STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY)

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,

Plaintiffs,

v.

Civil Action No.: 2016-CP-26-00673

Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Walter Jordan, Ralph Jump, Stanley Jordan, Ray Coghill, and John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc.,

Defendants.

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SC Court of Appeals

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STATE OF SOUTH CAROLINA) **IN THE COURT OF COMMON PLEAS**
) **15TH JUDICIAL CIRCUIT**
COUNTY OF HORRY)

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated,

Plaintiffs,

v. **Civil Action No.: 2016-CP-26-00674**

The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,

Defendants.

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STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) 15th JUDICIAL CIRCUIT
COUNTY OF HORRY	)
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders,	)
Plaintiffs,	)
v.	) Civil Action No.: 2016-CP-26-00743
K.A. Diehl and Associates, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc.,	)
Defendants.	)

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STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) 15TH JUDICIAL CIRCUIT
COUNTY OF HORRY	)
Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc.,	)
Plaintiffs,	)
v.	) Civil Action No.: 2016-CP-26-00744
Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Property Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., and K.A. Diehl and Associates, Inc.,	)
Defendants.	)

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ORDER DENYING PLAINTIFFS' MOTIONS TO RECONSIDER

THIS MATTER IS BEFORE THE COURT upon the Motions and Amended Motions of the Plaintiffs in each of the above-captioned cases (C.A. Nos. 2016-CP-26-00673, 2016-CP-26-00674, 2016-CP-26-00743, and 2016-CP-26-00744) (collectively, the "Actions"). Plaintiffs move for reconsideration of the Court's September 21, 2017, Order Granting Defendants' Motion to Enforce Settlement Agreement.

The Court has reviewed Plaintiffs' Motions and Amended Motions (together with the Exhibits thereto), as well as Defendants' filings opposing Plaintiffs' Motions and Amended Motions. The Court also is familiar with the facts, legal issues, procedural history, and pleadings on file in the Actions.

For the reasons set forth below, the Court **DENIES** Plaintiffs' Motions and Amended Motions for reconsideration of the Court's September 21, 2017, Order Granting Defendants' Motion to Enforce Settlement Agreement.

A. Findings of Fact.[1]

1. On May 1, 2017, all parties and their counsel attended and participated in (either in person or via telephone)[2] the Court-mandated mediation conference in the Actions, which was facilitated by Mediator Karl A. Folkens, Esq.—one of the most experienced and well-respected mediators in South Carolina.

2. Plaintiffs Mark Dos Santos and Jeff Richardson attended and participated in the mediation conference via telephone.

3. After a full-day mediation, involving extensive arms-length negotiations between the parties and their counsel, the parties reached a resolution of all claims in the Actions and a related matter.

4. In accordance with Rule 6(f), SCADR, Mediator Folkens ensured that the parties reduced their settlement to writing in an agreement that accurately captured the terms of the

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[1] These same facts have been central to Defendants' original Consolidated Motion for Preliminary Approval of Settlement Agreement filed July 3, 2017, and Plaintiffs' Motions and Amended Motions for reconsideration of the Order granting Defendants' Motion. Plaintiffs have never disputed the accuracy of any of these facts.

[2] Of the eight (8) named plaintiffs in the Actions, six (6) were physically present at the mediation, and two (2)—Mark Dos Santos and Jeffrey Richardson—were present via telephone.

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negotiated resolution and that all parties named in the Agreement signed—the Settlement Agreement in the Actions ("Agreement").[3]

5. Due to Plaintiffs Mark Dos Santos and Jeff Richardson not being physically present, Plaintiffs' counsel executed the Agreement on their behalf as their duly-authorized agent.

6. Plaintiffs' counsel presented the Agreement to Mediator Folkens and Defendants' counsel, signed by or on behalf of all of the named Plaintiffs.

7. Due to individual Defendants Ray Coghill, Bill Cameron, and Stanley Jordan not being physically present, Defendants' counsel executed the Agreement on their behalf as their duly-authorized agent.

8. Due to the inability of the organization Defendants—Ocean Front Spa Horizontal Property Regime, Inc., and The Myrtle Beach Resort Homeowners Association, Inc.—to execute the Agreement on their own behalf, Defendants' counsel executed the Agreement on their behalf as their duly-authorized agent.

9. Based on the parties' negotiated settlement, memorialized in the Agreement, Mediator Folkens filed an Amended Proof of ADR form in each of the Actions making clear that all parties were present and that each of the Actions were "[f]ully settled by Consent Judgment or a Voluntary Dismissal to be filed by the parties."

