ORIGINAL

THE SUPREME COURT OF SOUTH CAROLINA

Laurance H Davis, Jr , Rhoda G Rentz, Mortimer M Weinberg, Jr , Hodge Land Co , Inc , and Anna Trotter, Individually and in their capacities as the Limited Partners of Roosevelt Gardens, a South Carolina Limited Partnership,	)	Transfer from Court of Appeals Case No 2010180086
	)	Appellants,
vs	)	
Roosevelt Gardens, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown,	)	Respondents
Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl, and Rhoda Rentz, Individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership,	)	Transfer from Court of Appeals Case No 2010180088
	)	Appellants,
vs	)	
Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown,	)	Respondents

Laurance H Davis, Jr , Mary Jane R Pike, Eva Marie Reynolds, and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Parkview Apartments, a South Carolina Limited Partnership,	)	Transfer from Court of Appeals Case No 2010180666
vs	)	
Parkview Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown,	)	Respondents

Laurance H Davis, Jr , Marvin D McCarthy, James W Ivey, and Erin E Ivey, Individually and in their capacities as the Limited Partners of Palmetto Apartments, a South Carolina Limited Partnership,	)	Transfer from Court of Appeals Case No 2010180087
vs	)	
Palmetto Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown,	)	Respondents

Rhoda G Rentz, Mary Jane Pike, Eva Marie Reynolds, and Joanne O Mercy, Individually and in their capacities as the Limited Partners of Orleans Gardens, a South Carolina Limited Partnership,	)	Transfer from Court of Appeals Case No 2010176826
	)	Appellants,
vs	)	
Orleans Gardens, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown,	)	Respondents

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FINAL BRIEF OF RESPONDENTS

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ATTORNEYS FOR RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1 Did the court abuse its discretion by compelling Appellants to produce 96 documents for which they claimed attorney-client privilege and/or work product protection (see 6/2/09 and 7/28/09 Orders (R 100-101, 103-113))?

2 Did the court abuse its discretion by finding that Appellants failed to comply with its 3/3/09 and 7/28/09 Discovery Orders, finding that Appellants were in contempt of court, and imposing sanctions, including, *inter alia*, dismissal of the five lawsuits, subject to Appellants' ability to purge the sanction of dismissal by complying with the Discovery Orders within 25 days (see 4/6/10 Order (R 118-145))?

3 Did the Honorable Doyet A Early, III, Circuit Court Judge,[1] abuse his discretion by denying Appellants' motion for recusal and for vacation of his prior orders in the five lawsuits?

STATEMENT OF THE CASE

Respondents do not object to or disagree with the Statement of the Case set forth in each of Appellants' five initial briefs, **except** for the statements contained therein that are inconsistent with or contrary to the following facts

- Appellants falsely state that Respondents did not affirmatively plead statute of limitations as to all claims in the Pinewood case In each of the five lawsuits addressed in these appeals, including Pinewood, Respondents filed answers to Appellants' complaints, which included the statute of limitations defense as a bar to the legal claims asserted by Appellants (R 638 (¶¶ 148-149))

- Appellants and Respondents in the Parkview lawsuit (filed 4/22/03) agreed to postpone discovery in that lawsuit pending mediation, **but** Respondents **did not** agree to stay the statute of limitations applicable to Appellants' claims or enter into a tolling agreement with any of the Appellants The parties attempted to negotiate a compromise of Appellants' disputed claims and agreed to a mediation, but nothing more[2] The scheduled mediation was cancelled as of 7/26/04, but Appellants did not file the other four lawsuits until October 2005

- The appealed Orders primarily involve discovery disputes, Appellants' failure to comply with discovery orders, and sanctions for Appellants' continuing contempt of court

- One of the discovery orders Appellants disobeyed required Appellants to produce 96 documents which Appellants claimed were privileged or work product (7/28/09

[1] Judge Early is hereinafter referred to as the "court" or "Judge Early "

[2] Appellants falsely claim that Respondents' counsel insisted that Appellants postpone the filing of the Palmetto, Orleans, Roosevelt and Pinewood cases Respondents' counsel did no such thing, and at a minimum this is a contested matter (see *infra* at 9-10)

Privilege Order (R 103-113)) [3] The compelled documents included communications between Appellants, Appellants and third parties, and Appellants and their attorney The documents were all dated between 1998 and mid-October 2002, more than three years before four of these lawsuits were filed Several were dated more than three years before the first suit, Parkview, was filed

- Appellants also disobeyed a separate discovery order that required them to fully and completely answer discovery requests that were served upon them on 8/28/08 (3/3/09 Discovery Order (R 69-74)) [4]

ARGUMENT

I BACKGROUND

A The Critical Issues Presented in These Appeals

The most critical issues presented in these appeals are whether, in light of the evidence presented to the court, Appellants can satisfy their burden of showing that the court abused its discretion by (1) finding Appellants failed to answer discovery as required in the 3/3/09 Discovery Order, (2) compelling Appellants to produce specific documents as set forth in the 7/28/09 Privilege Order, and (3) dismissing the five lawsuits as sanctions for Appellants' willful and continuing disobedience of these Discovery Orders (see 4/6/10 Order (R 118-145)) [5] The remainder of the orders appealed are secondary to the above issues and generally concern Appellants' improper attempts to avoid the consequences of their willful disobedience of the Discovery Orders Similarly, large portions of Appellants' briefs in this Court are dedicated to the distortion of the lower court record and misrepresentation of evidence, much of which was not even presented to the court before it entered the pivotal Discovery Orders and the Sanctions Order (see *infra* at 48-49, 77 (note 86))

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[3] The 7/28/09 Order is sometimes referred to hereinafter as the "Privilege Order"

[4] The 3/3/09 Order, which granted Respondents' motion to compel, is referred to hereinafter as the "3/3/09 Discovery Order" or the "Discovery Order" A different order dated 3/3/09 (granting/denying Appellants' motion to compel) is also among the orders appealed, and it is hereinafter referred to as the "3/3/09 Order (App Mot)"

[5] The 3/3/09 Discovery Order and the 7/28/09 Privilege Order are hereinafter referred to collectively as the "Discovery Orders" The 4/6/10 Order is sometimes referred to hereinafter as the "Sanctions Order"

B Appellants' Claims and the Statute of Limitations Defense

Issues relating to Respondents' statute of limitations defense played a central role in the key orders appealed The following is a summary of Appellants' claims and the history of the statute of limitations defense in these lawsuits

1 Appellants' Claims

In the late 1960's and early 1970's, Appellants became investors in HUD affordable housing complexes *vis a vis* partnerships that were the predecessors of the five Respondent Limited Partnerships The advantages of such an investment were tax driven and dependent on being able to take advantage of the tax benefits Certain disadvantages also existed, which limited the marketability of such properties [6] Other significant risks included changes in the tax laws (which occurred), changes in HUD policies and regulations (which also occurred), and exit taxes (recapture)

In 1975 U S Shelter Corporation (the other corporate Respondents are successors in interest to U S Shelter) and Respondent Barton Tuck became general partners in the five Respondent Limited Partnerships and began to manage the apartment complexes By 1984, it was widely anticipated that the tax laws would change, and the depreciation deductions were petering out such that the limited partners would be recognizing phantom income Thus, the limited partners (Appellants) and the general partners (Respondents) determined that it would be prudent to sell the complexes

The Parkview, Palmetto, Orleans and Roosevelt complexes (as well as 15 others not involved in these lawsuits) were sold to entities created by Boston Financial Group ("BFG") and Pinewood was sold to Magi The consideration for each was a short term note payable

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[6] The disadvantages included restrictions on conveyance of the property and on prepayment of the mortgage controlled rent (but not expenses), and a return restricted to no more than six percent of the initial equity investment, and then only from surplus cash left over after payment of all current amounts due under the mortgage, deposits to the reserve fund for replacement, and other segregated expenses

over five years (paid) and a balloon note that would become due in 1999 HUD regulations would not allow a second mortgage to secure the notes, so the limited partnerships took a security interest in the purchasing limited partnerships

In 1986, Congress passed the Tax Reform Act of 1986 (Pub L 99-514, 100 Stat 2084), which destroyed the ongoing value of tax sheltered investments such as these The Act eliminated tax deductions for accrued but unpaid interest expenses, took away the accelerated depreciation benefits, and deductions could no longer be taken against ordinary income, only against passive income See 26 U S C § 469 In short, the effect of the Act was to put HUD deals on a purely economic footing, and the immediate downward impact on market values of the properties was profound

In light of these changes, the general partners warned the limited partners in 1987 that collection of the largest portion of the sales proceeds due in 1999 might not occur (R 1882-1884) Respondents provided similar warnings over the ensuing years (R 1885-1887)

As 1999 approached, BFG evaluated the portfolio of properties that it acquired in the 1984 transaction and determined that nine, sometimes called the "orphans," had no value above the HUD mortgages (R 787 17-20) For those that BFG determined had value, it offered to satisfy the balloon notes at a steep discount (paying approximately 10% of the face value of the note plus interest), which those partnerships accepted As for the "orphans," which included the Parkview, Palmetto, Orleans, and Roosevelt properties, BFG offered the properties back to the limited partnerships Respondents evaluated the properties and came to the same conclusion, *i e* the properties had no value above the HUD mortgages An independent brokerage firm came to the same conclusion Further, adverse tax consequences would pass to the limited partners if they took the properties back, and additional capital contributions would be required to bring the properties up to HUD standards Also, HUD

had embarked on a program of "Mark-to-Market" for the subsidized rental properties which likely would have significantly reduced the subsidies (R 3118-3119)

In light of these facts, the general partners declined to take these properties back BFG agreed to sell the four properties (along with five others not at issue in these cases) in late 1999 to Hediger Enterprises for $100 plus $100,000 closing costs, plus assumption or satisfaction of the HUD mortgages HUD's approval of the sale was not forthcoming, and Hediger Enterprises assigned its contracts to a non-profit entity, Carolina IX, LLC which purchased the properties and satisfied the HUD mortgages on 12/31/00 Respondents notified the limited partners of the BFG/Hediger sales agreement (and their decision not to take the properties back) no later than 1/18/00 (R 3118-3119), and the actual sale in early 2001 (R 1932-1934)

Shortly after the January 2000 notification of the BFG/Hediger sales agreement, Appellant Davis retained Joel Bailey on behalf of some or all of the Appellants (R 4885-4909 (Pl Priv Log 12/31/08)) [7] In April 2003, more than three years after retaining Bailey, Davis and other limited partners in Parkview filed the first of these lawsuits against Respondents In October 2005, the limited partners (including Davis) of Orleans, Roosevelt, Palmetto and Pinewood filed the other four suits against Respondents All Appellants have been represented by Bailey throughout the litigation

As for the Pinewood case, it is important to note that

- Appellants mischaracterize and misrepresent certain evidence to this Court, as they did to the lower court *after* entry of the 4/6/10 Sanctions Order,
- the alleged "evidence" Appellants rely upon in their brief was available to them prior to entry of the Discovery Orders and the Sanctions Order, but Appellants did not present such materials and issues to the court before those orders were entered such that the lower court could not, and this Court can not, consider such materials and issues with respect to the Discovery Orders and Sanctions Order (see *infra* at 48-49),

[7] Appellants refused to divulge when each Appellant retained Bailey to investigate/pursue claims against Respondents See *infra* at 12 (note 16), 15-20

- Respondents did in fact, plead the statute of limitations defense as to the Pinewood Appellants' legal claims (R 638 (¶¶ 148-149)), and

- the statute of limitations defense was viable in the Pinewood case because the alleged injury that was the basis of each of the Pinewood Appellants' claims (*i e*, Respondents' failure to pay the Pinewood Appellants their shares of the amount due on the 1999 balloon note) was known to Appellants since the purchaser defaulted on the 1999 note, and the Pinewood Appellants did not file this lawsuit until October 2005 [8]

Unlike the other properties, at the time the 1999 note became due, Pinewood was thought to have some value above the HUD mortgage Respondents attempted to negotiate a compromise with the purchaser, which would be acceptable to the Pinewood Appellants Respondents made various proposals to the Pinewood Appellants, which included sale of the Note, renegotiation of the Note's terms, taking the property back, and even replacement of the general partners such that the limited partners could do what they wished The limited partners either rejected or ignored each proposal and failed to suggest any alternatives (R 5805-5806, 5810-5816, 5818-5819, 5821-5823) Due to the Pinewood Appellants' continuing vacillation, Respondents entered into tolling agreements with the owners On two occasions when timely extensions of the tolling agreements could not be accomplished, a suit was filed to protect the Pinewood Limited Partnership's interest [9] Appellants' attorney was well aware of the tolling agreements and suits (see R 5816, R App 110-132) [10]

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[8] To the extent the Pinewood Appellants had any claim when they filed their suit in 2005, those claims were based on the same alleged injury that was known to them in 1999 Though Respondents attempted to negotiate a compromise with Appellants (*i e*, negotiate a resolution with the defaulting purchaser on behalf of the Limited Partnership, which would be acceptable to Appellants) both before and after the filing of the Pinewood Appellants' lawsuit, those attempts were unsuccessful Respondents' efforts to reach a compromise of Appellants' demands/claims did not serve to delay the accrual of their causes of action or stay the statute of limitations (see *infra* at 10)

[9] Appellants claim for the first time, here, that the Rule 41 dismissal of the second suit, without prejudice, was, nonetheless, with prejudice However, the dismissal of the first suit was pursuant to Rule 5(d), SCRCP The trial court never obtained jurisdiction, so it was an adjudication of nothing

[10] Appellants misrepresented to the lower court, under oath, that they first learned of the earlier Pinewood litigation and tolling agreements with the defaulting purchaser in April

In March 2007, an offer was received to purchase Pinewood for $500,000 with a net to the partnership, after fees and expenses of $425,000 The limited partners claimed not to have sufficient information, despite being provided a contemporaneous appraisal which included all past and current financial information, and withheld their approval of the sale (R 5824-5827) [11] On 7/5/07, the general partner agreed to the sale of the property, and the Pinewood Limited Partnership received a net of $425,000 (R 5828, 5831)

Seven years after Pinewood Appellants received notice that Ellis Johnston was negotiating with the owner on behalf of Pinewood Limited Partnership, and two and one-half years after the 7/5/07 sale of the property, Pinewood Appellants first claimed this was all part of a grand conspiracy and constituted fraud (R 3876) Their theory is clearly betrayed by the above-cited evidence More importantly, they did not present their "evidence" for the court's consideration (and Respondents' rebuttal) until *after* the 4/6/10 Sanctions Order was entered

The 60-plus-page Complaints in each of these cases allege breach of fiduciary duty and several other legal claims, which all hinge upon the business judgment of the Respondents in 1999 when they concluded that the properties had no value above the HUD mortgage (with the exception of Pinewood) and that taking the properties back was not in the best interests of the Limited Partnerships Nonetheless, Appellants chose to *allege* wrong doings and injury going back to the early 1980's in each case, including *inter alia* failure to entertain other offers to purchase the properties in the 1980's, misrepresenting that the purchaser was financially solvent and possessed other assets, not selling the property to BFG but to an entity created by BFG, failing to forward appropriate documentation of the sale,

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2010 (R 3876, R 3909 (¶102)) This was false, and Appellants have now corrected their misrepresentation (See R App 71-74, 110-141)

[11] In fact, this was Appellants' response in almost all instances, even though they were furnished the year-end and year-to-date operating statements and all other information in Respondents' possession (R 5809, 5813-5814, 5816 5824-5827)

failing to properly secure the Notes, and embarking upon a scheme whereby they would acquire various limited partnership interests by undervaluing the property

In fact, of Appellants' 40-plus separate claims of misconduct (R 281 287 (¶120, Parkview), R 493-498 (¶117, Palmetto), R 597-602 (¶121, Pinewood), R 389-395 (¶102, Orleans), R 693-698 (¶104, Roosevelt)), only six are alleged to have occurred after the 1999 notes became due, and none after the 12/31/00 sale of the properties The exceptions are Orleans and Roosevelt, in which Appellants also affirmatively alleged that Respondents interfered with their investigation and pursuit of claims in those lawsuits and others (see *infra* at 31)

2 Statute of Limitations and Appellants' Estoppel Argument

A 2006-2008 legal battle over Respondents' statute of limitations defense set the tone for the 2008-2010 discovery and sanctions disputes that ultimately resulted in the dismissal of these lawsuits On 1/17/06, Respondents moved for summary judgment on Appellants' legal claims in the Palmetto, Orleans and Roosevelt cases based on the statute of limitations defense (R App 40 (Palmetto), R 1604 (Orleans), R App 44 (Roosevelt)) [12]

In support of their motion for summary judgment, Respondents served Requests for Admission which principally concerned Appellants' receipt and possession of documents that put them on notice of their alleged injuries (R 1683-1767 (Palmetto), R 1606-1682 (Orleans), R 1768-1847 (Roosevelt)) Among the most critical of the documents was a 6/14/01 letter from Respondents to Appellants (four years and four months before Orleans, Roosevelt and Palmetto were filed) informing them, *inter alia*

> After a detailed review of the [BFG] sales documents, we have determined that the sale [of the property] was to an unaffiliated third party and that there were no net proceeds from the sale Given the result of this review, we do not believe that the Partnership has a claim against [the purchaser]

[12] Contrary to Appellants' erroneous supposition Pinewood was not included in the motion because, as stated in Respondents' Memorandum, "It [was] not clear at [the] time if all or parts of the Pinewood action are time barred " (R 1850)

With the property now sold, **the Partnership's note is of no value and the Partnership will be terminated** for tax purposes during 2001
(R 1935-1937, R 1611, 1674 (Request for Adm 29 & Ex FF - Orleans), R 1686, 1727 (Request for Adm 13 & Ex Q - Palmetto), R 1773, 1839 (Request for Adm 29 & Ex FF - Roosevelt))

