranted under the Agreement and the imposition of an improper proportion to various charges.

10. The owners of Quartermaster have made repeated demands for Broad Creek to refund and appropriately charge monthly assessments and Broad Creek has refused to do so.

11. The owners of Quartermaster have made repeated attempts and requests for financial information to justify the monthly charges assessed by Broad Creek. Broad Creek and its management agent have consistently failed and refused to provide the required and requested information.

12. Broad Creek has recently taken the position that the Agreement does not provide Quartermaster members with membership in the Broad Creek Regime and, therefore, Quartermaster does not have the right to review the Regime records. Broad Creek has refused to provide documents.

13. The Plaintiff requests that the Court inquire fully into the charges being levied by Broad Creek, issue the appropriate Orders concerning financial disclosure and the proper monthly fee charged to Quartermaster owners, and award Quartermaster its reasonable attorneys' fees associated with this declaratory judgment.

FOR A SECOND CAUSE OF ACTION

14. Each and every allegation of the First Cause of Action is realleged as fully as if repeated verbatim herein.

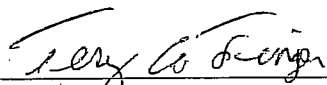
15. The owners of Quartermaster are informed and believe they are entitled to a refund of all overcharged assessments and fees charged to it under the Agreement.

16. Quartermaster is informed and believes it is entitled to escrow any disputed charges during the pendency of this action.

WHEREFORE, Quartermaster prays that the Court inquire fully into the matters raised by the pleadings, issue the appropriate Orders, grant unto the Plaintiff a judgment for all charges in excess of

that authorized by the Agreement between the parties, award Quartermaster its' reasonable attorneys' fees and costs, and for such other and further relief as is just and proper.

FINGER & FRASER, P.A.


Terry A. Finger
Attorney for Plaintiff
35 Hospital Center Common, Suite 200
P. O. Box 24005
Hilton Head Island, SC 29925-4005
(843) 681-7000

Hilton Head Island, South Carolina
June 9, 2011

F:\Client\Q - R\Quartermaster\Broad Creek\Pleadings\Complaint.doc

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-07-2497

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendants.

ANSWER

Defendant Broad Creek Landing Horizontal Property Regime ("Defendant") answers the Complaint as follows:

FOR A FIRST DEFENSE

1. Defendant does not have sufficient information on which to admit or deny Paragraph 1, and therefore denies same.
2. Defendant admits the allegations of Paragraph 2.
3. Paragraph 3 does not contain allegations, which this Defendant must admit or deny. To the extent that Paragraph 3 could be construed to contain allegations against this Defendant, all such allegations are denied.
4. Defendant admits the allegations of Paragraph 4.
5. Defendant admits only that document entitled "Amended Reciprocal Easement and Amenity Use Agreement" was executed on May 28, 1993 and recorded in the ROD Office for Beaufort County on June 9, 1994 in Book 711, at Page 179. Defendant denies all remaining and inconsistent allegations.

TPGL 3942077v1

6. Defendant admits that owners within Quartermaster are not part of the Horizontal Property Regime. In response to the remainder of allegations contained in Paragraph 6, Defendant craves reference to the Reciprocal Easement and Amenity Use Agreement ("Agreement"), which speaks for itself and denies all remaining and inconsistent allegations contained in Paragraph 6.

7. In response to the allegations contained in Paragraph 7, Defendant craves reference to the Agreement, which speaks for itself and denies all remaining or inconsistent allegations.

8. In response to the allegations contained in Paragraph 8, Defendant craves reference to the Agreement, which speaks for itself and denies all remaining or inconsistent allegations.

9. Defendant denies the allegations of Paragraph 9.

10. Defendants denies allegations of Paragraph 10.

11. Defendant admits on information and belief that some owners of Quartermaster have requested some information. Defendant denies all remaining and inconsistent allegations of Paragraph 11.

12. In response to the allegations contained in Paragraph 12, Defendant craves reference to the Agreement, which speaks for itself and denies all remaining or inconsistent allegations.

13. Paragraph 13 does not contain allegations which this Defendant must admit or deny. To the extent that Paragraph 13 could be construed to contain allegations, Defendant denies all such allegations. Defendant denies that Plaintiff is entitled to the relief requested in Paragraph 13.

TPGL 3942077v1

FOR A EIGHTH DEFENSE

24. Plaintiff has engaged in *ultra vires* action.

FOR A NINTH DEFENSE

25. Plaintiff has not sustained any damages and, therefore, Plaintiff may not recover on its claims.

FOR A TENTH DEFENSE

26. Plaintiff's claims are barred in whole or in part by the defense of in pari delicto.

FOR AN ELEVENTH DEFENSE

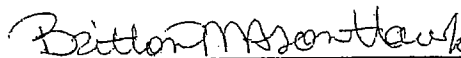
27. Plaintiff's claims are barred by condonation, acquiescence, and/or ratification.

FOR A TWELFTH DEFENSE

28. Plaintiff has no standing to sue.

WHEREFORE, Defendant demands judgment in its favor dismissing the Complaint and awarding it costs, attorneys' fees and such further relief as the Court deems just and equitable.

TURNER PADGET GRAHAM & LANEY P.A.



John S. Wilkerson, III
Britton Mason Hawk
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, SC 29413
Phone: 843-576-2819
Facsimile: 843-577-1648
Email: Bmason@turnerpadget.com

ATTORNEYS FOR DEFENDANT

Charleston, SC
July 29, 2011

TPGL 3942077v1

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

)
)
)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-07-2497

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendants.

**DEFENDANT BROAD CREEK
LANDING HORIZONTAL PROPERTY
REGIME'S NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT**

TO: PLAINTIFF AND COUNSEL

You will please take notice that ten (10) days after the service of this notice upon you or as soon thereafter as counsel may be heard, the Defendant Broad Creek Landing Horizontal Property Regime will move before the Presiding Judge of the Court of Common Pleas for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting summary judgment on all issues in this case on the following grounds:

1. Plaintiff does not have standing to assert a claim for monetary damages.
2. Assessments against the owners of Quartermaster at Broad Creek Landing have been properly calculated by Defendant Broad Creek Landing Horizontal Property Regime pursuant to the Reciprocal Easement and Amenity Use Agreement.
3. Plaintiff's claims are barred by the statute of limitations.
4. Plaintiff's claims are barred by waiver.
5. Plaintiff is estopped from bringing this action by the Doctrine of Estoppel by

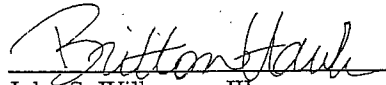
Deed.

6. Plaintiff is not entitled to an award of attorney's fees.

The Defendant will reply upon the pleadings in this action, the Affidavit of Ron Fenstermaker, attached hereto as Exhibit 1, and such additional affidavits and evidence and memorandums as may be presented to support this Motion for Summary Judgment.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.



John S. Wilkerson, III
Britton Mason Hawk
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, SC 29413
Phone: 843-576-2819
Facsimile: 843-577-1648
Email: Jwilkerson@turnerpadget.com
Bhawk@turnerpadget.com

ATTORNEYS FOR DEFENDANT

Charleston, SC
May 3 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-07-2497

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

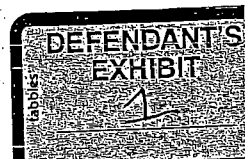
BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendants.

AFFIDAVIT OF RON FENSTERMAKER

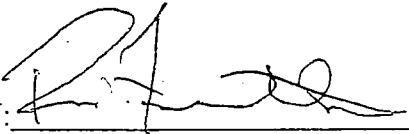
PERSONALLY appeared before me the undersigned, being first duly sworn, deposes and says to the best of my knowledge:

1. I am the president of IMC Resort Services.
2. IMC Resort Services is the association manager for the Broad Creek Landing development.
3. IMC Resort Services has been the association manager for Broad Creek Landing since 1997.
4. Each year since 1997, IMC Resort Services has provided to owners of the fee simple properties at Quartermaster a document explaining how the Quartermaster assessment is calculated.
5. The document attached as Exhibit A is an example of the document provided to Quartermasters owners each year referred to in Paragraph 4.
6. The assessment for Quartermaster owners in the budget year 2012 -2013 is \$184 for improved lots and \$46 for unimproved lots.



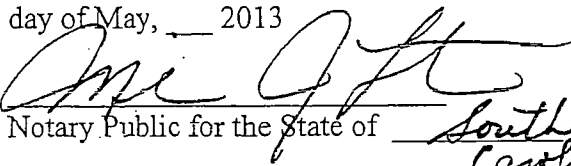
7. I have personal knowledge on all matters contained in this affidavit.

FURTHER AFFIANT SAYETH NOT.

BY: 

Ron Fenstermaker

SWORN to before me this 2nd
day of May, 2013


Notary Public for the State of South Carolina

My Commission Expires: _____

My Commission Expires
October 29, 2014

How Your Quartermaster fee is calculated
(per reciprocal agreement)
2011-2012 Budget Year

Total budgeted expenses @ Broad Creek Landing	\$	965,608.00	
Minus maintenance expense line item	\$	(106,845.00)	
Minus any termite bonds	\$	(7,700.00)	
Minus 2/3 property insurance	\$	<u>(234,182.00)</u>	
	\$	616,881.00	
\$616,881.00 divided by 278 units (# of units in Broad Creek Landing)	\$	2,219.00	avg/unit/year
\$2,219.00 divided by 12 months	\$	184.00	monthly fee improved (\$70,656.00 annual Improved)
An unimproved pays 25% of \$184.00	\$	46.00	monthly fee unimproved (\$9,384.00 annual unimproved)

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-07-2497

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendants.

**DEFENDANT BROAD CREEK
LANDING HORIZONTAL
PROPERTY REGIME'S NOTICE OF
MOTION AND SUPPLEMENTAL
MOTION FOR SUMMARY JUDGMENT**

13 MAY -7 PM 3:49
JAMES A. HARRIS
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TO: PLAINTIFF AND COUNSEL

You will please take notice that ten (10) days after the service of this notice upon you or as soon thereafter as counsel may be heard, the Defendant Broad Creek Landing Horizontal Property Regime will move before the Presiding Judge of the Court of Common Pleas for an Order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure granting summary judgment on all issues in this case on the following grounds:

1. Plaintiff does not have standing to bring this lawsuit.
2. Plaintiff does not have standing to assert a claim for monetary damages.
3. Assessments against the owners of Quartermaster at Broad Creek Landing have been properly calculated by Defendant Broad Creek Landing Horizontal Property Regime pursuant to the Reciprocal Easement and Amenity Use Agreement.
4. Plaintiff's claims are barred by the statute of limitations.
5. Plaintiff's claims are barred by waiver.

TPGL 5065180v1

6. Plaintiff is estopped from bringing this action by the Doctrine of Estoppel by Deed.

7. Plaintiff is not entitled to an award of attorney's fees.

The Defendant will reply upon the pleadings in this action, the Affidavit of Ron Fenstermaker, attached as Exhibit 1¹, and such additional affidavits and evidence and memorandums as may be presented to support this Motion for Summary Judgment.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.



John S. Wilkerson, III
Britton Mason Hawk
40 Calhoun Street, Suite 200 (29401)
P.O. Box 22129
Charleston, SC 29413
Phone: 843-576-2819
Facsimile: 843-577-1648
Email: Jwilkerson@turnerpadget.com
Bhawk@turnerpadget.com

ATTORNEYS FOR DEFENDANT

Charleston, SC
May 10 2013

¹ The original executed affidavit is attached to the original Motion for Summary Judgment.

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-07-2497

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendants.

AFFIDAVIT OF RON FENSTERMAKER

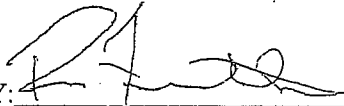
PERSONALLY appeared before me the undersigned, being first duly sworn, deposes and says to the best of my knowledge:

1. I am the president of IMC Resort Services.
2. IMC Resort Services is the association manager for the Broad Creek Landing development.
3. IMC Resort Services has been the association manager for Broad Creek Landing since 1997.
4. Each year since 1997, IMC Resort Services has provided to owners of the fee simple properties at Quartermaster a document explaining how the Quartermaster assessment is calculated.
5. The document attached as Exhibit A is an example of the document provided to Quartermasters owners each year referred to in Paragraph 4.
6. The assessment for Quartermaster owners in the budget year 2012 -2013 is \$184 for improved lots and \$46 for unimproved lots.



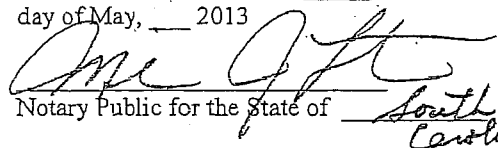
7. I have personal knowledge on all matters contained in this affidavit.

FURTHER AFFIANT SAYETH NOT.

BY: 

Ron Fenstermaker

SWORN to before me this 2nd
day of May, 2013


Notary Public for the State of South
Carolina

My Commission Expires: _____

My Commission Expires
October 29, 2014

How Your Quartermaster fee is calculated
(per reciprocal agreement)
2011-2012 Budget Year

Total budgeted expenses @ Broad Creek Landing	\$	965,608.00	
Minus maintenance expense line item	\$	(106,845.00)	
Minus any termite bonds	\$	(7,700.00)	
Minus 2/3 property insurance	\$	(234,182.00)	
	\$	616,881.00	
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\$2,219.00 divided by 12 months	\$	184.00	monthly fee Improved (\$70,656.00 annual Improved)
An unimproved pays 25% of \$184.00	\$	46.00	monthly fee unimproved (\$9,384.00 annual unimproved)

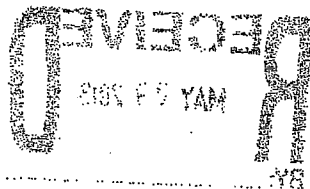


EXHIBIT A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-07-2497

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendant.

**MEMORANDUM OF LAW IN
SUPPORT OF DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant Broad Creek Landing Horizontal Property Regime by and through its undersigned counsel hereby submits this memorandum of law in support of its Motion for Summary Judgment.

STATEMENT OF UNDISPUTED FACTS

1. Broad Creek Landing is a development made up of condominiums as well as fee simple properties known as "Quartermaster."
2. The Plaintiff Quartermaster at Broad Creek Landing Owners Association, Inc. ("Plaintiff or Association") was dissolved on December 28, 1998. (Certified Copy of Certificate of Dissolution, Exhibit A).
3. The condominiums are organized into a regime known as the Broad Creek Landing Horizontal Property Regime ("Regime" or "Defendant").
4. Owners of the fee simple properties of Quartermaster ("Quartermaster Owners") pay unto the Defendant Regime monthly assessments pursuant to an agreement known as the Reciprocal Easement and Amenity Use Agreement ("Reciprocal Agreement", Exhibit B).

5. The Reciprocal Agreement provides for the calculation of monthly assessments

for Quartermaster Owners pursuant to Article IV which states in pertinent part:

a. Section 4.2 provides "...each owner of a lot within Quartermaster shall pay to the Regime or its authorized agent, a monthly assessment of \$100 per each dwelling unit and \$25 per each unimproved lot, both expressed in December 1990 Inflation Indexed Dollars...."

b. Section 4.2(b) provides, "In determining the amount of the monthly assessment payable by a lot owner within Quartermaster to the Regime for any current year, the Regime may, in its discretion, set an amount different from the immediately preceding years assessment in accord with the following standards:

1. Monthly Assessments for Improved Lots. Each improved lot within the Quartermaster property, shall pay unto the Regime a monthly assessment amount equal to its prorata share, if such dwelling unit were an "Average Unit" within the Regime provided further that the budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime fee for the "Average Unit" and provided further that two-thirds (2/3) of the "Property Insurance" line item from the "Average Unit" monthly regime fee is subtracted.

2. Monthly Assessment for Unimproved Lots Owned by Third Party Purchaser from Quartermaster. Monthly assessment for unimproved lots owned by third party purchaser from

Quartermaster within Quartermaster property shall be 25% of the
monthly assessment for improved lots.

6. IMC Resort Services ("IMC") is the association manager for the Broad Creek Landing Development. (Affidavit of Ron Fenstermaker is attached to Motion for Summary Judgment as Exhibit 1; a copy is attached hereto for convenience).

7. IMC calculates the assessments for Quartermaster Owners pursuant to the Reciprocal Agreement and has done so for the past seventeen (17) years. (Affidavit of Ron Fenstermaker).

8. This matter comes before the Court on Plaintiff's Complaint brought pursuant to the South Carolina Declaratory Judgments Act seeking a judicial interpretation of the Reciprocal Agreement and claiming damages for alleged incorrectly charged assessments.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SCR, Rule 56, State Farm Fire & Casualty Co. v. Breazell, 324 S.C. 228, 478 S.E.2d 831 (1996). The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (S.Ct. App. 2008). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. USAA Property & Casualty Insurance Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008).

ANALYSIS

I. The assessments for Quartermaster Owners have been properly calculated pursuant to the Reciprocal Agreement.

This matter comes before this honorable Court as one for declaratory judgment interpreting the Reciprocal Agreement (Reciprocal Agreement, Exhibit B): "An action to construe a contract is an action at law." McGill v. Moore, 381 S.C. 179, 185 (2009). The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. Id at 495, at 134. A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. Id. It is a question of law for the court whether the language of a contract is ambiguous. McGill, at 185.

The Reciprocal Agreement clearly and unambiguously provides that "... each owner of a lot within Quartermaster, shall pay to the Regime or its authorized agent, a monthly assessment of \$100 per dwelling unit and \$25 per each unimproved lot, both expressed in December 1990 inflation indexed dollars." (Reciprocal Agreement, Section 4.2, Exhibit B). The Reciprocal Agreement further provides that the Regime may in its discretion calculate the assessment for Quartermaster Owners pursuant to the following formula:

Each improved lot within the Quartermaster property shall pay unto the Regime a monthly assessment amount equal to its prorata share, if such dwelling unit were an "Average Unit" within the Regime provided further that the budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime fee for the "Average Unit" and provided further that two-thirds (2/3) of the "Property Insurance" line item from the "Average Unit" monthly regime fee is subtracted.

(Reciprocal Agreement, Section 4.2(b)(1)). The monthly assessment for unimproved lots may be assessed at 25% of the monthly assessment for improved lots. (Reciprocal Agreement, Section 4.2(b)(2)). The assessment for Quartermaster fees has been calculated pursuant to the formulas as set forth in Section 4.2(b)(1) and (2) of the Agreement by IMC Resort Services ("IMC") since at least 1997. (Affidavit of Ron Fenstermaker, IMC). IMC is the association manager for the Broad Creek Landing development.¹ Quartermaster Owners have been made aware of how their Quartermaster fees are calculated in writing every year since 1997. (Document entitled "How your Quartermaster fee is calculated" is Exhibit A to the Affidavit of Ron Fenstermaker, which is Exhibit 1 to the Motion for Summary Judgment; a copy of the Affidavit is attached hereto for convenience,). There can be no dispute that Quartermaster assessments have been appropriately calculated in the Reciprocal Agreement at all times relevant to this matter based on the formula set forth clearly in the Agreement. The assessments are calculated every year as follows:²

How Your Quartermaster fee is calculated
(per reciprocal agreement)
2012-2013 Budget Year

Total budgeted expenses @ Broad Creek Landing	\$ 967,920.00
Minus maintenance expense line item	\$(106,845.00)
Minus any termite bonds	\$(7,700.00)
Minus 2/3 property insurance	\$(234,182.00)
	\$619,193.00

¹ As the association manager for the Broad Creek Landing development, IMC is responsible for calculating the assessments due from Quartermaster owners. (Affidavit of Ron Fenstermaker).

² Every year the owners at Quartermaster are provided with a document entitled "How your Quartermaster Fees are Calculated" the contents of which is set forth herein for the 2012 -2013 budget year. (Affidavit of Ron Fenstermaker).

\$619,193.00 divided by 278 unit
(# of units in Broad Creek Landing)

\$ 2,227.31 avg/unit/year

\$2,227.31 divided by 12 months
(\$70,656.00 annual improved)

\$185.61 monthly fee improved

An unimproved pays 25% of \$185.61
(\$9,384.00 annual unimproved)

\$46.40 monthly fee unimproved

It is also clear from the Reciprocal Agreement that rather than basing the monthly assessment on the formula in Section 4.2(b)(1) and (2), the Regime may assess Quartermaster Owners "\$100 per each dwelling unit and \$25 per each unimproved lot, both expressed in December 1990 inflation indexed dollars." Plaintiff Quartermaster agrees that assessments may be levied at the rate of \$100 (or \$25 for unimproved lots) as expressed in December 1990 inflation index dollars. (Quartermaster 30(b)(6), 38:2 -39:1, Exhibit C).

Pursuant to the U.S. Bureau of Labor statistics, the monthly assessment for 2013 would be \$177.91 per dwelling unit and \$44.48 for each unimproved lot, as expressed in December 1990 inflation indexed dollars. (United States Bureau of Labor statistics accessed at http://www.bls.gov/data/inflation_calculator.htm on 5/28/2013). Using the formula set forth in the Reciprocal Agreement, the assessment for Quartermaster Owners for budget year 2012-2013 is \$185.61 per improved lot and \$46.40 per unimproved lot, very close to the assessment amount if calculated pursuant to inflation index. Plaintiff asserts that the assessment for 2012- 2013 year should be \$60.28 for an improved lot and \$15.07 for an unimproved lot. (Quartermaster 30(b)(6), 72:23-73; 74:6-14, Exhibit C). The drastic disparity between Plaintiff's number and the number arrived at when using the formula within the Agreement (\$184 improved; \$46 unimproved) and the December 1990 inflation indexed dollars calculation (\$177.91 improved; \$44.48 unimproved) both demonstrate the absurdity of Plaintiff's position, as does the simple

fact that Quartermaster Owners want to pay less than they did for assessments in 1990. This

result is neither allowed by the Reciprocal Agreement, the law, nor common sense.

II. Plaintiff Quartermaster at Broad Creek Landing Owners Association, Inc. has no standing to bring this lawsuit.

Plaintiff Association was administratively dissolved in 1998. (Exhibit A). Plaintiff filed the present lawsuit in 2011. South Carolina Code Section § 33-14-210, entitled "Procedure for and effect of administrative dissolution" provides in pertinent part:

(d) A corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under Section 33-14-105 and notify claimants under Sections 33-14-106 and 33-14-107.

South Carolina Code Section § 33-14-105, entitled "Effect of Dissolution" provides in pertinent part: "A dissolved corporation continues its corporate existence but may not carry on any business *except that is appropriate to wind up its affairs . . .*" (emphasis added).

Both the significant time lapse and the substance of this action show that it is not one that is permissible under South Carolina law. The filing of this lawsuit thirteen (13) years after Plaintiff's dissolution cannot under any rational theory be considered business that is "appropriate to wind up" Plaintiff's affairs. Plaintiff seeks relief in this lawsuit for allegedly "overcharged" assessments since 1999.³ (Quartermaster 30(b)(6), 59:9-18, Exhibit C). As such, all of the Plaintiff's alleged damages were incurred *after* the dissolution, thereby precluding any argument that this lawsuit is in any way "winding up" the affairs of the association. Simply put,

³ Plaintiff has no standing to assert a claim for damages in this action (see Section III of this Memorandum) and this claim is barred by the statute of limitations (see Section IV of this Memorandum).

~~the Plaintiff association does not exist and has absolutely no right nor authority whatsoever to~~
bring the present action.⁴

Not only did the Plaintiff Association not exist during the period of time relevant to this lawsuit, it had no board of directors and thus no decision making body to authorize for the decision on whether this non-existent entity could bring a lawsuit. (Quartermaster 30(b)(6), 41:24-25, Exhibit C). Accordingly, this suit is an ultra vires action (if same is possible given that the entity does not exist). It appears a few disgruntled "members" of the non-existent Plaintiff Association made the decision to bring suit without authority bestowed by a decision making body on behalf of the Association.⁵ In fact, the *Defendant Regime* actually owns one of the Quartermaster lots (which by the logic of Quartermaster would make it a member of the Plaintiff Association) and was certainly not consulted nor did it condone suing itself.

Plaintiff has no standing and no authority to bring the claims presented in this lawsuit and Defendant Regime respectfully requests the Court dismiss the Plaintiff's claim for damages on this basis.

III. Plaintiff Quartermaster at Broad Creek Landing Owners Association, Inc. has no standing to bring claims for damages.

Plaintiff Association has also asserted a claim for damages for allegedly overcharged assessments. (Complaint, ¶ 15). The Plaintiff Association does not have standing to bring a claim for damages in this action because the Association has suffered no damages. The Association does not and has never paid assessments to the Defendant Regime. (Quartermaster 30(b)(6), 40:23-41:12, Exhibit C).⁶

⁴ Plaintiff filed articles of incorporation on May 16, 2013. This has absolutely no effect on the fact that Plaintiff did not exist during the time period relevant to this lawsuit.

⁵ The decision to pursue legal action was made at a meeting with approximately eight Quartermaster owners present. (Quartermaster 30(b)(6), 47:16-48:12, Exhibit C).

⁶ The Association does not even have a bank account. (Quartermaster 30(b)(6), 41:13- 18, Exhibit C).

The Plaintiff Association also does not have standing to bring a claim for damages in this

action because the Association did not and may not bring this action in a representative capacity on behalf of the "members" of the Association. The South Carolina Supreme Court and the United States Supreme Court have both adopted the following three part test to determine if an association has standing to bring suit: "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Georgetown County League of Women Voters v. Smith Land Company, Inc., 393 S.C. 350, 713 S.E.2d 287 (2011), *citing* Beaufort Realty, 346 SC 298, 301 (Ct. App. 2001); Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). "[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (U.S. 1977) (~~superceded~~ *on other grounds*). Per the United States Supreme Court: "An organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof." Warth v. Seldin, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). "Where an association seeks to recover damages on behalf of its members, the extent of

injury to individual members and the burden of supervising the distribution of any recovery

mitigates against finding standing in the association." Creek Pointe Homeowner's Ass'n. v. Happ, 146 N.C. App. 159, 167 (N.C. Ct. App. 2001) (Creek Pointe Homeowner's Ass'n. cited by South Carolina Supreme Court in Georgetown County League of Women Voters, at 18). "Indeed, damages claims usually require significant individual participation, which fatally undercuts a request for associational standing." Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc., 280 F.3d 278, 284 (2002). The requirement of individual participation has been understood to preclude associational standing when an organization seeks damages on behalf of its members. United Food & Commer. Workers Union Local 751 v. Brown Group, 517 U.S. 544 (U.S. 1996). Creek Pointe Homeowner's Ass'n v. Happ, 146 N.C. App. 159, 167-168 (N.C. Ct. App. 2001) (finding that plaintiff homeowner's association's pursuit of monetary damages required the participation of individual homeowners, therefore homeowner's association lacked standing to bring suit under Hunt test).

The Plaintiff Association in the present action fails prong (c) of the standing test set forth in Georgetown County League of Women Voters because the interests it seeks to protect are not germane to the organization's purpose. The organization does not exist and therefore does not have a purpose. Further, if the Plaintiff Association were in existence at the time relevant to this suit it would still fail prong (c) as it has no part whatsoever in the calculation or payment of assessments.

The Plaintiff Association in the present action also fails prong (b) of the standing test set forth in Georgetown County League of Women Voters because the nature of individualized damages. The Plaintiff Association seeks monetary damages in form of "a refund of all overcharged assessments and fees charged to it under the Agreement." (Complaint, ¶ 15). The

~~Quartermaster Owners, not the Plaintiff Association, pay assessments to the Regime.~~

(Quartermaster 30(b)(6), 40:23-41:12, Exhibit C). Thus, the damage claims are not common to the entire (non-existent) Association, nor shared equally, and the existence and extent of injury requires individualized proof of damage. Alleged damages to an individual Quartermaster Owner would necessarily vary in an infinite number of ways, including but not limited to, how long the individual owner has owned the fee simple property, whether or not the property was improved or unimproved⁷, whether the property was owned by one or more individuals and/or entities, whether the property was rented, whether the owner actually paid the assessments due (as opposed to being in arrears), whether the individual owned one or more fee simple properties. The assessments Quartermaster Owners pay to the Regime varies from year to year. Based on Plaintiff's record of property transactions, the properties at issue have changed hands nearly 150 times since 1999. (Plaintiff's chart of property sales, Exhibit D). Not only do Quartermaster Owners change every year, the assessments change every year that the budget changes, which has been at least six times since 1999. (Quartermaster 30(b)(6), 64:6-9, Exhibit C). Lots may change from unimproved to improved at any time, thereby changing the assessments due mid-year, or even mid-month (assessments are pro-rated from time of groundbreaking) (Quartermaster 30(b)(6), 64:6-9, Exhibit C). Any award of damages for over-assessments to the Plaintiff's association would not only go toward an association that does not exist, does not and has not paid the assessments complained of, but also whose "membership" is constantly changing, and for which would require individualized proof of damages in a multitude of different ways.

⁷ The calculation of assessments for improved and unimproved lots varies depending if the lot is improved or unimproved. An improved lot is one with a house on it, while an unimproved lot is just the land with no structure. The assessment for unimproved lots is 25% of the assessment for improved lots (Reciprocal Agreement Section 4.2(b)(2), Exhibit B).

Plaintiff seeks hundreds of thousands of dollars in "damages" for alleged over assessments. Notwithstanding the fact that Plaintiff Association has never paid a dime to the Regime any award of "damages" would necessarily result in a special assessment in such a magnitude so as to financially destroy the families of the Broad Creek Landing, force units into foreclosure, and ultimately destroy the well-being of the entire community, including Quartermaster. Further, the Regime, by and through its Board, has for seventeen years relied upon the services of an expert professional association manager (IMC) to manage the association, including calculation of assessments and therefore cannot be held liable for any alleged over assessments.

IV. Plaintiff's claims are barred by the statute of limitations.

The statute of limitations for breach of contract is three years. S.C. Code Ann. § 15-3-530 (2005). 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 (2007). A breach of contract action generally accrues at the time the contract is breached. Id., citing State v. McClinton, 369 S.C. 167, 173, 631 S.E.2d 895, 898 (2006). Quartermaster Owners have been aware of the nature in which the assessments are calculated pursuant to the Reciprocal Agreement and their issues therewith since 1999. (Quartermaster 30(b)(6), 55:11-24, Exhibit C). Plaintiff brought this lawsuit in June of 2011, well passed the applicable statute of limitations. Accordingly, Defendant asks that Plaintiff's claim for damages be dismissed on the grounds that Plaintiff's action was not timely.

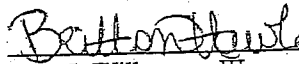
V. Plaintiff is not entitled to recovery of attorney's fees as a matter of law.

Attorney's fees are not recoverable unless authorized by contract or statute. Baumann v. Long Cove Club Owners Ass'n, 380 S.C. 131, 139 (S.C. Ct. App. 2008). Attorney's fees are not authorized by either the Reciprocal Agreement nor any applicable statute. Therefore, Defendant requests this court grant summary judgment denying Plaintiff's claim for attorney's fees.

CONCLUSION

Defendant Regime respectfully requests this Court to dismiss on summary judgment Plaintiff's claims because Plaintiff has no standing to bring this action nor a claim for any damages, the assessments have been properly levied pursuant to the Reciprocal Agreement, and Plaintiff's action is barred by the statute of limitations.

TURNER PADGET GRAHAM & LANEY P.A.



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ATTORNEYS FOR DEFENDANT

Charleston, SC
May 28, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-07-2497

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendants.

AFFIDAVIT OF RON FENSTERMAKER

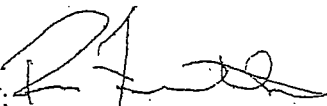
PERSONALLY appeared before me the undersigned, being first duly sworn, deposes and says to the best of my knowledge:

1. I am the president of IMC Resort Services.
2. IMC Resort Services is the association manager for the Broad Creek Landing development.
3. IMC Resort Services has been the association manager for Broad Creek Landing since 1997.
4. Each year since 1997, IMC Resort Services has provided to owners of the fee simple properties at Quartermaster a document explaining how the Quartermaster assessment is calculated.
5. The document attached as Exhibit A is an example of the document provided to Quartermasters owners each year referred to in Paragraph 4.
6. The assessment for Quartermaster owners in the budget year 2012 -2013 is \$184 for improved lots and \$46 for unimproved lots.

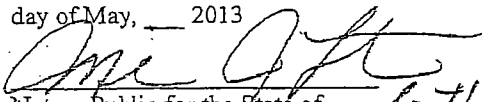


7. I have personal knowledge on all matters contained in this affidavit.

FURTHER AFFIANT SAYETH NOT.

BY: 
Ron Fenstermaker

SWORN to before me this 2nd
day of May, 2013


Notary Public for the State of South Carolina

My Commission Expires: _____

My Commission Expires
October 29, 2014

How Your Quartermaster fee is calculated
(per reciprocal agreement)
2011-2012 Budget Year

Total budgeted expenses @ Broad Creek Landing	\$	965,608.00	
Minus maintenance expense line item	\$	(106,845.00)	
Minus any termite bonds	\$	(7,700.00)	
Minus 2/3 property insurance	\$	(234,182.00)	
	\$	616,881.00	
\$616,881.00 divided by 278 units (# of units in Broad Creek Landing)	\$	2,219.00	avg/unit/year
\$2,219.00 divided by 12 months	\$	184.00	monthly fee improved (\$70,656.00 annual improved)
An unimproved pays 25% of \$184.00	\$	46.00	monthly fee unimproved (\$9,384.00 annual unimproved)

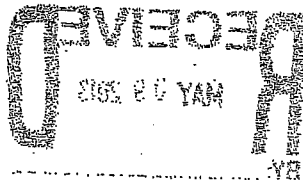


EXHIBIT A

EXHIBIT A

DEPARTMENT OF STATE

COLUMBIA, SOUTH CAROLINA

DECLARATION OF DISSOLUTION BY FORFEITURE

File: 20209460-6

Date of Dissolution DECEMBER 28, 1998

QUARTERMASTER AT BROAD CREEK LANDING
OWNERS ASSOCIATION INC
79 QUARTERMASTER DR
HILTON HEAD ISL SC 29928

Whereas, Section 33-14-200, of the 1976 Code of Laws of S.C., as amended, provides for the dissolution of a corporation by forfeiture if the corporation has failed to:

- (1) File its annual report on or before the date on which such report is due, or
- (2) Pay its franchise tax or income tax on or before the date on which such tax is due and payable, or
- (3) Appoint and maintain a registered agent in this State, or
- (4) Notify the office of The Secretary of State of a change in its registered agent or registered office, or
- (5) The corporation's period of duration stated in its Articles of Incorporation expires.

AND WHEREAS, IT APPEARS FROM THE RECORDS IN THIS OFFICE, AFTER DUE NOTICE, THAT THE ABOVE NAMED CORPORATION HAS FAILED TO MEET REQUIREMENTS OF NOS. 1 AND/OR 2 ABOVE SET FORTH.