10. After the mediation, three of the named Plaintiffs (Nancy Moore, Steven Dame and Jim Perkins) expressly ratified the Agreement by (a) official written notification to all members of the OFS community that they successfully "resolve[d the] five lawsuits"; and (b) notices posted in the OFS building informing all residents that "[t]he recent state court litigation between various

[3] The record also contains a copy of the Settlement Agreement memorializing the resolution of a separate but related action (*K.A. Diehl and Associates, Inc. v. Perkins et al.*, C.A. No. 2015-CP-26-05573) that all named parties to that agreement (all named Plaintiffs plus K.A. Diehl and Associates, Inc.) signed at the conclusion of the global mediation conference.

homeowners in the Ocean Front Spa and its management company and others has been resolved between the parties to their mutual satisfaction via alternative dispute resolution that occurred on May 1."

B. Regardless of whether Rule 43(k) Applies to the Agreement, the Agreement Fully Satisfies the Requirements of Rule 43(k).

Rule 43(k), SCRCP, contemplates several ways in which an agreement covered by the Rule becomes binding. One way is where the agreement is "reduced to writing and signed by the parties and their counsel." That has occurred here, regardless of whether Rule 43(k) applies, fully satisfying the requirements of the Rule:

- The parties' negotiated resolution was "reduced to writing" in the form of the Agreement;
- Each of the named parties to the Agreement signed the Agreement, either personally or through the actions of their duly-authorized agents; and
- The Agreement shows that counsel for the parties signed the agreement:
    - "A. Preston Brittain"—counsel for Plaintiffs—signed the Agreement twice (once in an agency capacity for Plaintiff Santos, and once in an agency capacity for Plaintiff Richardson both of whom were present at the mediation via telephone), and
    - "Phillip A. Kilgore"—counsel for all Defendants who were party to the Agreement—signed the Agreement five times (in an agency capacity for two corporate Defendants and the three individual Defendants who were present at the mediation via telephone).

Plaintiffs acknowledge the truth of each of these facts. This acknowledgement leaves no room to argue that Rule 43(k) was not satisfied.

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1. Counsel for All Named Parties to the Agreement Signed the Agreement.

Plaintiffs' first contention is that the signatures of Plaintiffs' counsel and Defendants' counsel on the Agreement should be disregarded because counsel did not sign in their individual capacity. The Rule has no such capacity requirement. Moreover, any signature by counsel in the course of the representation of a party would, by definition, be in an agency capacity.

The purpose of Rule 43(k) is to promote certainty with respect to the terms of agreements between counsel and to remove the Court from such disputes. *See Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006). Rule 43(k) was amended in 2009, adding another way in which to accomplish this purpose—by allowing the enforcement of an "agreement between counsel" (1) that is in writing, (2) to which the parties acknowledge their assent by signing the document, and (3) of which the attorneys confirm their review and approval by signing the document.

The obvious purpose of the attorney signature requirement is to ensure that the document accurately conveys the terms of the deal the parties have reached. It is certainly not to signal counsel's agreement to be bound individually, as the attorney essentially never has affirmative obligations or rights under the agreement.

Here, counsel for Plaintiffs and counsel for Defendants signed the Agreement as agents of their clients. In other words, it is beyond dispute that the parties' attorneys did indeed sign the Agreement. Applying the most fundamental statutory interpretation principles, this fact plainly satisfies Rule 43(k), which merely requires that the document be "signed by . . . counsel." *See State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002) ("[T]he words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."). To the extent Rule 43 applies, it would require counsel to sign the agreement, and they did so.

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Moreover, by signing the Agreement as agents/attorneys for their principals/clients, both counsel clearly indicated that they fulfilled their duties to their clients, having reviewed the Agreement and confirmed that it accurately set forth the relevant terms of settlement. Moreover, their signatures constitute representations that their clients gave them express permission to sign in their stead. Neither attorney would have signed the Agreement as the agent of his client unless these facts were true. Therefore, the Agreement satisfies the attorney signature requirement under Rule 43(k).

2. Plaintiffs Santos and Richardson signed the Agreement for purposes of Rule 43(k) by directing their agent/counsel to sign on their behalf.

Plaintiffs have also contended that a party does not actually sign an agreement for purposes of Rule 43(k), even when the party has expressly directed his agent/attorney to sign the agreement on his behalf and the attorney has done so in a manner making clear that the attorney is signing in the place of the party.[4] This argument fails based on well-established agency principles.