Though Appellants admitted that the 6/14/01 letter was a true and accurate copy, they were evasive as to who, if, and when each received it (R 1899 (Roosevelt – response to RFA 29), R 1913 (Orleans – response to RFA 29), R 1922-1923 (Palmetto – responses to RFA 13, 14, 29)) Appellants gave identical evasive responses to almost all of the other requests for admission (R 1889-1930)

In opposition to the motion for summary judgment, Appellants *argued* that Respondents were estopped from asserting the statute of limitations defense [13] Elaborating on allegations in the Orleans and Roosevelt Complaints (see *infra* at 31), Appellants claimed that the parties efforts to negotiate and/or mediate all claims between 8/11/03 (R 2056 (Johnston ltr to Bailey 8/5/03)) and 7/26/04 somehow tolled the statute of limitations (*i e*, estoppel) [14] However, the evidence and applicable law did not support Appellants' estoppel

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[13] Appellants also argued that the parties' Limited Partnership agreements were "sealed instruments," so a 20-year statute of limitations applied But the 6/1/75 agreements between Respondents and Appellants (R 2183-2188, 2208-2216, 2233-2239, 2248-2259) did not contain a "seal" of any of the signatures Nor did the documents meet the criteria for sealed instruments set forth in Carolina Marine Handling, Inc , v Lasch, 363 S C 169, 609 S E 2d 548 (Ct App 2005) (See R 2124-2128) They also argued that, even if the three-year statute of limitations applied, their injury was not complete and their claims did not accrue until the statute of limitations ran for the Respondents to sue BFG (*i e*, three years after the notes became due, despite the 2000-2001 notice that Respondents declined to take the properties back and determined that there was no viable opportunity to recover damages from the BFG debtors (see e g R 480 (¶¶ 84-85, Palmetto Complaint))) This theory is contrary to the law governing accrual, as set forth in Epstein v Brown, 363 S C 372, 610 S E 2d 816 (2005), among other South Carolina precedent (See R 1858-1864) Entries on Appellants' own privilege logs show that some or all of them had already hired an attorney no later than February 2000 (and had even hired an expert no later than August 2000) (see *infra* at 18, 57 (note 59))

[14] On 7/26/04, Appellants' counsel advised Respondents' counsel "[W]e are not in a position to delay proceeding with these claims any longer" He requested responses to discovery in the Parkview case within ten days and stated he would be preparing pleadings and discovery

argument (R 1864-1866, 1942-1946) Appellants never requested, nor did Respondents grant, a tolling agreement Under South Carolina law, **settlement discussions and mediation preparations, such as existed in these cases, are not a basis for denying summary judgment on a statute of limitations defense** based on the doctrine of equitable estoppel See Black v Lexington School District No 2, 327 S C 55, 61-63, 488 S E 2d 327, 330-31 (1997), Vines v Self Memorial Hospital, 314 S C 305, 308-09, 443 S E 2d 909, 911 (1994), Gadsden v Southern Railroad, 262 S C 590, 592, 206 S E 2d 882, 883 (1974), Moates v Bobb, 322 S C 172, 175-76, 470 S E 2d 402, 403-04 (Ct App 1996)

Even if Appellants had presented evidence which supported a finding that the statute of limitations was tolled from 8/11/03 until 7/26/04 (the negotiation/mediation period), it would not have mattered For the purposes of their motion for summary judgment, Respondents focused on the 6/14/01 letter (R 438, 544, 742 (exhibit to Answers in Orleans, Roosevelt, Palmetto)) as representing the latest possible date that Appellants' claims accrued [15] The suits in Orleans, Roosevelt and Palmetto were filed in October 2005, four years and four months later Even giving Appellants the benefit of the doubt and tolling the limitations period from August 2003 to July 2004, Appellants' claims were still time barred

However, as a result of the murkiness Appellants successfully created as to the facts (no doubt including Appellants' evasive responses to the Requests for Admission regarding the 6/14/01 letter and other documents), the court ruled "that a genuine issue exists as to material facts involving the statute of limitations' and denied Respondents' motion for summary judgment (R 39) Yet, the statute of limitations issues would remain a key factor in the later discovery disputes, Appellants' willful disobedience of the Discovery Orders, and

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in the other four cases "for service within the next couple of weeks " (R 2128-2137 (more detailed account of the evidence debunking Appellants' estoppel claim), R 2153 (7/26/04 letter))

[15] There was substantial evidence that the claims arose earlier (R 1854-1855, 1931-1934)

the court's dismissal of the five cases due to Appellants' persistent refusal to comply with the Discovery Orders, as shown below

II STANDARD OF REVIEW AS TO DISCOVERY ORDERS

These appeals primarily involve discovery orders and the sanctions imposed due to Appellants' refusal to comply with two of the discovery orders Thus, the standard of review applicable to discovery orders is of paramount importance "'[T]he scope and conduct of discovery are within the sound discretion of the trial court " Palmetto Alliance, Inc v South Carolina Public Service Com , 282 S C 430, 436, 319 S E 2d 695, 698 (1984) (citation omitted) Lower courts "'have broad discretion in [their] resolution of discovery problems that arise in cases pending before [them] '" Carefirst of Md , Inc v Carefirst Pregnancy Ctrs , Inc , 334 F 3d 390, 402 (4th Cir 2003) (citation omitted) "The rulings of a trial judge in matters involving discovery **will not be disturbed on appeal absent a clear showing of an abuse of discretion** " Hedgepath v AT&T, 348 S C 340, 353, 559 S E 2d 327, 335 (Ct App 2001) (citation omitted) (emphasis added) An abuse of discretion may be found where "the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law " Dunn v Dunn, 298 S C 499, 502, 381 S E 2d 734, 735 (1989) (citation omitted) The party appealing the discovery order has the burden of demonstrating that the trial court abused its discretion See id Appellants have not met their burden with regard to *any* of the appealed orders

III PRIMARY ORDERS ON APPEAL NO ABUSE OF DISCRETION IN THE 3/3/09 DISCOVERY ORDER, THE 7/28/09 PRIVILEGE ORDER, AND THE 4/6/10 SANCTIONS ORDER (Re Issues 1-2 and Appealed Orders dated 3/3/09, 6/2/09, 6/16/09, 7/28/09, 4/6/10 9/16 10)

A The 3/3/09 Discovery Order

1 Discovery Order was Supported by the Record

The 3/3/09 Discovery Order simply compelled Appellants to comply with the South Carolina Rules of Civil Procedure by fully and completely answering Respondents' 8/28/08

discovery requests, which they had not done The Discovery Order was supported by the South Carolina Rules of Civil Procedure governing discovery and the following

- After Appellants failed to respond to the 8/28/08 discovery requests (R 2889 2909), Respondents filed a motion to compel on 11/6/08

- Appellants' initial responses to the discovery, served on 11/14/08 (R 2984-3072), were evasive, non-responsive and incomplete, and their numerous objections were not applicable or appropriate (R 2924-2937, 2972-2982, R 981 8-1001 12)

- The court afforded Appellants an opportunity to address the deficiencies (R 1026 12-15) On 1/26/09, *Appellants in the Parkview case* alone served Supplemental Responses (R 5038-5136) Their responses continued to be evasive, non-responsive and incomplete (R 5039-5096, 5113-5135 (deficient responses to Document Requests 1-8, 10-16, 19-34, 36-43, 45-48 and Interrogatories 3, 6-18, 20 and 22-23)) Appellants in the other four cases provided no supplemental responses whatsoever [16]

The particulars of the Discovery Order and Appellants' evasive, non-responsive and incomplete answers to the 8/28/08 discovery requests are discussed in greater detail with regard to Appellants' failure to comply with the Discovery Order (see *infra* part III A 2)

On 3/13/09, Appellants filed a motion to amend the Discovery Order, which the court denied on 6/16/09 (R 102) The purported basis of the motion was that Appellants complied with the Rules of Civil Procedure and that the court had somehow treated them unfairly when compared to Respondents Appellants' first ground was clearly wrong, as evidenced by their own deficient responses, and there was nothing unfair about requiring Appellants to comply with the Rules (see R 3144-3153 (debunking Appellants' "double-standard" argument))

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[16] Exemplifying why the Discovery Order was necessary (with a May 2009 trial date less than three months away), **Appellants failed to disclose their testifying expert witnesses' opinions and bases for same** (R 3054-3056, R 5116-5118 (responses to Int 6)) **and when each Appellant first discussed the investigation/pursuit of claims against Respondents with other Appellants or an attorney, and when each Appellant retained Joel Bailey to investigate/pursue claims against Respondents** (R 3058-3060, R 5120-5122 (responses to Int 9, 10 and 12)) (See also R 3051-3052, R 5113-5114 (non-responsive answer to Int 3 regarding itemized statement of damages)) The scope of these and the other discovery requests at issue in the Discovery Order were reasonably tailored to issues relevant to the catalogue of claims set forth in Appellants' 60-plus-page Complaints and the defenses to such claims (R 2924-2937, 2972-3072) For this reason, Appellants' reliance on Oncology and Hematology Assoc of S C , LLC v S C D H E C , 387 S C 380 692 S E 2d 920 (2010), is misplaced

2 Appellants Refused to Comply with the Discovery Order

a Key Terms of the 3/3/09 Discovery Order, and the Filing of Respondents' First Motion for Sanctions

The 3/3/09 Discovery Order compelled each of the Appellants in all five cases to "provide full and complete responses" and to "produce all documents in their possession, custody or control, which are responsive to" the requests (R 71)

In addition, the court provided specific instructions as to the information Appellants must produce with respect to their expert witnesses' opinions and the bases of those opinions

> [I]f the experts identified by Plaintiffs have produced written reports setting forth the opinions held by the experts and the bases for such opinions Plaintiffs may produce such reports to the extent the reports contain all of the information requested **If the Plaintiffs' experts have not produced such written reports, Plaintiffs must provide a summary of the important opinions held by each expert (*i e*, the opinion testimony the expert is expected to give in these cases), as well as the factual bases for such opinions A description of the expert's general experience is not sufficient** (R 72 (emphasis added))

The court also addressed Appellants' practice of couching their answers such that it was impossible to discern whether they were withholding materials based on objections the court previously overruled

> This blanket method of objecting to all of the Discovery Requests, *coupled with Plaintiffs subsequent failure to respond in any meaningful way to the particular complaints raised in Defendants [12/8/08] Memorandum*, make it impossible for Defendants to know if responsive information and/or documents are being withheld To the extent that Plaintiffs have withheld any information or documents that would otherwise be responsive to the Discovery Requests on the grounds of any of the other General Objections contained in Plaintiffs' discovery responses, **Plaintiffs are hereby compelled to provide full and complete responses to all such Interrogatories and to produce the documents responsive to all such Requests for Production** (R 72-73 (emphasis added))

The court also disapproved of the fact that the Parkview Appellants alone provided the first supplemental responses to the discovery, even though the 8/28/08 discovery requests were directed to *all* plaintiffs in *all* five cases (R 71) The court held, "**Each and every Plaintiff** is required to provide all information **reasonably available to him or her**, which

would be responsive to any of the Interrogatories Further, **each and every Plaintiff** is required to produce all documents **in his or her possession, custody or control**, which would be responsive to any of the Requests for Production " (R 73 (emphasis added))

Appellants' failed to comply with each of the above terms, which simply required compliance with the Rules of Civil Procedure, as shown below

Due to Appellants' failure to produce *any* of the information required by the 3/3/09 Discovery Order, Respondents filed their 7/24/09 Motion for Sanctions (See R 3282-3283 (partial description of information compelled), R 71, 73 (requiring full compliance with the Order within 30 days), R 2896-2909)

b Non-Compliance After Motion for Sanctions Filed

1 Appellants' Representations at 8/24/09 Hearing and Court's Warnings to Appellants

At the 8/24/09 hearing on the Motion for Sanctions, Appellants informed the court that they were finally providing supplemental responses to the discovery requests that day (R App 4 4-6) The court found that Appellants had no legitimate excuse for their non-compliance to that point (R App 4 12-15, 5 11, 8 14-19, 25, 11 24-12 8), and warned Appellants that their non-compliance, coupled with the looming January 2010 trial date in the Parkview case,[17] was placing the court in the position of having no viable alternative but to dismiss the lawsuits (R App 4 23-25 ("It's [Parkview case] going to be tried in January, whenever it's set for If they don't get the discovery I'm going to throw the case out "), R App 12 2-8, 17 18-24 (materials compelled are important to the statute of limitations issue), R App 18 11-16) Appellants' counsel assured the court that they were now in compliance (R App 12 15-20) As a result, the court took the Motion for Sanctions under advisement (R App 30 10-17) As shown below, the representation was false

[17] The trial of the Parkview case had already been continued from a May 2009 trial date due to the ongoing discovery disputes (R 75-76)

11 Second Supplemental Responses Grossly Inadequate

After the hearing, Respondents received a copy of Appellants' second supplemental responses to discovery (R 3369-3498) It was immediately apparent that Appellants had not complied with the 3/3/09 Discovery Order They had not even come close Among the most critical deficiencies were Appellants' incomplete and evasive responses to the discovery relevant to the statute of limitations issue and their testifying experts' opinions Respondents immediately informed the court of Appellants' continuing non-compliance (R 3355-3507)

Statute of Limitations Discovery Requests

Appellants again failed to provide complete responses to Interrogatories 9, 10 and 12, asserting inapplicable objections and failing to avail themselves of non-privileged information in their possession Interrogatories 9 and 10 concerned the *first* communication between two or more Appellants, and/or between an Appellant and an attorney, concerning the investigation or pursuit of legal claims against any of the Respondents (R 2904-2905) Appellants responded that they "do not recall the details of the first communication" concerning these subject matters, and they gave no estimated date or even a timeframe (R 3475-3477) Then, in classic "answer the question that was not asked" style, Appellants said they did recall that, at some unspecified time, they discussed Respondents' purported lack of communication with Appellants and the pursuit of the Limited Partnerships' claims against the defaulting purchasers (R 3476-3477) Interrogatory 12 sought the date(s) upon which each of the Appellants agreed to retain Bailey to investigate/pursue claims against Respondents (R 2905) Appellants objected based on the attorney/client privilege and/or work product doctrine, and stated, "***No information is being provided at this time*** *pending Plaintiffs decision to seek review by the Appellate Courts of the Circuit Court s order relating to privileged documents*" (R 3478-3479 (emphasis added)) Appellants **never** provided an additional response Compounding the evasiveness of their answers, all

Appellants in all five cases answered as a consolidated group, rather than individually as required by the Rules of Civil Procedure and the Discovery Order ("Each and every Plaintiff is required to provide all information reasonably available to him or her " (R 73)) [18]

Even putting aside Appellants' group claim that they had no independent recollection of the information sought, and putting aside their simultaneous refusal to comply with the 7/28/09 Privilege Order (see *infra* part III B), Appellants could have provided more responsive and accurate information by reviewing the content of the documents identified in their Privilege Log Those documents are dated between 1998 and 2004 and reportedly involve numerous communications between and among the Appellants themselves and Appellants and Bailey (R 4885-4909)

It is black letter law that Appellants' claims of privilege with respect to those documents did not extend to the facts contained therein, which were responsive to the discovery requests The subject matter, purpose and mere fact of representation are not protected by the attorney-client privilege even if such facts are contained within privileged communications See State v Conyers, 268 S C 276, 283-84, 233 S E 2d 95, 98 (1977) (the fact that a party sought representation from an attorney and the general purpose of the representation are not privileged), McDonald v Berry, 243 S C 453, 457, 134 S E 2d 392, 393-94 (1964) Chaudhry v Gallerizzo, 174 F 3d 394 402 (4th Cir 1999) ("The identity of the client, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege "), In Re Grand Jury Subpoena, 204 F 3d 516,

[18] For instance, how could Appellant Weinberg or his estate "not recall" any responsive information considering he threatened a lawsuit against the general partners on 12/9/99 and 2/22/00? (R 3199-3201) How could Appellant Davis "not recall" any responsive informat on considering the Appellants' Privilege Log indicates that, after Respondent Tuck told him on 1/18/00 that the general partners declined BFG's offer to return the properties to the Limited Partnerships and BFG then sold the properties for $1 and assumption of the mortgages Davis sought Joel Bailey's advice on 2/21/00 concerning a letter Davis drafted to the other limited partners, and by 3/28/00 Davis forwarded escrow funds to Bailey for other limited partners to engage counsel? (R 3205-3206 (1/18/00 letter), R 4887, 4889 (Nos 14, 18))

520 (4th Cir 2000), U S v Swain, 1991 U S Dist LEXIS 6841, 23 (D S C 1991) (Privilege 'does not apply to the description of the general nature of legal services rendered or the dates when such services were provided "), U S v Legal Servs , 249 F 3d 1077, 1081 (D C Cir 2001), Upjohn Co v United States, 449 U S 383, 395 (1981) ("The [attorney-client] privilege only protects disclosure of communications, it does not protect disclosure of the underlying facts by those who communicated with the attorney "), 1 Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 88 (5th ed 2007)

Appellants could not simply avoid answering the discovery by failing to avail themselves of the non-privileged factual information reasonably available to them and/or their attorneys "A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney " Hickman v Taylor, 329 U S 495, 504 (1947), see also 8B Charles Alan Wright, Arthur R Miller & Richard L Marcus, Federal Practice and Procedure § 2177 (3d ed 2010) ("A party is charged with knowledge of what its agents know, or what is in records available to it A party must disclose facts in its attorney's possession even though the facts have not been transmitted to the party "), Oklahoma v Tyson Foods, Inc , 262 F R D 617, 629 (N D Okla 2009) ("Neither can a party refuse to respond to an interrogatory requesting factual information because that information is known only to its attorney "), Essex Builders Group, Inc v Amerisure Ins Co , 230 F R D 682, 685 (M D Fla 2005) ("The answering party cannot limit his answers to matters within his own knowledge and ignore information immediately available to him or under his control ")