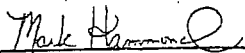
NOW THEREFORE, UNDER THE AUTHORITY OF SAID ACT, THE CHARTER IS HEREBY DECLARED FORFEITED AND DISSOLVED THIS DATE.

Inquiries concerning this administrative dissolution should be directed to the SC Department of Revenue, P.O. Box 125, Columbia, SC 29214, Attn: Corporate Section.

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

MAY 02 2013

Jim Miles
Secretary of State


SECRETARY OF STATE OF SOUTH CAROLINA

SOS-2 (Rev 4/94) 3119

98-04778106
QUARTERMASTER

EXHIBIT B

1392

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

RECIPROCAL EASEMENT
AND AMENITY USE AGREEMENT

34066

THIS AGREEMENT made this 20th day of December, 1990, by and between F.J.S.G.P. II, a Delaware Partnership, as Owner and Developer of Quartermaster at Broad Creek Landing (hereinafter "Quartermaster"), Quartermaster at Broad Creek Landing Owners' Association, Inc. (hereinafter "Association"), and Broad Creek Landing Horizontal Property Regime (hereinafter "Regime").

STATEMENT OF BACKGROUND

WHEREAS, Broad Creek Landing Horizontal Property Regime is an existing condominium regime, with existing roads, amenities and common areas, all as described in that certain Master Deed, By-Laws, Rules and Regulations (hereinafter "Master Deed") dated May 18, 1982 and recorded in the Office of the RMC for Beaufort County, South Carolina in Deed Book 348 at Page 1074 on June 3, 1982, as amended, and the Master Deed and all amendments thereto are hereby incorporated by reference into this Agreement; and

WHEREAS, the Quartermaster at Broad Creek Landing property is identified in certain documents recorded in the public records of Beaufort County, South Carolina as a potential future phase property for the Regime which may have a right to join into the

1393

Regime as a condominium development and share all costs and ownership proportionately with existing owners; and

WHEREAS, in order to develop the Quartermaster Property at lower density and provide single-family housing on the Quartermaster Property, P.J.S.G.P. II has elected to create a subdivision of fifty (50) lots on the property, which technically may not merge into the Regime Master Deed as part of the condominium form of ownership; and

WHEREAS, the Quartermaster Property includes a lagoon which the Regime desires to utilize as a common amenity, together with owners of Quartermaster lots, and the Regime property contains certain recreational amenities, open space and roads which Quartermaster and the Association desire to utilize together with Regime Owners; and

WHEREAS, Quartermaster, the Association and the Regime desire to enter into an agreement to establish the rights of the respective parties and owners within Quartermaster and the Regime to share certain roads, amenities and open spaces; and, further to share the use and maintenance costs of certain roads, amenities and open space charges; and further, to provide for the smooth and orderly functioning of the overall community;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, and for other good and valuable

consideration, the receipt and sufficiency whereof is hereby acknowledged, the parties do hereby agree as follows:

ARTICLE 1 - INCORPORATION CLAUSE. The above recitals are hereby incorporated into this Agreement as an integral part of this Agreement.

ARTICLE 2 - DEFINITIONS. For purposes of this Agreement, the following terms shall have the meanings set forth in this Article 2:

2.1 Amenities Area. That portion of the Regime property as described on Exhibit "A" attached hereto and incorporated herein by reference.

2.2 Quartermaster Property. That certain piece, parcel or tract of land being particularly shown on Exhibit "B", consisting of 7.96 acres, more or less, and containing fifty (50) residential lots.

2.3 Quartermaster Residents. F.J.S.G.P. II, the Association, and the owners of any lot located on the Quartermaster property or any portion of the Quartermaster property or the tenants, guests and family members of any of them.

2.4 Regime Residents. Regime and the owners of any unit subject to the Master Deed or any portion of the Regime property, or the tenants, guests and family members of any of them.

2.5 Common Area. All areas and improvements thereon or thereunder within the exterior boundaries of the Regime Property identified as common area under the Master Deed for the Regime, as the same may be amended from time to time, including parking areas, roadways, sidewalks, landscaped areas, the amenities area.

2.6 Average Unit. Total combined assessment for all regime property owners divided by the number of regime property owners.

ARTICLE 3 - RIGHTS OF JOINT USE OF COMMON AREA.

3.1 Rights to Use Common Area. Upon satisfaction of the conditions stated in Section 3.2 below, Quartermaster Residents shall have the same rights to use the common area located on the Regime Property as Regime Residents, subject to contribution to the costs of maintaining and improving the same as provided in Article Four below. In the same manner, and to the same extent as Quartermaster Residents, the rights of Regime Residents to use the common area located on the Quartermaster Property shall be subject to the rules and regulations and fee structure (if any) promulgated with respect to the common area located on the Quartermaster Property by the governing association, partnership or corporation of the Quartermaster Property, but such rules and regulations shall not discriminate against Regime Residents.

3.2 Conditions Precedent. The rights of the Quartermaster Residents to use the common area located on the

1396

Regime Property shall arise only upon satisfaction of the following conditions:

(a) Payment of all General or special Assessment in accord with Article Four below.

(b) Construction Standards. In the event that improvements are constructed on Quartermaster Property, Quartermaster and Quartermaster Residents shall cause all construction of improvements (including initial alterations and restorations prior to the completion of construction) to be carried out in accordance with the following standards:

(1) Upon commencement of construction, all construction shall be diligently prosecuted to completion in accordance with the terms of this Agreement, subject only to unavoidable delays; and

(2) All construction shall be performed in a good and workmanlike manner with good quality materials and, in the case of improvements to be constructed on common areas of the Quartermaster Property, in accordance with the plans approved pursuant to Article Three, Section 3.2 (c) hereof and in accordance with applicable laws, ordinances, rules and regulations;

(3) Construction work shall be performed so as not to cause any unnecessary interferences with the use and enjoyment of

the Amenities Area, Regime Property or any unit owned by any owner within the Regime; and

(4) Such safety measures to be taken are as reasonably required to protect the Regime and the unit owners within the Regime, and such parties' families, tenants and guests from injury or damage caused by the construction; Regime and the unit owners within the Regime shall be defended, indemnified and held harmless from and against all claims, costs, expenses and liabilities arising from or in respect to the death of or accident, injury, loss or damage caused to any natural person or to property caused or arising out of construction; and the Regime and the unit owners within the Regime shall be defended, indemnified and held harmless from and against mechanics, materialman, and laborers liens resulting from said construction.

(c) The Regime shall have the right to appoint an equal number of members as Quartermaster to the Architectural Review Committee, commencing with the date of execution of this Agreement. No improvements shall be constructed on the Quartermaster property without the formation by Quartermaster of the Architectural Review Committee and a review of such improvement plans by the said Committee including 50% representation by Regime appointed members. Architectural standards for Quartermaster shall be established at the first

meeting of the Architectural Review Committee.

1398

(d) The Declaration of Covenants, Conditions, Easements and Restrictions for Quartermaster at Broad Creek Landing attached hereto as Exhibit "D" shall not be amended without the consent of a majority of the then existing Board of Directors of Broad Creek Landing Horizontal Property Regime.

(e) Approval of Plans. No construction or reconstruction in the Quartermaster Property Common Area can commence until plans and specifications thereof have been approved by the Regime Board of Directors, not to be unreasonably withheld.

(f) Final Plans and Approvals. After approval of preliminary plans by Regime, final plans shall be prepared by the submitting party, which final plans shall be consistent with the concepts indicated on the approved preliminary plans. Such final plans, when completed, shall be submitted to Regime for its approval, which approval shall not be unreasonably or arbitrarily withheld. Regime shall either approve or disapprove in writing such plans within fourteen (14) days after receipt. If disapproval is given, such notice shall specify the items within such final plans which are disapproved and the changes necessary to correct such items. Upon receipt of a notice that final plans are not approved, the submitting party will amend and modify such final plans to meet such objections and will resubmit them for

1399

approval as required herein. If Regime again fails to approve such plans, then the submitting party may again revise such plans and submit them for approval or demand arbitration as provided hereinbelow. Failure by Regime to approve or disapprove such final plans within fourteen (14) days after receipt by it of such plans shall be deemed approval of such plans by it. Following approval of its final plans, the final plans shall not be modified or changed without the written approval of Regime if such changes would violate the terms of this Agreement or lessen the quality of materials or workmanship of said improvements, or change the general architectural treatment of the appearance of such improvements. If Regime disapproves preliminary or final plans submitted hereunder and the submitting party and Regime are unable to resolve any disagreements over such plans within thirty (30) days after their final submission to Regime, then upon the election of the submitting party, the submitting party and Regime shall each select an architect to review such plans as to compliance with this Agreement, which architect shall be selected within fifteen (15) days after such election. If such architects cannot resolve the disagreement over such plans within fifteen (15) days after their selection, then such architect shall select a third architect who shall, within fifteen (15) days after his selection, render a decision as to whether such plans are in

1400

compliance with this Agreement, or whether any changes proposed by Regime are required by this Agreement, which decision shall be final. Any architect selected hereunder shall be independent and shall be a member of American Institute of Architects and shall be regularly engaged in the practice of resort architecture. Any third architect appointed by the initial two architects shall meet the standards imposed in the preceding sentence and shall further not be regularly engaged in practice in the Hilton Head Island, South Carolina area. The charges of the architect selected by each party shall be borne by such party and the charges of the third architect, if necessary, shall be shared equally by both parties. Failure of either party to select an architect within the time frame provided, shall constitute a waiver of its right to object to such plans or any proposed changes therein.

ARTICLE 4 - MAINTENANCE.

4.1 Maintenance Management. Maintenance and operating management of the common area shall be under the control of, and at the sole cost and expense of the Regime Residents, except that the Quartermaster Residents shall bear a portion of the expense of operation and management of the common area, including the amenities area, as set forth in Section 4.2 below.

4.2 Common Area Expense. In order to provide a fund for

1401

Regime road maintenance, roadside landscaping, insect control, security and for maintenance, improvement and operation of the common area, Quartermaster and each owner of a lot within Quartermaster, shall pay to the Regime or its authorized agent, a monthly assessment of \$100.00 per each dwelling unit and \$25.00 per each unimproved lot, both expressed in December, 1990, Inflation Indexed Dollars, said sum to be placed in the Regime account and to be used exclusively for landscape maintenance and improvement, security, pool supplies and maintenance, pest control (excluding termite bond), common area electric, common area water/sewer, garbage and trash collection, management fee, reserve and general office expenses (including, but not limited to utilities, office supplies and professional services). Each unimproved lot monthly assessment shall increase to the then prevailing monthly assessment, as determined in accordance with the provisions herein, for dwelling units at such time as a dwelling unit is started on the lot (i.e. ground breaking) and such monthly assessment shall be prorated between the unimproved property monthly assessment and the improved property monthly assessment for that month.

(a) The Regime assumes the obligation of furnishing services to the Quartermaster Property and the common area of the Regime only to the extent that the cost of such services can be

1402

defrayed by the proceeds from the aforesaid monthly assessment together with the regime fees collected from Regime Residents.

(b) In determining the amount of the monthly assessment payable by a lot owner within Quartermaster to the Regime for any current year, the Regime may, in its discretion, set an amount different from the immediately preceding years monthly assessment in accord with the following standards:

(1) Monthly Assessment for Improved Lots. Each improved lot within the Quartermaster property, shall pay unto the Regime a monthly assessment amount equal to its prorata share, if such dwelling unit were an "Average Unit" within the Regime provided further that the budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime fee for the "Average Unit" and provided further that, two-thirds (2/3) of the "Property Insurance" line item from the "Average Unit" monthly regime fee is subtracted.

(2) Monthly Assessment for Unimproved Lots Owned by Third Party Purchaser from Quartermaster Within Quartermaster Property. Monthly assessment for unimproved lots owned by third party purchaser from Quartermaster within Quartermaster property shall be 25% of the monthly assessment for improved lots.

(3) Monthly Cost for Unimproved Lots Owned by Quartermaster. It is understood that Quartermaster is the

1403

initial owner of all fifty (50) lots within the Quartermaster property, and that Quartermaster will continue to own lots for some time in the future until final sale efforts are completed. The unimproved lots which are owned by Quartermaster as part of its sales inventory will produce the least impact upon the common area. For this reason, unimproved lots within Quartermaster's sales inventory will not be subject to the normal monthly assessment process described above. Specifically, commencing January 1, 1992, Quartermaster shall pay to the Regime, 15% per month of the monthly assessment for improved lots per each unimproved lot owned by Quartermaster.

4.3 Payment of Monthly Assessment. The Regime or Regime managing agent for the common area located on the Regime Property shall prepare an annual budget for maintenance and operating expenses for the common area and the improvements located thereon, including reasonable reserves for repair and replacement and including security, garbage and trash collection, no later than the 15th day of the last month of the fiscal year adopted by the Regime or the Regime managing agent. The Quartermaster Residents shall make monthly payments as required by the Regime or Regime managing agent; provided, however, that the due dates of such payments are the same for both the Regime Residents and the Quartermaster Residents. The first monthly assessment

1404

payable hereunder shall become due and payable in advance at closing of the sale of any lot by Quartermaster to a third party purchaser of any Quartermaster property. The assessment for any month, after the first month, shall become due and payable the first day of the succeeding month.

4.4 Special Assessments. The Regime may, but shall not be obligated to, make special assessments from time to time during the fiscal year of the Regime. Such special assessments may become necessary for various purposes, including, but not limited to, the necessity to restore existing improvements or erect additional improvements on the common area. The Regime, in its discretion may assess each dwelling unit within the Quartermaster Property (including such unimproved lots as are then owned by Quartermaster), provided further that the said special assessment for a dwelling unit and an unimproved lot shall be the same amount and further provided that such amounts are equal to the prorata share, if such dwelling units or unimproved lots were an average condominium within the Regime.

4.5 Delinquent Assessments: Assessment Rights. If any assessment is not paid on the date when such assessment is due, then such assessment shall become delinquent and shall, together with such interest thereon at the rate of fourteen (14%) percent per annum from the date and cost of collection thereof as

1405

hereinafter provided, thereupon become a charge and continuing lien on the said land and all improvements thereon, against which each such assessment is made, in the hands of the then owner, his heirs, devisees, personal representatives and assigns. The personal obligation of the owner at the time the assessment to pay such assessment, however, shall remain his personal obligation for the statutory period and shall not pass as a personal obligation to his successor in title unless expressly assumed by them.

In the event any lot owner within the Quartermaster Property shall fail to pay the amount of any assessment levied pursuant to this Agreement within thirty (30) days of the due date, the owner shall be considered in default. In the event of such default, the Regime, its successors or assigns, may enforce the assessment against the lot owner personally, and/or file a lien against the lot which is the subject of the default and proceed to enforce such lien by foreclosure pursuant to South Carolina law in like manner that mortgages are foreclosed. In the event any legal action is necessary to enforce these assessment provisions, either by personal suit, foreclosure or lien and foreclosure, the defaulting lot owner shall be responsible for all costs and expenses of such action, including reasonable attorney's fees, which may be incurred by the Regime.

Furthermore, any lot owner who fails to pay an assessment due hereunder within thirty (30) days of the due date, may receive a notice from the Regime terminating the right to utilize the common area, including any amenities in the amenities area, and the Regime shall have the power to enforce any such termination of rights and to collect all costs and expenses of necessary legal action, including reasonable attorney's fees. Upon full payment of any past due assessment amount, together with any interest due thereon and cost associated with collection efforts, the delinquent lot owner shall be restored to full use rights under this Agreement. Prior to termination of use rights pursuant to this provision, the Regime shall give the delinquent owner notice, by certified mail, of its election to enforce this provision.

Nothing contained within this article regarding rights of enforcing assessments shall be deemed to prejudice or interfere with the right of any mortgage holder of property within the Quartermaster property or within the Regime property, and the provisions of South Carolina Law, the Regime Master Deed and the Quartermaster Declaration which protects the rights of mortgage holders in assessment collection proceedings, shall apply fully in the event of any assessment collection proceeding pursuant to this Agreement.

1407

ARTICLE 5 - EASEMENTS.

5.1 Rights and Easement Granted unto Regime. F.J.S.G.P. II, as owner of the Quartermaster Property, does hereby grant and convey unto the Regime, the Regime property and all present and future owners of units within the regime property, their heirs, successors and assigns, a non-exclusive, perpetual and appurtenant easement to use, enjoy and/or enter upon for maintenance and/or covenant enforcement purposes, all property identified on the plat referenced on Exhibit "B" hereto. Nothing contained herein shall prevent Quartermaster, the Quartermaster Association or individual lot owners from entering into separate agreements with the Regime or its agents, from time to time, for grounds maintenance of lots and the area lying between lots and the lagoon. Further, nothing herein contained shall prevent the Regime or the Association from exercising any rights to enforcement of provisions contained in the Master Deed or Declaration of Quartermaster upon any portion of the Quartermaster Property whatsoever.

The right and easement granted unto the Regime specifically includes a grant to Regime, its legal representatives, successors and assigns, and the tenants, customers, employees and invitees of such parties, a Non-Exclusive Easement appurtenant to the Regime Property for passage and use for the purpose of ingress

1408

and egress over the Quartermaster Property and for the purpose of walking upon and driving vehicles upon and across all those entrances, drives, roads and walkways which are now or may hereafter from time to time be used for vehicles or pedestrian traffic. The rights granted unto the Regime specifically also includes the right of the Regime and its owners, tenants, customers, employees and invitees of such parties to enjoy the lagoon amenity located upon the property and maintain the same, subject to the exclusions mentioned above. Furthermore, the Regime and its owners shall have the right to enter upon the common property and roads of the Quartermaster Property for the additional purposes of upkeep and maintenance, subject to the Regime and the Quartermaster Association reaching an agreement as to compensation paid unto the Regime for such services from time to time. Quartermaster agrees to convey title to lagoon property, as depicted on Exhibit "B", unto the Regime at the request of the Regime, subject to approval of the existing mortgagee. If such approval cannot be obtained immediately, Quartermaster and its successors and assigns, including the Quartermaster Association agree to convey title after satisfaction of the mortgage, upon the request of the Regime.

5.2 Rights Granted Unto Quartermaster at Broad Creek Landing. The Regime does hereby grant and convey unto the

Quartermaster Property, and present and future owners therein, a non-exclusive, perpetual and appurtenant easement for the access, enjoyment and use of the following properties, subject to the provisions of this Agreement, and particularly subject to the conditions precedent described in Article Three and the compensation provided under Article Four of this Agreement.

(a) Recreational Amenity Use. The Regime hereby grants unto Quartermaster, its lot owners and successors and assigns, an easement and right of use to the recreational amenities contained within the Amenities Area, which is described in Exhibit "A" hereto, including the right to utilize the tennis courts and swimming pools as they presently exist or may be improved or enlarged in the future, together with surrounding open areas of these amenities and access to such amenities over other regime properties, subject to all provisions in the Master Deed and any and all rules and regulations which may be adopted by the Board of the Regime, from time to time, regarding access and use of the amenities, and conduct upon the property, provided that such provisions and rules shall apply equally to Regime owners and Quartermaster owners.

(b) Access and Roadways. The Regime grants unto Quartermaster, its lot owners and their successors and assigns, a non-exclusive, perpetual and appurtenant easement for ingress and

1410

egress over the road system of the Regime to access the Quartermaster Property and the recreational amenities mentioned above subject to all provisions of the Master Deed and any and all rules and regulations adopted by the Board of Directors of the Regime, from time to time, governing activities and conduct upon such property, provided that any such provisions or rules shall apply equally to Regime owners and Quartermaster owners.

ARTICLE 6 - MISCELLANEOUS.

6.1 Duration of Agreement. The terms, conditions and covenants of this Agreement shall become effective on the date hereof and shall continue until the affirmative vote in favor of terminating the same by the Quartermaster Residents holding title to 67% of the lots on the Quartermaster property, plus the affirmative vote of terminating the same by the Regime Residents holding title to 67% of the units on the Regime property.

6.2 Covenants Run With the Land. All covenants, conditions, and agreements contained herein shall be deemed to be covenants running with the land, and shall bind and inure to the benefit of the owners of each of the parcels, or units, or any portion thereof, and their respective heirs, personal representatives, successors and assigns.

6.3 No Partnership. Nothing contained in this Agreement shall be construed to make the parties hereto partners of or

1411

joint venturers with each other, or to render any of the parties hereto liable for the debts or the obligations of the other, except as expressly provided in this Agreement.

6.4 Governing Law: Severability. This Agreement shall be governed and construed in accordance with the laws of the State of South Carolina. If any provisions or a portion thereof of this Agreement or the application thereof shall to any extent be invalid or unenforceable, the remainder of this Agreement or the application of any such other provision or portion thereof, shall not be effected thereby, and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

6.5 Notices. Every notice, which is required to be given hereunder shall be effective only if given in writing and if given or made or communicated by mailing the same by registered or certified mail, postage pre-paid, return receipt requested, as follows:

(i) If to Regime:

Resident Manager

Broad Creek Landing Regime, 40 Point Comfort Road

Hilton Head Island, SC 29928

or at such other address as Regime may at any time designate by written notice as herein provided.

(ii) If to Quartermaster: F.J.S.G.P.II

1412

or at such other address as Quartermaster may at any time designate by written notice as herein provided.

(iii) If to the Association:

Quartermaster at Broad Creek Landing Owners' Association, Inc.

or at such other address as the Association may at any time designate by written notice as herein provided.

(iv) If to a Quartermaster resident: to the address of the lot as established by the United States Postal Service.

(b) Every notice sent as aforesaid shall be deemed to have been given three (3) business days after the time that the same shall have been deposited in the United States Mail, registered or certified, properly addressed as aforesaid, postage pre-paid.

6.6 Modifications. No Agreement shall be effective to add to, change, modify, waive or discharge this Agreement in whole or in part unless such agreement is in writing and signed by 67% of the owners of all portions of the Regime property and the Quartermaster property.

1413

6.7 Captions. Captions of the Articles and Sections of this Agreement are for convenience only and shall not be considered or referred to in resolving questions of interpretation and construction.

6.8 Beneficiaries of Agreement. This Agreement is made for the exclusive benefit of the parties hereto and for their respective legal representatives, heirs, successors and assigns, and not for any third person. Nothing in this Agreement, expressed or implied, is intended to confer upon each such person, other than the parties hereto, their respective legal representatives, heirs, successors and assigns, any rights or remedies under or by this Agreement.

6.9 Waiver. No delay or omission by any party hereto to exercise any right or power accruing upon any non-compliance or failure of performance by any other party of the provisions of this Agreement shall impair any such right or power or be construed to be a waiver thereof. A waiver by any party hereto of any of the covenants, conditions or agreements hereof to be performed by the other party, shall not be constructed to be a waiver of any succeeding breach thereof or any other covenant, condition or agreement herein contained.

6.10 No Dedication. This Agreement is not intended to, and shall not be construed to, dedicate all or any portion of the

1414

Quartermaster property or the Regime property to the general public.

6.11 No Timeshare. No timeshare or interval ownership shall be permitted in Quartermaster.

IN WITNESS WHEREOF, the parties hereby set their hands and seals effective the date first above written.

Lana Marie Cook F.J.S.G.P. II
Witness A Delaware Partnership
Tim J. [Signature] By: *[Signature]*
Witness

1415

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT) PROBATE

PERSONALLY appeared before me the undersigned witness, who being duly sworn, deposes and states that s/he saw the within named F.J.S.G.P. II by its duly authorized representative, sign, seal and as the act and deed of the Partnership, deliver the within written instrument and that said witness, together with the undersigned Notary Public, witnessed the execution thereof.

Anna Marie Cech

SWORN TO before me this 20th
day of December, 1990.

Lewis J. Hammett
Notary Public for South Carolina
My Commission Expires: 2-10-94

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME

Annette Brigel
Witness

BY: Thomas G. DeTore
President

Alba J. Redmont

Attest: Lewis J. Hammett

1416

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT) PROBATE

PERSONALLY appeared before me the undersigned witness,
who being duly sworn, says that s/he saw the within named Broad
Creek Landing Horizontal Property Regime by
Nancy DeFaria its President, sign the within
written instrument and Dennis Ayres its
209 ~~Exec Director~~ attest the same, and as the act and deed of
the Regime, deliver the same and the said witness, together with
the said Notary Public, witnessed the execution thereof.

Sharon Paterson

SWORN TO BEFORE ME THIS 20th
day of December, 1990.

Alaska J. Redmond
Notary Public for South Carolina
My Commission Expires: 4/5/92

1417

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS' ASSOCIATION,
INC.

Anna Marie Cech
Witness

BY: William B. Scott
President

James J. Harris
Witness

Attest: q/a

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

PROBATE

PERSONALLY appeared before me the undersigned witness,
who being duly sworn, says that s/he saw the within named
Quartermaster at Broad Creek Landing Owners' Association, Inc. by
William B. Scott its President, sign the within written
instrument, and q/a its
attest the same, and as the act and deed of
the Association, deliver the same and the said witness, together
with the said Notary Public, witnessed the execution thereof.

Anna Marie Cech

SWORN TO BEFORE ME THIS
20 DAY OF December, 1990.

James J. Harris
Notary Public for South Carolina
My Commission Expires: 2-10-94

Exhibit "A"
Regime Amenity Area
Legal Description

1418

ALL that certain property constituting the common properties of Broad Creek Landing Horizontal Property Regime, as described in that certain Master Deed of Broad Creek Landing Horizontal Property Regime recorded in Deed Book 348 at Page 1074, in the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina, as amended in Deed Book 349 at Page 817, Deed Book 349 at Page 1256, Deed Book 349 at Page 1274, Deed Book 349 at Page 1946, Deed Book 349 at Page 1946, Deed Book 349 at Page 1964, Deed Book 361 at Page 223, Deed Book 362 at Page 496, Deed Book 363 at Page 111, Deed Book 363 at Page 129, Deed Book 374 at Page 1207, Deed Book 384 at Page 1320, Deed Book 413 at Page 886, Deed Book 414 at Page 1180, Deed Book 415 at Page 1216, Deed Book 415 at Page 1221, Deed Book 417 at Page 22, Deed Book 417 at Page 27, Deed Book 418 at Page 1114, Deed Book 421 at Page 532, Deed Book 421 at Page 537, Deed Book 421 at Page 1891, Deed Book 421 at Page 1896, Deed Book 424 at Page 940, Deed Book 424 at Page 226, Deed Book 433 at Page 431, Deed Book 433 at Page 437, Deed Book 433 at Page 447, Deed Book 433 at Page 453, Deed Book 433 at Page 459 and Deed Book 433 at Page 1156, and also all such common properties as described in subsequent amendments to such Master Deed, the Master Deed and all amendments thereof of record in Beaufort County, South Carolina, being hereby incorporated herein by reference.

Save and except therefrom the area actually occupied by residential structures of Broad Creek Landing Horizontal Property Regime or areas reserved as limited common elements of residences thereof.

Exhibit "B"
Quartermaster at Broad Creek Landing
Legal Description

1419

ALL that certain tract, and parcel of land on Hilton Head Island, Beaufort County, South Carolina, containing 7.94 acres, more or less, as shown and described on a plat entitled "Plat of Townhouse Lots of Quartermaster at Broad Creek Landing," prepared by George A.Z. Johnson, Jr., Inc., David E. Gasque, S.C.R.L.S. No. 10506, dated August 21, 1990, and recorded in Plat Book 40 at Page 47 in the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina.

Exhibit "D"
Declaration of Covenants, Conditions,
Easements and Restrictions
Quartermaster at Broad Creek Landing

1420

Incorporated herein by reference is that certain document entitled "Declaration of Covenants, Conditions, Easements and Restrictions, Quartermaster at Broad Creek Landing," dated December 20, 1990 and recorded in the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina, on December 27, 1990 in Deed Book 567 at Page 1363.

Hammet

FILED AT	BEAUFORT COUNTY S.C.	RECORDED IN BOOK
9:53 O'CLOCK	DEC 27 1990	567 PAGE
<i>A</i> <i>Theresa A. Good</i> REGISTER OF MESNE CONVEYANCES		1392

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
QUARTERMASTER AT BROAD CREEK)
CREEK LANDING OWNERS)
ASSOCIATION, INC.,)

Plaintiff,)

vs.)

BROAD CREEK LANDING)
HORIZONTAL PROPERTY)
REGIME,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-2497

NOTICE OF MOTION
AND MOTION FOR A NEW TRIAL
AND/OR AMENDMENT OF JUDGMENT

TO: BRITTON MASON HAWK, ESQUIRE, ATTORNEY FOR DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that the undersigned, by and on behalf of Plaintiff, Quartermaster at Broad Creek Landing Owners Association, Inc. (hereinafter referred to as "Plaintiff"), will move before the Beaufort County Master-in-Equity and/or Special Circuit Court Judge in the Beaufort County Court of Common Pleas on the 10th day after service hereof or as soon thereafter as is convenient to Court and counsel for an Order pursuant to Rule 59 of the S.C.R.C.P. granting a new trial and/or amending the Order of the Court dated September 30, 2014. The ground for the Motion is that the Lower Court failed to rule on certain material issues, all of which were raised in the trial that occurred on October 1, 2013. The issues include, but are not limited to the following:

1. The Lower Court failed to ascertain or rule upon the intent of the parties when they entered into the Reciprocal Easement and Amenity Use Agreement (hereinafter referred to as the "Reciprocal Agreement").
2. The Lower Court failed to rule upon or define what the recreational or the amenities areas were under the Reciprocal Agreement.

3. The Lower Court failed to examine or rule upon whether the budget put forth by Plaintiff included money for property in Broad Creek Landing that should not have been included under the Reciprocal Agreement.

4. The Lower Court failed to rule upon what the definition of the common area was under the Reciprocal Agreement.

5. The Lower Court failed to rule upon the fact that the term "common area" in the Reciprocal Agreement specifically excludes any condominium buildings.

6. The Lower Court failed to rule upon the impact of the undisputed testimony that the Reciprocal Agreement required Plaintiff to formulate a "common area budget" every year and no common area budget was ever promulgated.

7. The Lower Court specifically failed to examine or rule as to whether all funds were used "exclusively for landscape maintenance and improvement, security, pool supplies and maintenance, pest control (excluding termite bond), common area electric, common area water/sewer, garbage and trash collection management fee, reserve and general office expenses (including, but not limited to utilities, office supplies and professional services)."

8. The Lower Court failed to examine or rule upon the fact that Article 4, Section 4.1 of the Reciprocal Agreement specifically says that "building maintenance and termite bonds" are not to be included in any assessments charged against Quartermaster.

9. The Lower Court failed to examine or rule upon the effect of the FJSGPII and Master Deed (respectively) for Broad Creek Landing, Sections 2.2 and 4.5.2 which state:

Section 2.2 (General Description of Number and Type of Apartments to be Developed)

"A maximum of seventy-two (72) units are to be developed on the 7.968 acre Future Phase Property. The Units shall be of similar and consistent design as existing units within the Regime, although Grantor reserves the right to alter floor plans and exterior designs prior to actual construction, so long as designs are reasonably compatible with existing development, in Grantor's opinion. Apartments may include one, two or three bedroom units, in townhouse, villa or

other style apartments. *Should Grantor elect to develop fee simple townhouse lots, rather than condominium units, an agreement shall be entered with the existing Board of Directors, consistent with Section 4.5.2 of the Master Deed, regarding the sharing of certain Common Element Expenses relating to the Regime Amenities Expenses.*"

Section 4.5.2 (Rights of Grantor) of the Master Deed

"For the purposes of this paragraph, the "Regime Amenities Expense" shall include the portion of the Common Expenses attributable to the maintenance, repair, operation, and insurance of any swimming pool (with related deck and bathhouse), any community recreational building, any tennis courts (with related bleachers, changing rooms and similar facilities), any jogging or bicycle track or course, any scenic walkways or marsh observation platforms or walkways or decks established in the Submitted Property, or, any recreational facilities established in connection with any lagoon or pond established on the Submitted Property."

10. The Lower Court failed to examine or rule upon the fact that Defendant was a dissolved corporate entity or that Plaintiff was not in existence at the time the Reciprocal Agreement was entered into.

11. The Lower Court failed to recognize or rule upon the undisputed testimony that the President of Defendant stated he did not know what formula was to be used to assess the Quartermaster owners and that no one on the Board of Directors knew what the formula was. By failing to acknowledge or rule upon this undisputed testimony, the Lower Court failed to make a finding that the Broad Creek Board did not meet the standard of care for Board Members.

12. The Lower Court failed to analyze or recognize that the budget put forth by Plaintiff included, among other things, insurance and reserves that are clearly not related to common areas or recreational amenities.

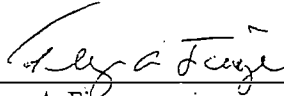
13. The Lower Court failed to recognize or acknowledge the undisputed testimony that insurance for the condominium buildings was included in the overall budget and that this inclusion created an overcharge of Thirty and 59/100 (\$30.59) Dollars per month charged to each and every Quartermaster owner.

14. The Lower Court was in error and ignored the uncontradicted testimony when it found that there was no "persuasive evidence that Defendant had at any time miscalculated assessments or inappropriately charged owners of property at Quartermaster under the Reciprocal Agreement.

15. The Lower Court was in error when it found that there was no ambiguity concerning the calculation of the monthly Quartermaster assessment.

16. Plaintiff reserves the right to supplement this Motion at the time of argument.

FINGER & FRASER, P.A.



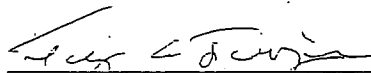
Terry A. Finger
35 Hospital Center Common, Suite 200
P. O. Box 24005
Hilton Head Island, SC 29925-4005
(843) 681-7000
Attorneys for Plaintiff

Hilton Head Island, South Carolina
October ____, 2014

AFFIRMATION

The undersigned attorney for Plaintiff, Quartermaster at Broad Creek Landing Owners Association, Inc., hereby certifies that consultation between the parties would serve no useful purpose and he has not contacted the defendant's attorney to resolve this matter.

FINGER & FRASER, P.A.



Terry A. Finger
35 Hospital Center Common, Suite 200
P. O. Box 24005
Hilton Head Island, SC 29925-4005
(843) 681-7000
Attorneys for Plaintiff

Hilton Head Island, South Carolina
October ____, 2014

client\Q - R\Quartermaster\Broad Creek\Pleadings\Motion for a New Trial and/or Amendment of Judgment.doc

RECEIVED
JUL 28 2015
BY: _____

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

 **COPY**

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

The Honorable Marvin H. Dukes, III
Beaufort County Master-In-Equity

JUL 21 2015

SC Court of Appeals

Case No.: 2011-CP-07-02497

Quartermaster at Broad Creek Landing
Owner's Association, Inc.....Appellant,

VS.

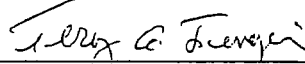
Broad Creek Landing Horizontal Property Regime.....Respondent.

NOTICE OF APPEAL

The Appellant appeals the Orders of the Honorable Marvin H. Dukes, III dated September 30, 2014 and June 17, 2015. The Orders were received by counsel for the Appellant on September 30, 2014 and June 19, 2015, respectively.