Below are the actual signatures from the Agreement with which Plaintiffs apparently take issue:

Mark Dos Santos

By his Attorney

Jeffrey Richardson

By his Attorney

[4] Plaintiffs raised this argument in opposition to Defendants' Motion to Approve Settlement, but Plaintiffs' Motions to Reconsider appear to have abandoned this argument. Plaintiffs' Motions to Reconsider focus instead on the isolated issue addressed in Section A.1 above—their contention that Plaintiffs' counsel and Defendants' counsel did not "sign" the agreement for purposes of Rule 43(k). The Court includes Section A.2 to address all issues potentially before the Court and to explain why Rule 43(k) has been satisfied fully.

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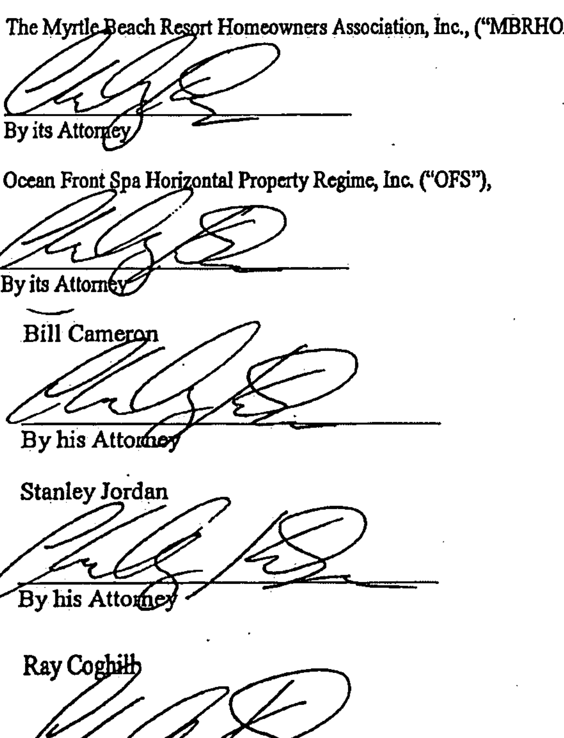

The Myrtle Beach Resort Homeowners Association, Inc., ("MBRHOA")

By its Attorney

Ocean Front Spa Horizontal Property Regime, Inc. ("OFS"),

By its Attorney

Bill Cameron

By his Attorney

Stanley Jordan

By his Attorney

Ray Coghill

By his Attorney

All of these signature blocks demonstrate that the parties/principals have signed the Agreement, and that the attorneys are merely putting pen to paper as the agents of the principals.

An agent with express authority to contract is able to bind the principal by signing on the principal's behalf. *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 183, 348 S.E.2d 617, 624 (Ct. App. 1986) ("An agent contracting with the authority of his principal binds him to the same extent as if the principal personally made the contract. The principal's liability to the third party is contractual and direct." (emphasis added)). Thus, through the actions of their agents/attorneys, all of the principals/parties effectively signed the Agreement.

To accept Plaintiffs' argument, corporate defendants (which always sign through their agents) and other parties who are forced to sign agreements through their agents (due to incapacity, absence, or otherwise) would never be able to enter into a binding agreement under Rule 43(k). This would be an absurd interpretation—one the Legislature could not have intended. *Duke*

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Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) ("If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect." (citing *Kiriakides v. United Artist Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994))).

There is no dispute that the Agreement was in writing. The Court finds that the signature-based requirements of the applicable provision of Rule 43(k) have similarly been satisfied for the reasons discussed above. Thus, the Agreement fully satisfies Rule 43(k) regardless of whether that Rule applies to the Agreement, mandating enforcement of the Agreement.

C. <u>The Plain Language of Rule 43(k)—as Emphasized by the Supreme Court—Renders the Rule Inapplicable to the Agreement</u>.

Despite the fact that the Agreement complies with Rule 43(k), the plain language of the Rule 43(k) demonstrates that it is inapplicable to the Agreement. The Rule provides as follows:

> **(k) Agreements of Counsel.** No agreement *<u>between counsel</u>* affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

SCRCP Rule 43(k) (emphasis added). "'In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.'" *Farnsworth*, 367 S.C. at 638, 627 S.E.2d at 726 (quoting *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003)). "[T]he words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Muldrow*, 348 S.C. at 268, 559 S.E.2d at 849. Applying this basic rule of statutory interpretation demonstrates Rule 43(k)'s inapplicability to the Agreement.