The entries in Appellants' Privilege Log reveal that each of the Appellants (or their attorney) had non-privileged factual information available to him, which would allow him to answer more fully, completely and accurately than Appellants' group response of "do not recall " Yet Appellants' evasive answers continued to conceal this information, which was

critical to the statute of limitations defense The bits of information known to Respondents from Appellants' Privilege Log and other documents were enough to show that Appellants were clearly capable of responding more fully and accurately than they did, but those bits of information did not provide Respondents with full and accurate answers to their interrogatories, nor did Appellants ever claim that those bits of information (or *any* information for that matter) constituted the best responsive information available to them For example, Appellants' 12/31/08 Privilege Log (R 4885-4909) indicates that

- no later than 2/16/00 Joel Bailey was in contact with unidentified limited partner "clients' relative to investigation of the Respondents (R 4887 (No 12)),
- by 2/21/00, limited partner Davis had asked his attorney, Bailey, for comments on a letter Davis drafted to "other limited partners" concerning the engagement of counsel (R 4887 (No 14)), and
- by 3/23/00, Davis had forwarded "funds for escrow" to Bailey in connection with "other limited partners" engaging counsel (R 4889 (No 18))

All of this transpired more than three years before the first suit, Parkview, was filed in April 2003

Further "garbling"[19] the information relevant to the statute of limitations issues, many entries in Appellants' Privilege Log could not possibly accurately describe the documents identified[20] Appellants applied a "canned" and misleading description to the three documents described above and numerous others identified in their Privilege Log, spanning the time frame 2/9/99 through **6/28/04** Appellants' "canned" descriptions indicated that the purpose of the retention of counsel was merely to investigate or inquire about the status of negotiations with, and/or pursuit of claims against, the purchasing entities (BFG or Magi) to collect on the notes and/or recover the properties, *implicitly* denying that the subject

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[19] See *infra* at 29 (Justice Hand quotation)

[20] Noticeably absent from Appellants' Privilege Log is any description of a written contingency fee agreement between Bailey and any Appellant Given that such an agreement is required under Rule 1 5(c), RPC, Rule 407, SCACR, Respondents can only assume that Appellants omitted that information from the Privilege Log's descriptions of such documents

documents described related to the investigation or pursuit of claims against Respondents For example, a document dated **6/28/04**, **15 months after the Parkview Appellants filed suit against Respondents**, was described as "concerning status of negotiations with and/or pursuit of claims against purchasing entities (BFG) to collect on the notes and/or recover properties" (R 4903 (No 100))

Appellants' "canned" description of these documents is obviously a "ruse" considering that the vast majority of the documents were dated **after**

- Appellant Weinberg threatened to sue the general partners on **12/9/99** and **2/22/00** (R 3199-3201), and
- Bailey, while representing all of the Appellants, informed an attorney for BFG on **8/9/00 that he was in the process of bringing action against the general partners (Respondents), to include claims for mismanagement, failure to collect on the notes, and fraud** (R 6046-6047, see also R 6006-6009, 6017-6057 (additional evidence as to Appellants' investigation/pursuit of claims against Respondents between late 1999 and September 2000))

Of the 20 documents identified on Appellants' Privilege Log (R 4885-4909), which are subject to Appellants' "canned ' description or a close variation thereof,

- one is dated *well after* the Parkview suit was filed against Respondents (R 4903 (No 100)),
- an additional ten are dated *after* Bailey informed BFG's attorney that he was preparing to sue the general partners on behalf of Appellants (R 4891, 4893-4895, 4902, 4904, 4906 (Nos 32, 43-44, 47, 49-51, 94, 109, 120)),
- an additional eight are dated *after* Weinberg threatened to sue the general partners (R 4887-4890, 4904 (Nos 12, 14, 15, 17-19, 25, 108)), and
- only one is dated before Weinberg threatened to sue (R 4904 (No 106))

The above facts indicate Appellants intentionally concealed information responsive to Interrogatories 9, 10 and 12 and, at a minimum, it is clear that they failed to avail themselves of non-privileged factual information reasonably available to them Though Appellants were well aware of these deficiencies in their Second Supplemental Responses, none of them *ever*

attempted to comply with the Discovery Order in this regard (R 3365-3366, R 1168 18-1170 11, R 3532-3538)

Testifying Experts' Opinions

Appellants' Second Supplemental Responses still provided no meaningful response to discovery concerning Appellants' testifying expert witnesses' opinions and the bases for those opinions (R 3356-3358, 3467-3474 (supp response to Int 6)) The evasive responses as to the opinions of their valuation experts (Chambers, Keyserling, Henson) (R 3470-3472) and their sole liability expert (Higgins) (R 3471-3472) were particularly troubling The court was exceptionally clear in the 3/3/09 Discovery Order that Appellants' prior responses were "incomplete and inadequate" and Appellants must "provide a summary of the important opinions held by each expert (i e , the opinion testimony the expert is expected to give in these cases), as well as the factual bases for such opinions A description of the expert's general experience is not sufficient " (R 71-72)

In light of the unambiguous directions from the court and the gross inadequacy of Appellants' supplemental response to Interrogatory 6, Appellants' non-compliance was clearly willful Appellants' response concerning Chambers is set forth below *with all of the changes made from their prior response to their Second Supplemental Response in* ***bold***

> Mr Chambers is expected to give an opinion as to the valuation for Parkview Apartments and Palmetto Apartments **a) in 1999 when Boston Financial/Lend Lease offered to convey the properties back to each of the subject limited partnerships, excluding Pinewood and b) as of their value on the date of trial**
>
> His opinion is believed to be based upon his knowledge of real estate values in and around Beaufort, South Carolina
>
> Mr Chambers is the former mayor of Beaufort, South Carolina and has extensive experience in matters concerning property values in the Beaufort area, and is also a real estate agent and broker licensed by the State of South Carolina Additionally, he is personally familiar with the two apartment complexes in question

(R 3467-3468 (initial response), R 3470 (supplemental response) (emphasis added to denote all changes made)) Appellants provided no information as to what Chamber's opinion actually was, the value he assigned to the properties at any point, how he determined value, or what he considered in determining value Appellants' responses as to Keyserling and Henson were virtually identical to their evasive response concerning Chambers (R 3468-3469 (initial responses), R 3471-3472 (supplemental responses)) Nor did Appellants produce any written report or statement disclosing these experts' opinions or the bases for their opinions [21]

Appellants provided *no additional information* concerning their liability expert, Higgins They merely copied verbatim their prior deficient response

> Attorney Higgins is expected to give an opinion regarding the relationship between HUD and AIMCO as it concerned the subject properties and the impact of AIMCO's previous history with HUD with regard to AIMCO's unilateral decision to decline the Subsequent Purchasers' [BFG's] offer to return the subject properties to the Limited Partnerships
>
> His opinion is believed to be based upon his knowledge and experience with HUD
>
> Atty Higgins is an attorney practicing in Columbia, South Carolina with substantial experience with HUD and Section 8 Housing (R 3468-3469 (initial response), R 3471-3472 (supplemental response))

The above deficiencies are merely representative samples of Appellants' non-compliance [22]

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[21] Yet, in response to Interrogatory 7, Appellants stated that Chambers, Keyserling and Henson "are prepared to offer opinions regarding the value of the [designated properties]" (R 3474)

[22] Appellants also continued to provide evasive and incomplete responses as to, *inter alia*, their itemized damages (R 3363-3364, 3464-3465 (Int 3), R 994 16-995 2, 1013 2-3), income and financial benefits derived from their interests in the subject properties and Limited Partnerships (R 3364-3365, 3425-3427, 3474-3475 (Int 8)), and familiarity with similar types of HUD-regulated properties as an owner, manager or investor (R 3366-3367, 3491-3493 (Int 18)) They continued to disobey the 3/3/09 Discovery Order by answering discovery as a consolidated group and being evasive as to which responsive documents were in the possession of Appellants (R 3361-3362, 3374-3445, R 989 8-23, R 71-73) This deficiency was exacerbated because Appellants produced 2,586 pages of documents but only

III 1/14/10 Hearing Court Again Admonishes Appellants for Continuing Non-Compliance

The court addressed Appellants' deficient Second Supplemental Responses at a 1/14/10 hearing (R 1164 14-1165 9) Respondents reiterated the most critical deficiencies in Appellants' responses (R 1166 3-1178 15) Appellants merely insisted that they had complied with the 3/3/09 Discovery Order, without addressing in any meaningful way the specific deficiencies identified by Respondents and/or the court (R 1181 19-24) They argued that Respondents would not be prejudiced as long as Appellants provided the compelled materials on the eve of trial (literally), to which the court responded, "This case has been going on for seven years, a long time And don't hand me this about getting an expert on Friday This is not an expert-to-be-given-on-Friday case" (R 1187 21-1188 9)

The court addressed Appellants' evasive responses, obvious non-compliance, and the effect their misconduct continued to have on discovery and the ability to proceed to trial (R 1183 12-21, 1185 23-1186 2, 1186 11-12, 1187 1-3, 1203 9-14) The court pressed Appellants' counsel for a viable explanation as to why they had still not divulged their testifying experts' opinions and the basis for those opinions, especially considering trial was set for 1/19/10, less than a week away Appellants' response illustrates their pervasive and inexcusable disobedience of the court's Discovery Order more than 16 months after the 8/28/08 discovery requests were served

> PENDARVIS Your Honor, **part of the problem is we, you know, <u>we don't have a final opinion from the experts</u>** They've got a preliminary opinion

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identified 38 of those pages as belonging to a specific (or any) Appellant (R 5876-5877 (¶4)) Further, when Respondents served Requests for Admission to clarify each Appellant's receipt and possession of several of the documents, Appellants provided evasive group responses, answering, "Plaintiffs admit the subject document(s) is a true and correct copy, but deny the Request to Admit with regard to the date alleged to have been received by Plaintiffs' (R 1891-1901, 1905-1915, 1919-1928 (Pl answers to Request for Adm), R 1606-1682, 1683-1767, 1768-1847 (Def First Request for Adm in Orleans, Palmetto, Roosevelt))

They've given their, their views on the preliminary opinions, and that's just the first part, Your Honor [23]

COURT **Well, trial was set for next week How can you not have a final opinion?**

PENDARVIS **It will be completed prior to trial**, Your Honor

COURT Mr Pendarvis, if you wanted to know what my expert's opinion was a in particular case, I would have to tell you You would expect me to tell you I expect you to tell them **I've ordered you to tell them, and you refuse to do so**

(R 1183 12-1186 12 (emphasis added))

Nevertheless, the court allowed Appellants yet another opportunity to comply with the Order

c Appellants' Non-Compliance Continues to This Day

On 1/25/10, one week **after** the Parkview case was supposed to go to trial, Appellants served their Third Supplemental Responses, which expressly applied to the *Parkview case only*, contrary to the Discovery Order (R 3546-3557 (Third Supp Responses), R 71, 73) Appellants' responses were evasive and grossly inadequate, yet again [24] They provided no information as to the expert opinions (or bases of opinions) of Higgins, their purported liability expert (R 3538) Chambers was said to have a "preliminary" opinion that Parkview had a fair market value of $1,650,855 (R 3547-3548) They stated his opinion was based upon recognized valuation methodology, *e g* income, comparable sales and replacement cost approaches, but they did not disclose any calculations or summaries thereof, nor did they disclose the factual bases he relied upon in deriving his opinion of value

Each of the recognized methodologies require the factual bases to be supplied by the valuation expert See S C Hwy Dept v Booker, 260 S C 245, 259, 195 S E 2d 615, 622 (1973) (expert real estate appraisers' knowledge concerning subject property, methods of

[23] Not even "preliminary" opinions were provided in their responses

[24] Among other things, the Parkview Appellants only supplemented their deficient responses to Interrogatories 6 and 18 They made no attempt to address their deficient responses to the other discovery requests as required by the 3/3/09 Discovery Order (R 71), including, *inter alia*, no attempt to answer Interrogatories 9, 10 and 12 (R 3532-3538)

appraising property, comparable sales and other information they considered in forming their opinions and conclusions of value are discoverable and must be produced) Despite being ordered to disclose the "factual bases" for his opinions Appellants did not disclose a single fact, actual (*i e* , supported by evidence) or assumed, relied upon by Chambers in arriving at his opinion of value [25] Appellants did not provide any of the information necessary for Respondents to understand and evaluate his expected testimony, to meaningfully prepare for his deposition, and to develop needed testimony from Respondents' own experts

The disclosure with respect to Keyserling suffered similar shortcomings He was said to have an opinion that

(1) Parkview could be "flipped" "as is" to a third party for a $300,000 to $500,000 gain to the partnership,

(2) Parkview could be converted to market-based multifamily units for resale at the targeted price of $225,000 to $150,000 per unit,

(3) Parkview could be maintained "as is" or taken out of the HUD program, retrofitted, and brought up to market-based rental prices (no opinion as to value or the cost to retrofit was given under this scenario), and

(4) The HUD mortgage on Parkview could be paid off, the buildings demolished, and the real estate held for sale or development at a later date (no dollar figure was given for this scenario)

(R 3548-3551)

What facts Keyserling relied upon in deriving these opinions, the materials he reviewed, and the methodology he employed are still a mystery [26] This is **not** what the Rules of Civil Procedure or the 3/3/09 Discovery Order required

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[25] These actual and/or assumed facts would include, *inter alia* for comparables, adjustments to include physical, financial and locational dissimilarities, lapses of time between sales, changes in market condition, etc , for the income approach, future rental income, future cost to maintain, market discount rates (to include all calculations that are implied within such a calculation), etc , and for the replacement approach, facts with respect to the scope of work, the depreciated value of the property, lost rental, etc

[26] As for the "exhibit" attached to the Parkview Third Supplemental Responses, it was prepared by Appellants' attorneys years earlier for the sole purpose of mediation as the *attorneys* estimate of damages for negotiation purposes Recall that a week before the

Appellants made no further attempt to comply with the Discovery Order

B 7/28/09 Privilege Order

1 Privilege Order was Supported by the Record

a Relevant Background

Along with the 3/3/09 Discovery Order, the court's 7/28/09 Privilege Order lies at the heart of the parties' discovery and sanctions disputes In the Privilege Order, the court compelled Appellants to produce 96 documents identified on their privilege log Though Appellants would have this Court believe that Judge Early's ruling represents a radical departure from the State's attorney-client privilege jurisprudence, nothing could be farther from the truth

Before examining the bases for the court's ruling, it is important to understand the context in which this dispute arose A month *after* the court denied Respondents' motion for summary judgment based on the statute of limitations defense, Appellants' counsel admitted that they had failed to provide a complete privilege log (R 959 9-24) The court ordered Appellants to produce a complete privilege log within 30 days (R 960 2-4) Appellants' 7/28/08 Privilege Log identified, for the first time in the litigation, *90 documents, which were created between 1998 and 2004, many of which were authored by or addressed to Appellants attorney, Bailey* (compare Appellants' 7/28/08 Privilege Log and the Parkview Appellants' 7/21/05 Privilege Log R 3311-3323 (7/28/08 Priv Log), R 3325-3330 (7/21/05 Priv Log)) [27]

Parkview supplemental response, Appellants' experts had not yet formed their opinion of value In their discovery responses, Appellants steadfastly objected to the use of the document and all other materials created solely for mediation The document also contained information that the parties agreed in or before 2004 was for purposes of settlement discussion only and could not be used in court (R 3541-3543, R 3374, 3384)

[27] Of the 96 documents Appellants were compelled to produce in the 7/28/09 Privilege Order, 53 of them were not identified by Appellants until they were listed in their 7/28/08 (and subsequent) privilege logs (R 4885, 4890-4892, 4894, 4897-4906 (documents first identified in 7/28/08 Priv Log Nos 1, 5, 27-29, 34-35, 39, 48, 66, 71-81, 84-86, 88-91, 94-

The 7/28/08 Privilege Log provided no description of the documents beyond the date, author and recipient of each document, and whether each document was a fax, letter or memo (R 2958-2971) It was not until January 2009 that Appellants finally provided a privilege log ("12/31/08 Privilege Log") that contained more descriptive information about the documents listed therein (*i e*, more informative than "fax," "letter," or "memo") (R 4885-4909)[28] Respondents addressed the privilege dispute in their motion to compel (R 2911-2924, 2944-2971)

At the 12/9/08 hearing on their motion to compel, Respondents argued their grounds for production of certain documents identified on Appellants' privilege log (R 971-981) With the express consent of the parties, the court appointed a former judge, Gary Clary ("Clary"), to review the documents *in camera* and report his findings to the court, which Clary did (see *infra* at 62-63 (note 64)) On 6/2/09, the court issued its Order adopting the findings and conclusions contained in Clary's reports The parties then filed motions to amend the 6/2/09 Order (R 3160-3162, R 3191-3198) After thoroughly reviewing the parties' arguments, the court issued the 7/28/09 Privilege Order, granting in part and denying in part both parties' motions to amend the 6/2/09 Order

b Law of Implied Waiver of Privilege Applied to These Cases

Appellants claimed attorney-client privilege and/or work product protection for 91 documents created *prior to 10/16/02* (R 4887-4895, 4897-4906), more than three years before the last of these cases were filed[29] A three-year statute of limitations applied to Appellants' legal claims See S C Code Ann §§15-3-530, 540 (2005) and §39-5-150 (1976) Sixteen of the documents were created *prior to 4/21/00*, more than three years before

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97, 99, 104-114, 117-119, 121-126))

[28] The 12/31/08 Privilege Log was the log referred to in subsequent arguments and orders

[29] The lawsuits were filed on the following dates Roosevelt and Orleans on 10/17/05, Palmetto and Pinewood on 10/13/05, Parkview on 4/22/03 (See generally R 160-226, 343-402, 439-505, 545-609, 645-705 (Complaints in all five cases))

the first of these cases, Parkview, was filed (R 4887-4889, 4897-4900, 4904 (Nos 12-19, 66, 71 73, 84, 105-106, 108)) The 91 documents range in date between *10/30/98* and 9/19/02 (R 4895, 4904 (Nos 54, 105)), and they involved communications between and among some of the Appellants themselves (most often between Appellant Davis and other limited partners), Appellants and their attorney, Bailey (most often between Bailey and Appellant Davis, who acted as the liaison for the other limited partners), Appellants and third parties, and Bailey and third parties (R 4885-4909)