July 17, 2015

FINGER, MELNICK & BROOKS, P.A.



Terry A. Finger, Esquire
P. O. Box 24005
Hilton Head Island, SC 29925-4005
(843) 681-7000
Attorneys for Appellant

Other Counsel of Record:

John S. Wilkerson, III, Esquire
Turner, Padgett, Graham & Laney, P.A.
P. O. Box 22129
Charleston, SC 29413
(843) 576-2800

Attorneys for Respondent

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QUARTERMASTER

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-07-2497

RECEIVED

JUL 21 2015

SC Court of Appeals

ORDER

ending case

2014 SEP 10 PM 2:00

This case arises out of a dispute surrounding monthly assessments charged to owners of real property at a development known as "Quartermaster" pursuant to a binding contract called the Reciprocal Easement and Amenity Use Agreement ("Agreement"). This matter is presented as a declaratory judgment seeking an Order regarding the "proper monthly fee charged to Quartermaster owners" and an action seeking a refund for any "overcharged assessments and fees charged" under the Agreement.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage. If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495 (2003) (*internal citations omitted*). It is a question of law for the court whether the language of a contract is ambiguous. McGill v. Moore, 381 S.C. 179, 185 (2009).

QUARTERMASTER

TPGL 5121913v1

The Agreement provides in pertinent part:

Monthly Assessment for Improved Lots. Each improved lot within the Quartermaster property, shall pay unto the Regime a monthly assessment amount equal to its pro rata share, if such dwelling unit were an "Average Unit" within the Regime provided further that the budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime fee for the "Average Unit" and provided further that, two thirds (2/3) of the "Property Insurance" line item from the "Average Unit" monthly regime fee is subtracted.

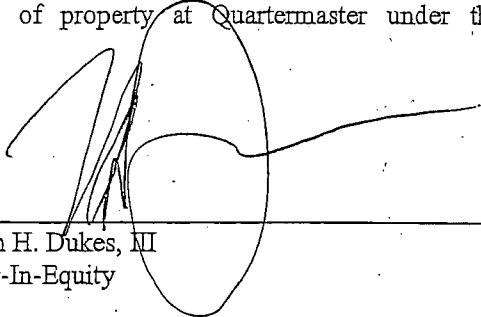
Monthly Assessment for Unimproved Lots Owned by Third Party Purchaser from Quartermaster Within Quartermaster Property. Monthly assessment of unimproved lots owned by third party purchaser from Quartermaster within Quartermaster property shall be 25% of the monthly assessment for improved lots.

"Average Unit" is defined in the Agreement as the "total combined assessment for all regime property owners divided by the number of regime property owners."

This matter was tried before me on October 1, 2013. At trial the parties presented testimony as well as other evidence. After consideration of all evidence, I hereby find that the Agreement is valid and binding as well as clear and unambiguous regarding calculation of assessments. Specifically, the Agreement is clear and unambiguous that: a.) "Average Unit" does not include Quartermaster property as by definition it only includes property that is part of the Broad Creek Landing horizontal property regime, and b.) assessments are to be calculated using the same budget as the calculation of the monthly assessment for the "Average Unit."

Further, I find no persuasive evidence that Defendant has at any time miscalculated assessments or inappropriately charged owners of property at Quartermaster under the Agreement.

AND IT IS SO ORDERED.



Marvin H. Dukes, III
Master-In-Equity

Tuesday, September 30, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2011-CP-07-2497

QUARTERMASTER AT BROAD CREEK
LANDING OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

BROAD CREEK LANDING HORIZONTAL
PROPERTY REGIME,

Defendant.

2015 JUN 19 PM 10:22
ORDER DENYING PLAINTIFF'S
MOTION FOR A NEW TRIAL AND/OR
AMENDMENT OF JUDGMENT

This matter is before the Court on Plaintiff's Motion for a New Trial and/or Amendment of Judgment filed October 14, 2014. According to the Motion filed by Plaintiff, "The ground for the Motion is that the Lower Court [SIC] failed to rule on certain material issues, all of which were raised in the trial that occurred on October 1, 2013."

In its Order Ending the Case, this court held *inter alia*:

Specifically, the Agreement is clear and unambiguous that: a.) "Average Unit" does not include Quartermaster property as by definition it only includes property that is part of the Broad Creek Landing horizontal property regime, and b.) assessments are to be calculated using the same budget as the calculation of the monthly assessment for the "Average Unit." Further, I find no persuasive evidence that Defendant has at any time miscalculated assessments or inappropriately charged owners of property at Quartermaster under the Agreement.

These rulings are dispositive of the issues raised by the pleadings and the specific issues raised by Plaintiff's current motion are moot. The Court has carefully reviewed the evidence and testimony submitted at the trial of this case, and has considered all filings related to this Motion (except new evidence offered after the Court's Order Ending the Case filed September 30, 2014) and finds no reason to reconsider its earlier ruling on the merits for the reasons set forth in its

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earlier Order and as further explained herein. Therefore, the Motion for a New Trial and/or Amendment of Judgment must be denied. The Court takes this opportunity, however, to further explain its ruling, and specifically address the issues raised by Plaintiff's Motion.

FINDINGS OF FACTS

1. Broad Creek Landing is a development made up of condominiums as well as fee simple properties known as "Quartermaster."

2. The Plaintiff Quartermaster at Broad Creek Landing Owners Association, Inc. ("Plaintiff or Association") was administratively dissolved on December 28, 1998.

3. The condominiums are organized into a regime known as the Broad Creek Landing Horizontal Property Regime ("Regime" or "Defendant").

4. Owners of the fee simple properties of Quartermaster ("Quartermaster Owners") pay to the Defendant Regime monthly assessments pursuant to an agreement known as the Reciprocal Easement and Amenity Use Agreement ("Reciprocal Agreement").

5. The Reciprocal Agreement (dated December 20, 1990) provides for the calculation of monthly assessments for Quartermaster Owners pursuant to Article IV which states in pertinent part:

- a. Section 4.2 provides "...each owner of a lot within Quartermaster shall pay to the Regime or its authorized agent, a monthly assessment of \$100 per each dwelling unit and \$25 per each unimproved lot, both expressed in December 1990 Inflation Indexed Dollars..."
- b. Section 4.2(b) provides, "In determining the amount of the monthly assessment payable by a lot owner within Quartermaster to the Regime for any current year,

the Regime may, in its discretion, set an amount different from the immediately preceding year's assessment in accord with the following standards:

1. Monthly Assessments for Improved Lots. Each improved lot within the Quartermaster property, shall pay unto the Regime a monthly assessment amount equal to its prorata share, if such dwelling unit were an "Average Unit" within the Regime provided further that the budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime fee for the "Average Unit" and provided further that two-thirds (2/3) of the "Property Insurance" line item from the "Average Unit" monthly regime fee is subtracted.
2. Monthly Assessment for Unimproved Lots Owned by Third Party Purchaser from Quartermaster. Monthly assessment for unimproved lots owned by third party purchaser from Quartermaster within Quartermaster property shall be 25% of the monthly assessment for improved lots.
6. "Average Unit" is defined in the Agreement as the "total combined assessment for all regime property owners divide by the number of regime property owners."
7. IMC Resort Services ("IMC") is the association manager for the Broad Creek Landing Development and is an expert in the field of Association Management.
8. IMC calculates the assessments for Quartermaster Owners pursuant to the Reciprocal Agreement and has done so for the past seventeen (17) years.
9. Quartermaster Owners have been made aware of how their Quartermaster fees are calculated in writing every year since 1997.

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This matter came before the court for trial of the issues raised in Plaintiff's Complaint brought pursuant to the South Carolina Declaratory Judgments Act seeking a judicial interpretation of the Reciprocal Agreement and claiming damages for alleged incorrectly charged assessments.

ANALYSIS

I. **The assessments for Quartermaster Owners have been properly calculated pursuant to the Reciprocal Agreement.**

The First Cause of Action seeks a declaratory judgment interpreting the Reciprocal Agreement "An action to construe a contract is an action at law." *McGill v. Moore*, 381 S.C. 179, 185 (2009). The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. *Id.* at 495, at 134. A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. *Id.* It is a question of law for the court whether the language of a contract is ambiguous. *McGill*, at 185.

The Reciprocal Agreement clearly and unambiguously provides that "... each owner of a lot within Quartermaster, shall pay to the Regime or its authorized agent, a monthly assessment of \$100 per dwelling unit and \$25 per each unimproved lot, both expressed in December 1990 inflation indexed dollars." (Reciprocal Agreement, Section 4.2, Exhibit B). The Reciprocal Agreement further provides that the Regime may in its discretion calculate the assessment for Quartermaster Owners pursuant to the following formula:

Each improved lot within the Quartermaster property shall pay unto the Regime a monthly assessment amount equal to its prorata share, if such dwelling unit were an "Average Unit" within the Regime provided further that the

budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime fee for the "Average Unit" and provided further that two-thirds (2/3) of the "Property Insurance" line item from the "Average Unit" monthly regime fee is subtracted.

(Reciprocal Agreement, Section 4.2(b)(1)). The assessment for Quartermaster fees has been calculated pursuant to the formulas as set forth in Section 4.2(b)(1) and (2) of the Agreement by IMC Resort Services ("IMC") since at least 1997. There can be no dispute that Quartermaster assessments have been appropriately calculated in the Reciprocal Agreement at all times relevant to this matter based on the formula set forth clearly in the Agreement. The assessments are calculated every year as follows:¹

How Your Quartermaster fee is calculated
(per reciprocal agreement)
2012-2013 Budget Year

Total budgeted expenses @ Broad Creek Landing	\$ 967,920.00
Minus maintenance expense line item	\$(106,845.00)
Minus any termite bonds	\$(7,700.00)
Minus 2/3 property insurance	\$(234,182.00)
	\$619,193.00
\$619,193.00 divided by 278 unit (# of units in Broad Creek Landing)	\$ 2,227.31 avg/unit/year
\$2,227.31 divided by 12 months (\$70,656.00 annual improved)	\$185.61 monthly fee improved
An unimproved pays 25% of \$185.61 (\$9,384.00 annual unimproved)	\$46.40 monthly fee unimproved

¹ This is an example from a document entitled "How your Quartermaster Fees are Calculated" for the 2012 -2013 budget year.

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It is also clear from the Reciprocal Agreement that rather than basing the monthly assessment on the formula in Section 4.2(b)(1) and (2), the Regime may assess Quartermaster Owners "\$100 per each dwelling unit and \$25 per each unimproved lot, both expressed in December 1990 inflation indexed dollars." Under this provision (which is not based upon any budgetary calculation), the monthly assessment for 2013 would be \$177.91 per dwelling unit as expressed in December 1990 inflation indexed dollars.² Using the formula set forth in the Reciprocal Agreement, the assessment for Quartermaster Owners for budget year 2012-2013 is \$185.61 per improved lot.

Plaintiff proposes the Court should engage in a re-writing of the Reciprocal Agreement and superimpose Plaintiff's view of the cost to maintain the Common Areas (nowhere set forth in the unambiguous formula contained in the Reciprocal Agreement which is based off the defined term "Average Unit") and suggests that the assessment for 2012-2013 year should be \$60.28, less than 2/3 of the base assessment agreed upon by the parties in 1990. To reach this result would require the Court to completely re-write the contract under consideration (Reciprocal Agreement), which the Court is without authority to do. *Dobyns v. S.C. Dept. Parks Rec. and Tourism*, 325 S.C. 97, 480 S.E.2d 81 (1996) (The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract. Citing *Patterson v. Aetna Life Ins. Co.*, 248 S.C. 374, 149 S.E.2d 915 (1966)).

² See, United States Bureau of Labor statistics accessed at http://www.bls.gov/data/inflation_calculator.htm on 5/28/2013.

II. Plaintiff Quartermaster at Broad Creek Landing Owners Association, Inc. has no standing to bring this lawsuit.

Plaintiff Association was administratively dissolved in 1998. Plaintiff filed the present lawsuit in 2011. South Carolina Code § 33-14-210, provides in pertinent part:

(d) A corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under Section 33-14-105 and notify claimants under Sections 33-14-106 and 33-14-107.

South Carolina Code Section § 33-14-105 provides in pertinent part: "A dissolved corporation continues its corporate existence but may not carry on any business *except that is appropriate to wind up its affairs . . .*" (emphasis added).

Both the significant time lapse and the substance of this action demonstrate that it is not one that is permissible under South Carolina law. The filing of this lawsuit thirteen (13) years after Plaintiff's dissolution clearly cannot be considered business that is "appropriate to wind up" Plaintiff's affairs. Plaintiff seeks in its First Cause of Action a declaration of rights and in its Second Cause of Action "a refund of all overcharged assessments and fees charged to it under the Agreement" dating back to 1999.³ As such, all of the Plaintiff's alleged damages were incurred *after* the dissolution, thereby precluding any argument that this lawsuit is in any way "winding up" the affairs of the association. Simply put, the Plaintiff association does not exist and has absolutely no right nor authority whatsoever to bring the present action.⁴

Not only did the Plaintiff Association not exist during the period of time relevant to this lawsuit, it had no board of directors and thus no decision-making body to authorize the bringing of a lawsuit. Accordingly, this suit is an ultra vires action (if same is possible given that the

³ Plaintiff has no standing to assert a claim for damages in this action (see Section III of this Memorandum) and this claim is barred by the statute of limitations (see Section IV of this Memorandum).

⁴ Plaintiff filed articles of incorporation on May 16, 2013. This created a new entity and did not have the effect of reinstating the right of the plaintiff to do business.

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entity does not exist). It appears a few disgruntled "members" of the non-existent Plaintiff Association are pursuing this action for their own benefit in the name of the non-existent entity.

Plaintiff has no standing and no authority to bring the claims presented in this lawsuit and therefore the claims asserted herein

III. Plaintiff Quartermaster at Broad Creek Landing Owners Association, Inc. has no standing to bring claims for damages.

As noted, Plaintiff Association seeks in its Second Cause of Action damages for allegedly overcharged assessments. The Plaintiff Association does not have standing to bring a claim for damages in this action because the Association has suffered no damages. The Association does not and has never paid assessments to the Defendant Regime. All assessments have been billed to and paid by individual property owners.

Even if the Plaintiff Association existed and had authority to bring an action, cannot bring an action for damages in a representative capacity. The South Carolina Supreme Court and the United States Supreme Court have both adopted the following three part test to determine if an association has standing to bring suit: "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Georgetown County League of Women Voters v. Smith Land Company, Inc.*, 393 S.C. 350, 713 S.E.2d 287 (2011), citing *Beaufort Realty*, 346 SC 298, 301 (Ct. App. 2001); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). "[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it

can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (U.S. 1977) (*superceded on other grounds*). Per the United States Supreme Court: "An organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof." *Warth v. Seldin*, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). "Where an association seeks to recover damages on behalf of its members, the extent of injury to individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association." *Creek Pointe Homeowner's Ass'n. v. Happ*, 146 N.C. App. 159, 167 (N.C. Ct. App. 2001) (*Creek Pointe Homeowner's Ass'n.* cited by South Carolina Supreme Court in *Georgetown County League of Women Voters*, at 18). "Indeed, damages claims usually require significant individual participation, which fatally undercuts a request for associational standing." *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278, 284 (2002). The requirement of individual participation has been understood to preclude associational standing when an organization seeks damages on behalf of its members. *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544 (U.S. 1996). *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 167-168 (N.C. Ct. App. 2001) (finding that plaintiff homeowner's association's pursuit of monetary damages required the participation of individual homeowners, therefore homeowner's association lacked standing to bring suit under *Hunt* test).

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The Plaintiff Association seeks monetary damages in form of "a refund of all overcharged assessments and fees charged to it under the Agreement." (Complaint, ¶ 15). The Quartermaster Owners, not the Plaintiff Association, pay assessments to the Regime. Thus, the damage claims are not common to the entire (non-existent) Association, nor shared equally, and the existence and extent of injury requires individualized proof of damage. Alleged damages to an individual Quartermaster Owner would necessarily vary in an infinite number of ways, including but not limited to, how long the individual owner has owned the fee simple property, whether or not the property was improved or unimproved⁵, whether the property was owned by one or more individuals and/or entities, whether the property was rented, whether the owner actually paid the assessments due (as opposed to being in arrears), whether the individual owned one or more fee simple properties. The assessments Quartermaster owners pay to the Regime varies from year to year. Based on Plaintiff's record of property transactions, the properties at issue have changed hands nearly 150 times since 1999. Not only do Quartermaster owners change every year, the assessments change every year that the budget changes, which has been at least six times since 1999. Lots may change from unimproved to improved at any time, thereby changing the assessments due mid-year, or even mid-month (assessments are pro-rated from time of groundbreaking). Any award of damages for over-assessments to the Plaintiff's association would not only go toward an association that does not exist, does not and has not paid the assessments complained of, but also whose "membership" is constantly changing, and which would require individualized proof of damages in a multitude of different ways.

⁵ The calculation of assessments for improved and unimproved lots varies depending if the lot is improved or unimproved. An improved lot is one with a house on it, while an unimproved lot is just the land with no structure. The assessment for unimproved lots is 25% of the assessment for improved lots (Reciprocal Agreement Section 4.2(b)(2), Exhibit B).

Plaintiff seeks hundreds of thousands of dollars in "damages" for alleged over assessments. Notwithstanding the fact that Plaintiff Association has never paid any assessments, an award of "damages" as sought in this action would necessarily result in a large special assessment to the owners of Broad Creek Landing, potentially force units into foreclosure, and adversely impact the well-being of the entire community, including Quartermaster.

IV. Plaintiff's claims are barred by the statute of limitations.

The statute of limitations for breach of contract is three years. S.C. Code Ann. § 15-3-530 (2005). 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 (2007). A breach of contract action generally accrues at the time the contract is breached. *Id.*, citing, *State v. McClinton*, 369 S.C. 167, 173, 631 S.E.2d 895, 898 (2006). Accordingly, Plaintiff's claim for declaratory relief is barred, and even if the court were inclined to grant an award of damages, the earliest the Court could consider for the calculation thereof would be three years from the date of filing of the Complaint.

Plaintiff urges the Court to apply a 20 year statute of limitations on the theory that the Reciprocal Agreement is allegedly a "contract under seal." S.C. Code Ann. § 15-3-520(b). An instrument need not have an actual seal affixed to it in order to be considered a sealed instrument. Section 19-1-60 of the South Carolina Code provides:

Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

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Courts in South Carolina construe this statute narrowly. *Orlando Residence, Ltd. v. Hilton Head Hotel Investors, et al.*, 2013 U.S. Dist. LEXIS 36087 (D.S.C. 2014).

The circumstances in which a contract will be considered to be a "sealed instrument" were recently examined by Judge David Norton in the *Orlando Residence* case, *supra*. Judge Norton explained the status of South Carolina law on this issue as follows:

Inclusion of standard attestation language, such as "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals," is not enough to indicate the parties' intent to create a sealed instrument. *Lasch*, 609 S.E.2d at 551-52. Rather, courts will find an intent to create a sealed instrument only where the standard attestation language is accompanied by additional indicia. Compare *Treadaway v. Smith*, 325 S.C. 367, 479 S.E.2d 849, 855 (S.C. Ct. App. 1996) (finding sealed instrument where agreement included standard attestation language plus the language "SIGNED SEALED AND DELIVERED IN THE PRESENCE OF [signatures of parties and witnesses]"), and *S. Carolina Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464, 467 (S.C. Ct. App. 1984) (finding sealed instrument where the agreement included standard attestation language plus the notation "L.S.," the abbreviation for *Locus sigilli* or "the place of the seal," by the parties' signatures), with *Clifton, LLC v. Tadlock*, No. 11-cv-01234, 2012 U.S. Dist. LEXIS 35659, 2011 WL 909826, at *5 (D.S.C. Mar. 16, 2012) (finding no sealed instrument where the only indicia of an intent to seal was the phrase "Signed, sealed and delivered" immediately above the parties' signatures and the agreement did *not* include standard attestation language), and *Lasch*, 609 S.E.2d at 551-52 (finding no sealed instrument where only indicia of intent to seal was standard attestation language).

The settlement agreement in this case includes the following standard attestation language immediately preceding the parties' signatures: "IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals as of this 1st day of November, 1994." Settlement Agreement 19. This language closely mirrors the language at issue in *Lasch* and, as in *Lasch*, the settlement agreement in this case includes neither the language "SIGNED SEALED AND DELIVERED" nor the abbreviation "L.S." Nelson's confession of judgment similarly contains no language that indicates that it is a sealed instrument. South Carolina judicial precedent dictates that the settlement agreement and confession of judgment cannot be considered sealed instruments, and therefore are not subject to the twenty-year statute of limitations for sealed instruments. To hold otherwise "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state." *Lasch*, 609 S.E.2d at 552. South Carolina's three-year statute of limitations for contract actions controls in this case.

Id.

This case presents the identical scenario to that examined in Orlando and the cases cited therein. Here, the Reciprocal agreement concludes with the words "IN WITNESS WHEREOF, the parties herby set their hands and seals," but no other indicia that the parties to this action intended the instrument to be sealed. In fact, the "Probate" sections of the document attesting to the signatures of both parties to this action⁶ glaringly omit any reference to a seal, and the signatures of the parties are not followed by any indicial such as "L.S." or "Seal" as required by South Carolina precedent. Accordingly, Plaintiff's unsupported assertion that the document was signed "under seal" is rejected, and the three year statute of limitations is applied to this claim.

V. All remaining arguments set forth by Plaintiff are without merit and/or moot.

To the extent not specifically addressed herein, the Court has considered all remaining specific issues identified by Plaintiff in its motion which the Plaintiff contends the Court failed to rule upon in the Order Ending the Case and finds them to be without merit.

Having already ruled that the formula at issue in the Reciprocal Agreement is clear and unambiguous, it would be improper for the court to go beyond the plain language of the agreement to discern the intent of the parties.

Furthermore, because the covenant is clear and unambiguous, we look only to the language of the covenant and not to extrinsic evidence to determine the intent of the parties. *See C.A.N. Enters., Inc., v. South Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988) (when a contract is clear and unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms).

⁶ Of particular interest and as further evidence these parties did not intend to affix a seal to the instrument, the other signatory to the Reciprocal Agreement, F.J.S.G.P. II (the property developer) contains a Probate that states "'she saw the within named F.J.S.G.P II by its duly authorized representative, sign, seal and as the act and deed of the Partnership, deliver. . . ." The omission of this language from the signatures of the other two signatories, who happen to be the parties to this action, is further evidence that those parties did not intend the instrument to be "sealed."

13. *ey 15 n*

Moser v. Gosnell, 334 S.C. 425 (S.C. Ct. App. 1999).

The terms the Plaintiff asks the Court to define and interpret are not used in the formula at issue, therefore it would be improper for the Court to attempt to define these terms in an effort to vary the terms of the unambiguous written agreement. *Id.*

As noted above, the formula called for by the Reciprocal Agreement is build off the assessment of an "Average unit," defined as the "total combined assessment for all regime property owners divide by the number of regime property owners." The parties have, therefore, agreed that the budget for the "Average unit" in Broad Creek Landing is the measuring stick for determining the assessment amount for Quartermaster. To find otherwise would be in direct conflict with the unambiguous terms of the agreement. Further, the Court has already specifically ruled that there is "no persuasive evidence that Defendant has at any time miscalculated assessments or inappropriately charged owners of property at Quartermaster under the Agreement." This issue has been dealt with in the original order and Plaintiff's assertions are without merit.

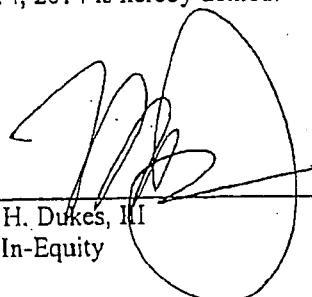
VI. Plaintiff is not entitled to recovery of attorney's fees as a matter of law.

Attorney's fees are not recoverable unless authorized by contract or statute. *Baumann v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 139 (S.C. Ct. App. 2008). Attorney's fees are not authorized by either the Reciprocal Agreement nor any applicable statute. Therefore, the Plaintiff's claim for attorney's fees is denied.

CONCLUSION

Having previously ruled that the contract at issue is clear and unambiguous and that there have been no errors in the calculation of the assessments under the terms of the agreement, and

further having addressed the issues raised by Plaintiff's current motion, the Motion for a New Trial and/or Amendment of Judgment filed October 14, 2014 is hereby denied.
AND IT IS SO ORDERED.



Marvin H. Dukes, III
Master-In-Equity

Beaufort, South Carolina

6/17 2015

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1 State of South Carolina) Court of Common Pleas
 2 County of Beaufort) 14th Judicial Circuit
 3) No.: 2011-CP-07-02497
 4
 5 Quatermaster at Broad)
 6 Creek Landing Owner's)
 7 Association, Inc.,)
 8 Plaintiff,)
 9 vs.) HEARING
 10 Broad Creek Landing)
 11 Horizontal Property)
 12 Regime,)
 13 Defendants.) October 1, 2013

13 Hearing reported by Deborah S. Thomas,
 14 Certified Verbatim Reporter and Notary Public in and
 15 for the State of South Carolina; said hearing held
 16 before the Honorable Marvin H. Dukes, III, Beaufort
 17 County Master in Equity and Special Circuit Court
 18 Judge in accordance with the South Carolina Rules of
 19 Civil Procedure, at the Beaufort County Courthouse,
 20 102 Ribaut Road, Room 212, Beaufort, South Carolina,
 21 on October 1, 2013, at the hour of 9:07 a.m.

22
 23 THOMAS REPORTING SERVICES
 24 156 Argent Way
 25 Bluffton, South Carolina 29909
 (803) 206-7390

1 Appearances
 2 Representing the Plaintiff:

1	CONTENTS	
2	Hearing	
3		Page
4	Exhibit Index	4
5	RONALD FENSTERMAKER	
	Direct Examination by Mr. Finger	28
6	Cross Examination by Mr. Wilkerson	40
	ReDirect Examination by Mr. Finger	51
7	ReCross Examination by Mr. Wilkerson	89
	ReDirect Examination by Mr. Finger	99
8	ReCross Examination by Mr. Wilkerson	100
9	CHARLES VIENNE	
	Direct Examination by Mr. Finger	102
10	Cross Examination by Mr. Wilkerson	132
	ReDirect Examination by Mr. Finger	132
11	Certificate of Reporter	131
12	Word Index	
13		
14	* * * * *	
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

THOMAS REPORTING SERVICES

3 10-1-13 QUARTERMASTER HEARING.txt
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20
21
22
23
24
25

THOMAS REPORTING SERVICES

3

1	CONTENTS	
2	Hearing	
3		Page
4	Exhibit Index	4
5	RONALD FENSTERMAKER	
	Direct Examination by Mr. Finger	28
	Page 2	

	10-1-13 QUARTERMASTER HEARING.txt	
6	Cross Examination by Mr. Wilkerson	40
	ReDirect Examination by Mr. Finger	51
7	ReCross Examination by Mr. Wilkerson	89
	ReDirect Examination by Mr. Finger	99
8	ReCross Examination by Mr. Wilkerson	100
9	CHARLES VIENNE	
	Direct Examination by Mr. Finger	102
10	Cross Examination by Mr. Wilkerson	132
	ReDirect Examination by Mr. Finger	132
11		
12	Certificate of Reporter	131
13	Word Index	

* * * * *

THOMAS REPORTING SERVICES

4

1	EXHIBIT INDEX	
2	Exhibits:	Marked at Page
3	(Copy of exhibits attached to each copy of transcript.)	
4	Plaintiff's Exhibits	
5	1 (Letter)	75
6	2 (Colored Diagram)	86
	3 (Vienne Notebook)	114
7	4 (Assignments)	132
	5 (R. Fenstermaker Deposition)	132
8	6 (J. McNichols Depositions)	132
	7 (T. Waters Depositions)	132
	Page 3	

9	8	10-1-13 QUARTERMASTER HEARING.txt (P. Owens Deposition)	132
10		Defendant's Exhibits	
11	1	(Fee Calculations)	46
12	2	(Assessment Formula)	132
13		Joint Exhibits	
14	1	(Reciprocal Agreement)	6
15	2	(Secretary of State Letter)	132
16	3	(Secretary of State Letter)	132
17	4	(Articles of Incorporation)	132
18			
19			
20			
21			
22			
23			
24			
25			

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THOMAS REPORTING SERVICES

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1 This hearing is taken in accordance
2 with the South Carolina Rules of Civil Procedure.
00:17:48 3 JUDGE DUKES: Good morning, everyone..
00:17:52 4 We are here on Case 11-CP-07-2497. This is
00:20:08 5 Quartermaster of Broad Creek Landing Owner's
00:20:15 6 Association versus Broad Creek Landing Horizontal
00:20:48 7 Property Regime.
00:20:52 8 The Plaintiff is here represented by Mr.
00:21:35 9 Finger. The Defendant is here represented by Mr..
00:21:40 10 Wilkerson. I had previously discussed with both
00:21:45 11 counsel some attempt at settlement. Have the

00:21:53 12 parties exhausted all efforts to settle at this
00:21:59 13 point?

00:22:24 14 MR. FINGER: I believe we have, Your
00:22:25 15 Honor.

00:22:27 16 JUDGE DUKES: Okay. All right. Then
00:22:32 17 any pretrial issues we might need to take up on the
00:22:38 18 record before we begin this trial?

00:22:50 19 MR. FINGER: Nothing from the
00:22:54 20 Plaintiff.

00:22:56 21 JUDGE DUKES: All right. Then I'm
00:23:01 22 happy to hear a short opening if you would like.

00:23:24 23 MR. FINGER: Your Honor, we forwarded
00:23:31 24 yesterday to you a pretrial brief. I copied
00:23:41 25 opposing counsel. Our positions are set out. Tried

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00:23:50 1 to be as brief as possibly in that pretrial brief.

00:24:01 2 Essentially we are arguing over a
00:24:08 3 reciprocal easement and amenity use agreement. And
00:24:28 4 the parties have stipulated that it will be marked
00:24:54 5 as Joint Exhibit Number 1. I have given you a copy.

00:25:02 6 JUDGE DUKES: All right. Let me stop
00:25:04 7 one second and go off the record briefly.

00:25:07 8 (Discussion off the record.)

00:26:01 9 (MARKED JOINT EXHIBIT NO. 1.)

00:26:04 10 JUDGE DUKES: All right.

00:26:09 11 MR. FINGER: Just very briefly from
00:26:13 12 an opening statement perspective, through our first
00:26:23 13 witness we are -- this is a Horizontal Property
00:26:51 14 Regime Broad Creek with a number of condominium

00:27:07 15 buildings and a Plaintiff Quartermaster being a fee
00:27:50 16 simple development within the confines of the
00:27:56 17 overall regime.

00:28:06 18 The Exhibit Number 1 is the reciprocal
00:28:48 19 easement and amenity use agreement. It specifies
00:29:35 20 that the Quartermaster fee simple owners will have
00:29:44 21 access to their property and the right to use
00:29:48 22 certain amenities.

00:29:52 23 It requires a common area budget to be
00:29:56 24 formulated for those common areas. And they are to
00:30:05 25 pay a pro rata share of those common expenses. The

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00:30:32 1 argument today is that it is the Plaintiff's
00:30:36 2 position that they have been overcharged for in
00:30:50 3 excess of 20 years, that the Broad Creek regime is
00:31:07 4 obligated under the agreement to formulate an annual
00:31:15 5 common area budget. They never have.

00:31:22 6 We are prepared today to try to, from the
00:31:26 7 Plaintiff's perspective, prove to you beyond a
00:31:33 8 preponderance of the evidence what the common area
00:31:39 9 is, what the budget should be, and what our
00:32:00 10 assessment should be.

00:32:04 11 There also is an issue about a request for
00:32:09 12 a refund for the overpayments. There is an argument
00:32:22 13 between counsel, between the respective parties,
00:32:42 14 about which statute of limitations applies. The
00:32:48 15 Defendants are alleging that there is a three-year
00:32:58 16 statute which means we would only be entitled to go
00:33:04 17 back to '08 for a refund because we filed in '11.

00:33:17 18 I believe that the evidence will show that
 00:33:20 19 the 20-year statute for documents under seal applies
 00:33:29 20 because the document is signed, set my hand and seal
 00:33:41 21 this blank day of blank. That alone may not be
 00:33:49 22 enough to get you to the 20-year statute, but if you
 00:33:56 23 look at the first probate, which is on Page 24 of
 00:34:02 24 Exhibit 1, a little different probate than you
 00:34:16 25 typically see.

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8

00:34:20 1 In that probate within the four corners of
 00:34:26 2 the probate itself, again, it indicates it's a
 00:34:31 3 sealed document, which certainly indicates the
 00:34:37 4 intent of the parties back there. So that is a
 00:34:43 5 legal issue you will have to rule on is which
 00:34:49 6 statute of limitations applies if, in fact, we prove
 00:34:58 7 that we have been overcharged, what statute applies.

00:35:12 8 Lastly, at the appropriate time, the
 00:35:18 9 plaintiff is going to allege that the document
 00:35:21 10 itself, because it lasts forever or until such time
 00:35:27 11 as both parties vote to terminate by 67 percent, we
 00:35:44 12 believe that violates the old common law rule
 00:35:50 13 against perpetuities, and more importantly the
 00:35:59 14 statutory rule against perpetuities that was put in
 00:36:06 15 place by our legislature in 1987.

00:36:15 16 We believe that the proper monthly charge
 00:36:46 17 is approximately \$60 per month for an improved
 00:36:59 18 property, \$15 for an unimproved --

00:37:39 19 MR. VIENNE: Twenty-five.

00:37:49 20 MR. FINGER: Twenty-five percent.

00:37:50 21 I'm sorry. Twenty-five percent, \$15 for an
 00:38:02 22 unimproved. Currently and historically over the
 00:38:37 23 last at least four or five years we have been
 00:38:49 24 charged \$184 a month as opposed to the 60.
 00:39:02 25 we have two -- we have one live witness

THOMAS REPORTING SERVICES

9

00:39:05 1 and one who is not here yet, hopefully she will be
 00:39:25 2 here, from the Plaintiff's side and then two
 00:39:36 3 depositions that we will submit.

00:39:41 4 We are asking the court to rule that the
 00:39:47 5 common area budget that we have -- that we will
 00:39:54 6 present today and the analysis we do is correct. We
 00:40:01 7 are asking for a refund. We are also asking that
 00:40:08 8 they comply with the formula in the budget going
 00:40:14 9 forward.

00:40:18 10 Of note, it is in the document, and we
 00:40:29 11 will go through the reciprocal agreement with the
 00:41:05 12 first witness, it says the funds from Quartermaster
 00:41:09 13 must be used exclusively for common area expenses.

00:41:20 14 The formula that they have applied has
 00:41:26 15 insurance for the buildings in it. It has more
 00:41:35 16 importantly reserves for the buildings in it. And
 00:41:49 17 we do not believe that they have ever properly
 00:41:56 18 formulated the common area budget. That is the
 00:42:03 19 nutshell and that is set out in our brief.