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The Agreement is not an "agreement between counsel." It is an agreement between the parties. A Rule 43(k) "agreement between counsel" contemplates an agreement negotiated by attorneys, as to which the attorneys must later take overt action, identified in the Rule, before it becomes enforceable. One of these actions can be where the "agreement between counsel" is later "reduced to writing and signed by the parties and their counsel." SCRCP Rule 43(k). To satisfy this Rule, lawyers must memorialize their agreements with other counsel, consult with their clients about the terms, and ensure that their clients sign the agreement. The obvious purpose of the Rule is to protect parties in connection with agreements negotiated and entered into by their attorneys. The Rule is not designed to replace the basic law of contract pertaining to agreements into which the parties themselves enter.

A recent Court of Appeals opinion recognized as much. According to SCRCP Rule 43(k), "*lawyers* have been required . . . to reduce *their* agreements to a written document." *Inglese v. Beal*, 403 S.C. 290, 742 S.E.2d 687, 694 (Ct. App. 2013) (Pieper, J., concurring in part and dissenting in part) (emphasis added). Likewise, the Supreme Court recognized the importance of the two words, "between counsel," in the introductory clause, emphasizing them when quoting and construing the Rule. *See Farnsworth*, 367 S.C. at 637, 627 S.E.2d at 725 (quoting SCRCP Rule 43(k)).

The *Farnsworth* Court went a step further, noting that "Rule 43(k) plainly applies to all settlement agreements signed by counsel." *Id.* at 638, 627 S.E.2d at 726 (emphasis added). If the Court interpreted Rule 43(k) as applying to all settlement agreements, including those entered into by parties themselves, the Court's use of the wording "signed by counsel" was superfluous. A fair reading of this language is that the Court intended to distinguish between "all settlement agreements," and "all settlement agreements signed by counsel." By including this qualifying

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language, the Court demonstrated that not all settlement agreements are covered by Rule 43(k)—only those that are "agreement[s] between counsel," as the language of the Rule makes clear.

The history of Rule 43(k) further demonstrates its inapplicability to the Agreement. The predecessor to Rule 43(k), Circuit Court Rule 14, provided as follows: "No agreement or consent between parties, or their attorneys, in respect to the proceedings in a cause, shall be binding, unless . . . ." *Farnsworth*, 367 S.C. at 638 n.3, 627 S.E.2d at 726 n.3 (emphasis added). The *Farnsworth* Court compared Circuit Court Rule 14 to SCRCP 43(k) to point out that language included in the old rule but omitted in the new rule rendered the agreement at issue unenforceable. *Id.* ("Under [the old] rule, Davis and Farnsworth's agreement would be enforceable simply because it is in writing. Unlike Rule 43(k), Circuit Court Rule 14 did not contain the additional requirement that written agreements be entered into the record.").

Similarly, new SCRCP Rule 43(k) omits other language present in old Circuit Court Rule 14, and that omission is directly relevant in this dispute. SCRCP Rule 43(k) makes no reference to "agreement[s] . . . between parties" and retains only the reference to "agreement[s] . . . between counsel." It is fair to conclude that this omission was intentional, has meaning, and cannot be overlooked.

The Legislature clearly intended for old Circuit Court Rule 14 to apply to all litigation agreements, whether between the parties or their attorneys. In devising Rule 43(k), the Legislature must have contemplated the possibility of including agreements between parties, but elected to omit any reference to such agreements. Such omission in the new Rule, on the same subject, demonstrates the Legislature's clear intent to limit the requirements of the Rule to only agreements "between counsel."

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To hold otherwise would require the Court to assume that the Legislature committed an oversight, simply forgot to retain the reference to agreements between parties when drafting Rule 43(k), and has allowed the error to remain in place for decades. There is no basis for such assumptions, and the Court must give meaning to the Legislature's intentional omission of "agreements between parties" from Rule 43(k).

Plaintiffs rely on *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533 (1995), in an attempt to overcome the above interpretation of Rule 43(k). *Ashfort* appears distinguishable, as that case involved (1) the attorneys vaguely "advis[ing] the circuit court that the case had been settled" without providing any details as to the terms, and (2) some undescribed, purported agreement between a party and the other party's insurer. *Id.* at 493, 495, 458 S.E.2d at 534-35. There was no evidence of the terms or form of the purported agreement between the party and the other party's insurer or how it was entered. Thus, the *Ashfort* Court was left with nothing more than representations by counsel that a purported agreement had been reached. These circumstances are what placed *Ashfort* neatly within the parameters of Rule 43(k), as the Court was relying exclusively on information from counsel.