The above-referenced 91 documents are clearly relevant to Respondents' statute of limitations defense in each of the five cases When Appellants first identified most of these documents in July 2008, their relevance was readily apparent to Respondents and the court, which emphasized to Appellants' counsel, "**[T]he statute of limitations is a big issue in this case**" (R 1011 19-20 (emphasis added)) However, relevance alone does not justify a finding of waiver of privilege Rather, the court's ruling that Appellants must produce the subject documents was based on its finding that Appellants affirmatively waived privilege by placing the subject matter of the documents directly at issue in these lawsuits They did so in their initial pleadings, and in their arguments opposing Respondents' motion for summary judgment, and even by the mere filing of these lawsuits in light of the unusual circumstances presented

Hearn v Rhay, 68 F R D 574 (E D Wash 1975), is widely regarded as the seminal case involving "at issue" implied waiver of the attorney-client privilege and work product protection In Hearn, the court held that, for an implied waiver to be found, there must be (1) an assertion of the privilege through some "**affirmative act, such as filing suit**, by the asserting party,' (2) through the affirmative act, the asserting party put the protected information at issue by making it relevant to the case, and (3) application of the privilege would have denied the opposing party access to information vital to his defense Id at 581

(emphasis added) See also In Re Long Point Limited Partnership, 1997 Bankr LEXIS 2403 (Bankr D S C 1997) (applying the Hearn test and finding "at issue" waiver) Hearn has been the majority approach for more than two decades See T Maxfield Bahner & Michael L Gallion, Waiver of Attorney-Client Privilege Via Issue Injection A Call for Uniformity, 65 Def Couns J 199, 204 (1998)

In the recent case of City of Myrtle Beach v United Nat'l Ins Co , 2010 U S Dist LEXIS 89725 (Aug 27, 2010 D S C), the federal district court considered the Hearn analysis and determined that it is consistent with South Carolina law

> Under South Carolina law, lack of waiver is a necessary element to establish the attorney-client privilege **Under South Carolina law, the waiver may be explicit or a waiver may be implied by making communications with counsel an issue** See Floyd v Floyd, 365 S C 56, 615 S E 2d 465, 484 (S C App 2005) (implied waiver of privilege by making communications with counsel an issue) **The approach first espoused in [Hearn]** sets forth a frame work that provides a balance between the two competing policies of attorney-client privilege and the administration of justice and **is consistent with established South Carolina law** Additionally, the Hearn approach is the most widely accepted approach **[I]f a [party] voluntarily injects an issue in the case, whether legal or factual, the [party] voluntarily waives, explicitly or impliedly, the attorney-client privilege** Thus, "voluntarily injecting" the issue is not limited to asserting the advice of counsel as an affirmative defense **A party's assertion of a new position of law or fact may be the basis of waiver**

Id at 13-15 (internal citations omitted) (emphasis added) [30]

As recognized by the court in City of Myrtle Beach, the Hearn analysis is entirely consistent with the South Carolina Court of Appeals' opinion in Floyd The Court of Appeals acknowledged that the attorney-client privilege is far from absolute, and otherwise privileged materials may be admitted into evidence if the party claiming privilege places the privileged materials and their subject matter at issue See Floyd, 615 S E 2d at 483-84 The

[30] South Carolina courts often rely on federal court decisions in determining issues related to the attorney-client privilege See e g Marshall v Marshall, 282 S C 534, 320 S E 2d 44, 46-47 (Ct App 1984) (citing Duplan Corp v Deering Milliken, Inc , 397 F Supp 1146 (D S C 1974) and U S v Jones, 696 F 2d 1069 (4th Cir 1982)), Floyd v Floyd, 365 S C 56, 615 S E 2d 465, 480-82 (Ct App 2005) (citing Upjohn Co v U S , 449 U S 383 (1981))

holdings in Floyd, Hearn and similar federal decisions, as well as the lower court's ruling in the 7/28/09 Privilege Order in these cases are based on the same principles of fairness, completeness, and the just consequences of a party claiming privilege affirmatively placing the privileged materials at issue in a case "The public policy of protecting confidential communications must be balanced against the public interest in the proper administration of justice" Floyd, 615 S E 2d at 483 (quoting State v Doster, 276 S C 647, 284 S E 2d 218, 220 (1981)) See also Felder v Wyman, 139 F R D 85, 88 (D S C 1991) ("The privilege remains an exception to the general duty to disclose Its benefits are all indirect and speculative, its obstruction is plain and concrete It is an obstacle to the investigation of the truth It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle") (quoting N L R B v Harvey, 349 F 2d 900, 907 (4th Cir 1965)) As the esteemed Justice Learned Hand wrote, "It must be conceded that the privilege is to suppress the truth, **but that does not mean that it is a privilege to garble it**,[31] although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition" U S v St Pierre, 132 F 2d 837, 840 (9th Cir 1942) (addressing privilege against self-incrimination) (emphasis added), *cert granted* 318 U S 751 (1943), *cert dismissed as moot* 319 U S 41 (1943)

In Floyd, the Court of Appeals held that the defendant "opened the door" with respect to letters he claimed to be privileged communications from his attorney when, in his testimony, he 'professed that he relied on the advice of various attorneys in formulating his position" regarding the subject of the parties' dispute Id at 484 The primary purpose of this doctrine 'is that of fairness and completeness If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go

[31] See *supra* at 8-11, 18-19, *infra* at 31 (examples of Appellants' "garbling" of the truth relating to the accrual of their claims and the filing of these suits)

into, then it is unfair not to allow the opposing party to go into the matter and provide more information to the fact-finder" Id (quoting Danny R Collins, *South Carolina Evidence* §2 9 (2d ed 2000))

Some courts applying Hearn have specifically recognized that the mere filing of a complaint may be sufficient to place the statute of limitations at issue if the circumstances warrant such a result In Aloe Vera of Am , Inc v United States, 2003 U S Dist LEXIS 18317 (D Ariz 2003), the court held that, **where plaintiffs' privilege log contained documents dated prior to the earliest time the claim could have accrued, if the claim was timely filed under the applicable statute of limitations, the plaintiffs' affirmative act of filing suit was sufficient to give rise to a statute of limitations issue** Id at 9 (granting defendants access to otherwise privileged documents to prove defendants' statute of limitations defense) "By allowing 'filing suit' to constitute an affirmative act the *Hearn* test explicitly contemplates allowing a party's pleadings to raise an issue giving rise to an implied privilege waiver" Rambus Inc v Samsung Elecs Co , 2007 U S Dist LEXIS 97619, 12-13 (N D Ca 2007)

> It might make more sense and be more consistent with other privilege doctrines to analyze this situation from the perspective that each time a plaintiff brings a suit, he tacitly puts into issue the question of whether the statute of limitations [has] run We do not generally require the plaintiff to affirmatively prove that it has not Rather, we require the defendant to prove that it has **But since the plaintiff's (and arguably his counsel's) state of mind is thereby put into issue, in certain cases, plaintiff puts into issue what he and his counsel knew and when they knew it**

Edna Selan Epstein, The Attorney-Client Privilege and the Work-Products Doctrine 544 (5th ed 2007) (citing Aloe Vera) (emphasis added)

Though the facts in the instant cases certainly warrant a finding of waiver by Appellants under the holding in Aloe Vera (*i e* , Appellants' privilege log contained documents dated more than three years prior to the date each of the lawsuits was filed), the court's ruling that Appellants waived their privilege was based on evidence that was even

more compelling In the Roosevelt and Orleans cases, **Appellants alleged, in their Complaints, that Respondents caused Appellants to delay their investigation and pursuit of claims in those and the other cases** (except Parkview, which was filed in April 2003) Not only did these allegations serve to set up Appellants' claim of estoppel with respect to Respondents' statute of limitations defense in each case, the allegations were actually pled as a basis for the recovery of damages from Respondents! In the Orleans Complaint Appellants *alleged*

- Respondents conspired to injure and harm them by "misleading the Plaintiffs concerning the Defendants' willingness to resolve the issue of the damages to the Plaintiffs *via* the mediation process, **in order to cause the Plaintiffs to delay in their investigation of the Defendants' conduct with respect to the said Defendant Limited Partnership and *a fortiori*, to delay in the filing of this legal action** " (R 379-380 (¶82(e)) (emphasis added)),

- "Defendants also required that litigation of any claims against them by the Plaintiffs be postponed and/or held in abeyance " and Respondents otherwise induced Appellants **to delay filing "suit in this and other cases"** (R 377-379 (¶¶76-78) (emphasis added)),

- Respondents' purported breach of contract was accompanied by fraudulent acts because they "used false and misleading information in order to delay discovery in existing litigation [Parkview], as well as the filing of additional litigation, including the action *sub judice* " (R 385-386 (¶91(l))),

- Respondents represented to the Appellants that they "should delay in proceeding with litigation against the Defendants " (R 386-387 (¶92(m))),

- Respondents breached their duty of care to Appellants by "using false and misleading information to delay discovery in existing litigation, as well as the filing of additional litigation, including the action *sub judice*" (R 389-390, 395 (¶102(rr))), and

- "As a direct and proximate result of the conduct of the Defendant General Partners as set forth above, the Plaintiffs have sustained injuries and damages in that they **have been delayed and damaged in their investigation and/or prosecution of this and other claims against the Defendants** " (R 400-401 (first paragraph of "Damages" section) (emphasis added))

See also Roosevelt Complaint (R 680-682 (¶¶78-80), R 683 (¶84(e)), R 688-689 (¶93(l)), R 689-691 (¶94(m)), R 693, 698 (¶104(rr)), R 704 (first paragraph of "Damages" section) (allegations identical to those made in the Orleans Complaint, quoted above))

Appellants' affirmative allegations, which injected the issues of the timeliness of Appellants' investigation and pursuit of claims against Respondents grounds for the avoidance of a statute of limitations defense, and even the recovery of damages from Respondents due to their alleged interference with the investigation and pursuit of Appellants' claims, clearly constitute an "affirmative act" under Hearn [32] See e g , Imperial Corp of America v Shields, 179 F R D 286 (S D Ca 1998) (finding "at issue" waiver where the plaintiff alleged facts to support avoidance of the statute of limitations), Rambus, 2007 U S Dist LEXIS 97619, at 14 (finding "at issue" waiver of privilege where counterclaimant asserted discovery rule and equitable tolling in its counterclaim, and "placed the timing and scope of its investigation of these claims at issue by alleging that it did not and could not investigate potential claims until 2005"), WLIG-TV, Inc v Cablevision Sys Corp , 879 F Supp 229 (E D N Y 1994) (finding "at issue" waiver where plaintiff, in an attempt to overcome the statute of limitations bar, alleged in its complaint that it was unable to discover the basis for its claims due to defendants' fraudulent concealment and fraudulent inducement), League v Vanice, 374 N W 2d 849, 856 (Neb 1985) (in finding "at issue" waiver via plaintiff's attempt to avoid the statute of limitations by alleging defendant's concealment of the questioned events, the court held that the plaintiff "injected his knowledge, or lack of knowledge, into the litigation as a crucial issue relevant to disposition of the claims [Plaintiff] is not permitted to thrust his lack of knowledge into the

[32] Appellants' allegations of delay/interference with their investigation/pursuit of claims against Respondents opened the door to numerous issues, such as when did their causes of action accrue (*i e* , when did they know, or reasonably should have known, of the injuries now complained of), how and when did Respondents interfere with Appellants' investigation/pursuit of claims, how long was the period of delay caused by such alleged interference, were Appellants, in fact, delayed or interfered with by Respondents, what was the effect of such delay, if any, on the limitations period, and what damages did Appellants incur as a result of the alleged interference/delay Communications among the Appellants, and between Appellants, their attorney (Bailey), and third parties, all of which were dated more than three years before four of these cases were filed (several dated more than three years before the first suit was filed), clearly contained information relevant to these critical questions raised by Appellants

litigation as a foundation or condition necessary to sustain his claim against [defendant] while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted against [defendant] "), Bohack Corp v Iowa Beef Processors, Inc , 1981 U S Dist LEXIS 11002, 4 (E D N Y 1981) (finding "at issue" waiver where plaintiff affirmatively alleged that defendant fraudulently concealed the claimed violation, and, concomitantly, created "a question of its knowledge or what it should have known regarding defendant's activities more than four years prior to the commencement of [the] action ")

Appellants in the Orleans, Roosevelt and Palmetto cases argued their grounds for avoidance of the statute of limitations defense, first raised in the Orleans and Roosevelt Complaints, in opposition to Respondents' motion for summary judgment based on the statute of limitations (see *supra* at 9-10) They argued that Respondents were estopped from asserting a statute of limitations defense due to the parties' alleged agreement to maintain the "status quo" during settlement negotiations and mediation (R 1975-1978, R 2558, 2595-2598, 2634-2673, R 863 14-16, 877 13-14)

Appellants' *affirmative* claim of estoppel in opposition to Respondents' motion for summary judgment also warrants a finding of waiver of privilege with respect to the 91 documents on their privilege log dated prior to October 2002 In Connell v Bernstein-Macaulay, Inc , 407 F Supp 420 (S D N Y 1976), the court found "at issue" waiver where, in response to defendants' motion for summary judgment on statute of limitations grounds, plaintiffs claimed defendants were estopped to assert such a defense because defendants asked plaintiffs to withhold suit while they took steps to resolve the underlying issue Id at 422 The court reasoned

> [W]here a litigant seeks to avoid a statutory protection which has been established for the benefit of his adversary (*e g* a statute of limitations), by a claim that his adversary is estopped to assert such protection, and where it appears that there is a good faith basis for believing that invasion of the

> attorney-client privilege would shed light on the validity of such claim of estoppel, the party making such assertion must be deemed to have waived the privilege

Id. See also Conkling v. Turner, 883 F.2d 431 (5th Cir. 1989) (finding "at issue" waiver where, in response to defendants' motion for summary judgment on statute of limitations grounds, plaintiff filed an affidavit claiming lack of knowledge of the falsity of the operative fact giving rise to the litigation), 3M Co. v. Engle, 328 S.W.3d 184 (Ky. 2010) (finding "at issue" waiver where, in response to defendants' motion for summary judgment on statute of limitations grounds, plaintiffs filed an affidavit stating that they were not aware of their claim until they were informed by their attorneys).

The effect of Appellants' "at issue" waiver is the same for their claims of attorney work product protection with respect to the 91 documents dated prior to mid-October 2002. In Byers v. Burleson, 100 F.R.D. 436 (D.C. 1983), the court compelled production of materials over plaintiff's attorney-client privilege and work product objections, holding that "the plaintiff has waived the privilege because the information which the defendant seeks is necessary to resolve the precise statute of limitations issue which the plaintiff has interjected into the case." Id. at 440 ("Thus, this case may present the unusual situation where a showing that the material sought was prepared in anticipation of litigation would also illustrate the substantial need for that information by the opposing party." Id. at 439-40). "For indeed [work product protection] must give way when the exigencies of the case are such that the statements involved were made at such a time and under such circumstances that they become 'unique catalysts in the search for truth.'" Foley v. Juron Associates, 1986 U.S. Dist. LEXIS 25535, 11-12 (E.D. Pa. 1986) (discussing 'at issue" waiver in the context of "opinion work product," which is normally given a higher degree of protection from disclosure, but "exceptions have been made where such information is directly at issue and the need for its production is compelling." Id. at 13).