00:42:10 20 JUDGE DUKES: Okay. Just a couple of
 00:42:12 21 quick questions then, Mr. Wilkerson, I guess before
 00:42:23 22 your opening. Where in the document itself in the
 00:43:04 23 reciprocal easement agreement, if you could just

00:43:09 24 help me out so I can mark these things and follow
00:43:16 25 along, is the portion that requires the Defendant to

THOMAS REPORTING SERVICES

10

00:43:20 1 prepare a common area budget? Is that actually in
00:43:28 2 here or is that --
00:43:31 3 MR. FINGER: Section 4.3 on Page 12.
00:43:37 4 JUDGE DUKES: Page 12? Okay. 4.3.
00:43:42 5 Okay. And --
00:43:56 6 MR. FINGER: About the fourth line
00:43:58 7 down.
00:44:00 8 JUDGE DUKES: And then you had
00:44:01 9 mentioned the must be used for common area
00:44:06 10 maintenance. Is that also in the four corners?
00:44:16 11 MR. FINGER: That is also in four --
00:44:18 12 that is in 4.2 --
00:44:36 13 JUDGE DUKES: 4.2?
00:44:39 14 MR. FINGER: -- on the page before.
00:44:43 15 JUDGE DUKES: Okay. 4.2. All right.
00:44:49 16 Mark these where I can figure it out later. Okay.
00:44:52 17 Thank you very much.
00:44:55 18 MR. FINGER: Thank you, Judge.
00:45:01 19 JUDGE DUKES: Happy to hear from you
00:45:02 20 sir.
00:45:07 21 MR. WILKERSON: Thank you, Your
00:45:08 22 Honor. As Mr. Finger indicated, Your Honor, this is
00:45:16 23 a combination of a horizontal property regime that
00:45:25 24 was originally in existence to condominiumize the
00:45:31 25 entire property apparently. According to the

THOMAS REPORTING SERVICES
Page 9

00:45:50 1 document that we are here to construe it was decided
 00:45:55 2 mid-development that they wanted instead for this
 00:46:15 3 section in the middle, that is now designated as
 00:46:25 4 Quartermaster to not be condominiums, but to be fee
 00:46:33 5 simple property.

00:46:39 6 So they carved out that piece of property.
 00:46:48 7 And they decided to develop 50 lots for fee simple
 00:46:54 8 ownership. And at the time that they did that this
 00:00:47 9 contract was entered into between Broad Creek
 00:00:58 10 Landing Horizontal Property Regime which was in
 00:01:33 11 place at that time. They were already well into
 00:01:40 12 development of Broad Creek Landing at that time.
 00:02:14 13 And an entity known as ABCD 3 or FJSGP 3, which is
 00:02:29 14 designated as a Delaware partnership which was,
 00:02:35 15 according to the recitals, the owner of that entire
 00:03:37 16 fee simple piece of property. They were the
 00:03:41 17 developer.

00:03:42 18 And so this contract was entered into
 00:03:47 19 between my client and the developer. Now, of
 00:03:53 20 interest, and maybe not of importance but I think it
 00:04:01 21 is, a purported signatory to this document is also
 00:04:15 22 Quartermaster -- Quartermaster at Broad Creek
 00:04:22 23 Landing Owners Association, Inc., which is
 00:04:28 24 purportedly the Plaintiff in this case. And we will
 00:04:35 25 get into that in just a minute.

THOMAS REPORTING SERVICES

00:04:39 1 But according to the records of the
 Page 10

10-1-13 QUARTERMASTER HEARING.txt

00:04:50 2 Secretary of State, that entity did not come into
00:05:19 3 existence until 1996 which would be -- 1995 or 1996
00:05:35 4 which would be -- actually it came into existence on
00:05:42 5 12/28 -- excuse me. On 9/3/1996.

00:06:13 6 It was signed by someone who purportedly
00:06:19 7 was the president of that non-existent entity at the
00:06:32 8 time, but irrespective of that, I think that goes
00:06:45 9 more to the issue of standing than it does to
00:07:41 10 anything else because the contract was entered into
00:07:48 11 between my client, Broad Creek Landing, which was
00:08:01 12 the horizontal property regime, and the owner of
00:08:15 13 this fee simple property.

00:08:19 14 And it purportedly was a document that
00:08:30 15 runs with the land -- was an agreement that runs
00:08:37 16 with the land. And it sets forth -- in that
00:08:45 17 document there are recitals and it sets forth, you
00:08:56 18 know, these people are going to be using all of
00:09:00 19 these areas that are designated here for the
00:09:06 20 condominium. So they ought to -- even though they
00:09:23 21 are not a member of the regime, they ought to have
00:09:37 22 to pay some fees.

00:09:39 23 And so the parties at that time entered
00:09:43 24 into this agreement which specifically sets forth
00:09:54 25 the manner in which the monthly assessments of the

THOMAS REPORTING SERVICES

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13

00:09:59 1 owners of these fee simple properties would be --
00:10:06 2 would be assessed.

00:10:12 3 Now, with all due respect to Mr. Finger,
00:10:19 4 there is nothing in these computations, nothing in
Page 11

10-1-13 QUARTERMASTER HEARING.txt

00:10:29 5 the computations, that talk about this common area
00:10:39 6 budget. And furthermore, there is nothing in the
00:10:45 7 complaint or in the issues before the court that
00:10:58 8 challenges the use of these funds.

00:11:10 9 The only challenge before this court is
00:11:14 10 the method of computation. So this thing about
00:11:23 11 having to use it for common areas has not been
00:11:41 12 challenged. That is not an issue before this court
00:11:47 13 to decide whether we've been using it properly. The
00:12:02 14 question here is whether we've been assessing it
00:12:11 15 properly according to the documents.

00:12:14 16 And I would call the court's attention to
00:12:17 17 the very clear and unambiguous language of the
00:12:24 18 document as to how these monthly assessments were to
00:12:30 19 be computed. And that is found at -- beginning at
00:12:50 20 Page 9. In order to provide a fund for regime and
00:13:01 21 maintenance -- and road maintenance, roadside
00:13:13 22 landscaping, et cetera, et cetera, Quartermaster and
00:13:25 23 each owner of a lot within Quartermaster shall pay
00:13:30 24 to the regime or its authorized agent a monthly
00:13:42 25 assessment of \$100 per dwelling unit and \$25 per

THOMAS REPORTING SERVICES

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14

00:13:53 1 unit for each unimproved property, both expressed in
00:14:08 2 December 1990 inflation index dollars.

00:14:17 3 So it's set forth as a specific amount.
00:14:26 4 \$100 a month for improved, \$25 a month for
00:14:36 5 unimproved and to increase according to inflation.
00:14:59 6 We've got some computations for the court based upon
00:15:05 7 U.S. Department of Labor, the Consumer Price Index

Page 12

10-1-13 QUARTERMASTER HEARING.txt

00:15:19 8 as to what that would be today in 1990 dollars.
00:15:30 9 But that is the way that it's supposed to
00:15:34 10 be done. Now, the agreement also provides in the
00:15:56 11 next section over on Page 11, starting at B there,
00:16:04 12 it says, in determining the amount of the monthly
00:16:20 13 assessments payable by a lot owner within
00:16:32 14 Quartermaster to the regime for any current year,
00:16:41 15 the regime may in its discretion set an amount
00:16:51 16 different from the immediately preceding year's
00:16:58 17 monthly assessment in accordance with the following
00:17:05 18 standards.

00:17:07 19 And then it lays out a formula that the
00:17:14 20 regime can use in its discretion if it chooses to
00:17:25 21 establish this assessment amount in lieu of the \$100
00:17:34 22 a month or \$25 a month set fee index to inflation.
00:17:48 23 And that provision set forth in the very next
00:17:56 24 paragraph, it says that Quartermaster -- each owner
00:18:11 25 of Quartermaster shall pay unto the regime a monthly

THOMAS REPORTING SERVICES

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15

00:18:17 1 assessment amount equal to its pro rata share if
00:18:31 2 such dwelling unit were an average unit.
00:18:38 3 And that is a quoted defined term in the
00:18:45 4 agreement. Within the regime, provided further that
00:18:53 5 the budgetary line items entitled building
00:19:04 6 maintenance and termite bond are subtracted from the
00:19:13 7 monthly regime fee for the average unit. And
00:19:32 8 provided further that two-thirds of the property
00:19:40 9 insurance line item from the average unit monthly
00:19:45 10 regime fee is subtracted.

Page 13

10-1-13 QUARTERMASTER HEARING.txt

00:19:56 11 we will demonstrate, Your Honor, that at
00:20:01 12 least for the last 14, 15 years, as far back as we
00:20:15 13 have the records that we can establish that that
00:20:28 14 calculation has been done precisely according to
00:20:35 15 that -- according to those terms.

00:20:40 16 They took the average unit, which is a
00:20:46 17 defined term. You can find the average unit
00:20:57 18 definition on Page -- on Page 4, section 2.6. That
00:21:12 19 is the total combined assessment for all regime
00:21:28 20 property owners. You take everybody -- all the
00:21:38 21 regime property owners, how much their total
00:21:49 22 combined assessment is, and divide that by the
00:21:56 23 number of regime property owners.

00:22:05 24 We've done that every time. And that has
00:22:11 25 come up with a number that has been the amount of

THOMAS REPORTING SERVICES

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16

00:22:16 1 the assessment every year. And ironically those
00:22:22 2 assessment numbers actually pretty much if you
00:22:33 3 follow them along and along every year, they pretty
00:22:38 4 much track within 10 or 15, maybe \$20, the inflation
00:22:47 5 index \$100 amount. So it's just another way of
00:23:08 6 doing it. The agreement allows for that provision.
00:23:15 7 And that is the way it's been done. And it's really
00:23:21 8 not challenged that we've done it that way.

00:23:35 9 JUDGE DUKES: The average unit is --
00:24:52 10 the calculation includes not Quartermaster?

00:25:02 11 MR. WILKERSON: Not Quartermaster.

00:25:05 12 JUDGE DUKES: Okay. I understand
00:25:08 13 there may be a dispute about that, but I'm just

Page 14

10-1-13 QUARTERMASTER HEARING.txt

00:25:12 14 trying to follow along with your logic here. Okay.
00:25:25 15 MR. WILKERSON: They want to argue
00:25:26 16 that it should include Quartermaster, but that is
00:25:34 17 totally contrary to the agreement. It's very clear.
00:25:48 18 Regime property owners. And they are clearly not a
00:25:54 19 regime property owner. They can't be.
00:26:08 20 JUDGE DUKES: All right. I'm sorry.
00:26:09 21 I didn't mean to interrupt you.
00:26:14 22 MR. WILKERSON: That is quite all
00:26:16 23 right. I'm happy to answer any questions as we go
00:26:21 24 forward. Now -- so -- and again, what we are going
00:26:35 25 to hear today, Your Honor, is rather than dealing

THOMAS REPORTING SERVICES

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17

00:26:43 1 with that language, which is we believe very clear
00:26:51 2 and precise. It's probably the most clear and
00:27:00 3 precise language in the entire agreement that sets
00:27:06 4 forth exactly how you are supposed to make these
00:27:13 5 computations.
00:27:16 6 The Plaintiffs want to ignore that. And
00:27:24 7 they want to go over and start talking about this
00:27:28 8 common area budget. Now, if you will notice the
00:27:41 9 assessment does not say anything about requiring any
00:27:48 10 sort of common area budget. You take the average
00:27:57 11 unit and you subtract from the average unit the line
00:28:05 12 items for building maintenance, termite bond, and
00:28:23 13 two-thirds of the property insurance.
00:28:33 14 Now, you've got to remember this
00:28:39 15 development has not only condominium units which
00:28:43 16 carry with them all the rules and regulations

Page 15

10-1-13 QUARTERMASTER HEARING.txt

00:28:50 17 related to the Horizontal Property Regime which the
00:28:57 18 court I'm sure is very familiar with, but it also
00:29:07 19 has roads, lights, grass, landscaping, watering,
00:29:17 20 trash pickup, clubhouse, pool, tennis courts, other
00:29:27 21 things that you would expect to see in a development
00:29:32 22 of this type.

00:29:36 23 And all of those things are certainly
00:29:40 24 available to the people at Quartermaster under this
00:29:45 25 document actually, their use of the entities. They

THOMAS REPORTING SERVICES

18

00:29:58 1 are entitled to do. And this document sets forth
00:30:08 2 very clearly how they are supposed to pay for it.
00:30:14 3 Now, what Quartermaster really wants, Your
00:30:24 4 Honor, is a reformation of the contract. And I
00:30:46 5 think that will be very clear at the end of the
00:30:52 6 trial. They've asked for a declaratory judgment,
00:30:58 7 for the court to declare the rights and
00:31:17 8 responsibilities of the parties to the contract, but
00:31:23 9 it will be very clear that what they want to do is
00:31:27 10 rewrite it.

00:31:30 11 And you will hear testimony, if the court
00:31:36 12 allows it, ad nauseam as to the way they think they
00:31:45 13 ought to be assessed and a more fair way they think
00:32:12 14 they ought to be assessed. And how they think this
00:32:20 15 so-called common area budget ought to be created,
00:32:29 16 but it really has nothing to do with assessment
00:32:40 17 according to this document.

00:32:44 18 And so we will hear a lot of that. And
00:32:52 19 what they are really wanting you to do is to say, we

Page 16

10-1-13 QUARTERMASTER HEARING.txt

00:33:05 20 are not going to go by this assessment calculation
00:33:08 21 anymore. We are going to do it in a different way
00:33:44 22 which would require a reformation, and that is not
00:34:06 23 before the court.

00:34:09 24 Now as I pointed out it's not a challenge
00:34:17 25 to what the money is used for. That is not before

THOMAS REPORTING SERVICES

19

00:34:24 1 the court. You will hear a lot of that today. Now,
00:34:32 2 one thing that I think the court needs to be aware
00:34:36 3 of is we take the position that this is not a
00:34:44 4 testimonial matter. This is not a matter that would
00:34:49 5 be subject to testimony other than perhaps if they
00:34:53 6 could establish entitlement to damages, testimony
00:35:08 7 concerning the damages calculation because as the
00:35:22 8 court knows the interpretation of a contract is
00:35:26 9 first and foremost a matter of law for the courts to
00:35:34 10 determine.

00:35:38 11 And we will object to any testimony that
00:35:47 12 violates the parole evidence rule which would be
00:36:01 13 offered in an effort to, we believe, alter or amend
00:36:24 14 the terms of this written agreement. And so we are
00:36:33 15 going to have to deal with that as we go through.
00:36:42 16 And we'll deal with it as efficiently as we possibly
00:36:48 17 can.

00:36:56 18 Perhaps one of the most important issues
00:36:59 19 that the court needs to resolve in this case is that
00:37:03 20 the Plaintiff has no standing to bring this lawsuit.
00:37:14 21 As indicated, the Plaintiffs didn't exist when the
00:37:18 22 contract was entered into in 1990. They were

Page 17

10-1-13 QUARTERMASTER HEARING.txt

00:37:29 23 established in 1996. Then they were forfeited for
00:37:35 24 not -- for failure to file the appropriate documents
00:37:55 25 in 1998.

THOMAS REPORTING SERVICES

20

00:37:58 1 And they continued in a forfeiture
00:38:03 2 position until this day. They have never remedied
00:38:08 3 the forfeiture. They have never sought
00:38:14 4 reinstatement under the statute that allows them to
00:38:19 5 reinstate and seek reference back. So at the time
00:38:32 6 that this lawsuit was filed, it was filed by a
00:38:38 7 non-existing entity. More importantly, that
00:38:52 8 non-existing entity does not own any units in
00:39:38 9 Quartermaster.

00:39:42 10 That non-existing entity has not paid any
00:40:38 11 of these assessments that are being challenged here.
00:40:45 12 Those have been paid by individual property owners
00:40:50 13 who are not parties to this lawsuit.

00:40:56 14 And what we will also hear is that there
00:41:00 15 is now a new corporate entity that has been
00:41:08 16 established as of May of this year which has the
00:41:11 17 same name, but which is not a reinstatement of this
00:41:23 18 statute -- of this preexisting entity.

00:41:34 19 So we strongly believe that the Plaintiff
00:41:42 20 is it not a -- first of all, is not an existing
00:41:47 21 entity. And secondly, does not have any standing to
00:41:59 22 pursue this claim. And furthermore, has never
00:42:05 23 really had any -- since it's not an entity, there
00:42:18 24 has never been a board of directors. There has
00:42:29 25 never been a vote of that entity to bring this

Page 18

THOMAS REPORTING SERVICES

21

00:42:40 1 lawsuit. This is simply being brought by a group of
00:42:45 2 people who we believe are less than a majority of
00:42:49 3 the owners of Quartermaster who call themselves
00:42:57 4 Quartermaster ambassadors.

00:43:03 5 And they have kind of put this together in
00:43:29 6 an effort to try to correct what they believe to be
00:43:39 7 an unfairness. The appropriate way to bring such an
00:43:47 8 action, of course, Your Honor would be individuals
00:43:53 9 bringing an action in their own names. And that has
00:43:58 10 not been done, and therefore there is no standing
00:44:05 11 here.

00:44:13 12 We've got additional defenses which I'll
00:44:18 13 talk about more at the conclusion but the other big
00:44:22 14 defense, as Terry mentioned, is the statute of
00:44:29 15 limitations. Terry has come up with the argument
00:45:02 16 that the statute of limitations should be 20 years
00:45:22 17 under the statute that deals with contracts under
00:45:35 18 seal.

00:45:37 19 well, I'll hand up some case law at the
00:45:43 20 appropriate time, Your Honor, but that issue has
00:45:49 21 been resolved with finality directly on point, both
00:46:10 22 by a Court of Appeals in a recent decision and
00:46:15 23 perhaps more specifically by a decision by Judge
00:46:28 24 Brian Harwell on the U.S. District Court recently
00:46:35 25 where he addressed a contract that was identical to

THOMAS REPORTING SERVICES

22

10-1-13 QUARTERMASTER HEARING.txt

00:46:56 1 this one. Actually it had the identical indicia of
00:47:09 2 a contract under seal.

00:47:13 3 As you know, the statute says it doesn't
00:47:22 4 have to have a seal so long as it's clear from the
00:47:33 5 document that it was intended to be under seal they
00:47:40 6 will allow the under seal statute to apply. And
00:47:51 7 they've created some rules of interpretation, both
00:47:56 8 the Court of Appeals as explained by Judge Harwell
00:48:02 9 as to what this court needs to look at to determine
00:48:25 10 whether or not the contract is under seal.

00:48:28 11 And Judge Harwell specifically held that
00:01:45 12 this -- this indicia is not a contract under seal.
00:01:54 13 And the case law has really said that if this really
00:02:01 14 is -- if this is all it takes to get a contract
00:02:10 15 under seal then every contract is under seal. And
00:02:23 16 that is just not the situation. It's designed to be
00:02:29 17 a special situation or a special case.

00:02:37 18 So those are the big defenses that we
00:02:41 19 have. We want the court to be aware of and watch as
00:02:57 20 the testimony goes up is standing. Who are these
00:03:05 21 people and what is their entitlement to pursue this
00:03:11 22 claim. And is not this claim barred by the statute
00:03:17 23 of limitations?

00:03:21 24 And all of that is wrapped around the more
00:03:25 25 important direct issue, and that is has there been

THOMAS REPORTING SERVICES

23

00:03:33 1 any miscalculation according to the calculations set
00:03:41 2 forth in this contract.

00:04:16 3 JUDGE DUKES: Thank you. Another
 00:04:17 4 quick question.
 00:04:21 5 MR. WILKERSON: Yes, sir.
 00:04:23 6 JUDGE DUKES: So the Defendant
 00:04:29 7 interprets the contracts to allow two methods
 00:04:39 8 basically or two choices of how it's going to -- how
 00:04:49 9 it's going to bill Quartermaster. And the first one
 00:04:54 10 is just the \$100 increased by the cost of living or
 00:05:10 11 as an alternative it can be this other method which
 00:05:21 12 is under B-1. And that basically all of these years
 00:05:27 13 B-1 has been -- at least 15 years you said you had
 00:05:34 14 the records, had not used the \$100 plus cost of
 00:05:44 15 living. They had used the B-1 calculation. Is
 00:06:20 16 that --
 00:06:22 17 MR. WILKERSON: And that keys off the
 00:06:25 18 average unit definition. It has nothing to do with
 00:06:32 19 common area budget as they want -- they want the
 00:06:39 20 court to conclude.
 00:06:45 21 JUDGE DUKES: But, I mean it doesn't
 00:06:47 22 have anything to do -- the \$100 is not even a factor
 00:06:54 23 in this case, right?
 00:07:05 24 MR. WILKERSON: They are alternates.
 00:07:08 25 And we would submit, Your Honor, that even if --

THOMAS REPORTING SERVICES

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00:07:15 1 even if the calculation is found to have been done
 00:07:20 2 wrongly in some respect, and I don't know what that
 00:07:24 3 would be. But even if it is, then certainly the
 00:07:31 4 minimum amount would be the hundred dollars indexed
 00:07:36 5 to inflation.

00:07:38 6 And so they want to go back to \$60 a month
 00:07:44 7 which is -- which is -- which is \$40 less than it
 00:07:50 8 was in 1990. That is what the testimony is going to
 00:08:01 9 be. They want the assessments to be \$60 a month
 00:08:08 10 based on their calculations of this common area
 00:08:12 11 budget that they think needs to be used in some
 00:08:17 12 fashion in trying to establish these assessments.

00:08:28 13 And so it clearly can't be that. The \$100
 00:08:35 14 and indexed would clearly in our view be a backstop
 00:08:46 15 even if there is some problem with the calculation.

00:09:00 16 JUDGE DUKES: Okay.

00:09:02 17 MR. FINGER: Your Honor? Just very
 00:09:08 18 briefly, Your Honor. The \$100 in the formula has
 00:09:16 19 two very significant bookends on each side of it.
 00:09:28 20 In front of it it says the money from Quartermaster
 00:09:32 21 must be used exclusively for common areas. Common
 00:09:38 22 areas is a defined term. And it excludes all the
 00:09:47 23 buildings.

00:09:50 24 So that is the bookend on one side before
 00:09:57 25 the formula which says the \$100 or the formula must

THOMAS REPORTING SERVICES

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00:10:12 1 be used exclusively. Right behind the other bookend
 00:10:19 2 it says after the \$100 and the formula, it says the
 00:10:28 3 regime shall prepare an annual budget for the common
 00:10:35 4 areas so the parties can determine whether it's
 00:11:20 5 being used exclusively.

00:11:25 6 So the argument ignores those two very
 00:11:33 7 critical and very clear bookends which we think
 00:11:38 8 mandates a \$60 a month deal. If the court wants to

00:12:02 9 interpret the fact that back in 1990 when none of us
00:12:08 10 were involved in this there was no Quartermaster,
00:12:34 11 therefore there is no contract, I can live with
00:12:40 12 that. We can go home right now.

00:12:46 13 If there is no contract between us, that
00:12:51 14 means it doesn't bind any of my people who live
00:12:57 15 there. We will go home right now. I'm happy with
00:13:01 16 that result. I don't think that was John's
00:13:05 17 suggestion, but I'm happy with the result.

00:13:13 18 MR. WILKERSON: Just briefly, Your
00:13:14 19 Honor, the contract was entered into between the
00:13:21 20 regime and the owners of the property who then
00:13:32 21 imposed this agreement to run with the land. So
00:13:37 22 Quartermaster has never owed a nickel.
00:13:47 23 Quartermaster didn't even need to be a signatory to
00:13:53 24 the document. I was surprised to see that they were
00:13:58 25 a signatory to it even though it didn't exist, but

THOMAS REPORTING SERVICES

26

00:14:13 1 it was between the right people to make it a
00:14:16 2 contract that runs with the land and is binding.
00:14:20 3 And I'll just say that these bookends that
00:14:25 4 counsel talks about, he says that -- talks about
00:14:44 5 common area that excludes the buildings. That is an
00:14:49 6 inaccurate interpretation. And we will go into that
00:14:57 7 as we get through it. It clearly does not. It
00:15:02 8 clearly includes -- it clearly includes what it does
00:15:10 9 include, including the amenities. And the amenities
00:15:18 10 don't include the building, but by virtue of the
00:15:29 11 fact that when it defines common areas and the

00:15:37 12 amenities, the amenities does not include the
00:15:44 13 buildings, but the rest of it does. The rest of the
00:15:50 14 definition of common areas does.

00:15:54 15 And common area has nothing to do again
00:15:58 16 with the calculations. It has to do with their
00:16:07 17 argument that we've been spending the money wrong.
00:16:11 18 And that issue is not -- it doesn't have any
00:16:19 19 traction either because while it does say that you
00:16:26 20 ought to spend it on certain things, it also
00:16:32 21 includes in there reserves. And every year there is
00:16:44 22 money going into the reserves.

00:16:55 23 And so it's -- even if we were here to
00:17:01 24 talk about how the money has been spent and it's
00:17:11 25 been spent properly, which we are not, I keep

THOMAS REPORTING SERVICES

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27

00:17:15 1 talking about it so I will sit down and shut up, but
00:17:23 2 if we were talking about that it doesn't have
00:17:27 3 anything to do with what we are here for.

00:17:41 4 JUDGE DUKES: All right. Well, thank
00:17:45 5 you. I'll certainly try to sort through it as best
00:17:56 6 I can as we go.

00:18:07 7 MR. WILKERSON: Your Honor, we did
00:18:10 8 not file an additional trial brief. We would rely
00:18:15 9 on our summary judgment brief that was fairly
00:18:22 10 complete that we filed earlier.

00:18:28 11 JUDGE DUKES: All right.

00:18:29 12 MR. WILKERSON: It sets forth the
00:18:33 13 facts and our position on most of the legal issues.

00:18:43 14 JUDGE DUKES: Okay. Thank you very

10-1-13 QUARTERMASTER HEARING.txt

00:18:45 15 much.
00:18:48 16 MR. WILKERSON: Yes, sir.
00:18:53 17 JUDGE DUKES: Mr. Finger, call your
00:18:56 18 first witness.
00:19:00 19 MR. FINGER: Call Mr. Ron
00:19:10 20 Fenstermaker first.
00:19:53 21 JUDGE DUKES: All right. Come
00:19:59 22 around, sir.
00:20:14 23 COURT REPORTER: I didn't get the
00:20:18 24 full name.
00:20:23 25 JUDGE DUKES: Ron -- I'll get him to

THOMAS REPORTING SERVICES

28

00:20:26 1 spell it for you.
00:20:32 2 COURT REPORTER: Thank you.
00:20:37 3 JUDGE DUKES: How are you, sir?
00:20:45 4 MR. FENSTERMAKER: Fine.
00:20:47 5 JUDGE DUKES: Hold your right up for
00:20:48 6 me, please. Do you swear or affirm to tell the
00:20:54 7 truth the whole truth, and nothing but the truth so
00:20:59 8 help you God?
00:21:01 9 MR. FENSTERMAKER: I do.
00:21:04 10 JUDGE DUKES: All right. Turn around
00:21:07 11 and watch your step there. It's a tricky step,
00:21:13 12 and --
00:21:16 13 MR. FENSTERMAKER: Do you need the
00:21:21 14 spelling? (Passes business card.)
00:21:23 15 JUDGE DUKES: Yes, please. Even
00:21:34 16 better.
00:21:38 17 MR. FENSTERMAKER: Probably the

00:21:39 18

easiest way.

00:21:45 19

JUDGE DUKES: Please answer any

00:21:47 20

questions Mr. Finger may have of you.

00:21:57 21

MR. FENSTERMAKER: Okay.

00:21:57 22

WHEREUPON:

00:21:57 23

RONALD FENSTERMAKER, being duly sworn

00:21:57 24

and cautioned to speak the truth, the whole truth

00:21:57 25

and nothing but the truth, testifies as follows:

THOMAS REPORTING SERVICES

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29

00:21:59 1

DIRECT EXAMINATION

00:22:01 2

BY MR. FINGER:

00:22:04 3

Q. Mr. Fenstermaker, you own a management

00:23:51 4

company, am I correct, or a condominium management

00:23:57 5

company?

00:24:56 6

A. Suncation Management, yeah.

00:25:01 7

Q. You manage about 57 condos including Broad

00:25:10 8

Creek; is that correct?

00:25:16 9

A. Fifty-seven properties.

00:25:22 10

Q. Okay. You also manage Lake Winden; am I

00:25:41 11

correct?

00:25:42 12

A. Yeah.

00:25:43 13

Q. Roughly the same number of units as Broad

00:25:47 14

Creek, Quartermaster?

00:25:53 15

A. I don't know exactly, but it's 250-plus.

00:26:02 16

250-plus.

00:26:04 17

Q. Okay. And we have already marked Exhibit

00:26:06 18

Number 1 which is the reciprocal agreement. You are

00:26:39 19

familiar with this document; am I correct?

00:26:44 20

A. I am.

00:26:45 21 Q. And isn't it correct that you believe that
00:26:49 22 that document has various confusing issues in it and
00:26:55 23 paragraphs in it?
00:27:00 24 MR. WILKERSON: Objection, Your
00:27:01 25 Honor.

THOMAS REPORTING SERVICES

30

00:27:07 1 MR. FINGER: I would declare him
00:27:09 2 adverse, Your Honor. He manages the Defendant.
00:27:43 3 MR. WILKERSON: Let me make my
00:27:45 4 objection.
00:27:49 5 MR. FINGER: I assumed that's what it
00:27:49 6 was. I'm sorry, your Honor.
00:28:01 7 MR. WILKERSON: He's leading this
00:28:03 8 witness. This guy -- he's not an officer, director,
00:28:11 9 or managing agent of the -- well, let's look at the
00:28:19 10 rule to see what allows him to do a cross
00:28:26 11 examination of a party. And I don't believe this
00:28:31 12 guy qualifies.
00:28:38 13 BY MR. FINGER:
00:28:39 14 Q. You were the 30(b)(6) deponent for the
00:28:46 15 Defendant; am I correct?
00:28:54 16 A. Yes.
00:28:56 17 MR. FINGER: Your Honor, I would like
00:28:58 18 to have the ability to --
00:29:04 19 JUDGE DUKES: Either hostile or
00:29:06 20 adverse, I don't know.
00:29:15 21 MR. WILKERSON: If Your Honor please,
00:29:17 22 the 30(b)(6) rule only requires us to name someone
00:29:24 23 who we are willing to be bound by what they say in

00:29:30 24 that deposition. And that is all that rule says.

00:29:35 25 It doesn't create them -- it doesn't make them

THOMAS REPORTING SERVICES

♀

31

00:29:40 1 somebody that he can lead all the way around the

00:29:43 2 courtroom, but that's --

00:29:50 3 BY MR. FINGER:

00:29:52 4 Q. Are the paragraphs in --

00:29:55 5 JUDGE DUKES: I'll allow it.

00:30:00 6 MR. FINGER: Thank you.

00:30:01 7 BY MR. FINGER:

00:30:01 8 Q. The paragraphs in the reciprocal agreement

00:30:16 9 are convoluted; isn't that correct?

00:30:22 10 A. Which paragraphs?

00:30:25 11 Q. Bear with me one second and we will go

00:30:28 12 right to your deposition.

00:30:50 13 MR. FINGER: Your Honor, with your

00:30:55 14 permission hand up the original. May I open the

00:31:05 15 original or let the court reporter open up the

00:31:11 16 original?

00:31:51 17 BY MR. FINGER:

00:31:52 18 Q. Give you the original of your deposition.

00:31:56 19 And go to Page 44 for me, please. Beginning on the

00:32:13 20 bottom of Page 43, do you not say the whole

00:32:29 21 paragraph is sort of convoluted at the bottom of

00:32:33 22 Page 43 and 44?

00:32:47 23 MR. WILKERSON: If Your Honor please,

00:32:49 24 he just asked him which paragraph he's talking --

00:33:06 25 what provision he's talking about. He's trying to

THOMAS REPORTING SERVICES
Page 28

00:33:13 1 impeach him with his testimony. He needs to tell
 00:33:20 2 him what paragraph he's talking about.
 00:33:31 3 BY MR. FINGER:
 00:33:32 4 Q. I'm talking about the paragraph that
 00:33:39 5 defines common areas. Do you believe that that is a
 00:33:46 6 convoluted paragraph?
 00:33:51 7 MR. WILKERSON: Can we show him that
 00:33:57 8 document?
 00:34:02 9 THE WITNESS: Yeah. I still don't
 00:34:04 10 know which paragraph you are referring to.
 00:34:09 11 JUDGE DUKES: I'm confused about the
 00:34:11 12 question. Is the question did he say it in his
 00:34:17 13 deposition or does he believe it here today?
 00:34:22 14 BY MR. FINGER:
 00:34:23 15 Q. Do you believe that there are convoluted
 00:34:26 16 paragraphs in this reciprocal agreement?
 00:34:34 17 A. Which paragraphs?
 00:34:38 18 Q. The question is, Mr. Fenstermaker, do you
 00:34:47 19 believe that there are convoluted paragraphs in this
 00:34:52 20 document?
 00:35:02 21 JUDGE DUKES: The document being --
 00:35:07 22 BY MR. FINGER:
 00:35:08 23 Q. Any of them?
 00:35:12 24 JUDGE DUKES: And the document you
 00:35:14 25 are talking about is the reciprocal agreement?

THOMAS REPORTING SERVICES

00:35:23 1 MR. FINGER: Is the reciprocal
 Page 29

10-1-13 QUARTERMASTER HEARING.txt

00:35:25 2 agreement?

00:35:28 3 THE WITNESS: What do you mean by

00:35:30 4 convoluted?

00:35:38 5 BY MR. FINGER:

00:35:39 6 Q. That is a word that you used on Page 44.
00:35:50 7 Convoluted. Confusing, ambiguous, vague, sends you
00:35:59 8 to different places to figure it out.

00:36:06 9 A. I never used the term ambiguous. As far
00:36:29 10 as --

00:36:30 11 MR. WILKERSON: Objection, Your
00:36:34 12 Honor. Just a minute. The issue of whether or not
00:36:38 13 a witness believes that a document is confusing or
00:36:43 14 convoluted or even ambiguous is not relevant. That
00:36:53 15 is a legal question for the court to determine.

00:37:00 16 JUDGE DUKES: I thought that was
00:37:01 17 going to be your first objection actually when you
00:37:07 18 stood up. That is what I was -- I guess, Mr.
00:37:20 19 Finger, what I was -- is the purpose of this witness
00:37:37 20 contractual interpretation or is the -- is it that
00:37:49 21 what they are lived by for years is something that
00:37:53 22 can't be understood? I guess I'm trying to figure
00:38:01 23 out the purpose of these questions.

00:38:06 24 MR. FINGER: I heard in the opening
00:38:12 25 statement that I was going to get a bunch of parole

THOMAS REPORTING SERVICES

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34

00:38:16 1 evidence objections. And I was trying to set the
00:38:20 2 testimony in the proper context to give the court
00:38:42 3 some advance notice on how the parole evidence may
00:38:49 4 or may not apply to this document.