The facts are far different here. This Court is not relying on the representations of counsel that a deal has been reached, or even the terms of the deal. The record is replete with evidence of the deal and its actual terms: (1) all of the parties (with the assistance of counsel and a seasoned and well-respected mediator) actively participated in, negotiated, and reached terms on a settlement during a full-day mediation conference, (2) the parties reduced those terms to writing in the Agreement, (3) all parties named in the Agreement signed the Agreement before leaving the mediation, and (4) the mediator filed a notice with the Court confirming each of the above facts.

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Additionally, the Court must review *Ashfort* through the lens of *Farnsworth*, in which the Supreme Court expressly accounted for its prior holding. In *Farnsworth*, the Supreme Court has clarified that Rule 43(k) applies only to "'agreements *between counsel*,'" 367 S.C. at 637, 627 S.E.2d at 725 (quoting SCRCP Rule 43(k)) (emphasis in original), including those which are "settlement agreements *signed by counsel*," *id.* at 638, 627 S.E.2d at 726 (emphasis added). This is consistent with the historical backdrop of Rule 43(k) and the plain language of the Rule, and this Court sees no reason to hold otherwise.

The Agreement in this case was not an "agreement between counsel," as contemplated in Rule 43(k). The Agreement was negotiated, memorialized, and executed by all of the parties named in the Agreement, after a full day of mediation in which all actively participated. Thus, notwithstanding the Agreement's full satisfaction of Rule 43(k), the Court finds the Rule inapplicable to the Agreement.

D. <u>Plaintiffs' "New Evidence" Argument does not Impact the Enforceability of the Agreement</u>.

Plaintiffs' Motions to Reconsider present what they refer to as "new evidence," which they argue demonstrates that one of the individual Defendants breached the Agreement. They say that an email sent by Defendant Walter Jordan violated the Agreement's non-disparagement clause. This new argument, which was not raised before the Order was entered, fails for several reasons.

First, by asking the court to enforce a certain provision of the Agreement in their favor, Plaintiffs have effectively conceded the enforceability of the entire Agreement. For Defendant Walter Jordan to be in breach of the Agreement's non-disparagement clause as alleged in Plaintiffs' "new evidence" argument, there must first be a valid and enforceable non-disparagement clause. Thus, Plaintiffs rely on the binding and enforceable nature of the Agreement as a means of repudiating the Agreement.

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If Plaintiffs believe that there has been a breach of the Agreement, they are free to pursue their rights under the Agreement accordingly, at a different time and in a different forum. The alleged breach—on which the Court makes no findings whatsoever—has no bearing on whether the Agreement is binding and enforceable. That is the only issue before the Court.

Additionally, the email does not constitute "new evidence" under Rule 60(b)(2). Evidence is "newly discovered" if it was not known to the party or in his possession at the time of hearing. *See Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005). The Plaintiffs received the email in July 2016, several weeks before the hearing on Defendants' Motion to enforce the Agreement. Since the email is not new evidence under Rule 60(b)(2), Plaintiffs' only recourse would be Rule 59(e). But since this issue was not previously raised and preserved under Rule 59(e), it is barred as new argument. *See Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005).

E. Plaintiffs' Contentions regarding the Application of the Agreement to K.A. Diehl or its Successor in Interest are Premature.

Plaintiffs argue that the Court erred (1) "in ruling that this agreement releases KA Diehl and Associates, Inc.", and (2) in ruling that "First Services Residential is released from liability." Plaintiffs' argument is premature, as the Order of which they are seeking reconsideration makes no mention whatsoever of First Services Residential, nor does it specifically address the release of K.A. Diehl and Associates, Inc. The Order simply finds that the Agreement is enforceable. Thus, Plaintiffs' arguments with respect to the release of claims against K.A. Diehl and Associates, Inc., and First Services Residential are not yet ripe for adjudication.

F. Conclusion.

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Plaintiffs' Motions and Amended Motions have never questioned the accuracy of the Agreement's terms. Nor have Plaintiffs challenged the fact that all parties to the Agreement and their respective counsel signed the Agreement at the conclusion of mediation (either personally or through their duly-authorized agents). Instead, Plaintiffs rely on untenable interpretations of Rule 43(k) that are not supported by principles of statutory construction or existing precedent. The Court rejects those interpretations of Rule 43(k) and **DENIES** Plaintiffs' Motions for reconsideration of the September 21, 2017 Orders enforcing the Agreement.

IT IS SO ORDERED on this _____ of ____________________________, 2017.

____
The Honorable William H. Seals, Jr.

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Horry Common Pleas

Case Caption:	Jim Perkins , plaintiff, et al VS KA Diehl And Associates Inc , defendant, et al
Case Number:	2016CP2600743
Type:	Order/Other

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

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