The court's Privilege Order properly applied to Appellants in all cases, even if this Court were to determine that the implied waiver of privilege is based solely on the affirmative allegations contained in the Orleans and Roosevelt Complaints Once the Appellants in the Orleans and Roosevelt cases made the allegations in their October 2005 Complaints, the documents dated more than three years before the cases were filed were no longer privileged and protected from discovery Once the privilege was waived in October 2005, it could not be reasserted, and the documents were not protected from discovery in any case See U S v Suarez, 820 F 2d 1158, 1160 (11th Cir 1987) ("[It] has long been held that once waived, the attorney-client privilege cannot be reasserted "), U S v Krasnov, 143 F Supp 184, 191 (E D Pa 1956) ("The privilege once waived cannot be regained "), U S v Blackburn, 446 F 2d 1089, 1091 (5th Cir 1971), Bowne of New York City, Inc v Ambase Corp , 150 F R D 465, 478-79 (S D N Y 1993), Dimmer v Appleton, 628 F Supp 1249, 1252 (S D N Y 1986)

Further, the Appellants, the allegations, and the claims in all five cases, as well as Appellants' **collective** "privileged" documents (a **single** privilege log for all Appellants in all five cases), are so intertwined and intermingled that the subject documents can not be differentiated from one case to another, let alone from one plaintiff to another At least one plaintiff in the Orleans and Roosevelt cases appears as a plaintiff in the other three cases Documents produced in the litigation and the information provided in Appellants' **joint** privilege log show that Appellants in all cases, led by Appellant Davis and Appellants' attorney, Bailey, pooled and shared all of their documents and information [33] In fact, many of the communications to or from Appellants, both produced and withheld, concern all of the

[33] Appellants' privilege log makes no distinction between the five cases (i e , there is only one privilege log, not five, and entries are not separated by case or plaintiff) The privilege log is entitled "Plaintiffs' Supplemental Privilege Log," referring to all Appellants collectively The form of the privilege log, and the information contained therein, indicate that the documents were shared among all Appellants at the time of their making and/or in the investigation and pursuit of their collective claims (R 4885-4909)

properties and the Appellants *en masse* [34] The facts of these cases are nearly identical, as are Appellants' claims in each of the cases They involve the same defendants, the defaulted notes came due at or around the same time, the properties were sold at the same time under the same terms, the allegations in the Complaints and the causes of action are essentially the same, and all Appellants have been represented by the same attorney, Bailey, since 2000 (See generally R 227-293 (Amended Complaint), R 343-402, R 439-505, R 545-609, R 645-705)

In light of the above, Appellants **affirmatively** placed the statute of limitations at issue in the five cases by the mere filing of these lawsuits more than three years after the date of the documents identified in their privilege log, **and** by specifically alleging in the Orleans and Roosevelt Complaints that Respondents interfered with their investigation/pursuit of the claims in those and the other lawsuits, **and** by arguing avoidance of the statute of limitations defense based on estoppel in opposition to Respondents' motions for summary judgment [35] Under the majority rule set forth in Hearn, Appellants impliedly waived their claims of privilege and work product protection with respect to all documents identified in their privilege log dated prior to 10/16/02 (16 of which are dated prior to 4/21/00, *i e* , more than

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[34] For example, Bailey often sent communications addressed to all of the Appellants concerning all of the Limited Partnerships (sometimes directly to all Appellants, sometimes to the Appellants c/o Davis) (R 4892-4905 (Nos 37, 49, 51, 52, 75, 92, 115, communications dated between 10/11/00 and 6/27/01)) Davis often served as the client representative for all Appellants (R 4887-4906 (Nos 12, 14, 15, 17, 18, 19, 25, 32, 40, 41, 43, 44, 47, 93, 116, 120, communications dated between 2/16/00 and 3/18/01)) Mercy, a limited partner in Orleans only, and Davis, a limited partner (or owner of a limited partner) in all of the Limited Partnerships *except* Orleans, shared information with one another and Bailey despite their lack of a mutual legal interest in any of the Limited Partnerships (R 4901-4902 (Nos 90 (9/5/00), 96 (6/18/01) 97 (6/26/01)))

[35] The critical need for production of the subject documents was only compounded by Appellants' stubborn refusal to comply with the 3/3/09 Discovery Order, which compelled them to fully answer discovery requests concerning the first communications among Appellants or between Appellants and an attorney (including the retention of Bailey) regarding the investigation/pursuit of claims against Respondents See *supra* at 12 (note 16), 15-20

three years before the first suit was filed) Thus, the court's ruling based on "at issue" waiver was supported by the evidence and the law, and the court did not abuse its discretion in this discovery matter

c Court Compelled Production of Some of the 96 Documents because They Were Never Subject to Any Privilege

Appellants were compelled to produce 96 documents in the 7/28/09 Privilege Order, but not all of those documents were compelled based on the court's finding of implied waiver of privilege Clary's reports (findings adopted in the 6/2/09 Order) concluded that a number of the documents identified on Appellants' privilege log were "not subject to any privilege claimed by Plaintiffs and shall be produced" (R 3337-3338, 3350, R 100-101) The court agreed with this finding with respect to 17 of those documents[36] (R 104 ("6/2/09 Order and the Special Master's reports incorporated therein are sustained in all respects, except for the following amendments thereto "), R 110-112) Appellants failed to raise any argument in opposition to these findings of "no privilege" in their motion to amend the 6/2/09 Order (R 3155-3157)

2 Appellants Refused to Comply with 7/28/09 Privilege Order

It is undisputed that, to this day, Appellants have refused to produce *any* of the 96 documents they were compelled to produce in the 7/28/09 Privilege Order (R App 26 15-22, R 3287-3289, 3291-3292, R 3265)[37] On 8/24/09, the court warned Appellants that it

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[36] The 17 documents compelled in both the 6/2/09 Order (adopting Clary's findings) and the 7/28/09 Order, which Clary and the court agreed were simply not attorney-client privileged communications, were identified in Clary's reports (R 3337-3338, 3350) and the 7/28/09 Order (R 110-112) as Nos 1, 5, 16, 33, 35-36, 50, 71, 84, 90, 96, 104-109 Examples of these non privileged documents include a third party communication to Appellant Davis (No 16), a letter from Davis to third party Ruff (No 36), a **2/15/99** letter from Davis to other limited partners (No 71), three letters between Davis and Arthur D Mercy (Nos 84, 90 and 96), three letters between Davis and third party Wildman, dated **10/30/98**, **2/9/99**, and **9/5/00**, respectively (Nos 105, 106, 109), and a **3/16/00** memo between Davis and Appellant Ivey (No 108)

[37] While Appellants' arguments focused on the court's ruling that they impliedly waived privilege as to most of the 96 documents, they have never produced any of the documents,

would not be able to proceed with the trial scheduled in the Parkview case for January 2010 if the compelled documents were not produced that it was taking the matter under advisement, and that it "very well could be that my order is, as drastic as it may be is that I will dismiss the action for failure to comply I'll give them x amount of days to comply with it to remedy that I'd rather not do that but I'm backed into a corner" (R App 30 10-17) The court instructed Appellants' counsel "to report to your clients that I'm taking this under advisement this afternoon with strong leans towards dismissing the action for them failing to comply" (R App 31 9-17, 34 22-36 4)

More than four months later, the court again warned Appellants that their continuing willful disobedience would result in entry of an order dismissing the five lawsuits as sanctions (R 1161 1-22) However, before issuing the order imposing the sanctions, the court encouraged Appellants to address any concerns they had with the *proposed* sanctions/dismissal order (R 1209 8-18), which Respondents submitted to the court and Appellants' counsel per the court's instructions Instead, Appellants filed motions under Rule 60(b), SCRCP, on 1/28/10, seeking amendment or vacation of the 7/28/09 Privilege Order [38]

Appellants' motions under Rule 60(b) SCRCP, did not apply to the Privilege Order, because the Order was not a final order or judgment and Appellants otherwise failed to show that they were entitled to relief under Rule 60(b), SCRCP (R 3583-3587) Appellants' Rule 60(b) motions were actually untimely motions for reconsideration of the Privilege Order, and were properly denied as such (R 144-145) See Grosshuesch v Clamer, 377 S C 12 659 S E 2d 112 122 (2008) (holding "discovery orders, in general, are interlocutory"), Ex Parte Missy Wilson In Re BB&T of S C v Pender, 367 S C 7, 625 S E 2d 205, 208 (2005),

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including the 17 that Clary and the court agreed were never subject to a claim of privilege

[38] Appellants complain that the court signed the order proposed by Respondents, but when the court asked them to address any perceived errors in the proposed order or to suggest any changes, Appellants provided none

Hamm v S C Public Service Commission, 312 S C 238, 439 S E 2d 852, 853 (1994) Rule 60(b), by its express terms, only applies to the review of final orders (or final judgments or proceedings) See Rule 60(b), SCRCP See also NationsBank of North Carolina, N A v Parsons, 324 S C 506, 477 S F 2d 735, 739 (Ct App 1996), Top Value Homes, Inc v Harden, 319 S C 302, 460 S E 2d 427, 429 (Ct App 1995), Thynes v Lloyd, 294 S C 152, 363 S E 2d 122, 123 (Ct App 1987) Motions for reconsideration of an interlocutory discovery order are properly construed as motions under Rule 59(e), SCRCP See Elam v S C Dept of Transportation, 361 S C 9, 602 S E 2d 772, 778 (2004) [39]

C 4/6/10 Sanctions Order

1 Respondents' Two Motions for Sanctions

The court's 4/6/10 Sanctions Order granted Respondents' two separate Motions for Sanctions (R 118-145) Respondents' first Motion for Sanctions, dated 7/24/09, concerned Appellants' failure to comply with the 3/3/09 Discovery Order (R 3239-3258) [40] Respondents' second Motion for Sanctions, dated 8/10/09, concerned Appellants' refusal to comply with the 7/28/09 Privilege Order (R 3259-3276, R 3277-3280, R 110-112) After three additional hearings and several "second chances" afforded to Appellants to comply with the Discovery Orders, the court entered the Sanctions Order, finding all Appellants in contempt of court and dismissing the five lawsuits as sanctions for their willful non-compliance, subject to Appellants' ability to purge the dismissals if they complied with the Discovery Orders within 25 days (R 118-119, 145), which they did not do

[39] The arguments raised in Appellants' Rule 60(b) motions were more fully addressed and rebutted in Respondents' 2/16/10 memorandum (R 3571-3583)

[40] Appellants argue that Respondents filed their first Motion for Sanctions due to the alleged weakness of their arguments supporting the Privilege Order The 7/24/09 Motion for Sanctions was filed before the 7/28/09 Privilege Order was even entered

2 Sanctions of Dismissal Were Both Necessary and Appropriate

a Sanctions Under Rule 37(b), SCRCP

As the court deliberated over the two Motions for Sanctions for seven and a half months (8/21/09 to 4/6/10), it repeatedly advised Appellants' attorneys that it wished to avoid dismissing the cases but it had no viable alternative if Appellants' non-compliance persisted Just prior to entry of the 4/6/10 Sanctions Order (amid Appellants' spurious claims that Judge Early had been biased against them), the court stated

> I don't like dismissing the lawsuit because somebody won't comply with an order I don't have any other choice when there was total noncompliance with the order I've sat on it, and this motion for disclosure and protective order you asked me not to sign the [sanctions/dismissal] order that I intend to sign until we can have this hearing today and I have honored that request, but, gentlemen, if I thought for one minute that my position as Judge was being compromised because of any relationship that I have with any of y'all I would step out in a second and I say that from the bottom of my heart (R 1224 11-25)

Appellants never complied with either of the Discovery Orders, and the court dismissed the cases in light of the clear and convincing evidence of their willful non-compliance (see *supra* parts III A 2 and III B 2) and the applicable law discussed below (R 119-133 (court's findings of fact), 133-144 (court's application of applicable law))

The sanctions imposed by the court dismissal of the five lawsuits and the award of Respondents' reasonable expenses (amount yet to be determined), are authorized by Rule 37(b)(2), SCRCP ("If a party fails to obey an order to provide or permit discovery," the court "may make such orders in regard to the failure as are just," including dismissing the action, holding the party in contempt of court and requiring the party to pay reasonable expenses, including attorney's fees, caused by the failure) See also McNair v Fairfield County, 379 S C 462, 465, 665 S E 2d 830, 832 (Ct App 2008) ("Under Rule 37(b)(2)(C), SCRCP, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action ")

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court' Karppi v Greenville Terrazzo Co , Inc , 327 S C 538, 489 S E 2d 679, 681 (Ct App 1997) Discovery sanctions will not be disturbed on appeal unless the trial court clearly abused its discretion See id , Halverson v Yawn, 328 S C 618, 493 S E 2d 883 (Ct App 1997) Generally, the "sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case **The sanction should be aimed at the specific misconduct of the party sanctioned** Furthermore, **whatever sanction is imposed should serve to protect the rights of discovery** provided by the Rules of Civil Procedure" Karppi 489 S E 2d at 682 (internal citations omitted) (emphasis added) In light of Appellants' misconduct and the extreme prejudice to Respondents, the **only** sanctions that could have achieved justice were the dismissal of Appellants' five lawsuits and the award of expenses incurred by Respondents as a direct result of Appellants' discovery abuses and non-compliance [41] These sanctions were justified in response to Appellants' failure to comply with the Discovery Order **or** the Privilege Order Appellants' failure to comply with both of the Orders deprived Respondents of their ability to defend against Appellants' claims, based on the statute of limitations and other defenses, including defenses to liability and damages

Appellants intentionally deprived Respondents of evidence that would have better enabled (if not guaranteed) Respondents to obtain judgment in their favor The record shows that much of the information wrongfully withheld was relevant to, and likely supported, Respondents' statute of limitations defense Appellants wrongfully withheld such evidence to avoid the entry of judgment against them, and so it was both reasonable and necessary that the sanction imposed equate to the very result they **wrongfully** sought to avoid No other

[41] The court awarded expenses in connection with Respondents' 11/6/08 Motion to Compel and the two Motions for Sanctions (R 73 (holding award of expenses related to Discovery Order in abeyance), R 143-145 (4/6/10 Sanctions Order))

sanction could have adequately addressed Appellants' specific misconduct and the resulting prejudice to Respondents

Alternative sanctions were either inadequate or would have also resulted in dismissal or judgment for Respondents [42] Rule 37(b)(2)(A), SCRCP, permits the court to order that designated facts be taken as established for the purposes of the action in accordance with Respondents' claims Under the circumstances, those facts would have had to include (1) that all Appellants knew or reasonably should have known, of the injury complained of in these cases as of some date in 1999 or, at the latest, by February 2000, by which time some or all of the Appellants had engaged their attorney in these cases (Bailey),[43] and (2) that Appellants' pursuit of their claims was not delayed by Respondents such that the statute of limitations was tolled for any period of time As a result, it would be inescapable that Appellants' claims accrued no later than February 2000 and, given that their claims are subject to a three-year statute of limitations and that the lawsuits were not filed until April 2003 (Parkview) and October 2005 (Palmetto, Pinewood, Orleans, Roosevelt), Respondents would be entitled to judgment as a matter of law in all cases [44] Sanctions under Rule 37(b)(2)(B), SCRCP, which permits the court to enter an order refusing to allow Appellants to support or oppose designated claims or defenses would also result in the same outcome

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[42] Appellants have never identified, in the lower court or to this Court, lesser sanctions that might have been appropriate

[43] Documents compelled in the Privilege Order, but wrongfully withheld by Appellants, included documents dated in or before 1999, which was when the purchasers defaulted on the notes, and communications between some or all of Appellants and Bailey in February 2000 (R 4887 (12/31/08 Privilege Log at Nos 12, 13 & 14, dated 2/16/00, 2/17/00 & 2/21/00, respectively, which were between Bailey and Davis and were described as involving "meeting with clients," and communications with "other limited partners" concerning "engaging counsel"), R 4888 (Nos 15 & 16, dated 2/24/00 & 2/25/00, respectively, which were between Bailey, Davis and Reynolds), R 4898 (No 71, dated 2/15/99), R 4904 (Nos 105 & 106, dated 10/30/98 & 2/9/99, respectively)) Non-privileged information available in such documents was also withheld in violation of the Discovery Order

[44] If the sanctions imposed were anything less than dismissal, other prejudice resulting from Appellants' non-compliance would also have to be addressed, including, *inter alia*, exclusion of critical expert witnesses as to liability (Higgins) and damages (Chambers, Keyserling, Henson), which would be fatal to Appellants' claims

(*i e*, Respondents would be entitled to judgment as a matter of law on the statute of limitations defense, and likely other defenses)

The sanction of dismissal also clearly served to protect the rights of discovery If Appellants are going to file lawsuits, engage in discovery and receive the benefits thereof (including documents produced by Respondents as required by the Privilege Order, despite Respondents' claims of privilege), but refuse to produce their discoverable information after being ordered to do so by the court, twice, then they should be deemed to have forfeited their right to pursue their claims in the courts

In accordance with South Carolina law, the court specifically considered the following factors in imposing the sanctions in these cases (1) the "precise nature of the discovery," (2) "the discovery posture of the case," (3) "willfulness," and (4) 'degree of prejudice " See Griffin Grading and Clearing, Inc v Tire Service Equipment Mfg Co , Inc , 334 S C 193, 551 S E 2d 716, 719 (Ct App 1999) (citing Laney v Hefley, 262 S C 54, 202 S E 2d 12 (1974)), see also Samples v Mitchell, 329 S C 105, 495 S E 2d 213, 216 (Ct App 1997) As to the nature of the discovery, Appellants' failure to comply with the Discovery Order concerned their failure to provide full and complete responses to discovery requests that were served on 8/28/08 [45] The discovery requests were not unusual and they sought critical information and documents that were relevant to both Appellants' claims and Respondents' defenses, including, *inter alia*, the statute of limitations defense, testifying experts' opinions (liability and damages), and other information as to Appellants' and their agents' prior opinions of value of the properties As for Appellants' failure to comply with the Privilege Order, the discovery was clearly directed at the statute of limitations defense and related issues, including, among other things, *Appellants claims for damages as a result of Respondents alleged interference with their investigation/pursuit of the claims in these*

[45] Actually, some of the information not produced dated back to Respondents' 11/17/04 discovery requests in the Parkview case (R 3561-3563 (Int 3, 10, 14))

lawsuits The materials wrongfully withheld go to the very essence of the claims and defenses in these cases

With regard to the discovery posture of these cases, at the time of dismissal the Parkview case was seven years old and the other four cases were more than four years old The cases were scheduled to go to trial, starting with the Parkview case, almost a year before the court entered the Sanctions Order, but had to be continued twice (R 75-76 (continuing May 2009 trial date), R 116-117 (continuing January 2010 trial date)) due to the subject discovery disputes and Appellants' refusal to comply with the Discovery Orders Given the consistency and longevity of Appellants' disobedience, dating back to entry of the 3/3/09 Discovery Order, and the amount of discovery that remained **if** Appellants ever chose to comply with the Discovery Orders, a viable trial date could not even be determined at the time the cases were dismissed The age of these cases, the fact that the cases involved events occurring between 1975 and 1999, and the delays caused by Appellants' non-compliance had, undoubtedly, already combined to deprive Respondents of relevant evidence

The evidence leaves no doubt as to the willfulness of Appellants' non-compliance, and the court properly considered this critical factor (R 133-134) Appellants should have started compiling the information and documents sought in the 8/28/08 discovery requests when they were served They repeatedly promised to provide the responsive materials (except for the 96 documents compelled by the Privilege Order), but repeatedly failed to do so Even the court's pleas and warnings of impending sanctions, including dismissal of the lawsuits, were not sufficient to coerce legitimate compliance with either of the Discovery Orders, despite the fact that the Motions for Sanctions had been pending for more than seven months when the court entered the Sanctions Order The evidence shows that Appellants' non-compliance was in bad faith, was in willful disobedience to the court's Discovery Orders, and was with gross indifference to Respondents' rights to discovery and to present

their full defenses (see *supra* parts III A 2 and III B 2), such that dismissal was warranted in these cases See Griffin 551 S F 2d at 719 (For sanction tantamount to judgment by default, the moving party must show 'bad faith, willful disobedience or gross indifference to its rights ")

The prejudice to Respondents as a result of Appellants' non-compliance was specifically addressed in the Sanctions Order (R 134-135) In addition, when a party is deprived of his rights to discovery, "**prejudice must be presumed** " Samples, 495 S E 2d at 217 (emphasis added) **The party refusing to submit to discovery must bear the burden of proving lack of prejudice** See id Appellants did not and could not prove a lack of prejudice to Respondents The sanctions were reasonable and necessary in order to counter the specific prejudice to Respondents, and under the circumstances the court would have erred had it not dismissed the cases or imposed sanctions that would lead to the same result "Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery " Id

The court considered and properly applied all of the applicable law cited above to the facts of these cases (R 138-143), and it did not abuse its discretion The South Carolina appellate courts have affirmed identical sanctions where a party has willfully disobeyed discovery orders as Appellants did here See Barnette v Adams Bros Logging, Inc , 355 S C 588, 593-95, 586 S E 2d 572, 575-76 (2003) ("Given [plaintiff's] persistent refusal to comply with the trial court's orders, we find the court acted within its discretion in dismissing her action "), McNair, 665 S E 2d at 832-33 (affirming dismissal with prejudice where the record revealed persistent disobedience of a discovery order very similar to Appellants' misconduct in these cases), Halverson, 493 S E 2d at 884-85, see also Griffin, 551 S E 2d at 717-19 (affirming order striking defendant's answer for failure to comply with

discovery orders) [46]

b. The Law of Civil Contempt

The court declared all Appellants to be in contempt of court as a result of their refusal to comply with the Discovery Orders, and sought to coerce Appellants' compliance by dismissing the cases *subject to Appellants' ability to purge the dismissals* if they complied with the Discovery Orders within 25 days (R. 119, 133-138, 145). The South Carolina Court of Appeals summarized the law applicable to civil contempt in Ex Parte: David G. Cannon, In Re: The Estate of James Brown, 385 S.C. 643, 660-62, 685 S.E.2d 814, 824 (Ct. App. 2009). In accordance with the applicable law, the court found that there was clear and convincing evidence in the record that Appellants willfully, voluntarily and intentionally disobeyed the Discovery Orders, Respondents made a *prima facie* case for contempt, and Appellants did not carry their burden of establishing any defense or their inability to comply with the Discovery Orders (R. 134-137). See id. There is no doubt that Appellants disagreed with the Discovery Orders and did not *want* to comply with the orders, but there was no evidence that they were *unable* to comply.