Page 30

10-1-13 QUARTERMASTER HEARING.txt

00:39:12 5 when the Defendant 30(b)(6) deponent says
00:39:22 6 it's a convoluted document, I think that is
00:39:26 7 something that would bear on the parole evidence
00:39:29 8 rule.

00:39:35 9 JUDGE DUKES: And I guess the
00:39:36 10 question is as far as making a complete record at
00:39:47 11 some point I've got to do an analysis of this entire
00:39:53 12 thing, at least the parts that you all find to be in
00:39:59 13 dispute. And you all correct me if I'm wrong, but
00:40:04 14 if I find them not to be ambiguous and to be clear
00:40:13 15 using nothing more than the four corners of the
00:40:17 16 contract, then I think the analysis for me at least
00:40:24 17 would stop there. But if I find it is ambiguous
00:40:36 18 then this testimony might be relevant. Is that a
00:40:41 19 fair assessment of how this should work?

00:41:05 20 MR. WILKERSON: You can allow parole
00:41:08 21 evidence to establish the intent of the parties,
00:41:14 22 Your Honor.

00:41:15 23 JUDGE DUKES: Right.

00:41:36 24 MR. WILKERSON: He wasn't around when
00:41:39 25 they signed the document. He can talk about how

THOMAS REPORTING SERVICES

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35

00:41:46 1 they've interpreted it over the years, but the
00:41:50 2 intent of the signing parties is the question to
00:41:53 3 resolve an ambiguity and none of those are here.

00:42:00 4 JUDGE DUKES: Well, but as we get --
00:42:03 5 and, again, I'm leaping forward to something I may
00:42:10 6 never get to because I think as we all agree if I
00:42:50 7 read the four corners of the contract and say this

Page 31

00:42:55 8 is crystal clear, then the analysis perhaps stops
 00:43:05 9 there. But if we get to -- at some point I find
 00:43:12 10 that its ambiguous and have to use whatever I've
 00:43:20 11 been given to determine the intent of the contract,
 00:43:25 12 then I suppose I've got to go into the effect of
 00:43:37 13 that ambiguous contract and how to balance the
 00:43:41 14 scales and make it right. And I'm guessing that is
 00:43:48 15 at least in part what I could use this testimony for
 00:43:59 16 if I know -- I think I know where this is going.

00:44:09 17 And so I suppose I would let him continue
 00:44:13 18 subject to your objection and with the understanding
 00:44:18 19 that if this is an unambiguous contract most of this
 00:44:26 20 probably makes no difference at all.

00:44:52 21 MR. WILKERSON: Okay, Your Honor.

00:44:56 22 MR. FINGER: I'll move on.

00:44:59 23 MR. WILKERSON: And I think that is a
 00:45:01 24 fair -- I think that is a fair analysis since we are
 00:45:07 25 not going to be able to get a ruling on ambiguity

THOMAS REPORTING SERVICES

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36

00:45:13 1 before we start. And so it will be taken
 00:45:23 2 conditionally I assume. Conditional testimony?

00:45:31 3 JUDGE DUKES: Exactly.

00:45:35 4 MR. WILKERSON: And if I can have a
 00:45:37 5 continuing objection to this line of questioning.

00:45:54 6 JUDGE DUKES: Right.

00:45:59 7 MR. WILKERSON: Thank you, Your
 00:46:00 8 Honor.

00:46:01 9 MR. FINGER: I'll move on, Your Honor
 00:46:03 10 very quickly all right.

10-1-13 QUARTERMASTER HEARING.txt

00:46:06 11 BY MR. FINGER:
00:46:07 12 Q. Have you read the complaint in this matter
00:46:14 13 at this point in time, the complaint filed by
00:46:17 14 Quartermaster? Have you read the complaint?
00:46:22 15 A. Not in its entirety, no.
00:46:27 16 Q. You hadn't read it at all when I took your
00:46:36 17 deposition back August the 12th; am I right?
00:46:59 18 A. I had not.
00:47:02 19 Q. And you haven't read it since in its
00:47:05 20 entirety?
00:47:08 21 A. No.
00:47:09 22 Q. Okay. Did you inform the board of
00:47:33 23 directors, did you or your company inform the board
00:47:38 24 of directors at Broad Creek that they could not and
00:47:43 25 should not give Quartermaster owners any access to

THOMAS REPORTING SERVICES

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37

00:47:50 1 the financial records that they had been asking for?
00:47:56 2 MR. WILKERSON: Objection. Your
00:47:59 3 Honor, this is not a motion to compel.
00:48:03 4 MR. FINGER: I'm not saying it is.
00:48:12 5 I'm not saying it is a motion to compel.
00:48:19 6 MR. WILKERSON: And financial
00:48:21 7 records -- the distribution of financial records has
00:48:31 8 nothing to do, Your Honor, with the interpretation
00:48:34 9 of this contract. So it's an irrelevant, improper
00:48:45 10 question.
00:48:48 11 JUDGE DUKES: Is this -- is there an
00:48:51 12 attorneys fee claim one way or the other in this
00:48:59 13 thing?

10-1-13 QUARTERMASTER HEARING.txt

00:49:02 14 MR. WILKERSON: There is an attorneys
00:49:07 15 fee claim?

00:49:13 16 JUDGE DUKES: I'll allow it. I'll
00:49:19 17 allow it. I assume what we are getting to is the
00:49:43 18 difficulty in negotiation in trying to get this
00:49:51 19 thing straight.

00:49:55 20 MR. FINGER: No. What we are getting
00:49:57 21 to, Your Honor, is that the president -- the prior
00:50:02 22 president indicated that Mr. Fenstermaker told them
00:50:08 23 not to give any records out. Mr. Fenstermaker in
00:50:11 24 his deposition said, I never told the Board that.
00:50:22 25 And I'm entitled to ask him that because that is a

THOMAS REPORTING SERVICES

38

00:50:26 1 direct contradiction between Mr. Fenstermaker's
00:50:31 2 testimony and Mr. Water's who was the president.

00:50:38 3 MR. WILKERSON: On a totally
00:50:39 4 irrelevant matter.

00:50:43 5 JUDGE DUKES: Well, and again, I
00:50:46 6 understand your continuing objection to anything
00:50:48 7 that might go outside the four corners of the
00:50:52 8 contract. And you may very well be right. And it
00:50:56 9 may be irrelevant, but in the -- we were talking
00:51:04 10 about Judge Kimmerlin earlier. He put it all on the
00:51:27 11 record and then sort it out at some point. I think
00:51:43 12 I'll do it that way. So, again, subject to your
00:51:48 13 objection I'll allow him to continue. Thank you,
00:52:01 14 Mr. Finger. Go ahead.

00:52:03 15 BY MR. FINGER:

00:52:04 16 Q. Did you tell -- did you or someone on your
Page 34

10-1-13 QUARTERMASTER HEARING.txt

00:52:08 17 staff tell the Board at Broad Creek that they could
00:52:12 18 not and should not give financial disclosure to the
00:52:19 19 Quartermaster owners?

00:52:34 20 A. Can I see where I said it in my
00:52:38 21 deposition?

00:52:43 22 Q. Yeah. On Page 59. Well, you don't recall
00:52:54 23 that without looking at your deposition, Mr.
00:52:57 24 Fenstermaker?

00:53:00 25 A. I don't recall having said it in my

THOMAS REPORTING SERVICES

39

00:53:03 1 deposition.

00:53:06 2 Q. Do you recall ever telling the Board that
00:53:16 3 they were not suppose to give the financial data
00:53:23 4 requested by my clients? And let the record show
00:53:31 5 he's looking at Page 59 in his original deposition
00:53:36 6 at this point.

00:53:37 7 A. I am. And do I recall -- here and now do
00:53:46 8 I recall having said that to the Board?

00:54:00 9 Q. Do you recall ever --

00:54:04 10 A. My advice to my Board --

00:54:08 11 THE WITNESS: May I explain?

00:54:11 12 JUDGE DUKES: Is this an answer to
00:54:13 13 the question?

01:02:59 14 THE WITNESS: It is.

01:03:06 15 JUDGE DUKES: Okay. Go ahead.

01:03:10 16 THE WITNESS: My advice to my Board
01:03:16 17 is based on my understanding of the industry. Broad
01:03:29 18 Creek Landing is a member association. There are
01:03:36 19 278 members. Quartermaster was not a member to that

Page 35

10-1-13 QUARTERMASTER HEARING.txt

01:03:46 20 association, therefore they would not be entitled to
01:03:58 21 seeing the financial records of a private entity.
01:04:06 22 BY MR. FINGER:
01:04:06 23 Q. so did you tell the Board not to give them
01:04:11 24 financial information -- give Quartermaster
01:04:17 25 financial information?

THOMAS REPORTING SERVICES

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40

01:04:24 1 A. I don't know how to answer the question
01:04:27 2 other than what I just said. I gave them my advice.
01:05:23 3 MR. FINGER: Give me one second, Your
01:05:26 4 Honor.

01:05:33 5 BY MR. FINGER:
01:05:34 6 Q. If you could look at please beginning on
01:05:52 7 Page --

01:05:59 8 MR. FINGER: I'm sorry. I'll move
01:06:07 9 on, Your Honor. I'm not being productive.
01:06:24 10 Primarily, I think I will just -- I called Mr.
01:06:32 11 Fenstermaker on the parole evidence issue. I'll
01:06:54 12 reserve the right to recall him later. And I have
01:07:01 13 no further questions of this witness.

01:07:16 14 JUDGE DUKES: All right. Thank you.
01:07:19 15 Mr. Wilkerson, any questions of Mr. Fenstermaker.

01:07:27 16 MR. WILKERSON: Yes, Your Honor.

01:07:28 17 CROSS EXAMINATION

01:07:57 18 BY MR. WILKERSON:

01:07:58 19 Q. Mr. Fenstermaker, what is the name of your
01:08:01 20 entity that you work for?

01:08:27 21 A. Our company?

01:08:31 22 Q. Yes, sir.

Page 36

10-1-13 QUARTERMASTER HEARING.txt

01:08:33 23 A. I.M.C. Resort Services, Inc.

01:08:55 24 Q. Are you the owner of that?

01:08:58 25 A. I'm a partner.

THOMAS REPORTING SERVICES

41

01:08:59 1 Q. Okay. And what is your role in that

01:09:03 2 organization?

01:09:04 3 A. I'm the president and C.E.O.

01:09:06 4 Q. Okay. And what does that organization do?

01:09:10 5 A. We manage community associations.

01:09:20 6 Q. And approximately how many do you manage?

01:09:31 7 On Hilton Head Island or elsewhere?

01:09:39 8 A. Hilton and Bluffton area. Fifty-seven, I
01:09:54 9 think.

01:09:57 10 Q. Okay. Is that more than anybody else that
01:10:00 11 does what you do?

01:10:02 12 A. I don't think so.

01:10:03 13 Q. Okay. So you are not the biggest, but --

01:10:11 14 A. No.

01:10:12 15 Q. -- pretty big? Now, how long have you and
01:10:28 16 your organization had a relationship with Broad
01:10:36 17 Creek Landing regime?

01:10:42 18 A. I believe since 1997 or '98.

01:10:48 19 Q. All right, sir. And what do you do for
01:10:51 20 them?

01:11:05 21 A. We provide association management
01:11:09 22 services, staff, accounting, onsite manager,
01:11:22 23 insurance purchasing, contract negotiation.

01:12:35 24 Q. As part of your position with -- as
01:12:38 25 property manager, as manager of that regime have you

Page 37

THOMAS REPORTING SERVICES

¶

42

01:12:51 1 given advice and/or participated in the calculation
 01:13:00 2 of the regime fees to be charged to Quartermaster
 01:13:14 3 according to the reciprocal agreement?
 01:13:17 4 A. You mean me personally?
 01:13:21 5 Q. Yes, sir.
 01:13:22 6 A. Yes.
 01:13:23 7 Q. All right sir. Now, and have you provided
 01:13:30 8 those calculations to the owners of Quartermaster?
 01:13:33 9 A. Yes.
 01:13:34 10 Q. All right, sir.
 01:13:35 11 (DISCUSSION OFF THE RECORD.)
 01:14:33 12 MR. WILKERSON: Your Honor, what we
 01:14:35 13 are discussing here is I have a document reflecting
 01:14:46 14 the calculation of the Quartermaster regime fees.
 01:15:00 15 We've done our best to get the documents together.
 01:15:03 16 And we are missing a year or two. They state the
 01:15:19 17 years that they are for. Some of these documents
 01:15:25 18 Mr. Finger has just reminded me are really --
 01:15:32 19 contain commentary by his client at the bottom which
 01:15:44 20 he intends to put in any way. It's really not my
 01:15:51 21 intent to put that in. I just want to put in the
 01:15:59 22 calculations that have been done to the years that
 01:16:02 23 we have a.
 01:16:03 24 JUDGE DUKES: Is the commentary such
 01:16:10 25 that I will be able to recognize it's commentary or

THOMAS REPORTING SERVICES

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43

01:16:20 1 is it in the same font or anything or --
01:16:38 2 MR. FINGER: It is -- on a number of
01:16:40 3 the years, Your Honor, it is below the line -- below
01:16:50 4 the solid line is from my -- from one of the
01:16:57 5 witnesses you will hear from momentarily.
01:17:04 6 JUDGE DUKES: Okay.
01:17:08 7 MR. WILKERSON: We could actually
01:17:11 8 mark it.
01:17:18 9 MR. FINGER: We can just mark it.
01:17:23 10 MR. WILKERSON: We could actually
01:17:25 11 mark it if you wanted to and just put a bracket
01:17:31 12 beside it and say that is commentary.
01:17:37 13 JUDGE DUKES: I mean, if we are going
01:17:38 14 to make those exhibits and put them in it probably
01:17:46 15 wouldn't hurt to at least draw a line through them
01:17:53 16 or something just so somebody that is looking at it
01:17:57 17 years from now will know.
01:18:03 18 MR. FINGER: But during my client's
01:18:08 19 testimony they are going to get in any way. So
01:18:12 20 maybe it makes more sense to just put them all in
01:18:20 21 now with the specific stipulation that anything --
01:18:28 22 any of those documents that have commentary under a
01:18:32 23 line like that because --
01:18:47 24 JUDGE DUKES: To save time now?
01:18:52 25 Okay.

THOMAS REPORTING SERVICES

44

01:18:56 1 MR. FINGER: Yeah, there are a number
01:18:58 2 of them that don't have a line. Like, for instance,

10-1-13 QUARTERMASTER HEARING.txt
 01:19:05 3 that one, no line, no commentary.
 01:19:10 4 JUDGE DUKES: Got it.
 01:19:11 5 MR. FINGER: Anything with a line --
 01:19:15 6 a solid line in the middle of it, below that solid
 01:19:35 7 line is from Charlie.
 01:19:45 8 MR. WILKERSON: I could put a bracket
 01:19:49 9 by it.
 01:19:51 10 JUDGE DUKES: That's all right. Now
 01:19:53 11 that I see the line I think it's pretty clear. And
 01:20:06 12 with that explanation which is on the record I think
 01:20:17 13 we will be able to figure it out.
 01:20:31 14 MR. WILKERSON: Is it the budget that
 01:20:33 15 is with it?
 01:20:34 16 MR. FINGER: Some of them do. Some
 01:20:36 17 of them don't.
 01:20:40 18 MR. WILKERSON: I just don't happen
 01:20:41 19 to have them all together. If you have them, you
 01:20:47 20 can put them in.
 01:20:53 21 MR. FINGER: Okay. So this is just
 01:20:56 22 four copies of the same deal?
 01:20:59 23 MR. WILKERSON: Four copies of the
 01:21:01 24 same deal.
 01:21:05 25 MR. FINGER: Okay. With that

THOMAS REPORTING SERVICES

45

01:21:12 1 stipulation about anything on the cover sheets that
 01:21:16 2 attempt to explain the Quartermaster fee, if there
 01:21:26 3 is a solid line then the documentation and the lines
 01:21:43 4 and the calculation under that are done by this
 01:21:52 5 gentlemen right here, Charlie Vienne.

Page 40

01:22:03 6 JUDGE DUKES: All right. And is it
 01:22:05 7 the intent then of the parties or the Defendant, I
 01:22:10 8 guess you were going to offer them, to put those in
 01:22:14 9 as one single marked exhibit rather than
 01:22:32 10 individually marked?

01:22:39 11 MR. WILKERSON: I would rather do it
 01:22:41 12 that way, Your Honor. We can mark page numbers if
 01:22:45 13 you want to.

01:22:49 14 JUDGE DUKES: No. No. That is fine.
 01:23:01 15 I was just going to make it a little easier for
 01:23:07 16 Deborah. So -- all right. So why don't we take
 01:23:16 17 just a second and let her put a stick other that.
 01:23:21 18 And that would be Defendant's one? Is that what
 01:23:26 19 that would be?

01:23:28 20 MR. WILKERSON: Yes, sir. Let me --
 01:23:32 21 let me make it into one exhibit. I was not aware
 01:23:37 22 Mr. Fenstermaker was going to be testifying right
 01:23:41 23 now. So I'm little unprepared to do this. If you
 01:23:45 24 bear with me just a second.

01:23:51 25 JUDGE DUKES: All right. Let's --

THOMAS REPORTING SERVICES

46

01:23:53 1 you want to go off the record for a second while
 01:23:58 2 you --

01:24:06 3 COURT REPORTER: Yeah. If this is
 01:24:09 4 going to be -- if the top part is going to be
 01:24:14 5 Defendant's 1, does that mean the bottom part is
 01:24:18 6 going to be Plaintiff's 1?

01:24:47 7 MR. FINGER: No. It will all be
 01:24:49 8 Defendant's 1. All Defendant's 1.

10-1-13 QUARTERMASTER HEARING.txt
JUDGE DUKES: Yes.

01:25:12 9

01:25:13 10

COURT REPORTER: Okay. It's not

01:25:16 11

joint because we started out with Joint 1?

01:25:24 12

MR. FINGER: No. This will be

01:25:26 13

Defendant's.

01:25:28 14

COURT REPORTER: Okay.

01:25:29 15

(Recess 9:53 to 10:02.)

01:25:29 16

(MARKED DEFENDANT'S EXHIBIT NO. 1.)

02:21:35 17

JUDGE DUKES: All right.

02:21:37 18

MR. WILKERSON: All right, Your

02:21:38 19

Honor. What we have done here, a collaboration

02:21:44 20

between great minds, Mr. Finger's and somebody else,

02:21:56 21

we've gotten together a cover sheet for these

02:22:01 22

budgets that we have and the fee calculations.

02:22:13 23

Just in accordance with the court's ruling

02:22:18 24

to let it all in and sort it out later, we are

02:22:24 25

putting in these calculations that do, in fact,

THOMAS REPORTING SERVICES

47

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02:22:31 1

contain some commentary by Plaintiff's counsel. I

02:22:41 2

don't want my putting these in to waive my objection

02:22:50 3

to the commentary at all.

02:22:53 4

I want a continuing objection, but just

02:22:56 5

out of expediency and efficiency we are going to put

02:23:06 6

that in subject to that objection if the court -- if

02:23:14 7

it's agreeable to the court.

02:23:17 8

JUDGE DUKES: No. No. I understand

02:23:20 9

completely. Everything below the line is

02:23:25 10

commentary.

02:23:28 11

MR. WILKERSON: Yes, sir.

Page 42

02:23:29 12 JUDGE DUKES: And it may ultimately
02:23:32 13 be not admissible at all, but rather than cut those
02:23:42 14 pieces of paper in half or mark through things we
02:24:45 15 are going to go ahead and put them in subject to
02:24:48 16 your objection.

02:24:50 17 MR. WILKERSON: Thank you, Your
02:24:51 18 Honor. I like non-jury trials. It's a whole lot
02:25:00 19 easier.

02:25:32 20 BY MR. WILKERSON:

02:25:34 21 Q. All right. Mr. Fenstermaker, I'm going to
02:25:40 22 hand you Exhibit Number 1. Can you tell us what
02:25:47 23 that is, please, sir, although we've talked about
02:25:54 24 it. A bunch of people that don't know anything
02:25:58 25 about it have been talking about it for awhile. Can

THOMAS REPORTING SERVICES

♀

48

02:26:09 1 you tell us what it is?
02:26:12 2 A. It's a compilation of the last 14 years,
02:26:18 3 give or take a couple, of a form called how your
02:26:25 4 Quartermaster fee is calculated on an annual basis.
02:26:37 5 Q. Have you prepared those or participated in
02:26:40 6 the preparation of those calculations?
02:26:45 7 A. I believe I have in every one of them.
02:26:49 8 Q. All right, sir. And what did you use for
02:26:51 9 your formula that you went by?
02:26:57 10 A. The second of the reciprocal agreement.
02:27:03 11 Q. I call your attention, please, to Page 11
02:27:14 12 of the reciprocal agreement.
02:27:21 13 A. I have it.
02:27:22 14 Q. All right, sir.

02:27:27 15 JUDGE DUKES: Can you -- is there a
 02:27:32 16 copy of that I can follow along with or -- not the
 02:27:41 17 reciprocal agreement, but the calculation that I
 02:27:46 18 assume you all are about ready to get into?
 02:27:54 19 MR. WILKERSON: You can have that one
 02:27:56 20 actually. I don't intend to go through it in
 02:28:01 21 detail.
 02:28:06 22 JUDGE DUKES: All right.
 02:28:09 23 BY MR. WILKERSON:
 02:28:10 24 Q. Now, are you at Page 11?
 02:28:15 25 A. Yes, sir.

THOMAS REPORTING SERVICES

♀

49

02:28:22 1 Q. Subparagraph 1?
 02:28:24 2 A. Yes, sir.
 02:28:25 3 Q. Is that the go by that you used for that
 02:28:31 4 calculation?
 02:28:34 5 A. Yes, it is.
 02:28:35 6 Q. And how did you arrive at the average
 02:28:38 7 unit?
 02:28:42 8 A. Took the budget -- common area budget for
 02:28:57 9 Broad Creek Landing H.P.R. and basically divided by
 02:29:17 10 278 which is the number of members in Broad Creek
 02:29:23 11 Landing.
 02:29:32 12 Q. All right, sir. And --
 02:29:41 13 A. If I may, if I may have a copy? The
 02:29:53 14 results are the same, but the steps might be
 02:29:56 15 different. What I did was what this paragraph calls
 02:30:02 16 for.
 02:30:03 17 I took the entire budget of Broad Creek

02:30:12 18 Landing H.P.R. I subtracted the maintenance line
 02:30:19 19 item which it calls to do. I subtracted any termite
 02:30:27 20 bonds which it calls to do. And I subtracted
 02:30:33 21 two-thirds of property -- it says property
 02:30:41 22 insurance, but I subtracted two-thirds of all
 02:30:47 23 insurance which includes flood and all the
 02:30:53 24 liabilities which gave me a basis for the
 02:30:57 25 Quartermaster fees.

THOMAS REPORTING SERVICES

50

02:31:24 1 Then I divided by the number of units in
 02:31:30 2 Broad Creek Landing to come up with an average per
 02:31:33 3 unit per year. Divided that by 12 months. And that
 02:31:42 4 is the monthly fee that was assessed or charged to
 02:31:48 5 the Quartermaster owners and then divided by four or
 02:31:54 6 25 percent for an unimproved lot.

02:32:06 7 Q. All right, sir. Now, before you did these
 02:32:10 8 take-aways or these subtractions, would the amount
 02:32:15 9 that you started with be the same amount as the
 02:32:31 10 assessments for an average unit at Quartermaster?

02:32:39 11 A. At Broad Creek Landing.

02:32:44 12 Q. I mean at Broad Creek Landing.

02:32:47 13 A. Yes, sir.

02:32:50 14 Q. Okay. Did you notify Quartermaster owners
 02:33:09 15 of these calculations every year?

02:33:14 16 A. To say every year, I don't know if I could
 02:33:19 17 swear to it, but the copy that you have here -- this
 02:33:25 18 document was created just for Quartermaster owners.
 02:33:31 19 This document is not something that we would
 02:33:36 20 normally create for anybody. I mean, it was created

02:33:41 21 so that it was clear to the Quartermaster owners
 02:33:44 22 exactly how we calculated the fees that we charged
 02:33:50 23 them, we being Broad Creek Landing.
 02:33:58 24 MR. WILKERSON: All right, sir. That
 02:34:35 25 is all the questions I have for you, sir.

THOMAS REPORTING SERVICES

‡

51

REDIRECT EXAMINATION

02:34:40 1
 02:34:56 2 BY MR. FINGER:
 02:34:57 3 Q. And all of the documents that have been
 02:35:01 4 produced by I.M.C. or Broad Creek there is no
 02:35:06 5 document that is denominated a common area budget;
 02:35:15 6 am I correct?
 02:35:17 7 A. I have to say, no, you are not.
 02:35:20 8 Q. Okay. I'm not correct?
 02:35:21 9 A. You are not correct.
 02:35:23 10 Q. Does the reciprocal agreement require a
 02:35:57 11 common area budget to be formulated? And I direct
 02:36:11 12 your attention to Page 12.
 02:36:15 13 A. May I -- may I answer the question?
 02:36:19 14 Q. Sure. Well, let me direct your attention
 02:36:25 15 to Page 12. And then I'll ask my question.
 02:36:33 16 A. Okay.
 02:36:36 17 Q. Paragraph 4.3. Does it say that the
 02:36:47 18 regime shall prepare an annual budget for the
 02:36:54 19 maintenance and operating expenses of the common
 02:37:00 20 area and improvements?
 02:37:08 21 A. What it says in its entirety is the regime
 02:37:17 22 or regime managing agent for the common area located
 02:37:26 23 upon the regime property shall prepare an annual

02:37:38 24 budget for maintenance and operating which is the
02:37:44 25 budget for Broad Creek Landing. That is the common

THOMAS REPORTING SERVICES

52

02:37:48 1 area budget.

02:37:52 2 Q. The common area as its defined in this
02:37:57 3 reciprocal agreement specifically excludes the
02:38:05 4 buildings, does it not?

02:38:10 5 MR. WILKERSON: Objection, Your
02:38:11 6 Honor. If he wants to show him a definition, that
02:38:21 7 is a matter for the court to determine.

02:38:27 8 BY MR. FINGER:

02:38:28 9 Q. Do you know whether the buildings are
02:38:31 10 excluded from the common area definition in this
02:38:38 11 reciprocal agreement?

02:38:39 12 A. I do not.

02:38:40 13 Q. You've never undertaken a study to see
02:38:44 14 whether that is correct or not?

02:38:48 15 A. No, because the formula takes the building
02:38:53 16 maintenance as a deduction from the formula. So to
02:39:01 17 me that excludes the buildings if I subtract --
02:39:09 18 my --

02:39:16 19 THE WITNESS: Can I continue?

02:39:20 20 JUDGE DUKES: Yeah. Go ahead.

02:39:24 21 THE WITNESS: By subtracting the
02:39:26 22 general maintenance from the formula for how the fee
02:39:30 23 is calculated, and by subtracting the termite bonds,
02:39:41 24 it seems to me that that was logical that that was
02:39:48 25 excluding those areas from what they pay.

THOMAS REPORTING SERVICES
Page 47

02:39:58 1 BY MR. FINGER:

02:39:59 2 Q. Please look at Page 4. That is the

02:40:05 3 definition of common areas; is it not?

02:40:31 4 A. It is their definition of common area,

02:40:34 5 yes.

02:40:35 6 Q. Okay. And if you try to find a definition

02:40:42 7 of common area in the Broad Creek master deed, there

02:40:50 8 isn't one, is there?

02:40:52 9 A. I don't know the answer to that without

02:40:55 10 looking at the master deed.

02:41:00 11 Q. Have you not looked at the master deed in

02:41:02 12 conjunction with this specific question?

02:41:09 13 A. I certainly don't have it memorized. I

02:41:19 14 don't -- no, I do not.

02:41:24 15 Q. There are common elements and limited

02:41:28 16 common elements, but there is no common areas.

02:41:36 17 Isn't that correct under that master deed?

02:41:40 18 A. In our industry common area and common

02:41:51 19 elements is a synonymous phrase -- are synonymous

02:42:01 20 phrases.

02:42:03 21 Q. Well, let me get you to back up a page if

02:42:06 22 you would to Page 3. Look at the amenities area if

02:42:48 23 you would; please. Do you see the definition for

02:42:58 24 amenities area?

02:43:00 25 A. I do.

THOMAS REPORTING SERVICES

02:43:01 1 Q. Okay. And it refers you to Exhibit A; is
Page 48

02:43:07 2 that correct?

02:43:07 3 A. It does.

02:43:08 4 Q. which I believe -- it's not a numbered

02:43:14 5 Page 26, but it would be Page 26 in this document.

02:43:27 6 would you please go there. The recorded page number

02:43:32 7 is 1418 in the top right-hand corner if that helps.

02:43:45 8 A. Okay.

02:43:46 9 Q. Is that the Exhibit A which describes the

02:43:52 10 regime amenity area?

02:44:08 11 A. It is.

02:44:09 12 Q. And if you will go down to the last

02:44:12 13 paragraph, doesn't it specifically exclude any

02:44:25 14 structures where the condominiums are located?

02:44:33 15 A. It does.

02:44:34 16 Q. And your budget that you applied this

02:44:37 17 formula to includes reserves for those buildings, am

02:44:48 18 I correct?

02:44:49 19 A. It includes reserves.

02:44:56 20 Q. Painting for those buildings, correct?

02:45:00 21 A. Not in every year.

02:45:07 22 Q. You don't have reserve paintings in that

02:45:17 23 budget?

02:45:17 24 A. Not in every year.

02:45:22 25 Q. How about the last three or four years,

THOMAS REPORTING SERVICES

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55

02:45:28 1 have you had painting reserves in there?

02:45:36 2 A. I couldn't tell you three or four. I

02:45:44 3 couldn't tell you two or three. There are budgets

02:45:47 4 that do.

10-1-13 QUARTERMASTER HEARING.txt

02:45:49 5 Q. Please take a look at Exhibit Number --
02:45:55 6 Defense Exhibit Number 1 the judge has. Look at the
02:46:13 7 last page which should be the budget for 2012 and
02:46:24 8 '13.
02:46:35 9 A. Yes.
02:46:36 10 Q. Does it have reserves in there?
02:46:40 11 A. It has roof and paint.
02:46:56 12 Q. All right. What is the total of the
02:47:06 13 reserves that you have for the roofs and paints on
02:47:30 14 the condominium buildings in the budget year for
02:47:36 15 this year?
02:47:39 16 A. '12-'13?
02:47:48 17 Q. Yes.
02:47:50 18 A. Zero.
02:47:51 19 Q. There are no reserves?
02:47:56 20 A. Hold on. I'm sorry. 33,503.
02:48:04 21 Q. For paint?
02:48:14 22 A. For paint.
02:48:18 23 Q. Is that correct?
02:48:22 24 A. No. I'm sorry. For roofs. No paint.
02:48:29 25 Q. Are there any other reserves in that

THOMAS REPORTING SERVICES

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56

02:48:34 1 budget for 2012 and '13?
02:48:42 2 A. Operating reserves.
02:48:44 3 Q. Okay. And how much is that?
02:48:49 4 A. 91,200.
02:48:51 5 Q. And you've been averaging about 120,000,
02:49:00 6 \$130,000 a year in reserves for these condominium
02:49:08 7 buildings; isn't that correct?

Page 50

10-1-13 QUARTERMASTER HEARING.txt

02:49:13 8 A. Without doing the calculation, I'll accept
02:49:19 9 what you say, yes.

02:49:33 10 Q. And you have in excess or you had in
02:49:36 11 excess of \$770,000 in reserves last time you
02:49:48 12 reported it to Quartermaster; isn't that correct?

02:50:11 13 A. I would have to see the document.

02:50:29 14 Q. A document from June of 2011 from your
02:50:35 15 office. Does it not indicate that excludes there is
02:50:38 16 over \$760,000 in reserves in Broad Creek Landing?

02:50:52 17 A. I'll take somebody's math for granted.
02:50:57 18 It's handwritten. Yes.

02:51:00 19 Q. Okay.

02:51:01 20 A. Including insurance reserves.

02:51:06 21 Q. Including insurance reserves. And my
02:51:14 22 clients are fee simple. They don't pay any
02:51:34 23 insurance -- you don't pay any insurance for my
02:51:40 24 clients. They pay all their own; am I correct?

02:51:58 25 A. They pay insurance on the common area.

THOMAS REPORTING SERVICES

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57

02:52:02 1 The formula dictates what to subtract, two-thirds of
02:52:14 2 insurance.

02:52:18 3 Q. Well, the money that you collect for Broad
02:52:24 4 Creek from Quartermaster is to be used exclusively
02:52:29 5 for the common areas; isn't that correct?

02:52:37 6 MR. WILKERSON: Object.

02:52:39 7 BY MR. FINGER:

02:52:40 8 Q. That they give to you; isn't that right?

02:52:47 9 MR. WILKERSON: Objection. It
02:52:48 10 mischaracterizes the document, Your Honor.

Page 51

10-1-13 QUARTERMASTER HEARING.txt

02:53:01 11 JUDGE DUKES: well, how -- I guess
02:53:03 12 the better question may be -- or maybe it's not a
02:53:19 13 better question is how is in practice used? I don't
02:53:31 14 know. I mean, I guess that is the basis of the
02:53:37 15 dispute. And then you can point to where in the
02:53:41 16 contract you believe it's in error, how it's being
02:53:48 17 used.

02:53:49 18 BY MR. FINGER:

02:53:50 19 Q. Money from Quartermaster people go into
02:53:55 20 fund the reserves for the condominium buildings;
02:54:03 21 isn't that correct?

02:54:08 22 A. If you follow the formula, yes.

02:54:20 23 Q. And that is approximately \$65,000 per year
02:54:26 24 would come out of that if the reserves were not
02:54:31 25 assessed against my clients; isn't that right?

THOMAS REPORTING SERVICES

♀

58

02:54:36 1 A. I don't agree with that, no.

02:54:43 2 Q. You don't agree with that math?

02:54:49 3 A. Not at all. And when you --

02:54:58 4 Q. If the reserves were taken out of the
02:55:06 5 formula, how much reserves would come out if you
02:55:13 6 deleted the buildings? Let me ask it that way?

02:55:24 7 MR. WILKERSON: Objection, Your
02:55:25 8 Honor. There is nothing in the formula that says
02:55:30 9 take the reserves out. It's just -- this is just
02:55:35 10 ridiculous.

02:55:44 11 JUDGE DUKES: well, it's an element
02:55:46 12 of what they claim is damages so I think I'm going
02:55:51 13 to need some information on it or I'm going to have

Page 52

10-1-13 QUARTERMASTER HEARING.txt

02:55:57 14 to do a whole lot of math myself. So --

02:56:08 15 BY MR. FINGER:

02:56:09 16 Q. If you took the condominium building
02:56:21 17 reserves out, what would be the difference
02:56:38 18 dollar-wise that you would plug into this formula?
02:56:42 19 How much less would you plug into the formula?