The court appropriately sought to coerce Appellants' compliance with the Discovery Orders, imposing sanctions but providing them with an *opportunity to purge the dismissal* of

[46] Appellants misrepresent the holding in Griffin, 551 S.E.2d 716, which *affirmed* (not reversed) the lower court's sanction of striking defendant's answer for its "willful disobedience of previous orders." Id. at 719 ("If there was ever a case where striking a party's pleading was an appropriate sanction, it is this case where the record is full of multiple, egregious discovery abuses that blocked the opposing party's attempts to conduct meaningful discovery."). The other cases cited by Appellants are not controlling as to the cases at bar. See e.g. Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990) (reversal of a discovery sanction as unduly harsh where discovery responses were mailed in time, but not delivered by the postal service until a few hours after a noon deadline), Karppi, 489 S.E.2d at 683 (reversing the lower court's sanction, in part, because it was overly broad in that it created a windfall for a co-defendant whose discovery rights were not at issue), Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) (based on the lower court's use of an improper standard when considering a claim of privilege under the Fifth Amendment's protection against self-incrimination, not the harshness of a discovery sanction).

the lawsuits "'The purpose of civil contempt is to coerce the [party] to do the thing required by the order for the benefit of the complainant'. When sanctions are conditioned on compliance with the court's order, the contempt is civil in nature" Id. After the court informed Appellants of its intent to dismiss the cases, Appellants argued that the court should merely find them in contempt, without more. The finding of contempt would not have been an appropriate sanction in and of itself. Rather, the finding of contempt was a precursor to sanctions designed to coerce compliance with the Discovery Orders, which is the very purpose of a civil contempt order. Id. A finding of contempt, without more, would have no more effect than the terms of the Discovery Orders themselves, which already directed Appellants to comply.[47] Appellants could have simply continued their non-compliance, resulting in further delay to the cases which were already delayed by their non-compliance for far too long. A simple finding of contempt without the corresponding *appropriate* sanction to coerce compliance, would be an incomplete and meaningless exercise of the court's powers to compel compliance with its orders. All courts have the power to impose sanctions for contempt, and that power is "'essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice'" Id. (citation omitted). The court's contempt power is not intended to be exercised as a mere circuitous route for parties to avoid the rule that discovery orders are interlocutory and not subject to immediate appeal.

The court noted that its contempt powers also applied to Appellants' persistent disobedience as it undermined the court's administration of justice in these cases. (R. 135-136). Id. (authorizing use of contempt power "to preserve the authority and dignity of the courts"). Finally, the court determined that an award of expenses to Respondents was appropriate under both Rule 37, SCRCP, and the law applicable to civil contempt. (R. 143-

[47] Months of warning of the impending dismissal sanctions were not enough to bring Appellants into compliance with either of the Discovery Orders.

144) Id at 827 ("Courts, by exercising their contempt power, can award attorneys' fees under a compensatory contempt theory")

The Sanctions Order clearly shows that the court examined all of the relevant evidence presented to it, properly applied the law governing civil contempt and sanctions, and entered the coercive sanctions (dismissal, subject to purge) and compensatory award (Respondents' expenses) as a result of Appellants' willful disobedience of the Discovery Orders (R 119 133-138, 143-145)

3 9/16/10 Order Denying Appellants' Motion for Reconsideration

On 4/22/10, Appellants filed a Motion for Reconsideration of the Sanctions Order pursuant to Rule 59(e), SCRCP, and the lower court denied the motion on 9/16/10 (R 146-147) A substantial portion of Appellants' Rule 59(e) motion was devoted, *not* to the Sanctions Order, but to repetitive and untimely attacks on the Discovery Orders **Appellants also attempted to utilize their Rule 59(e) motion to improperly introduce purported "evidence" that was available to Appellants, but not filed of record or presented to the court, prior to entry of the 4/6/10 Sanctions Order [48] As a matter of black letter law, the court could not consider such materials or issues in conjunction with Appellants' Rule 59(e) motion** Such materials **cannot be considered on appeal, either** See Spreeuw v Barker, 385 S C 45, 68-69, 682 S E 2d 843, 855 (Ct App 2009) ("Father's Form 2106-EZ appears only as an attachment to his Rule 59(e) motion Accordingly, it cannot be considered on appeal See Hickman v Hickman, 301 S C 455, 456, 392 S E 2d 481, 482 (Ct App 1990) ('A party cannot use Rule 59(e) to present to the court an issue the party

[48] The materials that were not provided to the court prior to the 4/6/10 Sanctions Order included the following affidavits filed by Appellants in connection with their motion for recusal or their 4/22/10 motion for reconsideration of the Sanctions Order Davis Aff (4/7/10) (R 3721-3744), Bailey Aff (4/7/10) (R 3706-3720), Rentz Aff (4/9/10) (R 3766-3770), Pike Aff (4/9/10) (R 3760-3765), Hodge Aff (4/8/10) (R 3745-3759), Reynolds Aff (4/15/10) (R 3792-3798), Hinnant Aff (4/13/10) (R 3771-3786), Ivey Aff (4/15/10) (R 3787-3791), Pendarvis Aff (4/22/10) (R 3882-5800)

could have raised prior to judgment but did not ') ") See also Brailsford v Brailsford, 380 S C 443, 669 S E 2d 342, 345 (Ct App 2008), Boryan v United States, 884 F 2d 767, 771 (4th Cir 1989), Pacific Insurance Co v American Nat'l Fire Insurance Co , 148 F 3d 396, 403 (4th Cir 1998)

In light of the above, this Court should not consider the numerous affidavits of the Appellants and their attorneys, which Appellants filed *after* the 4/6/10 Sanctions Order,[49] with the lone exception being *some* of the documents attached as *exhibits* to the 4/22/10 Pendarvis Affidavits (such documents were previously submitted to the court) Respondents' 6/7/10 memorandum (R App 58-62) identifies the portions of the 4/22/10 Pendarvis Affidavits and the exhibits thereto that should *not* be considered by this Court **This issue is noteworthy**, because Appellants' briefs in these appeals frequently cite the unsubstantiated and misleading arguments and opinions stated in their post-4/6/10 affidavits as if they were evidence of *fact* The cited materials are not evidence of fact, and for the reasons set forth above, they should not be considered by this Court in conjunction with the appeal of the Sanctions Order, any preceding order, or the 9/16/10 Order (denying Appellants' 4/22/10 motion for reconsideration), as a matter of law [50]

IV NO ABUSE OF DISCRETION IN OTHER DISCOVERY ORDERS APPEALED (Re Issue 3 and Appealed Orders dated 8/18/08, 12/17/08, 3/3/09 (App Mot), 6/2/09, 10/22/10, 12/11/10)

A Appeal of Certain Orders and Issues Abandoned by Appellants

In their briefs to the Court, Appellants generally allege error in the Orders dated 8/18/08, 3/7/06 (Supreme Court), 12/17/08, 3/3/09 (App Mot), 6/16/09, 9/16/10, 10/22/10,

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[49] The materials were, for the most part, unsubstantiated and misleading argument and opinion that Appellants and their attorneys submitted in the *form* of affidavits (R App 56-62, see also R 5873-5876 (¶¶ 2-3), 5879-6156, R 5802-5804 (¶¶ 2-3), 5805-5832)

[50] Respondents further opposed Appellants' Rule 59(e) motion by rebutting each of the grounds for amendment alleged by Appellants (R App 48-56, 62-172, R 5873-5877 (¶¶ 3(n), (x), (y), (dd), 4), R 5971, 6000-6001, 6058-6059, 6075-6078, 6107-6111, 6125-6136, 6138-6146)

and 12/11/10 However they failed to cite evidence of record and authority to support such allegations, relying entirely on vague and conclusory arguments, opinion and conjecture, or omitting argument altogether [51] It is well settled in South Carolina that, where an issue is treated in a conclusory manner and without citation to authority in an appellate brief, the issue is deemed abandoned See First Sav Bank v McLean, 314 S C 361, 363, 444 S E 2d 513, 514 (1994) ("Appellant fail[ed] to provide arguments or supporting authority for his assertion Thus, he is deemed to abandon [the] issue Mere allegations of error are not sufficient to demonstrate an abuse of discretion " (citations omitted)), see also R & G Constr , Inc v Lowcountry Reg'l Transp Auth , 343 S C 424, 437, 540 S E 2d 113, 120 (Ct App 2000) (issue abandoned where appellate brief cited no authority and merely made a conclusory argument supporting its position) As a result, Appellants' appeals as to these orders should be deemed abandoned as a matter of law

Appellants also failed to identify any issue with regard to the Orders dated 3/7/06 (Supreme Court), 8/18/08, 12/17/08, 3/3/09 (Discovery Order), 3/3/09 (App Mot), 6/2/09, 6/16/09, 9/16/10, 10/22/10, and 12/11/10 in their respective Statements of Issues on Appeal For this additional reason, Appellants have abandoned any issues with respect to these orders See Rule 208(b)(1)(B), SCACR

In an abundance of caution, and without waiving the above arguments as to Appellants' abandonment of their appeals of certain orders and issues, Respondents oppose Appellants' general conclusory arguments by briefly showing the Court that the additional

[51] The treatment given the subject Orders varies as follows 8/18/08 (no citation of authority supporting Appellants' motion, which was denied), 3/7/06 (nothing as to error by Supreme Court, which issued the Order), 12/17/08 (mere passing reference to Appellants' memoranda in lower court), 3/3/09 (App Mot) (mere passing reference), 6/16/09 (no discussion), 9/16/10 (no discussion), 10/22/10 (mere passing reference), 12/11/10 (no discussion)

orders appealed were supported by the evidence presented to the court and the applicable law [52]

B Two Orders Denying Appellants' Motion to Compel the Production of Respondents' Privileged Documents

1 Two Attempts to Compel Respondents' Privileged Documents

Appellants filed what became known as their Motion to Compel #2 on 11/7/07, seeking to compel the production of privileged documents created within the attorney-client relationship between the Limited Partnerships' general partners (Respondents) and their attorneys Appellants also sought to prevent Respondents from objecting, based on the attorney-client privilege, to unspecified questions that would be posed to their attorneys in future depositions of those attorneys [53] The court announced its ruling denying the motion on 7/1/08 (R 1011 3-6, 1025 5-9), but did not sign the written order until 12/17/08 (R 1017 1-18, R 42-43) **However**, after entering the 12/17/08 Order, the court gave Appellants a second bite at the apple, rendering the 12/17/08 Order of little practical effect This culminated in the 7/28/09 Privilege Order [54]

The scope of Respondents' privileged documents at issue, the evidence presented, and the arguments made differ somewhat between the first time the court considered Appellants' motion (*i e* , 12/17/08 Order) and the second time it considered the motion (*i e* ,

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[52] Respondents' showing that the subject orders were supported by the evidence and the applicable law is also made as further evidence that Judge Early did not abuse his discretion in denying Appellants' motion for recusal (Order 10/7/10 (R 148-153)) See *infra* at 68-76

[53] The lower court denied the motion with respect to the *future* depositions of Respondents' former attorneys because it was not ripe (R 43, R 2881-2885) The denial was reaffirmed by the court's 6/2/09 Order adopting Clary's findings (R 100-101, R 3347)

[54] The court compelled Respondents to produce 29 of their privileged documents to Appellants (R 110, 112-113), and Respondents promptly complied The court otherwise denied Appellants' motion to compel (R 100-101, R 3342-3345, 3351, R 104-106, 109-110)

7/28/09 Privilege Order) Nevertheless, the same basic issues were presented each time, and so they are discussed together, with significant differences noted [55]

2 Appellants' Argument Based on the Fiduciary Exception to the Attorney-Client Privilege

Appellants' principal argument was that Respondents' privileged documents should be produced under the fiduciary exception to the attorney-client privilege, relying on Garner v Wolfinbarger, 430 F 2d 1093 (5th Cir 1970) This appears to be an issue of first impression in South Carolina appellate courts Appellants argued that, as a result of the general partners' fiduciary duties to the limited partners the general partners are obligated to share all partnership information, including communications between the general partners and their attorneys concerning the affairs of the Limited Partnerships, despite the otherwise available attorney-client privilege To the extent this Court would recognize a fiduciary exception to the attorney-client privilege, the analysis applied in Garner and its progeny is the approach taken by the majority of courts and it should be applied here See also Fortson v Winstead, McGuire, Sechrest & Minick, 961 F 2d 469, 475 n 5 (4th Cir 1992) (following Garner), Ferguson v Lurie, 139 F R D 362, 365 (N D Ill 1991) (Garner 'appears to be the leading authority with respect to this doctrine'), Metropolitan Bank and Trust Co v Dovenmuehle Mortgage, Inc , 2001 Del Ch LEXIS 153 (Ct of Chancery of Del December 20, 2001) (the fiduciary exception to attorney-client privilege is generally traced back to Garner), In Re ML-Lee Acquisition Fund II, LP, 848 F Supp 527, 564 (D Del 1994) (citing and following Garner) **However**, in light of the evidence, the Garner analysis

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[55] *Appellants narrowed the scope of their 11/7/07 motion to compel* to the first three documents and the "GWB" (Gallivan White & Boyd) documents identified on the 11/15/07 Privilege Log (R 826 2-20, R 2430-2431, 2484-2496, see also R 4202-4273 (12/5/07 Priv Log)) Appellants' *second opportunity* to argue for the production of Respondents' privileged documents resulted in the 7/28/09 Privilege Order In these proceedings, Appellants sought the GWB documents, Bryan Cave documents (obtained and identified by Respondents' counsel after the initial arguments on Appellants' motion to compel), and several others (R 5139-5140, 5193-5222 (1/26/09 Priv Log)) Appellants acknowledged that all of the documents were attorney-client privileged (R 815 19-25, R 3338)

dictates that Respondents' privileged documents **are not subject to disclosure under the fiduciary exception**, because some of the Appellants threatened to sue and/or remove the general partners and, therefore, the requisite **mutuality of interest** between them ceased to exist, *before* the privileged documents were created

In Garner, the court recognized the competing interests of corporate management's need to manage, including the ability to seek legal counsel without the risk of having the communications revealed at the instance of one or more dissatisfied stockholders, and the stockholders right to know whether the corporation is being adequately managed See Garner, 430 F 2d at 1101 The court struck a balance between the competing interests of corporate management (here, the general partners) and the corporation's shareholders (here, the limited partners), holding that, **where there is mutuality of interest**, stockholders may, upon a showing of "good cause," obtain information that would otherwise be protected from disclosure by the attorney-client privilege Id See also Fortson, 961 F 2d at 475 n 5 (Fourth Circuit, citing Garner, agreed that general partners may assert attorney-client privilege against limited partners), Ferguson, 139 F R D at 366 (applying Garner and recognizing substantial difference in potential liability of general partners, who can be held jointly and severally liable for partnership actions, and limited partners, who enjoy limited liability), S C Code Ann § 33-42-630 (2006) (liability of general partner), S C Code Ann § 33-42-430 (2006) (limited liability of limited partner), S C Code Ann § 33-42-450 (2006) (limited partner is entitled to "information regarding the affairs of the limited partnership as is *just and reasonable*" (emphasis added))

Under the Garner analysis, **the limited partners must "first establish that a mutuality of interest existed between the parties** " The Continental Ins Co v Rutledge & Co , Inc , 1999 Del Ch LEXIS 12, at 6 (Ct of Chancery of Delaware 1/26/99) (emphasis added) Only then should a court examine the limited partners' showing of good cause "If

such a showing is made, and an exception to the attorney-client privilege will not yield an inequitable result, the fiduciary duty exception applies." Id.

In Continental, the court determined that, as of a specific date, a dispute arose between the limited partners and the general partner, as evidenced by the limited partners' indication that they intended to withdraw from the limited partnership. At that point, the parties no longer shared the requisite mutuality of interest. The court explained:

> [N]otwithstanding the fact that the general partner may have continued to owe duties to the limited partners and the Partnership, the general partner's subjective interests, the Partnership's interests, and the subjective interests of the limited partners diverged. [S]ince that mutuality of interest was obviously lacking at a point where an attempt to withdraw was understood by all, any communications between the general partner, the Partnership, and their counsel at that point are not an appropriate subject of the fiduciary duty exception.

Id. at 10-11.

In Metropolitan Bank and Trust, the court found that the requisite mutuality of interest ceased to exist once the general partner and the limited partners could reasonably anticipate litigation between them:

> In order for the Plaintiffs to take advantage of the fiduciary duty exception, the documents which they seek must have been created while there was a mutuality of interest with the general partner. Because the exception is premised upon common purpose and common interest, once those purposes and interests diverge, the exception no longer applies. I am satisfied that the "mutuality of interest" will have lapsed by the time that the general partner and the limited partners can reasonably anticipate litigation about an identified dispute. Once litigation can reasonably be anticipated, the interests of the parties are sufficiently adverse that the general partner should be able to communicate with the partnership's counsel about the matters likely to be litigated without fear that the fiduciary duty exception might be invoked to deny continuing confidentiality to those communications.

Metropolitan Bank and Trust, 2001 Del. Ch. LEXIS 153, at 9-10.

Here, the evidence shows that the requisite mutuality of interest ceased to exist *before* Respondents' privileged documents were created.

- Appellant M. M. Weinberg, Jr., an attorney and a limited partner in Roosevelt, **threatened to sue the individual and corporate general partners on 12/9/99 and**

2/22/00, respectively On 12/9/99, Weinberg wrote to Tuck, a general partner, stating

> I have an outstanding Note that I should be able to collect for a serious amount of money I have relied on you people getting in this deal and allowing you all to handle it throughout However, I don't believe I am justified in any further reliance upon you if I can't hear from you If I don't hear from you, **I am going to sue somebody, and it will probably include you in the pot** (R 3199 (emphasis added))

- On 2/22/00, Weinberg wrote to Pat Foye of AIMCO, stating that (1) he is writing on behalf of himself and Daniel Trotter, both limited partners in Roosevelt, (2) the balloon note held by Roosevelt was payable in February 1999, and (3) "**It is our intention to collect our share of this Note, and we would like to hear from you as to your position in the matter before suit is filed I would appreciate any information you could give me, in order that litigation will not be necessary**" (R 3200-3201 (emphasis added))

- See also Respondents' **SEALED** *In Camera* Memo (R SEALED App 2-3, 6-11),[56] for additional **confidential and privileged documents** that show how the general partners and their attorneys perceived Weinberg's threats of litigation, and that the parties' mutuality of interest ceased no later than the date that Weinberg threatened to sue the general partners [57]

- The only documents at issue in Appellants' motion to compel (first or second time), which were created *prior* to the **12/9/99** threat of litigation, are the documents identified in the 7/28/09 Privilege Order as GWB Nos 70-71 and Bryan Cave Nos 39 and 41-57 (R 112-113), which Respondents produced to Appellants following entry of the Order

- Weinberg's threats to sue the general partners were made and received in the context of the following communications, which alerted all parties to the fact that the limited partners and the general partners did not agree on which course of action was in the best interests of the Limited Partnerships On 10/25/99, limited partner Davis had written to Tuck, stating

> Early this year I realized that we had interest in several partnerships that had notes which should be maturing I found notes suggesting maturity dates as early as March of this year, and **I began locating partners in the seven partnerships remaining** [including the Limited Partnerships in these cases] As you know three partnerships accepted a **token payment** [from the BFG entities] for their notes in 1997 or 1998 **The partners or agents that I have spoken with feel they have been neglected** and have not received reports and projections from management or the general partners that

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[56] Respondents' *In Camera* Memo, dated 7/2/09, was **filed under seal** with this Court, as a Sealed Appendix to the Record on Appeal, pursuant to this Court's 10/5/11 Order

[57] See also (R 3176-3191, 3199-3213 (discussing more fully the arguments and evidence that the fiduciary exception did not apply to privileged documents that were created on or after 12/9/99), R 2540-2551)

represent us In some cases I am satisfied that the land is more valuable than the notes in question **We all prefer that the note be paid as issued, however, we will consider accepting the real property if necessary** (R 3202-3203 (letter copied to "Partners" and regarding "Past Due Payments to Partnerships') (emphasis added))

- In response, Tuck wrote on 10/28/99

  Your comment in the first paragraph that the partnerships accepted a token payment on certain of the properties, quite frankly, surprises me I do not remember what the percentage of the collections of the gross receivables were, but it was certainly not token These properties are obviously still limited as to the amount of any distributions or rents unless you are able to take them out from under HUD, which once again, limits their value (R 3204)

- On 1/18/00, Tuck sent another letter to Davis, stating that both Lend Lease (BFG's successor) and the general partners had concluded that the properties had no value above the amounts due on the HUD mortgages "[T]here was no value to the partnership and the second mortgages [the Limited Partnerships' notes]" Tuck further advised that the general partners declined Lend Lease's offer to return the properties to the Limited Partnerships, and Lend Lease then "sold all of the properties for the mortgage and $1 00 to Hediger Enterprises" in October 1999 (R 3205-3206) Thus, Respondents advised the limited partners of their opinion that it would not be in the best interests of the Limited Partnerships to take the properties back [58]

- Prior to a 9/14/00 meeting called by the limited partners, Appellants' attorney (Bailey) sent Respondents a "Notice of Special Meeting," which advised that the purpose of the meeting would be "to consider and act upon "

  Propriety of actions/conduct of General Partners *et al vis-a-vis* Limited Partners, including, *inter alia*, action/inaction of General Partners regarding partnership assets,

  Actions to be taken regarding actions/conduct of General Partners, including, *inter alia*, **removal/replacement of General Partners** and/or successors per the Limited Partnership agreement(s) and/or applicable law (R 2541-2542, 2550-2551 (emphasis added))

It is clear that by late 1999, the limited partners and the general partners had expressed their fundamental disagreement with one another as to what was in the Limited Partnerships' best interests This fundamental disagreement, whether the general partners' decision not to take the troubled properties back was based on their business judgment or

[58] These exchanges took place **after** the general partners had been warning of non-payment for years The warnings sounded by the general partners began in 1987 and continued through 1998 (R 3207-3213)

constituted breach of their fiduciary duties, is at the very heart of these lawsuits The divergence of interests between the general partners and the limited partners clearly escalated when Weinberg expressly threatened to sue the general partners in December 1999 and February 2000, and that divergence of interests never abated [59]

In analyzing the mutuality of interest issue, the Continental court deemed it proper to look first and foremost at the general partner's perspective (*i e*, when the general partner reasonably perceived that its interests diverged from the interests of the limited partners) See Continental, 1999 Del Ch LEXIS 12 at 11, n 16 This is entirely consistent with the purpose of the attorney-client privilege, which "is to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice '" Id at 3 (citing and quoting Upjohn Co v United States, 449 U S 383 (1981)) The general partner's perception of whether he has a reasonable expectation of confidentiality, even to the exclusion of his limited partners, is the central question

There is no doubt that Respondents reasonably anticipated litigation with the limited partners after they received Weinberg's threatening letters In Continental, the court made it clear that **the requisite mutuality of interest may cease to exist long before the parties, or**

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[59] In response to Appellants' argument that the 9/14/00 "Special Meeting" called by the limited partners' attorney (R 2550-2551) was a "Kumbaya" moment between the general partners and the limited partners (R 1047 2-4), Respondents provided the lower court with *additional* evidence that emphatically showed that was not the case (R 6006-6009, 6017-6057) The additional evidence included Appellants' attorney's April 2000 FOIA requests to HUD and the SEC, requesting documents relating to, among other things, complaints against or investigations of the Respondents (R 6017-6022) a *lis pendens* filed by Appellants' attorney on behalf of the limited partners with respect to the Parkview property on 7/14/00 (R 6042) BFC's attorney's notes pertaining to an **8/9/00** phone call he had with Appellants' attorney, **in which Bailey stated that he represented the limited partners, he was in the process of bringing action against the general partners, to include claims for mismanagement, failure to collect the outstanding debt on the 1999 notes, and fraud against general partner Tuck, and that he had filed *lis pendens* on the properties in Charleston, Allendale, Orangeburg and Beaufort Counties** (R 6046-6047), and Appellants' attorney's August and September 2000 letters to USC Professor Greg Adams, retaining him as an expert witness for the limited partners (R 6052-6056)

any one of them, resigns themselves to litigation such that they are anticipating litigation within the meaning of the work product doctrine "[T]he work product doctrine should be seen as much more limited in its effect than the mutuality of interest requirement, the lack of a mutuality of interest may preclude production of counsel s advice, legal memoranda, or other documents long before the work product doctrine is ever effective" Continental at 16-17 "'[T]he mutuality of interest that is the rationale behind the fiduciary exception expires [at the latest] upon anticipation of litigation '" Id at 5 (citation omitted)

In Metropolitan, the court relied on significantly less evidence than was presented in the instant cases in finding that, once the general partner and the limited partners could reasonably anticipate litigation between them, there was no longer the requisite mutuality of interest for the fiduciary exception to apply The only evidence cited by the court was that Regency (a limited partner) refused to participate in a subordinated debt transaction proposed by the general partner, Regency apparently indicated to the general partner that it believed the proposed transaction would be a violation of the partnership agreement, and the general partner perceived "the potential that Regency might commence litigation" Metropolitan, 2001 Del Ch LEXIS 153 at 3-4

Under the circumstances, the divergence of interest between the general partners and one or more of the limited partners (Weinberg, Trotter, Davis) necessarily rendered the fiduciary exception to privilege unavailable to all of the limited partners This was demonstrated in Metropolitan, where certain privileged documents were created after the general partner anticipated litigation with Regency, but before the general partner's relationship with another limited partner (Metropolitan) deteriorated to the point where, viewed independently, it would be denied the benefit of the fiduciary exception The court denied Metropolitan's motion to compel, as well, holding

> I see no practical method that would allow for preservation of the attorney-client privilege in this action as to Regency but, at the same time, allow

> Metropolitan, assuming that it could demonstrate good cause, to have access to the documents **I conclude that, in these circumstances, the privilege must prevail not only as to Regency, but also as to Metropolitan** **Both Regency and Metropolitan seek the same documents to assert the same claims through the same counsel** **The purpose of the 'mutuality of interest' requirement is to allow the general partner to communicate with the partnership's counsel without fear of disclosure to the limited partners** The general partner, when it reasonably anticipates litigation with a limited partner, should not have to factor in the possibility that a limited partner with whom it is not yet at loggerheads may, in time, join the fray on the side of the already disaffected limited partner **At issue here is the question of how [the general partner] perceived the circumstances surrounding any specific communication with counsel**

Id at 12-13 (emphasis added) In the instant cases, it was undisputed that all of the **Appellants/limited partners sought the same documents to assert the same claims through the same counsel** The only possible result is that the fiduciary exception is not available to any of the limited partners with respect to documents created after Weinberg threatened to sue the general partners [60]

3 No Evidence to Support Other Grounds Argued by Appellants

a Arguments Abandoned by Appellants in Lower Court

Appellants also made each of the following additional arguments for the production of Respondents' privileged documents, **but only** in the arguments preceding the 12/17/08 Order, which rejected each of Appellants' arguments Appellants abandoned the following arguments in the lower court by not including them in their subsequent written and oral arguments to the court (R 3155-3156, R 3168-3173)

b Appellants' Claims of Express or Implied Waiver

Prior to entry of the 12/17/08 Order, Appellants argued that Respondents expressly or impliedly waived their claim of privilege by informing them and their attorneys of the fact

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[60] Appellants also failed to show the requisite "good cause," which includes showing their particularized need for the production of each of Respondents' privileged documents (R 3189-3191) Respondents are unaware of any evidence presented to the court, which would support a finding that Appellants had "good cause" to exercise the fiduciary exception to Respondents' attorney-client privilege under the Garner analysis

that Respondents retained counsel (Art Howson of GWB and the Bryan Cave law firm) for the purposes of pursuing collection on the notes, communicating with the defaulting purchasers, and otherwise determining the remedies available to the Limited Partnerships [61] However, the fact that Respondents sought and obtained legal representation and the purpose of that representation are not privileged, and divulging such non-privileged information does not result in a waiver of privilege See *supra* at 16-17

Appellants also argued that Respondents waived the privilege by providing Appellants copies of letters between the general partners' attorneys and third parties The letters were **non-privileged** communications that did not divulge Respondents' confidential, attorney-client privileged communications (R 2502-2525) [62]

Appellants also argued that Respondents waived their claim of privilege because some of their attorneys' documents, dated prior to the filing of these lawsuits, were not identified on the initial privilege logs (R 830 25-831 10, R 2528 (explaining delay in obtaining/identifying GWB documents)) However, **Appellants formally abandoned this argument, stipulating**

> To the extent Plaintiffs and/or Defendants have previously pursued claims or arguments that the opposing party or parties have waived attorney-client privilege or work product protection for documents identified on their respective privilege logs based on when such documents were first identified on the parties' privilege logs, such claims and arguments are hereby forever abandoned (R 5223-5224)

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[61] To be clear, Respondents have never asserted the defense of reliance upon advice of counsel in these lawsuits, and Respondents' counsel has so stated on the record (R 1021 2-6)

[62] In two of these letters, Bailey references Appellants' intent to sue the Respondents, more than four and a half years **before** four of these suits were filed In his 2/16/01 letter, Bailey states, "I feel **it is incumbent upon AIMCO and Mr Tuck to compensate the limited partners for their losses My clients** are willing to discuss a reasonable settlement, but **are firm in their commitment to litigate**, if necessary" (R 2521 (emphasis added)) In his 5/29/01 letter, Bailey states, "I indicated to you that **we are considering litigation against our general partners** " (R 2525 (emphasis added))

c No Evidence for Crime, Fraud or Tort Exception

Prior to entry of the 12/17/08 Order, Appellants also claimed that the crime/fraud/tort exception required production of Respondents' privileged documents The crime/fraud/tort exception applies only where communications are made between attorney and client *before* the fact of or *during* the commission of a crime, fraud or tort See Duplan Corp v Deering Milliken, Inc , 397 F Supp 1146, 1172 (D S C 1974) Attorney-client communications made *after* the fact of the commission of a crime, fraud or tort are protected by the attorney-client privilege See id (requiring prima facie showing "that the lawyer's advice was designed to serve his client in the furtherance of its wrongful conduct ") Appellants offered no evidence in support of their claim that the crime/fraud/tort exception applied to *any* of Respondents' privileged documents Rather, their arguments consisted entirely of speculation, conjecture and unsubstantiated conspiracy theories (R 820 4-17, 835 14-25) See e g *infra* at 76-78

d Limited Partners Not Within the Attorney-Client Relationship

Appellants further argued that the attorney-client relationship between the general partners and their attorneys extended to them as limited partners of the Limited Partnerships It does not appear that this precise issue has been addressed by the South Carolina appellate courts However, a Virginia court's analysis of this issue is both compelling and consistent with South Carolina law See Smathers v GBA Associates Limited Partnership, 55 Va Cir 73, 2001 Va Cir LEXIS 63 (Cir Ct of Fairfax County, VA 03/14/01) (Opinion Letter) (holding that "a limited partner is not a client of an attorney hired by the limited partnership ") A partnership is a "singular legal entity," separate and apart from its limited partners, and the attorney-client relationship is contractual in nature Thus, when a partnership retains an attorney, the partnership is the client and the "attorney for a partnership or general partner does not thereby undertake representation of limited partners " Id at 55

Va Cir 75 (citations omitted) The Virginia court concluded

> An attorney is hired to advocate on behalf of its client Thus, an attorney for a limited partnership advocates on behalf of that client There are times when the limited partnership has opposing interests to its limited partners The limited partnership must be able to rely on its attorney to advocate on its behalf and represent its interests alone Only if there has been an express or implied agreement to the contrary would the limited partnership's expectation be different

Id at 76 This is consistent with South Carolina law governing partnerships and limited partnerships "[T]hrough a series of legislative enactments and judicial decisions, the partnership has become 'a legal entity separate and distinct from the persons who compose it'" Marvil Properties v Fripp Island Development Corp , 273 S C 619, 621 258 S E 2d 106, 107 (1979) (dissent) (citing and quoting Chitwood v McMillan, 189 S C 262, 1 S E 2d 162 (1939)) [63]

C 6/2/09 Order Adopting Clary's Findings and Conclusions

The *in camera* review of the parties' respective documents and Clary's reports to the court, the 6/2/09 Order adopting the findings/conclusions in Clary's reports, and the parties' respective motions to amend the 6/2/09 Order were all the direct result of unanimous collaboration and voluntary agreement between and among Judge Early, Appellants' counsel, and Respondents' counsel [64] Appellants only complained of the process and the court's

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[63] The following evidence makes it clear that the attorneys considered the general partners and the Limited Partnerships to be their clients, but not the limited partners In letters to Bailey and the defaulting purchasers, the attorneys stated, "This firm [GWB] represents AmReal Corporation (an AIMCO company) as the general partner of the former selling limited partnerships or "As you know, this firm [Bryan Cave] represents AIMCO " (R 2505, 2507, 2509, 2514) Even Bailey acknowledged whom these attorneys represented, in his 2/16/01 letter to Tomilson of Bryan Cave, referring to "your recent letters to Lend Lease on behalf of AIMCO" and "Arthur Howson, Jr , attorney for AIMCO" (R 2520-2521)

[64] The court and the parties agreed to have Clary review the parties' documents *in camera* and report his findings to the court (R 1016 17-20, 1017 19-24, 1020 22-24, 1022 3-5, 1023 8-23, R 44-46, R 47-48 (Consent Order clarifying that Clary was *not* to issue an order of any type, but was merely "**to provide this Court with a Report** setting forth his findings and conclusions " (emphasis added)), R 78, R 3331-3348, 3349-3351 (Clary's reports to the court, which were never filed with any Clerk of Court)) After consulting with the parties'

related orders *after* they learned that the court was going to rule in Respondents' favor on several key issues addressed in the 7/28/09 Privilege Order