02:56:56 20 A. I don't know that I could answer that
02:56:58 21 question because the operating reserve is for all
02:57:06 22 common areas. It's for pools. It's for tennis
02:57:12 23 courts. It's for the clubhouse. It's for the
02:57:17 24 roadways. It's for everything. So I can't really
02:57:22 25 answer that question.

THOMAS REPORTING SERVICES

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59

02:57:30 1 Q. You have never done that math before?

02:57:35 2 A. To do what math?

02:57:40 3 Q. The math that I just asked you to do, have
02:57:43 4 you never done it before?

02:57:47 5 A. Take the entire reserve --

02:57:54 6 Q. Take the reserves out of the formula, what
02:57:58 7 is the dollar amount the formula would go down by
02:58:04 8 before you divide it?

02:58:06 9 A. I may have done that math, but I don't
02:58:12 10 remember what the dollars would be.

02:58:19 11 Q. Did you -- you have no recollection of
02:58:22 12 doing that within the last three months?

02:58:25 13 A. Yeah, I may have, yes.

02:58:32 14 Q. And did you discuss it with my client?

02:58:43 15 A. I discussed it in court ordered mediation
02:58:48 16 or whatever that was we met in your office.

Page 53

02:58:56 17 Q. So you have done the math?
02:59:02 18 MR. WILKERSON: If Your Honor please,
02:59:14 19 the order setting forth all of this further
02:59:30 20 discussion says that all of that is confidential
02:59:34 21 information. I'm not sure where he's going with
02:59:37 22 this, but I think we have to respect that order.
02:59:44 23 JUDGE DUKES: Yeah, I would rather
02:59:46 24 not get into the mediation. If he's got some
02:59:52 25 mathematics though I'm not -- happy to see them, but

THOMAS REPORTING SERVICES

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60

03:00:07 1 maybe they are -- maybe they are not here today. I
03:00:12 2 don't know.
03:00:14 3 BY MR. FINGER:
03:00:15 4 Q. Did you do the math to see what that
03:00:18 5 number would have been?
03:00:22 6 A. I did the math, but I don't remember what
03:00:24 7 the number was.
03:00:30 8 Q. You have no recollection at all what the
03:00:32 9 number was?
03:00:36 10 A. Absolutely not.
03:00:38 11 Q. Did you give us a number during the
03:00:43 12 meeting that we had?
03:00:55 13 A. I don't know. John was there. I don't
03:01:00 14 know. Did I?
03:01:03 15 JUDGE DUKES: And again your question
03:01:04 16 is not to settlement numbers.
03:01:10 17 MR. FINGER: That's correct.
03:01:11 18 JUDGE DUKES: Your question is to
03:01:15 19 what actual numbers having removed certain items.

Page 54

10-1-13 QUARTERMASTER HEARING.txt

03:01:24 20 MR. FINGER: Correct.
03:01:26 21 JUDGE DUKES: Not what the parties
03:01:29 22 could settle for but again just what the math would
03:01:34 23 be line iteming certain things out. I'm happy to
03:01:42 24 hear the objection, but I don't want to get into
03:01:47 25 what you all might have settled for or couldn't

THOMAS REPORTING SERVICES

†

61

03:01:51 1 settle for.
03:01:54 2 MR. FINGER: I understand. I
03:01:55 3 understand. I'm not trying to get him to go there.
03:01:59 4 MR. WILKERSON: And if can explain
03:02:00 5 that, Your Honor. In an effort to try to comply
03:02:09 6 with the court's order, we went through and tried
03:02:14 7 to, if you will, make up something that might be
03:02:20 8 considered by the other side to be fair if you will
03:02:25 9 in an effort to try to find some way to have some
03:02:33 10 discussion about that.
03:02:34 11 And that was the genesis of this document
03:02:47 12 that he's asking him about which is the
03:02:55 13 quintessential settlement negotiations that would be
03:03:03 14 subject to the court's order holding that
03:03:06 15 information as confidential even if he could
03:03:10 16 remember what the number was.
03:03:36 17 JUDGE DUKES: Well, it sounds like he
03:03:41 18 can't remember anyway, so maybe it doesn't matter.
03:03:55 19 MR. FINGER: It certainly would go to
03:04:00 20 the credibility of the witness, Your Honor. That is
03:04:05 21 my only point. I'll move on.
03:04:10 22 BY MR. FINGER:

Page 55

10-1-13 QUARTERMASTER HEARING.txt

03:04:11 23 Q. How many members of the Board of Directors
03:04:16 24 at Broad Creek now are currently employed by your
03:04:24 25 business?

THOMAS REPORTING SERVICES

‡

62

03:04:39 1 MR. WILKERSON: Relevance, Your
03:04:41 2 Honor. Objection.

03:04:45 3 MR. FINGER: Directly relevant, Your
03:04:47 4 Honor. If his company has three employees on the
03:04:53 5 Board and they control the Board, I think that is
03:04:59 6 directly relevant.

03:05:11 7 JUDGE DUKES: It may have some
03:05:12 8 relevance. I don't know.

03:05:25 9 THE WITNESS: One.

03:05:26 10 BY MR. FINGER:

03:05:27 11 Q. There is only one now? Who is that?

03:05:34 12 A. Tom Waters.

03:05:39 13 Q. Okay. If --

03:05:47 14 MR. WILKERSON: If Your Honor please,
03:05:48 15 just as administrative matter, I don't know who this
03:05:53 16 young lady is behind me, but everything I say she
03:05:58 17 disagrees with it behind me. It's quite
03:06:23 18 distracting. If you can ask her --

03:06:31 19 JUDGE DUKES: Ma'am, could you
03:06:32 20 please -- who -- who is --

03:07:17 21 MS. OVENS: I'm Pamela and I will --

03:07:22 22 JUDGE DUKES: Yeah. I'll tell you
03:07:25 23 what, if you are going to -- this is sort of like a
03:07:28 24 little bit of a wedding, and the bride's side and
03:07:59 25 the groom's side. It might help maybe if you would

Page 56

THOMAS REPORTING SERVICES

63

03:08:05 1 move over to the other side if that is -- if you
 03:08:12 2 feel -- and try not to say anything. But if you
 03:08:15 3 feel the need to --
 03:08:24 4 MS. OVENS: I feel that I can not
 03:08:26 5 comment. And stay where I am.
 03:08:28 6 JUDGE DUKES: All right. We will try
 03:08:31 7 to go with that then. All right.
 03:08:34 8 BY MR. FINGER:
 03:08:35 9 Q. So Tom Waters currently works for you and
 03:08:39 10 he's on the board of Broad Creek?
 03:09:03 11 A. Yes.
 03:09:04 12 Q. Okay. He was the president. Is he still
 03:09:07 13 the president?
 03:09:10 14 A. No.
 00:01:24 15 Q. When did he cease being president?
 00:01:31 16 A. When he came to work for me.
 00:01:34 17 Q. He was never president at any time when he
 00:01:38 18 worked for you?
 00:01:41 19 A. Not to my knowledge.
 00:01:43 20 Q. But he was a pool contractor that worked
 00:01:49 21 for I.M.C. for many years while he was on the Board;
 00:01:54 22 is that correct?
 00:02:16 23 A. He was pool manager, yes.
 00:02:20 24 Q. Okay. And how about Donna Golding?
 00:02:25 25 Wasn't she on the Board when she worked for you?

THOMAS REPORTING SERVICES

64

10-1-13 QUARTERMASTER HEARING.txt

00:02:36 1 A. She worked for -- she hasn't worked for me
00:02:42 2 for four years.
00:02:49 3 Q. Was she on the Board while she worked for
00:02:58 4 you?
00:02:58 5 A. Yes.
00:02:59 6 Q. Okay. John McNichol, is he still on the
00:03:05 7 Board?
00:03:07 8 A. He is.
00:03:08 9 Q. Did he work for you?
00:03:27 10 A. He was never on my payroll. He worked as
00:03:33 11 a vendor.
00:03:36 12 Q. Okay. That you used in your 57
00:03:51 13 management --
00:03:56 14 A. Yes, sir.
00:03:56 15 Q. How about Garrett Hamilton? Wasn't he on
00:04:05 16 the Board?
00:04:11 17 A. Yes.
00:04:12 18 Q. Did he work for you?
00:04:16 19 MR. WILKERSON: Your Honor, I have a
00:04:22 20 continuing objection to this line of irrelevant --
00:04:44 21 irrelevancy.
00:04:50 22 JUDGE DUKES: It's noted, but I'll
00:04:54 23 allow him to make a record on it.
00:05:15 24 MR. WILKERSON: Thank you, Your
00:05:16 25 Honor.

THOMAS REPORTING SERVICES

♀

65

00:05:18 1 BY MR. FINGER:
00:05:18 2 Q. Did he work for you while he was on the

10-1-13 QUARTERMASTER HEARING.txt

00:05:23 3 Board?
00:05:25 4 A. Yes.
00:05:33 5 Q. You have during discovery --
00:05:40 6 A. May I add something?
00:05:51 7 Q. Yes.
00:05:52 8 A. To my knowledge never more than one at any
00:06:01 9 of the time.
00:06:06 10 Q. All right. Mr. McNichol and Mr. Waters
00:06:12 11 weren't both on the Board at the same time?
00:06:19 12 A. No, they didn't work for me while they
00:06:22 13 served on the Board.
00:06:36 14 Q. On the balance sheet for Broad Creek it
00:06:40 15 lists some land that Broad Creek owns. What is
00:06:48 16 that, do you know?
00:06:50 17 A. I believe it's the Quartermaster lot.
00:06:56 18 Q. Okay. And did you check that since I
00:07:09 19 asked you at your deposition when you said you
00:07:16 20 didn't know what it was?
00:07:19 21 A. Probably. I don't know.
00:07:20 22 Q. Okay. So Broad Creek Landing actually
00:07:25 23 owns one of the Quartermaster lots, Lot Number 2; is
00:07:33 24 that correct?
00:07:36 25 A. I don't know the lot number. It's the

THOMAS REPORTING SERVICES

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66

00:07:38 1 very first lot.
00:07:48 2 Q. The very first lot?
00:07:51 3 A. Right at the entrance.
00:07:54 4 Q. And do you know whether that is deed
00:07:57 5 restricted to be common areas?

00:08:03 6

A. I do not.

00:08:16 7

Q. Do you think this reciprocal agreement between Broad Creek Landing and Quartermaster is fair?

00:08:24 9

00:08:26 10

MR. WILKERSON: Same objection, Your

00:08:28 11

Honor. Continuing.

00:08:36 12

JUDGE DUKES: That one I guess I'm

00:08:39 13

concerned about. What is the relevance there,

00:08:43 14

whether he thinks it's fair?

00:08:49 15

MR. FINGER: I think it goes to the

00:08:50 16

credibility of the witness, first off. And I

00:08:55 17

believe it goes to the original intent of the

00:08:59 18

parties because what they are doing is, as he's

00:09:06 19

already indicated my people, are paying for building

00:09:16 20

expenses.

00:09:23 21

JUDGE DUKES: Well --

00:09:25 22

MR. FINGER: And I don't think that

00:09:27 23

is what the intent of the parties was, and that is

00:09:31 24

what I'm going to.

00:09:33 25

JUDGE DUKES: That one I think I will

THOMAS REPORTING SERVICES

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67

00:09:35 1

sustain the objection. I think that is just a

00:09:41 2

little too subjective in a world of objectivity here

00:09:50 3

at least in theory.

00:09:54 4

MR. FINGER: All right. Just to

00:09:56 5

complete the record on Page 93 of his deposition in

00:10:32 6

response to that question the witness indicated no.

00:10:41 7

JUDGE DUKES: Well, I'll strike that.

00:10:52 8

MR. WILKERSON: Objection.

Page 60

00:10:58 9 MR. FINGER: Just for the purposes of
 00:11:01 10 completing the record, Your Honor. We are nonjury.
 00:11:12 11 JUDGE DUKES: All right. Go ahead.
 00:11:18 12 I'll let you -- I'll take that as a proffer that he
 00:11:25 13 would have said no in case there is an appeal issue
 00:11:51 14 on that.
 00:11:53 15 BY MR. FINGER:
 00:11:54 16 Q. How long does this agreement run; do you
 00:12:00 17 know?
 00:12:01 18 A. To my knowledge unless both parties agree
 00:12:07 19 it would end it.
 00:12:13 20 Q. It requires a 67 percent by both sides to
 00:12:19 21 end it; is that correct?
 00:12:30 22 A. Correct.
 00:12:31 23 Q. Otherwise it will run forever; is that
 00:12:35 24 right?
 00:12:38 25 A. I'm not a lawyer, but to my knowledge,

THOMAS REPORTING SERVICES

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68

00:12:42 1 yes.
 00:12:44 2 Q. This document has -- the reciprocal
 00:12:47 3 agreement has been modified at least ones; isn't
 00:12:57 4 that correct?
 00:12:59 5 A. I've been told that.
 00:13:02 6 Q. Okay. Have you seen the document? Have
 00:13:09 7 you ever seen the modification document that was
 00:13:16 8 recorded?
 00:13:17 9 A. I have.
 00:13:18 10 Q. Okay. And there was no vote taken to make
 00:13:21 11 that modification; is that correct?

00:13:32 12 A. In my opinion it was done completely
 00:13:35 13 illegally prior to my time.
 00:13:52 14 Q. Get you to go back to the reciprocal
 00:13:58 15 easement agreement, please, for a moment. If you
 00:14:04 16 look at Page 2, the second whereas clause. You've
 00:14:12 17 studied this, I assume, in preparation for today's
 00:14:17 18 testimony? Would that be correct, Mr. Fenstermaker?
 00:14:38 19 A. No.
 00:14:39 20 Q. You have not?
 00:14:41 21 A. No.
 00:14:41 22 Q. Okay. Did you look at it before your
 00:14:44 23 deposition?
 00:14:50 24 A. I've looked at it for 17 years.
 00:14:56 25 Q. You've looked at it for 17 years?

THOMAS REPORTING SERVICES

♀

69

00:15:01 1 A. Right.
 00:15:02 2 Q. Okay. The second whereas clause on
 00:15:07 3 Page 2, doesn't that explain the purpose for them to
 00:15:12 4 utilize certain recreational amenities, open spaces,
 00:15:21 5 and roads together so my clients can get into their
 00:15:30 6 units?
 00:15:33 7 MR. WILKERSON: Object to the
 00:15:34 8 characterization of the language. It can be read,
 00:15:54 9 Your Honor. And that is what the court should be
 00:15:59 10 doing.
 00:16:00 11 BY MR. FINGER:
 00:16:01 12 Q. Would you agree that that whereas clause
 00:16:03 13 gives some definition of the purpose of this
 00:16:28 14 agreement?

00:16:30 15 MR. WILKERSON: Objection. Same
 00:16:31 16 objection.
 00:16:34 17 JUDGE DUKES: Well, I'll allow it,
 00:16:39 18 but it does sort of speak for itself.
 00:16:47 19 THE WITNESS: Can I just read it? I
 00:16:50 20 mean, I don't have an opinion on it.
 00:16:54 21 JUDGE DUKES: You don't need to read
 00:16:56 22 it.
 00:16:59 23 THE WITNESS: Okay.
 00:17:02 24 BY MR. FINGER:
 00:17:03 25 Q. We've already covered with you that the

THOMAS REPORTING SERVICES

‡

70

00:17:05 1 amenities area excludes any buildings; am I correct?
 00:17:21 2 We went through Exhibit A, and it said the
 00:17:26 3 condominium buildings were excluded?
 00:17:35 4 A. Exhibit A, yes.
 00:17:37 5 Q. Okay. So if you then go to the provision
 00:17:44 6 that says you must prepare a common area budget on
 00:17:51 7 Page 12, the common area budget cannot include any
 00:18:02 8 expenses for the buildings; am I correct?
 00:18:11 9 MR. WILKERSON: Objection. Total
 00:18:13 10 mischaracterization of the agreement, Your Honor.
 00:18:30 11 Total mischaracterization.
 00:18:34 12 JUDGE DUKES: Well, again I think it
 00:18:36 13 is going to boil down to intent, I mean I guess.
 00:19:03 14 And I think I've heard this. What would be more
 00:19:17 15 interesting to me, and maybe I've already heard some
 00:19:23 16 of this, is how it is currently being used.
 00:04:50 17 MR. FINGER: That is my next

00:04:51 18 question, Your Honor.
 00:05:01 19 JUDGE DUKES: And so if you could
 00:05:02 20 skip ahead to the next question, that would be
 00:05:08 21 probably more helpful to me.
 00:05:11 22 BY MR. FINGER:
 00:05:12 23 Q. Just one question before that. The
 00:05:18 24 dollars from Quartermaster in this agreement on
 00:05:22 25 Page 10 are to be used exclusively for a set of

THOMAS REPORTING SERVICES

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71

00:05:32 1 items; is that correct? That is on Page 10, about a
 00:05:41 2 third of the way down.
 00:05:46 3 MR. WILKERSON: If Your Honor please,
 00:05:49 4 I'm not in the habit of objecting to the court's
 00:05:55 5 questions, but again the use of the funds is not a
 00:06:03 6 subject of this litigation.
 00:06:10 7 JUDGE DUKES: well, I thought it was,
 00:06:15 8 but the -- but rather than ask him the question, Mr.
 00:06:23 9 Finger, maybe in closing or post-trial briefs or
 00:06:35 10 something if you wanted to point out these sections
 00:06:53 11 and their applicability based on the testimony.
 00:07:00 12 MR. FINGER: Okay. Very good.
 00:07:01 13 BY MR. FINGER:
 00:07:03 14 Q. There are dollars from Quartermaster that
 00:07:08 15 are used to fund the reserves for the buildings;
 00:07:24 16 isn't that correct?
 00:07:25 17 A. There are dollars from Quartermaster that
 00:07:30 18 are used to fund the reserves.
 00:07:50 19 Q. There are dollars from Quartermaster that
 00:07:53 20 are used to landscape the condominium buildings;

00:08:05 21 isn't that correct?

00:08:06 22 A. There are dollars from Quartermaster used
00:08:09 23 to landscape the common areas.

00:08:18 24 Q. Around the condominium buildings?

00:08:24 25 A. Yes, sir.

THOMAS REPORTING SERVICES

72

00:08:25 1 Q. There are dollars from Quartermaster that
00:08:29 2 are used to do all kinds of things for the buildings
00:08:36 3 themselves like painting, doing new roofs, replacing
00:08:47 4 lights, and things of that sort; isn't that correct?

00:08:55 5 A. I don't know that I can answer that in an
00:08:57 6 affirmative. I can only answer that in the formula
00:09:05 7 maintenance -- general maintenance is subtracted out
00:09:12 8 before Quartermaster's fee is calculated. General
00:09:18 9 maintenance is normally used for building
00:09:24 10 maintenance, normally. Some of it is used for
00:09:31 11 common area maintenance, but I followed the formula
00:10:34 12 to make the calculation.

00:10:39 13 The reserves as listed on the budgets that
00:10:49 14 you mentioned, and I don't remember how many years
00:11:08 15 there were, they were specifically labeled paint
00:11:19 16 reserve or roof reserve, those were used for the
00:11:25 17 buildings. There is no doubting that. The other
00:11:32 18 reserves, the operating reserves, throughout the
00:11:40 19 years they've been used for pools, tennis courts,
00:11:47 20 roadways, whatever. I can't -- I can't give you a
00:11:57 21 definitive answer what that money was used for for
00:12:04 22 the last 17 years.

00:12:06 23 Q. Quartermaster dollars fund insurance for

10-1-13 QUARTERMASTER HEARING.txt
the buildings; isn't that correct?

00:12:09 24

00:12:17 25

A. I don't know how to answer that. The

THOMAS REPORTING SERVICES

8

73

00:12:19 1

formula says take the total property insurance,

00:12:46 2

subtract two-thirds. That is what I do. And if

00:13:02 3

that implies that the monies are being used to

00:13:23 4

insure the buildings, so be it. But that is what the

00:13:33 5

formula says.

00:13:35 6

Q. And if you look at Page 10, in the portion

00:13:50 7

where it says to be used exclusively for, you will

00:13:57 8

agree that there is no insurance in there; isn't

00:14:04 9

that correct?

00:14:09 10

A. It says what it says.

00:14:11 11

Q. Okay. And your company in the past has

00:14:16 12

told the Quartermaster people what their money is

00:14:19 13

supposed to be used for; isn't that correct? I'm

00:14:29 14

going to hand you an undated document that was

00:14:34 15

produced to us. Do you recognize that as coming

00:14:37 16

from your -- someone affiliated with your firm?

00:14:47 17

A. Ryan Gumlock was an employee of ours --

00:14:54 18

Q. Okay.

00:15:36 19

A. -- probably 13 years ago.

00:15:53 20

Q. Okay. And so it would date back at least

00:15:58 21

that long. And in that document Broad Creek takes

00:16:13 22

the position that the Quartermaster money is to be

00:16:17 23

used for what, next to that asterisk? What is it

00:16:32 24

supposed to be used for?

00:16:38 25

MR. WILKERSON: Same objection, Your

THOMAS REPORTING SERVICES

Page 66

QUARTERMASTER

170

00:16:39 1 Honor. I don't know what this document is. May I
 00:16:48 2 see it?
 00:16:52 3 MR. FINGER: Certainly.
 00:16:59 4 MR. WILKERSON: I just need to see
 00:17:01 5 which one you are holding. Got you. Again, we
 00:17:15 6 don't object to the authenticity of it, Your Honor.
 00:17:22 7 We object to the relevance of the document.
 00:17:46 8 MR. FINGER: We would offer this as
 00:17:51 9 Plaintiff's 1 I believe it is.
 00:18:13 10 JUDGE DUKES: And tell me again who
 00:18:17 11 the -- well, let me wait until Deborah marks it.
 00:18:25 12 (MARKED PLAINTIFF'S EXHIBIT NO. 1.)
 00:18:25 13 BY MR. FINGER:
 00:19:14 14 Q. And it this is a letter from Mr. Gumlock
 00:19:22 15 who worked for you and he was the general manager
 00:19:28 16 for Broad Creek Landing?
 00:19:57 17 A. He was the onsite manager, correct.
 00:20:03 18 Q. And in the first bullet point, does it say
 00:20:10 19 what the Quartermaster money is supposed to be used
 00:20:28 20 for?
 00:20:29 21 A. May I read it?
 00:20:33 22 Q. Yes.
 00:20:36 23 A. Briefly we will detail what falls under
 00:20:40 24 the responsibility of the regime for maintaining
 00:20:52 25 your lot or townhouse. All common areas, pools,

THOMAS REPORTING SERVICES

00:21:27 1 pool houses, roadways, common grounds, common area

10-1-13 QUARTERMASTER HEARING.txt

00:21:49 2 lighting, tennis courts, and playground. Garbage
00:22:02 3 removal -- this must be a typo. Garbage removal, I
00:22:14 4 think it means pick up and recycling, is paid for in
00:22:22 5 your monthly regime fee. Garbage is picked up on
00:22:58 6 Tuesday and Fridays.

00:23:06 7 There is a recycling area behind the
00:23:10 8 Forest Cove Pool, and it is picked up on an as
00:23:36 9 needed basis. Monthly exterminating services paid
00:23:50 10 for in your monthly regime fee as well. The
* 00:23:58 11 exterior of the unit is sprayed every month while
00:24:06 12 the exteriors are sprayed bimonthly following the
00:24:37 13 enclosed schedule. You would need to provide a key
00:24:42 14 to your town home at the onsite office of Broad
00:24:50 15 Creek Landing to ensure service. The Quartermaster
00:24:59 16 documents are enclosed in this package for your
00:25:04 17 review. The regime fees are due on the first day of
00:25:12 18 the month, blah, blah. I think that is all you --

00:25:26 19 Q. So the owners in Quartermaster are
00:25:41 20 responsible for the landscaping of their own
00:25:48 21 individual lot; am I correct?

00:25:52 22 A. Yes, sir.

00:26:12 23 Q. Okay. They are responsible for their own
00:26:17 24 insurance; is that correct?

00:26:23 25 A. Yes, sir.

THOMAS REPORTING SERVICES

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76

00:26:25 1 Q. Okay. And --

00:26:30 2 A. well, if you define insurance. I mean,
00:26:36 3 they are responsible for the insurance on their
00:26:42 4 building.

Page 68

10-1-13 QUARTERMASTER HEARING.txt

00:26:44 5 Q. On their building, correct?
00:26:48 6 A. Yes.
00:26:49 7 Q. And I think that Broad Creek maintains
00:26:55 8 maybe from the edge of the pavement about four or
00:27:01 9 five feet in the right-of-way; is that correct? And
00:27:07 10 then you stop there?
00:27:12 11 A. I would have to have the plat to look at
00:27:18 12 what falls into their --
00:27:23 13 Q. And the Quartermaster people have been
00:27:28 14 told that they can't park in any other parking
00:27:33 15 spaces; isn't that correct?
00:27:38 16 A. I believe I mentioned to you in a prior
00:27:41 17 meeting that that was an error. We apologized for
00:27:51 18 the error. And they have a full right to park
00:28:00 19 anywhere they want to.
00:28:03 20 Q. And the fact is as late as the fall of
00:28:14 21 2012, you all were again telling them -- the
00:28:26 22 Quartermaster people that they could not park
00:28:32 23 anywhere; isn't that correct?
00:28:37 24 A. I believe that is it the one you pointed
00:28:39 25 out to me and I told you that was an error.

THOMAS REPORTING SERVICES

‡

77

00:28:46 1 Q. And for the last 15 or 18 years, while
00:28:50 2 they have been prohibited from parking, and you have
00:29:00 3 a fairly -- aggressive may not be the right word,
00:29:08 4 but you all tow cars if they are parked incorrectly;
00:29:16 5 isn't that right?
00:29:24 6 A. As rarely as possible.
00:29:41 7 Q. As rarely as possible. But you do tow

Page 69

10-1-13 QUARTERMASTER HEARING.txt

00:29:49 8 cars?
00:29:51 9 A. I couldn't tell you the last time we towed
00:29:55 10 a car.
00:29:56 11 Q. Okay.
00:30:01 12 A. I mean, the policy of towing cars is if
00:30:07 13 they are parked in the landscaping or by a fire
00:30:14 14 hydrant. Other than that rarely will a car get
00:30:24 15 towed.
00:30:25 16 Q. And during the period of time that
00:30:27 17 Quartermaster people have been prohibited from
00:30:31 18 parking in any of the regime lots, there have been
00:30:42 19 reserves that they are paid for for those regime
00:30:47 20 lots; isn't that correct?
00:30:51 21 A. I don't know what the period of time is,
00:30:54 22 but I guess you could follow that train of thought.
00:31:00 23 And, once again, it was an error, and we apologize.
00:31:08 24 Q. And that error was not discovered until
00:31:11 25 August of this year; isn't that correct, when we

THOMAS REPORTING SERVICES

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78

00:31:21 1 met?
00:31:23 2 A. I couldn't answer that. I'm not the
00:31:26 3 onsite person down there. I don't know when she
00:31:47 4 realized that she had erred. I don't know if it was
00:31:59 5 before her. I don't know when it was that it was
00:32:07 6 published. I honestly don't.
00:32:11 7 Q. Did you give any instructions to your
00:32:26 8 staff to inform all the Quartermaster people that
00:32:30 9 they have a right to park anywhere they want in the
00:32:40 10 last five months?

Page 70

10-1-13 QUARTERMASTER HEARING.txt

00:32:45 11 A. Probably, after you pointed out the error
00:32:48 12 to me.
00:32:49 13 Q. And what was sent to Quartermaster to
00:32:52 14 correct that?
00:32:53 15 A. I wouldn't -- I don't know. Again, I'm
00:32:57 16 not on site.
00:33:01 17 Q. So you don't know whether anything was, in
00:33:06 18 fact, sent; am I correct?
00:33:10 19 A. I do not.
00:33:17 20 Q. Now, what we have here is you have a
00:33:23 21 situation where you take a budget for all of the
00:33:31 22 buildings and everything else within the four
00:33:35 23 corners of that property; is that correct?
00:33:40 24 A. Yes, sir.
00:33:41 25 Q. Okay. And you take that budget, you

THOMAS REPORTING SERVICES

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79

00:33:45 1 deduct a few things from it, and then you divide it
00:33:52 2 by 278; is that correct?
00:33:57 3 A. Yes, sir.
00:34:01 4 Q. Okay. And actually you don't add the
00:34:04 5 Quartermaster people in for the proportional share;
00:34:14 6 am I correct?
00:34:15 7 A. The document doesn't allow for that. The
00:34:37 8 document says an average unit within the regime.
00:34:43 9 The regime is the regime. Quartermaster isn't the
00:34:49 10 regime.
00:34:54 11 Q. And your average units within the regime,
00:34:58 12 they all pay different amounts, don't they?
00:35:04 13 A. That is why the word average. We take the

Page 71

10-1-13 QUARTERMASTER HEARING.txt

00:35:11 14 total, divide it by 278. That creates an average.
00:35:26 15 Q. Okay. And let's just use hypothetical
00:35:37 16 numbers. And we've done this before I think you
00:35:43 17 will recall. If your budget was a hundred dollars,
00:35:48 18 right, and you had a hundred owners in Broad Creek,
00:35:57 19 they all pay a dollar; isn't that right?
00:36:11 20 A. Correct.
00:36:12 21 Q. Okay. And you then take 10 owners from
00:36:22 22 Quartermaster and they all pay a dollar?
00:36:34 23 A. Not exactly. They pay a calculated
00:36:46 24 budget.
00:36:47 25 Q. They pay in addition to that. Am I

THOMAS REPORTING SERVICES

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80

00:36:55 1 correct?
00:36:58 2 A. They do pay in addition to that, correct.
00:37:01 3 Q. Okay. So that hundred dollar budget has
00:37:09 4 just been overpaid the way you calculate it; isn't
00:37:17 5 that correct?
00:37:20 6 A. No.
00:37:23 7 Q. Okay. I'll do it again.
00:37:25 8 A. The budget is -- the budget is created
00:37:29 9 from the expense side. The budget is created from
00:37:47 10 the expense side. All the expenses, all the
00:37:54 11 contracts are bid, all the -- you know, the Board
00:38:17 12 decides on what they want to put in for maintenance,
00:38:26 13 et cetera. The budget is created from the expense
00:38:35 14 side. And then that is how it's calculated.
00:38:45 15 Q. I'm going to show you a map and ask you if
00:38:49 16 this is an accurate representation of the Broad

Page 72

10-1-13 QUARTERMASTER HEARING.txt

00:38:57 17 Creek and Quartermaster property?

00:39:01 18 A. It's an accurate representation of Broad
00:39:05 19 Creek Landing.

00:39:09 20 Q. Okay. And the Quartermaster property is
00:39:13 21 in blue; is that correct?

00:39:24 22 A. The individual units are numbered in blue,
00:39:29 23 yes.

00:39:30 24 Q. And the one that is in red I believe is
00:39:35 25 Broad Creek's; is that correct?

THOMAS REPORTING SERVICES

81

00:39:40 1 A. I think all this property.

00:40:02 2 Q. No. Broad Creek Landing owns Number 2.

00:40:09 3 A. Oh, the one unit. Yes. Yes.

00:40:27 4 Q. Isn't that the one unit that you own?

00:40:35 5 A. That's correct. That's correct.

00:40:37 6 Q. Okay. And in the green area are the
00:40:40 7 tennis courts, correct? The clubhouse, correct?

00:40:51 8 Another little pool that is down here and the
00:40:55 9 entrance road so Quartermaster people can get to
00:41:04 10 their spots; isn't that correct?

00:41:12 11 MR. WILKERSON: If Your Honor please,
00:41:14 12 can we stipulate that that document was prepared by
00:41:20 13 the Plaintiff? It's not one of our documents.

00:41:36 14 MR. FINGER: I understand. I
00:41:37 15 understand.

00:41:41 16 MR. WILKERSON: I just want to make
00:41:43 17 sure that is clear to the court.

00:41:50 18 JUDGE DUKES: All right.

00:41:53 19 THE WITNESS: I'm not sure what
Page 73

10-1-13 QUARTERMASTER HEARING.txt

00:41:59 20 you're -- what are you asking me?
00:42:12 21 BY MR. FINGER:
00:42:13 22 Q. The amenities that the Quartermaster
00:42:16 23 people are allowed to use and the access road, is
00:42:35 24 that all properly shown in the green area on this
00:42:40 25 map?

THOMAS REPORTING SERVICES

‡

82

00:42:44 1 A. It's defined in the document. Is it
00:42:50 2 properly shown? I don't know. I mean, can they go
00:42:55 3 out here -- there is a dock out here on the back end
00:43:03 4 of Ship Watch Point, wherever I am here, that they
00:43:15 5 have access to. It's out in here. So I can't say
00:43:31 6 that this is accurate or not accurate.

00:43:37 7 Q. Have you ever made an attempt, you or
00:43:40 8 anybody on I.M.C.'s behalf, from the beginning of
00:43:49 9 time until now ever attempted to look at where the
00:43:54 10 amenities are and what my people are entitled to
00:43:59 11 use?

00:43:59 12 A. No. Why would I? I don't know why I
00:44:02 13 would.

00:44:05 14 Q. You've never attempted to do that?

00:44:08 15 A. No, sir.

00:44:09 16 Q. Okay. Do you believe that this is an
00:44:11 17 inaccurate representation of the amenity area and
00:44:15 18 the common area that is defined in the reciprocal
00:44:20 19 agreement?

00:44:22 20 MR. WILKERSON: Objection.
00:44:24 21 Objection, Your Honor. First of all, it calls for
00:44:29 22 speculation. The document itself speaks for itself.

Page 74.

10-1-13 QUARTERMASTER HEARING.txt

00:44:37 23 And he's asking him to look at every square inch of
00:44:47 24 that page. And I can show you a half a dozen things
00:44:52 25 that are not on there.

THOMAS REPORTING SERVICES

♀

83

00:44:57 1 JUDGE DUKES: Yeah, I'm a little
00:44:59 2 concerned about that question because, again, you
00:45:03 3 had pointed to Exhibit A. And I'm guessing perhaps
00:45:10 4 that was drawn with Exhibit A in mind which is very
00:45:24 5 complicated. And so, yeah, I'm going to sustain the
00:45:29 6 objection.

00:45:38 7 MR. FINGER: Okay.

00:45:39 8 BY MR. FINGER:

00:45:40 9 Q. Have you seen this before?

00:45:48 10 A. I've seen it in your office.

00:45:52 11 Q. Okay. Does it -- to your knowledge does
00:45:58 12 it accurately reflect the acreage within Broad Creek
00:46:09 13 within the different shaded areas, do you know?

00:46:14 14 A. I do not.

00:46:18 15 Q. The lagoon that is in the Quartermaster
00:46:23 16 property, Broad Creek is entitled to ask for a deed
00:46:33 17 and get it any time; isn't that correct? The
00:46:37 18 lagoon, this lagoon right here?

00:46:44 19 A. The lagoon -- my history and knowledge of
00:46:50 20 that lagoon is it's still owned by F.J., whatever,
00:47:09 21 G.P. or whatever it's called.

00:47:14 22 Q. Right.

00:47:15 23 A. And the County posted delinquent tax
00:47:40 24 notices on it. They were going to sell it as
00:47:45 25 auction. We contacted the County. We got the

Page 75

THOMAS REPORTING SERVICES

♀

84

00:47:52 1 address changed for the taxes. And we paid -- Broad
00:48:01 2 Creek Landing pays the taxes on that lagoon in order
00:48:08 3 to keep it from going to tax sale. Broad Creek
00:48:16 4 Landing also retained -- Ed Bullard at the time was
00:48:29 5 their legal counsel -- to try to get the deed turned
00:48:47 6 over. And it was, in his words, impossible. There
00:48:58 7 was no one left of the entity. We couldn't do it.
00:49:04 8 So on his advice we changed the address and Broad
00:49:10 9 Creek Landing pays the taxes to keep it from going
00:49:17 10 to tax sale. That is the history of the lagoon.

00:49:26 11 Q. Do you know what the reciprocal agreement
00:49:28 12 says about the lagoon? Have you ever looked at it
00:49:44 13 to see what it says about the lagoon?

00:49:48 14 A. No.

00:49:59 15 MR. WILKERSON: Can we ask that he
00:50:03 16 mark that since he asked him questions about it,
00:50:07 17 Your Honor?

00:50:10 18 JUDGE DUKES: Oh, I thought you were
00:50:12 19 going to make that an exhibit with the caveat that
00:50:18 20 it was a Plaintiff's exhibit prepared by the
00:50:24 21 Plaintiff. Was that not the intent?

00:50:52 22 MR. FINGER: That the intent? When I
00:50:53 23 have someone who can authenticate it and say how we
00:51:14 24 complied it. I was going to attempt to move it in
00:51:19 25 then.

THOMAS REPORTING SERVICES

♀

85

10-1-13 QUARTERMASTER HEARING.txt

00:51:21 1 JUDGE DUKES: All right.
00:51:24 2 MR. FINGER: This guy -- Mr.
00:51:26 3 Fenstermaker said he couldn't tell about the acreage
00:51:33 4 and didn't know about it. I'm happy to mark it for
00:51:38 5 I.D. if that is what you are asking.
00:51:47 6 MR. WILKERSON: That helps. I need
00:51:50 7 to be able to have it.
00:51:58 8 JUDGE DUKES: All right. Not a
00:52:05 9 problem.
00:52:06 10 MR. FINGER: Let's have this marked
00:52:08 11 as plaintiff's 2 for I.D. And I'll take the I.D.
00:52:17 12 away if you have no problem with it going in.
00:52:26 13 MR. WILKERSON: With the stipulation
00:52:27 14 that it was prepared by your people. Again --
00:52:37 15 MR. FINGER: No problem. Okay. Very
00:52:42 16 good. That will be Plaintiff's 2.
00:52:46 17 MR. WILKERSON: I've agreed to agree
00:52:48 18 to the authenticity of authentic documents. And
00:53:11 19 that was prepared by the Plaintiff authentically.
00:53:15 20 JUDGE DUKES: Wait. So then are we
00:53:18 21 calling it -- with the stipulation and without
00:53:32 22 objection Plaintiff's 2 or are we still calling it
00:53:36 23 I.D.?
00:53:39 24 MR. WILKERSON: I think we ought to
00:53:41 25 call it I.D., Your Honor, because --

THOMAS REPORTING SERVICES

86

00:53:45 1 JUDGE DUKES: Okay. That is fine. I
00:53:48 2 misunderstood you -- your comment.

00:53:54 3

00:53:54 4

(MARKED PLAINTIFF'S I.D. EXHIBIT NO.

00:53:54 5 2.)

00:55:00 6 BY MR. FINGER:

00:55:02 7 Q. Were you aware that Broad Creek Landing
00:55:04 8 itself was in forfeiture with the Secretary of State
00:55:20 9 when the reciprocal agreement was signed?

00:55:25 10 A. No, sir.

00:55:27 11 Q. You've never checked that out?

00:55:33 12 A. No, sir.

00:55:43 13 Q. It would be possible for I.M.C. when you
00:55:55 14 bid the insurance each year to separate out the
00:56:03 15 insurance component and have the pools, tennis
00:56:10 16 courts, clubhouse, and other little common areas,
00:56:24 17 another little pool house separately invoiced for
00:56:38 18 insurance; isn't that correct?

00:56:43 19 A. Possible, not practical.

00:56:48 20 Q. Not practical?

00:56:53 21 A. I don't think so.

00:56:54 22 Q. You get separate -- do you get separate
00:56:59 23 quotes from each condominium building?

00:57:17 24 A. No.

00:57:18 25 Q. You do not?

THOMAS REPORTING SERVICES

87

00:57:19 1 A. No. The property has a T.I.V. And
00:57:41 2 property insurance is based on T.I.V., total insured
00:57:49 3 value. And it's rated based on a million factors.

00:57:55 4 Q. There are no documents that show the
00:58:10 5 different values for the buildings as far as

00:58:14 6 insurance goes?

00:58:18 7 A. Oh, there are.

00:58:19 8 Q. There are, right?

00:58:21 9 A. Yes, sir.

00:58:25 10 Q. And you get separate premiums for

00:58:29 11 buildings, don't you?

00:58:33 12 A. No. They bid us one premium for the whole

00:58:40 13 property.

00:58:41 14 Q. And you've never attempted to separate out

00:58:44 15 the insurance component that may be in green on

00:58:49 16 Plaintiff's Exhibit Number 2, have you?

00:58:53 17 A. I never had any reason to.

00:59:35 18 Q. Do you know that there were a bunch of

00:59:38 19 Palmetto Electric lights that were installed in the

00:59:43 20 regime over the last eight or 10 years; am I

00:59:54 21 correct?

00:59:55 22 A. I can't answer that. I don't work down

00:59:58 23 there full-time. I don't know the answer. Sorry.

01:00:08 24 Q. Do you know whether any of these new

01:00:12 25 Palmetto Electric lights were installed in the

THOMAS REPORTING SERVICES

88

01:00:17 1 Quartermaster property at all?

01:00:21 2 A. I do not.

01:00:27 3 Q. Would you be surprised if there were no

01:00:31 4 Palmetto lights in the Quartermaster property?

01:00:40 5 A. I don't know how to answer that. I'm not

01:00:43 6 sure I understand why you are asking me that.

01:01:04 7 Q. Quartermaster pays part of the budget for

01:01:08 8 lighting; isn't that correct? For electricity?

10-1-13 QUARTERMASTER HEARING.txt

01:01:16 9 A. Yes.
01:01:17 10 Q. Okay.
01:01:18 11 A. By the formula.
01:01:20 12 Q. Okay. And you all had a bunch of new
01:01:36 13 mailboxes installed down at Broad Creek also, didn't
01:01:44 14 you?
01:01:46 15 A. Again, I'm not the manager. I would have
01:01:49 16 to defer. I don't -- the day-to-day operations down
01:01:57 17 there I'm not involved in.
01:02:02 18 Q. Who is the manager there currently?
01:02:07 19 A. Stephanie Jo Flint.
01:02:17 20 Q. Is Ms. Flint here?
01:02:21 21 A. She is.
01:02:23 22 Q. Okay. So I could ask her those questions.
01:02:41 23 She would know better than you?
01:02:43 24 A. Yes, she would.
01:03:11 25 Q. I showed you a few minutes ago that in

THOMAS REPORTING SERVICES

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89

01:03:18 1 June of 2011 Broad Creek had cash reserves of over
01:03:45 2 \$760,000. For '12 and '13 was there about 120,000,
01:04:06 3 \$130,000 in reserves also added to that?
01:04:31 4 A. That -- that is kind of a nebulous
01:04:40 5 question. Was there budgeted for reserves?
01:04:51 6 Q. Yes.
01:04:53 7 A. Yes. Was it added to the reserves? There
01:05:06 8 is money spent from the reserves, too. So the
01:05:12 9 balance sheet changes daily.
01:05:33 10 MR. FINGER: Thank you Mr.
01:05:35 11 Fenstermaker. Again, subject to my earlier

Page 80

QUARTERMASTER

184

10-1-13 QUARTERMASTER HEARING.txt
reservation to call him again if I need to.

01:05:41 12

JUDGE DUKES: All right.

01:05:52 13

MR. FINGER: Thank you.

01:05:54 14

RE CROSS EXAMINATION

01:05:58 15

01:06:00 16 BY MR. WILKERSON:

01:06:02 17

Q. This reserve issue, he said there are several hundred thousand dollars at one point on the balance sheet for insurance reserves. You pay insurance premiums throughout the year?

01:06:07 18

01:06:13 19

01:06:20 20

01:06:25 21

A. We pay -- the property insurance I believe is renewed on March 31st. Our (inaudible) insurance I believe are all on June 1st, I think. And the flood is July or August.

01:06:27 22

01:07:14 23

01:07:28 24

01:07:30 25

Q. So the month before the insurance is due

THOMAS REPORTING SERVICES

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90

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you are going to have a big reserve in your insurance?

01:07:40 2

01:07:47 3

A. Yes, sir. Yes, sir.

01:07:51 4

Q. Is that right?

01:07:52 5

A. Yes, sir.

01:07:53 6

Q. And then you pay that down when you pay the insurance premiums?

01:07:56 7

01:08:02 8

A. Yes, sir.

01:08:03 9

Q. Okay. Now, also on insurance, Mr. Finger was asking you a lot of questions about insurance on the buildings. Do you insure the clubhouse?

01:08:12 10

01:08:15 11

01:08:23 12

A. Yes.

01:08:25 13

Q. Pool house?

01:08:26 14

A. Yes.

Page 81

QUARTERMASTER

185

01:08:28 15 Q. Provide liability insurance for the
 01:08:30 16 operation of the -- all the property?
 01:08:34 17 A. Yes.
 01:08:35 18 Q. Okay. Now I'd like to just go to the
 01:08:44 19 document itself as it relates to the definition of
 01:08:47 20 common areas if we can.
 01:08:53 21 A. The reciprocal agreement?
 01:08:57 22 Q. Yes, sir. The reciprocal agreement.
 01:08:59 23 Exhibit Number 1. You recall the questioning by Mr.
 01:09:07 24 Finger where he suggested to you that common areas
 01:09:12 25 by definition does not include buildings? You heard

THOMAS REPORTING SERVICES

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91

01:09:23 1 that part?
 01:09:24 2 A. Yes.
 01:09:25 3 Q. Okay. Well, let's go through the common
 01:09:28 4 area definition if we can.
 01:09:33 5 MR. WILKERSON: Found on Page 4, Your
 01:09:35 6 Honor, of the reciprocal agreement at the top of the
 01:09:39 7 page.
 01:09:40 8 JUDGE DUKES: Let me -- and I see
 01:09:43 9 that. And let me just make sure we are not getting
 01:09:55 10 into something that is not in dispute. Mr. Finger,
 01:10:03 11 as I understand your client's primary concern, it is
 01:10:13 12 reserves and possibly some form of maintenance and
 01:10:16 13 modifications to the Broad Creek Landing buildings
 01:10:23 14 and not the various roads and things that your
 01:10:28 15 clients can drive on and the clubhouse and the dock
 01:10:35 16 and --
 01:10:37 17 MR. FINGER: The areas within that

01:10:38 18 green on Plaintiff's 2 we believe we should pay a
01:10:45 19 proportionate share of for the expenses in green.

01:10:53 20 And that is what my client -- kind of the
01:10:58 21 spokesman for my client is going to go through that
01:11:02 22 for the court. We do not believe we should be
01:11:07 23 paying anything with their condominium buildings.
01:11:36 24 Should we pay a proportionate share of the tennis
01:11:42 25 courts' insurance and reserves? Absolutely. The

THOMAS REPORTING SERVICES

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92

01:11:49 1 pool house, the pools? Absolutely. But that is all
01:11:56 2 within the context of that green area which we think
01:12:00 3 the agreement requires.

01:12:03 4 JUDGE DUKES: Now, the roads that are
01:12:04 5 in the -- what color is that pink? Salmon.
01:12:18 6 Whatever color that is, is it your client's position
01:12:23 7 that they are not responsible for those areas
01:12:27 8 outside of the structures, the road system --

01:12:36 9 MR. FINGER: We do not believe -- we
01:12:38 10 have been told consistently up until this summer
01:12:46 11 that we can't park there at all. So this agreement
01:13:05 12 we believe was designed to get our people from the
01:13:11 13 front gate to their house. And that is what is in
01:13:16 14 that green area.

01:13:22 15 Everywhere else that is pink on that
01:13:25 16 exhibit we've been told we cannot park in. So
01:13:29 17 therefore we should not have to pay for any of that.

01:13:53 18 JUDGE DUKES: Well, again -- and I
01:14:03 19 guess what -- this is one of those I've got to
01:14:09 20 interpret the contract at least as best I can. 2.5,

01:14:17 21 common area, seems to include everything that is not
 01:14:23 22 a building, if I'm understanding exterior
 01:14:28 23 boundaries. All areas and improvements thereon or
 01:14:39 24 thereunder within the exterior boundaries of the
 01:14:48 25 regime property.

THOMAS REPORTING SERVICES

♀

93

01:14:58 1 MR. FINGER: I understand, Your
 01:14:58 2 Honor. And it specifically refers you to common
 01:15:02 3 areas in the master deed. And if you look at the
 01:15:06 4 master deed, there is no definition of common area
 01:15:14 5 in the master deed. That was not done very well
 01:15:24 6 legally, but the master deed has common elements and
 01:15:29 7 limited common elements. It does not have common
 01:15:35 8 areas.

01:15:40 9 JUDGE DUKES: Wow.

01:15:46 10 MR. FINGER: So I think that you then
 01:15:47 11 have to look at what was the intent of the parties.
 01:15:51 12 And if you look at the two wherefore clauses on
 01:15:55 13 Page 2, if you look at Page -- at Section 5, A and
 01:16:10 14 B, gives you further insight as to what the intent
 01:16:17 15 of the parties was.

01:16:19 16 And my people are supposed to be able to
 01:16:23 17 get in and out of their property over that main road
 01:16:27 18 and have a shared use of the recreational amenities.
 01:16:36 19 And we are suppose to pay for that. We are not
 01:16:39 20 supposed to pay for their parking lots, their
 01:16:43 21 buildings, their reserves or their insurance. And
 01:16:49 22 the reserves and the insurance are big numbers.

01:16:57 23 JUDGE DUKES: No. No. I get that.

01:16:59 24 The road system I didn't realize was such an issue
01:17:43 25 there, but okay. Now that I understand it is --

THOMAS REPORTING SERVICES

94

01:17:49 1 MR. FINGER: Thank you, Your Honor.
01:17:53 2 JUDGE DUKES: Let me let you go on.
01:18:00 3 MR. WILKERSON: Could I comment with
01:18:01 4 regard to that issue, Your Honor?
01:18:12 5 JUDGE DUKES: Absolutely, please.
01:18:15 6 MR. WILKERSON: I don't think Mr.
01:18:19 7 Finger takes the position that within the exterior
01:18:30 8 boundaries of the regime property means anything
01:18:34 9 other than the entire property, the entire
01:18:43 10 boundaries of the property.
01:18:48 11 Everything that you see on that map, Your
01:18:55 12 Honor, please, would be the exterior boundaries of
01:19:06 13 the property. It doesn't say the exterior
01:19:11 14 boundaries of the buildings. And so we start with
01:19:18 15 the proposition that everything is a common area
01:19:26 16 within the exterior boundaries of the entire regime
01:19:40 17 property, which is this.
01:20:07 18 And then we start talking about it from
01:20:13 19 beyond that. So everything within those that is
01:20:19 20 identified as a common area under the master deed.
01:20:26 21 Now, common area -- in the master deed the term is
01:20:32 22 common elements. The term common area is not in the
01:20:47 23 master deed. It says common elements.
01:20:54 24 But setting that aside, the way he gets to
01:21:01 25 the argument that the common area does not include

THOMAS REPORTING SERVICES
Page 85

01:21:05 1 the condominium buildings is by looking at the
 01:21:16 2 definition of amenities. And if you look at
 01:21:25 3 amenities, it is simply and amenities. It doesn't
 01:21:37 4 say only to the extent of amenities.

01:21:41 5 If you will read the definition of common
 01:21:45 6 areas it says all areas within the boundaries
 01:21:52 7 including, if Your Honor please, including the
 01:21:57 8 parking areas which again would be -- which again
 01:22:07 9 would be all this pink. Because the parking area is
 01:22:13 10 all in this pink here which would also include
 01:22:21 11 roadways, all roadways. Not just the ones that they
 01:22:27 12 want to pick out that they want to pay for. Not
 01:22:31 13 just the ones they want to pick out. They want to
 01:22:37 14 pay for all of them.

01:22:40 15 Sidewalks. Landscaped areas. Not just
 01:22:46 16 the ones in their property, but all landscaped areas
 01:22:58 17 and the amenities area. And when you get to the
 01:23:04 18 amenities area, it specifically, that definition if
 01:23:15 19 you go to Exhibit A excludes the buildings. But the
 01:23:20 20 fact that the amenities area excludes the buildings
 01:23:28 21 doesn't mean that this definition which is much
 01:23:35 22 broader than amenities area does not also include
 01:23:40 23 the buildings, A.

01:23:50 24 JUDGE DUKES: It's the Defendant's
 01:23:51 25 position that the buildings are included in the

THOMAS REPORTING SERVICES

01:24:04 1 proportional amount that the Plaintiff is supposed
 Page 86

01:24:10 2 to pay for?

01:24:12 3 MR. WILKERSON: The proportional
01:24:18 4 amount that the Plaintiff is supposed to pay for,
01:24:23 5 Your Honor, is computed based upon a formula that
01:24:26 6 has nothing to do with what it goes for. It's a
01:25:02 7 formula. You take the total amount that the budget
01:25:08 8 is and you subtract from it two-thirds of the --
01:25:18 9 two-thirds of the insurance. You subtract from
01:25:25 10 it -- you subtract from it the building maintenance
01:25:35 11 and the termite bond.

01:25:39 12 So, again, we are conflating two concepts
01:25:45 13 here, and that is the whole problem with the
01:25:54 14 Plaintiff's case is they are conflating the concept
01:25:59 15 of what is a -- what do they think is fair for them
01:26:04 16 to pay for versus what did the founders and the
01:26:39 17 drawers and the people that drew up this document
01:26:47 18 say was the way they were going to compute the
01:26:51 19 amount they were going to pay. The amount they were
01:27:03 20 going to pay.

01:27:07 21 JUDGE DUKES: No. No. I get that
01:27:10 22 part, but if one of the buildings in Broad Creek
01:27:17 23 needs a roof, are you saying that it's the
01:27:22 24 obligation of the Quartermaster group to assist in
01:27:26 25 paying for that? Is that your interpretation of the

THOMAS REPORTING SERVICES

97

01:27:30 1 contract or your client's interpretation.

01:27:36 2 MR. WILKERSON: If there is money
01:27:37 3 available in the funds that can be used for that --
01:27:45 4 and, again, the money that they paid for -- and they

Page 87

10-1-13 QUARTERMASTER HEARING.txt

01:27:50 5 keep pointing to this point where it says, shall be
01:27:56 6 used exclusively for. And let's look at that
01:28:03 7 provision.

01:28:05 8 Exclusively for. And it includes
01:28:14 9 reserves. And so if some of the reserves include
01:28:21 10 some of their money, then certainly they can use
01:28:24 11 that for whatever they can use the reserves for, but
01:28:32 12 that is not the issue before the court as to what
01:28:37 13 they are using the money for, Your Honor. They have
01:28:44 14 said that they've been improperly assessed.

01:29:07 15 And so if they want to talk about what
01:29:11 16 they -- about that the money is being used for
01:29:23 17 something else, then that is a whole different -- a
01:29:29 18 whole different game. They are saying that they've
01:29:48 19 been assessed improperly.

01:29:59 20 JUDGE DUKES: Well, and they claim
01:30:06 21 they've been assessed improperly based on a
01:30:16 22 calculation that includes the things that I guess we
01:30:21 23 are going to get to in more detail in a minute, but
01:30:47 24 including but not limited to reserves for a roof on
01:30:56 25 a Broad Creek building.

THOMAS REPORTING SERVICES

♀

98

01:31:00 1 MR. WILKERSON: But the reserves
01:31:01 2 don't have anything to do with the calculation of
01:31:06 3 what they are supposed to pay.

01:31:12 4 JUDGE DUKES: I don't know. All
01:31:13 5 right. Interesting. All right. And I think I may
01:31:20 6 have interrupted you during a question. So I
01:31:26 7 apologize. Go ahead, please.

Page 88

10-1-13 QUARTERMASTER HEARING.txt

01:31:34 8 COURT REPORTER: Judge, three-minute
01:31:53 9 break?

01:31:55 10 JUDGE DUKES: Yeah, let's take a
01:31:56 11 break. Let's take a five-minute break.

01:32:36 12 (RECESS 10:55 TO 11:04.)

01:34:49 13 JUDGE DUKES: Back on then. Go
01:34:53 14 ahead, sir.

01:34:58 15 MR. WILKERSON: I want to further
01:35:00 16 answer the court's question that you asked me a
01:35:03 17 minute ago about whether they could use the money
01:35:10 18 for repairing roofs on the condominium buildings.
01:35:18 19 We've got to remember that the fees that are
01:35:23 20 assessed are based upon a formula that is budget
01:35:28 21 based.
01:35:29 22 You start with the budget. And then you
01:35:32 23 subtract from the budget certain line items to come
01:36:11 24 up with the amount that is charged to Quartermaster.
01:36:17 25 And that is found at Page 11, middle of the page,

THOMAS REPORTING SERVICES

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99

01:36:31 1 number one.

01:36:35 2 JUDGE DUKES: No, I see it. It takes
01:36:40 3 maintenance out of it.

01:36:45 4 MR. WILKERSON: It takes maintenance
01:36:46 5 out of it, yes, sir.

01:36:53 6 MR. FINGER: It takes building
01:36:57 7 maintenance out of it. Not just maintenance, but it
01:37:06 8 says building maintenance.

01:37:12 9 MR. WILKERSON: Correct. It takes
01:37:18 10 building maintenance out of it. And, again, Mr.

Page 89

10-1-13 QUARTERMASTER HEARING.txt

01:37:34 11 Fenstermaker's testimony was he takes all
01:37:40 12 maintenance out of it. And then it takes two-thirds
01:37:47 13 of the property insurance out of it.

01:37:52 14 So, again, we are talking about what the
01:38:04 15 property insurance is. That is why we think that
01:38:08 16 that has absolutely to do with the issue before the
01:38:16 17 court and that is whether or not they've been
01:38:19 18 properly assessed. Now, I have nothing further of
00:02:02 19 this witness, Your Honor.

00:02:07 20 JUDGE DUKES: All right. Mr. Finger,
00:02:12 21 anything else?

00:02:18 22 REDIRECT EXAMINATION

00:02:19 23 BY MR. FINGER:

00:02:19 24 Q. I think we just touched on it the formula
00:02:26 25 that you utilize says that you are suppose to take

THOMAS REPORTING SERVICES

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100

00:02:33 1 out building maintenance; am I correct?

00:02:39 2 A. Yes.

00:03:06 3 Q. And you use your reserves to maintain your
00:03:14 4 buildings; isn't that correct?

00:03:28 5 A. They are used for a variety of things.

00:03:35 6 Q. One of them to be maintain buildings?

00:03:44 7 A. Yes.

00:03:47 8 MR. FINGER: No further questions.

00:03:48 9 Thank you, Your Honor.

00:03:49 10 RECROSS EXAMINATION

00:04:17 11 BY MR. WILKERSON:

00:04:21 12 Q. Mr. Fenstermaker, if you would look at
00:04:42 13 Page 10 of the agreement for me where it talks about
Page 90

10-1-13 QUARTERMASTER HEARING.txt

00:04:52 14 the hundred dollar assessment indexed. You with me?
00:05:04 15 A. Yes.
00:05:06 16 Q. And then it says said sum -- we are
00:05:12 17 talking about the hundred dollar assessment. Said
00:05:16 18 sum to be placed in the regime account and to be
00:05:25 19 used exclusively for landscape maintenance and
00:05:33 20 improvement, security, pool supplies and
00:05:41 21 maintenance, pest control excluding termite bond,
00:05:54 22 common area electric, common area water, sewer,
00:06:03 23 garbage and trash collection, management fee,
00:06:13 24 reserve; is that --
00:06:23 25 A. Correct.

THOMAS REPORTING SERVICES

‡

101

00:06:25 1 Q. Okay. And general office expenses?
00:06:32 2 A. Yes.
00:06:33 3 Q. Did I read that correctly?
00:06:37 4 A. Yes, sir.
00:06:39 5 MR. WILKERSON: Okay. Thanks.
00:06:43 6 Nothing further.
00:06:48 7 MR. FINGER: Your Honor, I won't --
00:06:56 8 we've talked about the definition to death, so I
00:07:02 9 won't follow-up on that at all. I'll call or next
00:07:25 10 witness.
00:07:27 11 JUDGE DUKES: No, and it's hard to
00:07:31 12 over look the title of this document. Reciprocal
00:07:36 13 easement and amenity use agreement, but anyway we'll
00:07:52 14 get to figure that out in a second, I guess, but no
00:08:15 15 further questions?
00:08:18 16 MR. FINGER: No further questions of

Page 91

10-1-13 QUARTERMASTER HEARING.txt

00:08:19 17 this witness.
00:08:24 18 JUDGE DUKES: Thank you. Thank you
00:08:36 19 very much, sir.
00:08:42 20 THE WITNESS: Thank you.
00:08:49 21 JUDGE DUKES: Raise your right hand
00:08:51 22 up for me, please, sir. Do you swear to tell the
00:09:01 23 truth, the whole truth, and nothing but the truth so
00:09:10 24 help you God?
00:09:13 25 MR. VIENNE: I do.

THOMAS REPORTING SERVICES

♀

102

00:09:14 1 JUDGE DUKES: All right. Have a
00:09:15 2 seat. If you happen to have a business card that
00:09:20 3 you could give Deborah, that would be helpful.
00:09:29 4 MR. VIENNE: Sorry. I didn't bring
00:09:31 5 one.
00:09:31 6 JUDGE DUKES: Okay. That's all
00:09:32 7 right. If you could just answer any questions Mr.
00:09:48 8 Finger may have starting with your whole name.
00:09:55 9 MR. VIENNE: Charles Edward Vienne,
00:09:56 10 V-i-e-n-n-e.
00:10:05 11 WHEREUPON:
00:10:05 12 CHARLES VIENNE, being duly sworn and
00:10:05 13 cautioned to speak the truth, the whole truth and
00:10:05 14 nothing but the truth, testifies as follows:
00:10:10 15 DIRECT EXAMINATION
00:10:11 16 BY MR. FINGER:
00:10:12 17 Q. All right. Charlie, how long have you
00:10:16 18 lived here in Beaufort County?
00:10:20 19 A. Almost 15 years now.

Page 92

10-1-13 QUARTERMASTER HEARING.txt

00:10:22 20 Q. Okay. And what is your occupation?
00:11:52 21 A. Homebuilder, carpenter.
00:11:59 22 Q. Okay. And you live in Quartermaster?
00:12:03 23 A. I do.
00:12:11 24 Q. During the course of this litigation I
00:12:16 25 think we even discovered that we got married in the

THOMAS REPORTING SERVICES

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103

00:12:21 1 same church up in Hunnington, New York; is that
00:12:28 2 correct?
00:12:48 3 A. That's right. St. Patrick's..
00:12:53 4 Q. St. Patrick's. Early on in the ownership
00:12:59 5 of your unit in Quartermaster did you question or
00:13:03 6 attempt to question how the Quartermaster fee was
00:13:09 7 determined by I.M.C. and Broad Creek?
00:13:19 8 A. Yes, I did.
00:13:22 9 Q. What efforts did you make and how did
00:13:24 10 you -- what did you try to do?
00:13:29 11 A. It took approximately I want to say
00:13:31 12 between 12 and probably 15 months -- you need to
00:13:43 13 understand there is an onsite manager. I used to
00:13:57 14 occasionally walk in the office and express my
00:14:00 15 concerns about the fees and things of that nature of
00:14:07 16 what was or was not being maintained and things of
00:14:15 17 that nature. What I didn't realize at the time was
00:14:21 18 that I wasn't really documenting that well. So a
00:14:28 19 lot of the stuff was verbal early on. Once I
00:14:35 20 started to document things that I needed via an
00:14:43 21 e-mail or fax or what have you, we ended up getting
00:14:47 22 a meeting with Ron Fenstermaker of I.M.C. and some

Page 93

00:15:04 23 of the Board members.
00:15:08 24 Q. Okay.
00:15:09 25 A. And I believe Ed Bullard was there, too.

THOMAS REPORTING SERVICES

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104

00:15:15 1 Q. And what do you -- approximate timeframe
00:15:19 2 for that meeting was when?
00:15:31 3 A. The date of that meeting?
00:15:33 4 Q. Yes.
00:15:34 5 A. I think it was 2002.
00:15:41 6 Q. Okay. And what were you essentially told
00:15:45 7 in that meeting?
00:15:50 8 A. Well, that we --
00:15:50 9 MR. WILKERSON: Your Honor, I'm a
00:15:58 10 little hesitant to allow that question to lay there
00:16:19 11 without an objection. What was he told in that
00:16:25 12 meeting? I'm not sure.
00:16:31 13 BY MR. FINGER:
00:16:32 14 Q. What were you told in that meeting
00:16:34 15 relative to your concern about how Quartermaster fee
00:16:41 16 was calculated?
00:16:52 17 MR. WILKERSON: There are going to be
00:16:54 18 some hearsay issues. We need to find out who is
00:17:01 19 talking here.
00:17:06 20 JUDGE DUKES: Yeah. Who is talking?
00:17:07 21 who is the manager first? Is it somebody here?
00:17:39 22 THE WITNESS: Ron Fenstermaker was
00:17:41 23 present. Is that what the question --
00:17:43 24 MR. FINGER: Yes.
00:17:45 25 MR. WILKERSON: Who was talking I

THOMAS REPORTING SERVICES

♀

105

00:17:47 1 think was the question?
00:18:11 2 THE WITNESS: It was Ron Fenstermaker
00:18:14 3 who was -- answering the questions?
00:18:26 4 BY MR. FINGER:
00:18:26 5 Q. The people that you met with, were they
00:18:29 6 all either on the Board, involved in the management?
00:18:49 7 A. Association management.
00:18:54 8 Q. Right.
00:18:56 9 A. I believe one or two Board members.
00:19:05 10 Q. Right.
00:19:06 11 A. And Ed Bullard was there.
00:19:14 12 Q. Their attorney?
00:19:30 13 A. Right.
00:19:35 14 JUDGE DUKES: Let me ask you this.
00:19:38 15 The question is how were these things calculated.
00:19:45 16 MR. FINGER: Yes. What was he told.
00:19:49 17 He had had some questions about how they were
00:19:52 18 calculated, and I want to know what he was told back
00:19:59 19 then.
00:20:03 20 JUDGE DUKES: And the fact is while I
00:20:06 21 suppose there are elements of hearsay in that, this
00:20:13 22 is something that has been -- is not even in
00:20:18 23 dispute, is it, how it's calculated? And so I
00:20:25 24 suppose unless you all are going to lay it out for
00:20:30 25 me in a spreadsheet or something, it probably makes

THOMAS REPORTING SERVICES

♀

106

10-1-13 QUARTERMASTER HEARING.txt

00:20:37 1 sense to have somebody tell me how it's calculated
00:20:51 2 and how --
00:20:55 3 MR. FINGER: We are going to do that.
00:20:57 4 That is what that white book right there is.
00:21:03 5 JUDGE DUKES: Okay. All right. I'll
00:21:05 6 allow it.
00:21:09 7 MR. FINGER: Let me move on.
00:21:11 8 BY MR. FINGER:
00:21:16 9 Q. Since you bought 15 or 16 years ago have
00:21:22 10 you been attempting to get documentation to answer
00:21:26 11 questions on how the formula has been used and how
00:21:29 12 the assessment has been done?
00:21:35 13 A. Yes.
00:21:35 14 Q. And were you successful in getting any
00:21:38 15 type of documentation from Mr. Fenstermaker, I.M.C.,
00:21:45 16 or from Broad Creek?
00:21:58 17 A. No.
00:21:59 18 Q. Okay. And you all ultimately -- did we
00:22:12 19 have a meeting with Greg Alford and the same group
00:22:17 20 of people right as you hired me?
00:22:19 21 A. Yes.
00:22:30 22 Q. And what were we told about our request
00:22:38 23 for documentation at that point?
00:22:41 24 MR. WILKERSON: The same objection,
00:22:43 25 Your Honor. What were we told? I would like to

THOMAS REPORTING SERVICES

♀

107

00:22:51 1 know who is talking so I can deal with the issue
00:23:01 2 of -- there are credibility issues here and that

10-1-13 QUARTERMASTER HEARING.txt
 00:23:08 3 sort of thing.
 00:23:10 4 BY MR. FINGER:
 00:23:11 5 Q. Who did we meet with?
 00:23:22 6 A. At the March 2010 meeting?
 00:23:28 7 Q. Right.
 00:23:30 8 A. Greg Alford.
 00:23:34 9 Q. Right.
 00:23:35 10 A. The I.M.C. manager, Ron Fenstermaker, and
 00:23:44 11 a few of the Board members.
 00:24:01 12 COURT REPORTER: Excuse me. Could
 00:24:06 13 you use that microphone? Thank you.
 00:24:16 14 THE WITNESS: A few of the Board
 00:24:19 15 members and, of course, yourself and a number of
 00:24:37 16 Quartermaster folks were there.
 00:24:38 17 BY MR. FINGER:
 00:24:39 18 Q. And what were we told in that meeting
 00:24:42 19 about our request for documentation?
 00:25:14 20 MR. WILKERSON: The same objection,
 00:25:17 21 Your Honor.
 00:25:18 22 BY MR. FINGER:
 00:25:20 23 Q. And who told us?
 00:25:26 24 MR. WILKERSON: Yes. I'm sorry,
 00:25:41 25 Judge.

THOMAS REPORTING SERVICES

108

00:25:49 1 BY MR. FINGER:
 00:25:53 2 Q. I think they are all collectively as one.
 00:25:57 3 They are all agents of the Defendant, but please
 00:26:01 4 identify them.
 00:26:16 5 A. Gregory Alford, in a letter I believe also

00:26:26 6 denied our request for this, that documentation.

00:26:34 7 Q. All right. You have compiled a white
00:26:47 8 notebook there. Just generally tell the judge if
00:26:51 9 you would, please, what is in that notebook.

00:26:58 10 MR. FINGER: The contents have been
00:27:00 11 produced to the other side, Your Honor. And I'll
00:27:09 12 just hand you up a copy so you can follow.

00:27:17 13 JUDGE DUKES: All right. Thank you.
00:27:22 14 I don't think I've ever seen a notebook quite like
00:27:29 15 this.

00:27:34 16 BY MR. FINGER:

00:27:36 17 Q. Generally this notebook -- is this your
00:27:39 18 work?

00:27:42 19 MR. WILKERSON: Could I take a look,
00:28:10 20 Your Honor --

00:28:13 21 JUDGE DUKES: I assumed you've seen
00:28:15 22 this.

00:28:18 23 MR. WILKERSON: I'm sure I've been
00:28:19 24 provided with this.

00:28:24 25 JUDGE DUKES: All right. Let's take

THOMAS REPORTING SERVICES

♀

109

00:28:25 1 a second and we will go off the record and let
00:28:52 2 you --

00:28:55 3 MR. WILKERSON: Again, I'm second
00:29:00 4 team on this case, too, so I'm playing catch up on
00:29:09 5 what has been done in the past. I'm sure if Terry
00:29:14 6 says he gave it to us, we have it. And I'm sure we
00:29:21 7 have all of these documents, but I want to find out
00:29:32 8 what is in here.

00:29:39 9
00:32:21 10 MR. WILKERSON: Your Honor, I don't
00:32:23 11 know how to address this concern, particularly in a
00:32:28 12 nonjury matter. We don't have a jury to deal with,
00:32:47 13 but this document -- this notebook is replete with
00:32:54 14 what can best be described as advocacy pieces. It
00:33:05 15 looks like some memos that were submitted to Mr.
00:33:13 16 Finger pointing out Mr. Vienne's analysis.
00:33:22 17 If you look at the very first page there
00:33:36 18 it's called complaint brief. And it goes through
00:33:41 19 and talks about his view on all of these issues.
00:33:50 20 Then we have these statements concerning
00:34:03 21 Quartermaster's position here and there. I'm
00:34:06 22 looking at the documents behind tab entitled,
00:34:13 23 general details and site manager.
00:34:24 24 And I don't know how to handle this
00:34:26 25 because I'm sure that the court can wade through

THOMAS REPORTING SERVICES

†

110

00:34:46 1 this and separate the wheat from the chaff, but
00:34:55 2 technically these are not appropriate exhibits from
00:34:58 3 a witness to present. There would need to be oral
00:35:05 4 testimony that would subject to cross examination
00:35:11 5 rather than some document that he's prepared as
00:35:19 6 opposed to a brief that has been prepared by
00:35:27 7 counsel. There is --
00:35:32 8 MR. FINGER: Your Honor, none of this
00:35:36 9 in here has been prepared by me. It was all
00:35:42 10 prepared by this witness in an effort to assist him
00:35:51 11 with the testimony that he is about to give.

10-1-13 QUARTERMASTER HEARING.txt

00:35:55 12 MR. WILKERSON: And that is my point.
00:35:57 13 MR. FINGER: I thought it would be
00:36:00 14 beneficial for the court to have a copy. I did not
00:36:11 15 take a position relative to the Defendants that this
00:36:23 16 was work product and produced it all to them a
00:36:31 17 number of months ago.
00:36:37 18 MR. WILKERSON: I'm just reading a
00:36:38 19 page -- an excerpt from the notebook, Your Honor.
00:36:45 20 It's addressed, Terry, after reviewing the insurance
00:36:52 21 contracts provided by Britain Hawk it is clear our
00:37:01 22 suspicions are and have been correct. And then he
00:37:06 23 goes on and talks about his analysis of these
00:37:29 24 insurance contracts for whatever that is worth,
00:38:02 25 whatever the relevance of that might be.

THOMAS REPORTING SERVICES

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111

00:38:16 1 But it -- and I don't know how to deal
00:38:19 2 with it other than just to say it's unorthodox.
00:38:33 3 JUDGE DUKES: Well, and again as you
00:38:37 4 pointed out, sometimes nonjury gives us a little
00:38:55 5 more flexibility than jury. And I can look beyond
00:39:12 6 memos to Mr. Finger that are in here. I mean I
00:39:20 7 suppose much of this could have been slightly
00:39:25 8 re-worked and attached to some post-trial brief or
00:39:37 9 something, but if this -- I think it's probably
00:39:50 10 important to all of us to determine or at least have
00:39:56 11 in the record some of these expenses -- method of
00:40:03 12 calculating these expenses that the Plaintiff claims
00:40:10 13 were not appropriately calculated or assessed. And
00:40:19 14 these numbers may not be -- for instance, the back

Page 100

QUARTERMASTER

204

00:40:23 15 part that is 8-by-12 format, I mean, I haven't heard
00:40:34 16 what the testimony is yet, but I'm assuming some of
00:40:52 17 these were obtained from the Defendant and there may
00:41:01 18 be no issue.

00:01:11 19 MR. WILKERSON: Sure. A lot of these
00:01:17 20 documents are things that we have no objection to,
00:01:23 21 Your Honor, that are what they are and say what they
00:01:27 22 say. But, again, if I can have the liberty of at
00:01:59 23 some later time if necessary making a formal
00:02:11 24 objection to some particular portion of this
00:02:17 25 document --

THOMAS REPORTING SERVICES

112

00:02:35 1 JUDGE DUKES: Oh, absolutely. Why
00:02:38 2 don't we do that?

00:02:44 3 MR. WILKERSON: -- for the court's
00:02:46 4 consideration, that might be the easier way.

00:02:53 5 JUDGE DUKES: Why don't we work from
00:02:54 6 this notebook, but as the testimony progresses and
00:03:03 7 points to various parts of the document, certainly
00:03:12 8 you reserve the right to make whatever comments or
00:03:21 9 objections you want. I think you are right. This
00:03:26 10 is a big, enormous book with a whole lot of
00:03:32 11 information in it that would be -- to simply object
00:03:37 12 to the entire thing wouldn't be very efficient, but
00:03:43 13 to allow it in without objection would not be a safe
00:03:49 14 thing to do either. So I'm happy to do it that way.
00:04:07 15 We will just start off and use it and --

00:04:17 16 MR. FINGER: And anything in the
00:04:19 17 front is not --

00:04:27 18 THE WITNESS: That is not included.
 00:04:30 19 Those are my own.
 00:04:32 20 MR. FINGER: It's not in the book.
 00:04:32 21 THE WITNESS: That's my own.
 00:04:33 22 MR. WILKERSON: Oh, this is not in
 00:04:36 23 there?
 00:04:48 24 THE WITNESS: No.
 00:04:54 25 JUDGE DUKES: Mine starts like this.

THOMAS REPORTING SERVICES

113

00:05:00 1 MR. WILKERSON: Okay.
 00:05:01 2 JUDGE DUKES: And I don't know
 00:05:01 3 whether the one that is supposed to be the
 00:05:08 4 exhibit --
 00:05:15 5 MR. WILKERSON: It's got some of his
 00:05:17 6 stuff here in the front, so --
 00:05:29 7 JUDGE DUKES: The one that is
 00:05:30 8 intended to be the exhibit -- is there another one?
 00:05:39 9 MR. FINGER: It would be yours.
 00:05:44 10 JUDGE DUKES: It would be this one?
 00:05:49 11 Okay.
 00:05:56 12 MR. WILKERSON: So could I reserve
 00:05:58 13 the right to challenge any of these documents either
 00:06:05 14 on cross examination or later during the court's
 00:06:12 15 consideration of the issues?
 00:06:18 16 JUDGE DUKES: We can -- you know any
 00:06:20 17 time we are dealing with numbers and calculations
 00:06:30 18 I'm happy to hold the record open to verify. I
 00:06:41 19 don't expect anybody to be a math whiz on the fly.
 00:06:49 20 So, yeah, I'm happy to do that. And we can proceed

00:06:56 21 in that matter.
 00:06:58 22 Maybe we ought to mark just for the
 00:07:02 23 record, I don't know if we need to mark the notebook
 00:07:08 24 just for identification and then work out way
 00:07:13 25 through and maybe remove things or not remove

THOMAS REPORTING SERVICES

♀

114

00:07:17 1 things. Just see how it goes.
 00:07:26 2 MR. FINGER: I think that would be a
 00:07:27 3 wise move to do at this time, Your Honor.
 00:28:24 4 JUDGE DUKES: Okay. So is there
 00:28:27 5 another one? There is that one. You've got one.
 00:28:36 6 I've got one.
 00:28:41 7 MR. FINGER: I think it would be --
 00:28:44 8 JUDGE DUKES: I guess we will use
 00:28:46 9 this one as --
 00:28:55 10 MR. FINGER: I think yours would be
 00:28:59 11 the proper one.
 00:29:02 12 JUDGE DUKES: All right.
 00:29:15 13 MR. FINGER: And I think that
 00:29:16 14 actually the book that I think that Charlie has may
 00:29:25 15 even have a few things in it that I don't have and
 00:29:29 16 you don't have. So there is some other -- just some
 00:29:36 17 background that we do not feel needs to go into the
 00:29:42 18 exhibit marked for identification. And I'm happy
 00:29:47 19 to --
 00:29:56 20 MR. WILKERSON: Can I see it to --
 00:29:59 21 MR. FINGER: And happy to have John
 00:30:03 22 come sit in my spot so he can see what we are doing.
 00:30:08 23 (MARKED PLAINTIFF'S EXHIBIT NO. 3.)

00:36:22 1 A. No.

00:36:23 2 Q. Okay. Have you asked to see one?

00:36:26 3 A. Yes.

00:36:27 4 Q. Okay. And has any been produced in

00:36:34 5 discovery?

00:36:35 6 A. No.

00:36:36 7 Q. Okay. And your next category is what?

00:36:40 8 You've got it labeled divider. What does that mean?

00:36:47 9 A. It's -- the document calls for the pro

00:36:53 10 rata share and that type of language to determine

00:37:11 11 what is a fair assessment to both Quartermaster and

00:37:17 12 Broad Creek Landing.

00:37:25 13 And specifically in the reciprocal as it

00:37:31 14 pertains to Quartermaster we believe using the

00:37:34 15 number -- the divisor of 278 excludes Quartermaster

00:37:44 16 and therefore it's an unfair divider that results in

00:37:50 17 a higher cost due to Quartermaster residents as

00:37:58 18 opposed to adding in what Quartermaster units would

00:38:03 19 add to that. So at build-out Quartermaster is 48

00:38:10 20 units. We feel that 278 should include those 48

00:38:52 21 units at build-out. And in the meantime a running

00:38:57 22 adjustment as more units are completed in

00:39:12 23 Quartermaster.

00:39:16 24 MR. WILKERSON: If Your Honor please,

00:39:19 25 this again relates to the overall picture of what is

THOMAS REPORTING SERVICES

00:39:25 1 proper testimony when one is interpreting a

10-1-13 QUARTERMASTER HEARING.txt

00:39:33 2 contract. The sum and substance of this gentleman's
00:39:38 3 testimony is going to be his view of what is fair.
00:39:51 4 And that is not the issue before the court.

00:40:03 5 If looking at this thing from this point
00:40:06 6 looking back he finds some things that he and his
00:40:15 7 colleagues believe are unfair, he just used that
00:40:19 8 term actually, it's not relevant to the case and
00:40:24 9 it's not helpful to the court in making a
00:40:27 10 determination as to what the contract means.

00:40:39 11 JUDGE DUKES: And I don't disagree
00:40:46 12 with you. It's going to be hard to sort of pick
00:40:54 13 through and I'm hopefully able to do that. I
00:41:05 14 understand that if the contract says it's divided by
00:41:10 15 278, it's divided by 278 whether it's fair or not,
00:41:35 16 but within this I think are the numbers based on the
00:41:40 17 parts that might be ambiguous and that kind of
00:41:46 18 thing, at least that is where I think we are going.

00:41:54 19 MR. FINGER: That is exactly right,
00:41:56 20 Your Honor.

00:41:57 21 JUDGE DUKES: So we are going to have
00:41:59 22 some of this in here. This is again the entire
00:42:05 23 thing I think is subject to your ongoing and
00:42:16 24 continuing objection, but I recognize what you are
00:42:23 25 saying and the fact that fairness may very well not

THOMAS REPORTING SERVICES

♀

118

00:42:30 1 come into it.
00:42:36 2 MR. WILKERSON: Thank you, Your
00:42:37 3 Honor.
00:42:38 4 BY MR. FINGER:

Page 106

10-1-13 QUARTERMASTER HEARING.txt

00:42:39 5 Q. Is there a portion in the reciprocal
00:42:43 6 agreement that talks about Quartermaster paying
00:42:46 7 their pro rata share?
00:42:51 8 A. It does.
00:42:53 9 Q. Okay. And under the divider you have just
00:42:59 10 general -- a couple other concerns. What are those
00:43:08 11 other concerns?
00:43:11 12 A. The lighting throughout the property is
00:43:16 13 one. We touched on the Palmetto Electric lighting
00:43:26 14 before.
00:43:27 15 Q. Right.
00:43:29 16 A. That is a separate line item in the
00:43:41 17 budget. None of those lights are on the
00:43:47 18 Quartermaster property. And there is very little if
00:43:52 19 any security lighting on the Quartermaster property.
00:43:59 20 And then there is the mailbox pedestals that were
00:44:02 21 installed I want to say 2002. I don't -- I know we
00:44:24 22 were told we were going to receive those mailboxes.
00:44:32 23 And we never did. They were only installed on the
00:44:38 24 regime properties.
00:44:43 25 Q. Okay. And just to not hasten matters, but

THOMAS REPORTING SERVICES

119

00:44:51 1 the tabs that come behind all of this will explain
00:45:06 2 each of these. Am I correct?
00:45:16 3 A. It --
00:45:16 4 (Recording devices cut out at
00:45:16 5 approximately 11:35 a.m.) ***
00:45:16 6 BY MR. FINGER:
00:46:48 7 Q. -- part of that tab, you have building
Page 107

10-1-13 QUARTERMASTER HEARING.txt

00:46:52 8 numbers for the various buildings, condominium
00:46:58 9 buildings. You have at the bottom 55 through 62
00:47:11 10 which is the pool house, et cetera. And then you
00:47:16 11 have another map. Just very briefly for the court
00:47:29 12 explain what this map is and how you came about
00:48:00 13 preparing it, please.
00:48:15 14 A. The building numbers were derived from the
00:48:19 15 insurance information provided by Broad Creek
00:48:27 16 through Britain Hawk. And the numbers listed are
00:48:52 17 placed on the, you know correct buildings within
00:48:59 18 Broad Creek. And throughout the rest of the
00:49:07 19 property there are little symbols and key codes that
00:49:17 20 further designate other -- we think relevant areas
00:49:53 21 as far as, for example, I mentioned the mailboxes
00:49:58 22 earlier and the Palmetto Electric lighting.
00:50:08 23 If we look just at the Palmetto Electric
00:50:17 24 lighting symbol under the security lighting heading,
00:50:40 25 it's got a P.E. on it. We can see where they are

THOMAS REPORTING SERVICES

♀

120

00:50:57 1 distributed throughout the property. And none are
00:51:06 2 present in the Quartermaster property. So this map,
00:51:11 3 if you will, just itemizes those things and clearly
00:51:17 4 places them where they are on the overall property.
00:51:27 5 Q. Okay. And in the insurance key, which is
00:51:40 6 on the left-hand part of that map, you have a yellow
00:51:49 7 square with an X in it. That is -- what is that
00:51:54 8 supposed to denominate or label?
00:52:03 9 A. The X was just as a symbol to indicate
00:52:06 10 that there is a number that corresponds, so --

Page 108

10-1-13 QUARTERMASTER HEARING.txt

00:52:41 11 Q. And, again, those numbers correspond with
00:52:58 12 the numbers on the insurance key, the page right
00:53:02 13 before it; am I correct?

00:53:13 14 A. Yes. It's supposed to be like a diamond.
00:53:18 15 So that diamond would be -- diamond number 60 would
00:53:29 16 be the pool or whatever the designation is.

00:54:09 17 Q. Clubhouse pool, correct?

00:54:15 18 A. Clubhouse pool.

00:54:17 19 Q. Okay. Very good. So that just -- and you
00:54:26 20 have the mailbox key there. Anything else from this
00:54:30 21 map that you would like to kind of give any further
00:54:35 22 information to the court on relative to this map
00:54:42 23 here?

00:54:43 24 A. Yes. The security lighting is not --
00:54:47 25 there is two items; one is security lighting and the

THOMAS REPORTING SERVICES

121

00:54:53 1 other is Palmetto Electric lighting. They are two
00:55:05 2 separate things although they can kind of be
00:55:10 3 interpreted as the same.

00:55:13 4 However, the security lighting and the
00:55:32 5 Palmetto Electric lighting have as I say two
00:55:54 6 separate budget line items. And if you look at the
00:56:00 7 symbols for those type lighting throughout the
00:56:04 8 property you will see that the vast majority of them
00:56:08 9 are on Broad Creek regime properties and I believe
00:56:16 10 zero in the Quartermaster area.

00:56:38 11 Q. And, again, the Quartermaster area is the
00:56:41 12 area next to the lagoon right in the middle of the
00:56:47 13 map; am I correct?

Page 109

10-1-13 QUARTERMASTER HEARING.txt

00:56:54 14 A. Correct. Yes.
00:56:57 15 Q. Anything else from this map that you would
00:56:59 16 like to tell the court about?
00:57:09 17 A. We can touch on the landscaping and how
00:57:21 18 that is colored in and how that is serviced to --
00:57:40 19 differences in service for Broad Creek and --
00:57:47 20 Q. If you would please, go right ahead.
00:57:53 21 A. Yeah. I have a lighter colored green for
00:57:59 22 Broad Creek Landing landscape proper. And their
00:58:05 23 property is -- I guess the easiest way to describe
00:58:13 24 it is they do get landscaping. There is edging.
00:58:36 25 There is shrub pruning. There is weed control in

THOMAS REPORTING SERVICES

122

00:58:45 1 addition to mowing and other services that are
00:58:50 2 provided to all of the regime properties. And
00:58:59 3 Quartermaster by and large gets a simple mowing of
00:59:05 4 some grass and a blowing of the street. And that is
00:59:10 5 the extent of it.

00:59:12 6 (Loud construction noise going on outside
00:59:12 7 of courtroom.)

00:59:13 8 MR. WILKERSON: Your Honor, my
00:59:14 9 objection does continue as to all of his testimony I
00:59:37 10 hope. I'm not going to stand up as to it, but --

00:59:48 11 JUDGE DUKES: All right. In this
00:59:53 12 particular case I'm assuming he's actually witnessed
01:00:00 13 this, but I'll let Mr. Finger ask as to --

01:00:07 14 MR. WILKERSON: Well, my objection is
01:00:09 15 not that he's seen it. My objection is that it has
01:00:21 16 absolutely nothing to do with the issues before the

Page 110

10-1-13 QUARTERMASTER HEARING.txt

01:00:25 17 court.
01:00:27 18 JUDGE DUKES: Okay. I understand.
01:00:31 19 I'll allow it.
01:00:33 20 BY MR. FINGER:
01:00:34 21 Q. Other than in this map that you are
01:00:38 22 looking at, other than the dark green which is on
01:00:43 23 both sides of Quartermaster Lane as you come in and
01:00:46 24 then Quartermaster Lane as it comes up to the units
01:00:54 25 79, 78, et cetera, is there any other landscaping

THOMAS REPORTING SERVICES

123

01:00:59 1 that is done by Broad Creek in Quartermaster at all
01:01:06 2 except for a little bit around the lagoon?
01:01:31 3 A. None at all.
01:01:33 4 Q. And you have personally witnessed that?
01:01:38 5 A. Yes. And I have photographs in the back
01:01:41 6 of some of that if that is helpful.
01:01:46 7 Q. All right. The next page you have some
01:01:48 8 insurance documentation. Please explain to the
01:02:00 9 court what that is if you would, please.
01:02:13 10 I have Broad Creek Landing insurance
01:02:16 11 premium info. The same little key with building or
01:02:34 12 properties 1 through 62 on the right. And a -- it
01:02:45 13 seems to be an insurance premium of 327,590.88.
01:02:56 14 what is that, please?
01:03:19 15 A. This would go to when we discussed the
01:03:25 16 property insurance, the deduction of two-thirds
01:03:35 17 property insurance per the formulation to assess us.
01:03:42 18 Q. Okay.
01:03:43 19 A. This is here just to show that it's a

Page 111

01:03:47 20 commercial policy that covers all of the regime
 01:04:15 21 properties, buildings. And it's not -- well, that
 01:04:25 22 is what it is.
 01:04:27 23 Q. All right. The next page is -- you go
 01:04:29 24 into some insurance analysis there; is that correct?
 01:04:37 25 I have flood insurance -- two columns of flood

THOMAS REPORTING SERVICES

♀

124

01:04:43 1 insurance and then a summary on the other side.
 01:04:48 2 What is your belief that relative to the overcharges
 01:04:58 3 because insurance is included in your assessment?

01:05:22 4 MR. WILKERSON: Even the question is
 01:05:25 5 objectionable there, Your Honor, so I would object.
 01:05:31 6 BY MR. FINGER:

01:05:32 7 Q. How much insurance has been overcharged
 01:05:45 8 against the Quartermaster people under the
 01:05:49 9 reciprocal agreement?

01:05:50 10 MR. WILKERSON: The same objection.
 01:06:00 11 There is no provision in there as to how much
 01:06:07 12 insurance should be charged. It's a formula. And
 01:06:14 13 they can't go through and pull out one piece of
 01:06:19 14 insurance they don't paying for.

01:06:31 15 JUDGE DUKES: Why don't we -- I think
 01:06:32 16 I understand the position. And maybe I can just
 01:06:38 17 figure the math out myself, but I mean -- the
 01:06:43 18 position of the Plaintiff is that they should be
 01:06:54 19 paying a third of the insurance associated with the
 01:06:59 20 common elements?

01:07:02 21 MR. FINGER: That's correct, Your
 01:07:06 22 Honor.

01:07:07 23 JUDGE DUKES: I suppose I can pull a
01:07:10 24 calculator out and do that myself. I mean, if it's
01:07:18 25 just math and the numbers are right here I don't

THOMAS REPORTING SERVICES

♀

125

01:07:29 1 mind -- and, again, I understand that Defendant has
01:07:35 2 a completely different idea of what the contract
01:07:44 3 says and if they entered into a bad bargain, sobeit,
01:07:51 4 but --

01:07:57 5 MR. FINGER: This witness has done
01:07:59 6 that. That is what this page is so designed to --

01:08:16 7 JUDGE DUKES: Okay. So just to the
01:08:20 8 extent that we are talking about math, and again I'm
01:08:25 9 thinking some of these insurance charges are not in
01:08:33 10 dispute, I don't have a problem if he answers the
01:08:37 11 question and prevents me from having to pull a
01:09:02 12 calculator out.

01:09:10 13 BY MR. FINGER:

01:09:11 14 Q. First off, the insurance charges that you
01:09:14 15 show here on a per building line item, where did you
01:09:20 16 get those numbers from?

01:09:24 17 A. I think my booklet here is a little bit
01:09:29 18 out of order, so please bear with me.

01:09:36 19 JUDGE DUKES: And again in the
01:09:39 20 question to make it less objectionable, Mr. Finger,
01:09:44 21 maybe you can sort of lay it out not as overcharges
01:09:53 22 by the Defendant or anything but just what would the
01:09:57 23 difference have been had it been figured in a
01:10:02 24 different way. Maybe that will help the Defendant.

01:10:27 25 BY MR. FINGER:

THOMAS REPORTING SERVICES

126

01:10:28 1 Q. I'm going to the smaller portion of your
01:10:32 2 book entitled insurance premiums towards the back.
01:10:37 3 MR. FINGER: Which is the normal
01:10:40 4 letter size papers; Your Honor.
01:10:56 5 BY MR. FINGER:
01:10:57 6 Q. In the back of this book do you provide
01:11:00 7 the per building premiums as best you can from the
01:11:08 8 information that has been given to you?
01:11:17 9 A. Yes.
01:11:19 10 Q. Okay. For instance if you go about
01:11:24 11 halfway through that Tab you will see that in fact
01:11:28 12 there are different premiums paid for each building.
01:11:34 13 And you were able to get that through discovery;
01:11:39 14 isn't that correct?
01:11:41 15 A. Yes.
01:11:43 16 Q. For instance, there is a Harleysville
01:11:45 17 policy on Building 1, Units 1 through 8 for \$1,773.
01:11:59 18 And that is a number that you used in your chart; am
01:12:06 19 I correct?
01:12:28 20 A. I'm afraid I lost my place here.
01:12:39 21 MR. WILKERSON: That is flood
01:12:41 22 insurance, Your Honor, just for the record that he's
01:12:45 23 pointing to.
01:12:56 24 JUDGE DUKES: This is after the blue
01:13:01 25 tab in the back in the middle?

THOMAS REPORTING SERVICES

127

10-1-13 QUARTERMASTER HEARING.txt

01:13:24 1 MR. FINGER: Back to the book that
01:13:26 2 you've given me, I'm under red Tab -- insurance
01:13:33 3 premiums.
01:13:38 4 JUDGE DUKES: Red tab?
01:13:42 5 MR. FINGER: Insurance premiums.
01:13:45 6 Mine is red. I don't know whether yours -- whether
01:14:00 7 the colors are the same. You are there? About
01:14:08 8 halfway through we have some individual premium
01:14:12 9 numbers; is that right?
01:14:15 10 JUDGE DUKES: Under a blue Tab I
01:14:18 11 found one with Harleysville that is the 1,773 you
01:14:25 12 talked about.
01:14:27 13 MR. FINGER: Okay.
01:14:40 14 MR. WILKERSON: Have you got
01:14:41 15 different colored tabs for the court?
01:14:46 16 JUDGE DUKES: This makes it more
01:14:48 17 interesting. There is -- it's followed by, just so
01:14:54 18 we are all in the same place, a 1,525, an 1,872, and
01:15:10 19 a 1,017.
01:15:15 20 MR. FINGER: And you will see that
01:15:17 21 those match up with some of the documentation from
01:15:19 22 the original summary that we were talking about.
01:15:41 23 BY MR. FINGER:
01:15:42 24 Q. Are you following that, Charlie? I know
01:15:47 25 your book is a little more complete than this one.

THOMAS REPORTING SERVICES

128

01:15:55 1 On this insurance page here which is back after the
01:16:05 2 map that we just did and after the insurance page,

01:16:11 3 this page here which is the third page under that
01:16:15 4 tab, where did you get all of these numbers from?

01:16:20 5 A. I believe it was from the premiums
01:16:28 6 provided by Britain Hawk.

01:16:33 7 Q. Okay. And based upon the premium
01:16:38 8 information that you received from opposing counsel,
01:16:44 9 what do you believe the excess insurance overcharges
01:16:51 10 under the reciprocal agreement?

01:17:08 11 JUDGE DUKES: Well, if you would ask
01:17:10 12 perhaps rather than raise it in that, what would the
01:17:18 13 difference be if it were calculated and then perhaps
01:17:25 14 lay out --

01:17:29 15 BY MR. FINGER:

01:17:29 16 Q. What would the difference be if it was
01:17:33 17 calculated without the insurance in the assessment?

01:17:42 18 MR. WILKERSON: Objection if for
01:17:44 19 knows other reason totally irrelevant, Your Honor.

01:18:06 20 JUDGE DUKES: Well, it might be. But
01:18:12 21 anyway, I tried to get it as -- reduce the objection
01:18:17 22 as much as possible, but I certainly understand -- I
01:18:27 23 noted --

01:18:28 24 BY MR. FINGER:

01:18:29 25 Q. If the insurance was just for the area in

THOMAS REPORTING SERVICES

129

01:18:34 1 the green in Defendant's Exhibit 2, what is the
01:18:39 2 difference?

01:18:43 3 MR. WILKERSON: Objection. There is
01:18:45 4 flood insurance. There is building insurance.
01:18:50 5 There is C.G.L. insurance that covers lots of other

01:18:58 6 things. There is insurance on condominium
 01:19:01 7 buildings. There is insurance on pool buildings.
 01:19:07 8 There is insurance on -- and so -- we've got some
 01:21:00 9 terrorism coverage, too, I'm sure.
 01:21:10 10 BY MR. FINGER:
 01:21:11 11 Q. Are all of those things that Mr. Wilkerson
 01:21:15 12 just talked about in your analysis?
 01:21:20 13 A. Yes.
 01:21:22 14 Q. And what is the difference between what
 01:21:25 15 you are charged for insurance versus what would be
 01:21:47 16 charged for insurance if it was just on the green
 01:21:53 17 areas, including all the insurance coverages?
 01:22:03 18 A. It would be well over a hundred thousand
 01:22:06 19 dollars of assessment --
 01:22:16 20 MR. WILKERSON: Objection.
 01:22:18 21 JUDGE DUKES: Let him state his
 01:22:20 22 objection. Hold on one second. Okay. The
 01:22:26 23 objection is -- is it different than the last one?
 01:22:32 24 MR. WILKERSON: No. But he's now
 01:22:33 25 going to the green area, Your Honor. And we've

THOMAS REPORTING SERVICES

130

01:22:37 1 already established that the green area has nothing
 01:22:40 2 to do with the concept of common area because under
 01:22:43 3 the document itself it includes all of those other
 01:22:47 4 roads that he's excluding now. So if all of his
 01:23:08 5 calculations go to his green area --
 01:23:21 6 JUDGE DUKES: No. No. I get it.
 01:23:34 7 And just because I said 5.2 might mean something
 01:23:40 8 else, the Plaintiff of course I think still has a

01:23:53 9 different theory. So I'll allow him to come up with
01:23:58 10 it. I don't know if it's the right number or not,
01:24:08 11 but --

01:24:14 12 MR. WILKERSON: But it can't be
01:24:15 13 helpful to the court if it is keyed off of his
01:24:23 14 little green area that has no relationship to
01:24:29 15 anything other than his concept of fairness.

01:24:37 16 JUDGE DUKES: Well, the fact is
01:24:41 17 unless one were to go back for many years and go
01:24:46 18 back to the insurance company and ask for different
01:24:50 19 policies, we would never get to an exact number
01:24:59 20 because I don't know how these might have ended up
01:25:03 21 with different carriers and that sort of thing if
01:25:12 22 you started off differently, but to the extent there
01:25:18 23 is some number that may or may not be relevant I'll
01:25:30 24 let him tell me what he's come up with, but I know
01:25:34 25 what you are talking about.

THOMAS REPORTING SERVICES

7

131

01:25:37 1 BY MR. FINGER:

01:25:38 2 Q. Charlie, we are looking at in your book
01:25:43 3 under the second page past your map with all the
01:25:55 4 keys and the lights and all of that you have, an
01:25:58 5 insurance analysis; is that correct?

01:26:02 6 A. Yes.

01:26:05 7 Q. And in answer to my question a moment ago,
01:26:11 8 what do you believe the difference is dollar-wise?

01:26:22 9 A. Dollar-wise? I believe it's in excess of
01:26:25 10 \$100,000 of assessment value.

01:26:30 11 Q. Over what period of years?

Page 118

01:26:33 12 A. Year over year.
 01:26:38 13 Q. Every year?
 01:26:40 14 A. Every year.
 01:26:41 15 Q. Okay. And in doing your analysis did you
 01:27:11 16 factor in what you believe based upon the documents
 01:27:15 17 given to you is the proper premiums for the areas in
 01:27:20 18 the green on map Exhibit 3 -- Exhibit 2?
 01:27:28 19 MR. WILKERSON: Objection. Again the
 01:27:33 20 same objection. And then proper premiums, I'm not
 01:27:40 21 sure what that means.
 01:27:43 22 JUDGE DUKES: Yeah, I guess that
 01:27:45 23 concerns me because simply prorating an existing
 01:27:50 24 policy --
 01:28:05 25 BY MR. FINGER:

THOMAS REPORTING SERVICES

132

01:28:06 1 Q. What were the premiums? Did you attribute
 01:28:11 2 a premium for the pool, the tennis court, and things
 01:28:18 3 of that sort? You actually picked them off the
 01:28:26 4 schedule; am I correct?
 01:28:29 5 A. Yes.
 01:28:29 6 Q. Okay. And for instance the commercial --
 01:28:35 7 you estimated a common amenity premium of \$3,000.
 01:29:09 8 How did you come up with that number?
 01:29:14 9 A. Well, I referenced --
 01:29:15 10 (Recording cuts off after
 01:29:15 11 approximately 15 minutes or 11:50 a.m.)
 01:29:15 12 (12:00 objection by Mr. Wilkerson.)
 01:29:15 13 (12:05 objection by Mr. Wilkerson.)
 01:29:15 14 (12:25-1:48 Lunch Break.)

10-1-13 QUARTERMASTER HEARING.txt

01:29:15 15 (1:48 Marked Joint Exhibit Numbers 2,
 01:29:15 16 3, and 4.)
 01:29:15 17 (1:48-2:17 Cross by Mr. Wilkerson.)
 01:29:15 18 (2:17-2:22 Redirect by Mr. Finger.)
 01:29:15 19 (2:22-2:27 off record discussion.)
 01:29:15 20 (2:27 Marked Plaintiffs Exhibit
 01:29:15 21 Numbers 4, 5, 6, 7, and 8.)
 01:29:15 22 (2:37 Motion for Directed Verdict.)
 01:29:15 23 (2:42 Marked Defendants Exhibit
 01:29:15 24 Number 2.)
 01:29:15 25 (2:13 Motions by Mr. Wilkerson.)

THOMAS REPORTING SERVICES

133

01:29:15 1 (3:07 Motions by Mr. Finger.)
 01:29:15 2 (3:13 Closing by Mr. Wilkerson.)
 01:29:15 3 (3:16 Closing by Mr. Finger.)
 01:29:15 4 (Whereupon, the hearing was concluded
 01:29:15 5 at 3:19 p.m.)

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THOMAS REPORTING SERVICES

134

01:29:15 1 Certificate of Reporter

01:29:15 2

01:29:15 3 I, Deborah S. Thomas, Certified Verbatim
01:29:15 Reporter and Notary Public in and for the State of
01:29:15 4 South Carolina, do hereby certify that I reported
01:29:15 the hearing of Quartermaster at Broad Creek Landing
01:29:15 5 Owner's Association Inc. vs. Broad Creek Landing
01:29:15 Horizontal Property Regime, on the 1st day of
01:29:15 6 October, 2013, and that the foregoing 133 pages
01:29:15 constitute a true and correct transcription of the
01:29:15 7 said hearing.

01:29:15 8

01:29:15 9 I further certify that I am neither
01:29:15 attorney nor counsel for, nor related to or employed
01:29:15 10 by, any of the parties connected with this action,
01:29:15 nor am I financially interested in said cause.
01:29:15 11

01:29:15 12 I further certify that the original of
01:29:15 said transcript shall be hereafter delivered to
01:29:15 13 Terry A. Finger, Finger Melnick & Brooks, PA, 35
01:29:15 Hospital Center Common, Suite 200 (29926), Post
01:29:15 14 Office Box 24005, Hilton Head Island, South Carolina
01:29:15 29925.

01:29:15 16 In witness whereof I set my hand and seal
01:29:15 this 8th day of December, 2015.
01:29:15 17

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My Commission
expires 1/4/18

Deborah S. Thomas, CVRM
and Notary Public for the
State of South Carolina

10-1-13 QUARTERMASTER HEARING.txt

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