Both of the parties timely filed motions to amend the 6/2/09 Order, pursuant to Rule 59(e), SCRCP (R 3155-3157, R 3158-3165, R 3167-3174, R 3175-3198) [65] The court heard lengthy oral arguments from the parties' counsel concerning their respective motions to amend the 6/2/09 Order (R 1033-1119) Not once did Appellants question whether the court had the authority to amend the 6/2/09 Order, to enter the 6/2/09 Order, to accept reports from Clary concerning his *in camera* review of the parties' documents, or to assign the *in camera* review to Clary in the first instance

Appellants did not contrive their jurisdictional argument under Rule 53, SCRCP, until *after* the court announced its ruling on the parties' Rule 59(e) motions and Respondents submitted the proposed order on such motions [66] Appellants' counsel responded with a letter to Judge Early, objecting to entry of the proposed order and questioning for the first time whether the court had the authority to amend **its own** 6/2/09 Order (R 5421, see also R

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counsel as to how *they* wished to proceed (R 6076, 6078), Judge Early entered the 6/2/09 Order, adopting the findings and conclusions contained in Clary's reports, and emphasizing

> This action is taken **without prejudice to the parties' rights to make any arguments or objections concerning the findings and conclusions contained in the Reports, or the subject matter thereof**, via Motion(s) to Alter or Amend this Order, pursuant to Rule 59(e), SCRCP **As requested by the parties' counsel, the Court will grant a hearing on any Rule 59(e) Motion filed by the parties with respect to this Order and will afford the parties full consideration of any arguments or objections stated in such Motion(s)**, if any (R 101 (emphasis added))

[65] Although Appellants would later claim that the Clary reports constituted an "order or judgment" within the meaning of Rule 53(e), SCRCP, and that Judge Early had no authority to amend the Clary reports, Appellants clearly requested that Judge Early amend the 6/2/09 Order adopting Clary's findings and conclusions (R 3168-3174) They just did not like the results of Judge Early's review

[66] See (R 6058 (Judge Early 7/8/09 e-mail announcing his ruling to all counsel and instructing Respondents' counsel to prepare a proposed order), R 6060-6074 (transmittal of proposed order to the court and counsel))

6076) On 7/28/09, the court entered the Privilege Order, granting in part and denying in part **each** of the parties' motions to amend the 6/2/09 Order (R 103-113) [67]

An examination of Rule 53, SCRCP, shows Appellants' eleventh-hour claim to be specious Rule 53 applies only to Masters (defined in Rule 53(a), SCRCP, as "master-in-equity for the county," which Clary was not) and Special Referees, defined by Rule 53(a), SCRCP, as "a member of the South Carolina Bar to whom a matter has been referred under S C Code Ann §14-11-60 " S C Code Ann §14-11-60 (Supp 2010) provides

> In case of a vacancy in the office of master-in-equity or in case of the disqualification or disability of the master-in-equity from interest or any other reason for which cause can be shown the presiding circuit court judge, upon agreement of the parties, may appoint a special referee in any case who as to the case has all the powers of a master-in-equity

Here, there was no vacancy in the office of Master-in-Equity, nor was the Master-in-Equity disqualified or disabled from interest or any other reason Clary was not appointed a "Special Referee" under S C Code Ann §14-11-60, nor could he have been within the meaning of Rule 53

Further, Rule 53, SCRCP, applies to the reference of **causes of actions** and **cases** to a Master-in-Equity or Special Referee, not, as here, to a review of documents within a discrete discovery dispute See Rule 53(b), SCRCP That the Rule is applicable only to the reference of **cases** and **causes of action** is further buttressed by S C Code Ann §14-11-85 (Supp 2010) (Appeals from final judgment of masters-in-equity) ("When some or all of the **causes of action in a case** are referred to a master-in-equity or special referee, the master or referee shall enter final judgment as to those causes of action " (emphasis added)) No "cause of action" or "case," as contemplated by Rule 53, SCRCP, and S C Code Ann §14-11-60, 85,

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[67] During a later hearing on Respondents' Motions for Sanctions, the court rejected Appellants' contrived Rule 53 argument challenging the court's authority to amend the 6/2/09 Order, and reminded Appellants' counsel that they specifically agreed to the process and procedures that ultimately resulted in the 7/28/09 Order (R App 21 19-25, 22 1-10, 25, 23 1-5, 34 22-25, 35 1-7)

was referred to Clary He was merely asked to review documents *in camera* and provide a report of his findings to the court Also, Clary never issued an "order or judgment," and his reports were never filed with the Clerk of Court See Rule 53(e), SCRCP ("When a matter has been referred, any appeal from any **order or judgment** issued by the master or special referee shall be to the Supreme Court or the Court of Appeals " (emphasis added)) [68]

In sum, this Court specifically assigned Judge Early to preside over all aspects of this litigation, and he did not relinquish his authority or jurisdiction to Clary or anyone else Judge Early had the authority and jurisdiction to enter the 6/2/09 and 7/28/09 Orders

D 8/18/08 Order Denying Appellants' Motion to Compel #6

Appellants' sought to compel production of certain financial information and documents from Respondent AIMCO, which Appellants claimed their punitive damages expert needed, including (for each of AIMCO's five highest paid executives) life, health or other insurance premiums, club, social, political, professional or other membership dues, the make, model, and cost of each automobile, airplane or helicopter provided to the executives, entertainment expenses paid for each executive, allowances or reimbursement expenses provided for automobile, travel, educational, and clothing expenses (R 2823-2851, R 2856)

Respondents objected to the discovery on the grounds that it was not relevant to the issues considered in determining punitive damages (R 2864-2867) Consistent with this Court's holding in Branham v Ford Motor Co., 390 S C 203, 240-41, 701 S E 2d 5, 25 (2010), that such discovery requests "went far beyond the pale," the court ruled that such information need not be produced and denied Appellants' motion [69]

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[68] Appellants' claim that Judge Early was without authority to enter the 7/28/09 Order because one trial judge can not overrule an order from another trial judge (see Buckley v Shealey, 370 S C 317, 635 S E 2d 76 (2006)) ignores the fact that Clary was not a trial judge when he issued his *reports* to the court

[69] In addition, the 8/18/08 Order was supported by the following AIMCO is a publicly traded company and the U S Securities and Exchange Commission's website provides the complete compilation of AIMCO's quarterly and yearly reports for the requested years (R 2855-

E 3/3/09 Order Granting/Denying Appellants' 2005 Motion to Compel

Appellants filed their first Motion to Compel, pertaining to discovery requests in the Parkview action alone, on 7/29/05, but the matter was not pursued further until a motion hearing on 7/1/08 (R 903-939, 946-961) The only complaints not resolved prior to entry of the 3/3/09 Order (App Mot) were the scope of Appellants' interrogatories 12 and 24 and request for production 6 (R 66-67) [70]

Respondents objected to Interrogatories 12 and 24 and Document Request 6 on the grounds that they were vague, ambiguous, overly broad, overly burdensome, and sought information that was not relevant and was not reasonably calculated to lead to the discovery of admissible evidence (R 66-67 (setting forth the subject discovery requests objections and answers to the same, verbatim)) The discovery requests generally pertained to all lawsuits against Respondents, as well as all investigations, criticism, reprimands, and sanctions of or against Respondents by any governmental agency (R 66-67, R 925 6-9)

The discovery requests were obviously too broad as written, covering lawsuits, investigations and inquiries arising out of any circumstances, from slip and falls to slander to tenant complaints (R 925 20-22, 926 2-11, 15-25, 927 1-8, 951 1-12, see also R 5980-5981,

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2856), Respondents produced AIMCO's SEC Schedule 14A, Definitive Proxy Statement, for its 4/28/08 Shareholder Meeting (R 5914-5967) and one of AIMCO's 10-K reports (without objection by Appellants) (R 941) to further illustrate the information available in the public domain, Judge Early observed that the information available on the SEC website "ought to be enough" for the expert (R 944 4-5), and though the court afforded Appellants an additional, post-hearing opportunity to produce evidence supporting their claim of need, their expert's affidavit merely stated that he needed the information sought, *without any explanation*, and claimed that a "substantial portion of the information I requested is not publically [sic] available,' *again without elaborating further* (R 2874-2875 (¶¶3-4)) Appellants' expert's opinion that he needs the information sought, without more, did not require a different ruling

[70] All other matters raised in Appellants' 7/29/05 motion were resolved by Respondents' compliance with the court's verbal instructions (R 66, 68, R 908 4-8, 24-25, R 920 9-25, 921 1-12, 924 4-24, 957 12-22, 958 3-16), the court's verbal rulings that Respondents' answers were sufficient (R 917 8-10, 24-25, R 918 1, 919 1-18, 922 11-25, 929 19-25, 930 1-18, 934 11-25, 935 9-16, 938 17-22, 955 2-7), or the court's verbal rulings as to matters that would be addressed prior to trial in a scheduling order (R 910 1-3, 10-11, R 911 1-7, 912 17-21, 915 4-8, 14-16, R 956 3-5, 12) (See also R 961 14-16 (Appellants' counsel's affirmation that all concerns were addressed))

5984-5986, 5992-5993 (proposed revisions of more reasonable scope)) [71] The requests were also too broad in that they were directed to all of the Respondents (not only those that were involved in the 1999-2000 decision not to take the properties back) and they were not limited to a particular timeframe (though Appellants later advised that they were intended to be limited to 1975 to the present, *i e* , 33 years) (R 5980-5981, 5983-5984, 5993) The court instructed the parties' counsel to try to work with one another to revise the discovery requests to a more reasonable scope (R 927 12-17, 951 13-21), but they were unable to reach a final agreement

The court required Respondents to answer a more reasonably tailored version of the requests set forth in the Order (R 67-68)

F 10/22/10 Order Denying Motion for Protective Order

On 2/22/10, almost seven months after Appellants were ordered to produce 96 documents they claimed were privileged and/or work product, they "offered" to submit them to the court under seal, *conditioned upon* the court redacting mental impressions, conclusions, opinions or legal theories, and making specific findings as to why each document was not privileged or work product, before the court could provide redacted versions to Respondents (See e g R 3591) But Appellants did not provide **any** of the 96 documents compelled in the 7/28/09 Order to the court The court correctly construed the motion as one *conditioned upon* the court accepting Appellants' terms [72]

The court held that the motion, though purportedly filed under Rule 26(c), SCRCP, was in effect an untimely motion under Rule 59(e), SCRCP, in that it sought to amend the

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[71] Respondents also pointed out the inherent, practical ambiguities in the language proposed by Appellants, "investigated, reprimanded, criticized, cited or sanctioned " (R 5986 ("What constitutes an investigation by HUD? A phone call, e-mail or letter from any HUD employee that inquires as to what is occurring at a property or when repairs will be made? What constitutes a reprimand by HUD?"), R 5981)

[72] Appellants did not contend in their subsequent Rule 59(e) motion that the court misconstrued the conditional nature of their motion

7/28/09 Privilege Order (R 155-156) It also held that the issue of redaction was not timely presented to it, *i e*, no such issue was raised prior to entry of the 7/28/09 Order (R 156) Finally, the court reaffirmed its earlier holding that Appellants waived all claims of privilege, including work product, thus making further review of the documents a meaningless exercise (R 156-157, see *supra* at 34)

On 11/8/10, Appellants filed a Rule 59(e) motion seeking to amend the 10/22/10 Order denying their motion for protective order They did not contend the court misconstrued their motion Instead, they claimed they were denied due process, alleging that the court signed an order prepared by Respondents' counsel without Appellants having had an opportunity to provide their input, correct errors, etc Appellants' argument ignored Respondents' earlier memoranda (R 3600-3602, R App 46-84), the earlier hearing (R 1242 16-1247 6), the court's 6/5/10 request that **both sides** submit proposed orders (R 6170-6171, 6184-6187 (court's 6/15/10 e-mail)), and Respondents' proposed order submitted to the court *and* Appellants' counsel on 6/15/10, four months before the court entered the 10/22/10 Order (R 6184-6191 (Respondents' 6/15/10 e-mail with attached proposed order)) Appellants never forwarded a proposed order to the court, never provided any briefing, input, or comments with respect to Respondents' proposed order, and have never identified a single error in the 10/22/10 Order Appellants' argument was frivolous and insincere (R 158-159 (denying motion to amend 10/22/10 Order))

V NO ABUSE OF DISCRETION IN 10/7/10 ORDER DENYING MOTION FOR RECUSAL (Re Issue 3 and Appealed Orders dated 3/7/06, 10/7/10, 12/11/10)

A Facts Relevant to Appellants' Motion for Recusal

During the 3/29/10 afternoon motion hearing, after the court, once again, advised counsel that it intended to enter an order dismissing the cases due to Appellants' disobedience of the Discovery Orders, Appellants' counsel made an oral motion for recusal,

which Judge Early denied (R 1234 6-16, 1236 9-1237 4)[73] As the record clearly shows, Appellants were not bothered by Judge Early's "relationships," which they knew about for years, until he informed them of the impending dismissal of their claims due to their persistent failure to comply with the Discovery Orders

Stripped of their conspiracy theories, hearsay, innuendo, opinions and unfounded conclusions, Appellants' recusal argument is based upon the following

- Ellis Johnston's wife's ***ex***-husband was a fraternity brother of Judge Early **40 years ago** (R 1220 21-25)

- About **30 years ago**, following a wedding, Marvin Infinger[74] spent the night at then attorney (now Judge) Early's lake house (R 1216 12-22) **This was disclosed to Appellants' counsel at a 4/23/08 status conference, which Appellants' attorney has admitted** (R 3610 (¶10) (3/30/10 Bailey Aff)),[75] **and Appellants raised no concerns -- until two years later** when Judge Early announced the impending sanctions against Appellants

- Assisting Infinger during his nine-month involvement in these cases, was his principal associate, Anne Ross Rosen Judge Early officiated at the wedding of Mrs Rosen in 2007[76] As often happens at weddings, the bride's parents provided accommodations to the entire wedding party, which included Judge Early (R 1217 19-1218 3)[77] **Judge Early informed Appellants' counsel of his role as**

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[73] Though Appellants' counsel informed the court that he would need to consult with the Appellants before he decided whether to file a written motion for recusal, on the very next day he filed a 4-page Motion for Recusal (*signed the day of the hearing*) and an accompanying 19-page affidavit (R 3603-3606, R 3607-3625)

[74] The Haynsworth Sinkler Boyd law firm and Ellis Johnston, as lead counsel, have represented Respondents in these cases since their inception Marvin Infinger and Anne Ross Rosen, both formerly of HSB's Charleston office, assisted with the representation between April 2008 and January 2009

[75] Identical affidavits of Joel Bailey were filed on 3/30/10 in each of the five cases Respondents cite to the specific paragraphs of the Parkview affidavit only so as to avoid unnecessary duplication (See R 3607-3625, 3626-3645, 3646-3665, 3666-3685, 3686-3705)

[76] Because Miss Ross was Protestant and Mr Rosen was Jewish, a non-sectarian officiant was sought (R 1217 19-25)

[77] In connection with the "wedding" allegation of misconduct, Appellants point to a partial quote from the 3/29/10 hearing transcript, which expressed Judge Early's initial reaction after being notified by Respondents that Appellants issued a subpoena potentially requiring disclosure of Judge Early's credit card numbers, Social Security number, etc , without notice to him (see R 6149-6156 (Johnston e-mail and ltr 3/15/10, with encls)) The portion quoted by Appellants is presented *in context* below

COURT Well, quite frankly, Mr Bailey, I got the thing [3/15/10 e-mail with

officiant at Mrs Rosen's wedding at the 4/23/08 status conference, when it appeared that she would be involved in the case, and asked if that presented a problem (R 1228 15-17, 1231 17-1232 2, R 3610-3611 (¶¶ 10-12) (**Bailey acknowledged 4/23/08 disclosure**)) **Again, Appellants raised no concerns -- until 2 years later** when Judge Early announced the impending sanctions against Appellants

- Mrs Rosen's father performed a colonoscopy on Judge Early (R 1217 1-7)

- Though Mrs Rosen's parents once lived in Bamberg, South Carolina, Judge Early did not see them socially then, nor does he see them now (R 1217 10-13)

- Infinger appeared only once in court, and that was at the 4/23/08 status conference Rosen never appeared in court Neither signed any pleadings, letters, discovery, or documents filed with the court or Clerk

- Neither Infinger, nor Rosen, have been involved in these cases since January 2009, two months **before** the 3/3/09 Discovery Order was issued, six months **before** the 7/28/09 Privilege Order was issued, and 15 months **before** the 4/6/10 Sanctions Order was issued (R 5968-5970)

- Mr Johnston's son, Caldwell, and Judge Early's son, Ross, were fraternity brothers in college **14 years ago** and went to Europe together **13 years ago** They have remained friends over the years [78] (R 1220 13-16, 1221 2-4) **Judge Early disclosed this to Appellants' counsel, at the latest, on 2/13/08 during a conference call** (R 1221 10-15, R 3608 (¶7) (**Bailey acknowledged disclosure of Ross' and Caldwell's friendship in "the spring of 2008"**))

- **During that same conference call in early 2008, Judge Early informed counsel** that his son, Ross, invited him to go fishing, along with Caldwell and Caldwell's fiance, on Caldwell's uncle's (Mr Johnston's brother's) boat **Judge Early specifically inquired if counsel had any objection to his going Appellants' counsel said they had none** (R 1221 10-13, 1228 15-17, 1229 17-1230 3, R 3608-3609 (¶7) (**Bailey acknowledged disclosure of the fishing trip invitation in the**

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enclosed subpoena] I looked at it Of course, you know, when you first read something like that your blood boils a little bit

MR BAILEY Sure I understand

COURT I said, Jack, you better just sit back and reflect on it a little bit and not do anything, which I did, and, quite frankly, when I got Ellis' – Mr Johnston's letter or e-mail I realized it had been sitting over there on my desk and I needed to give you a hearing
(R 1235 17-1236 2)

[78] Appellants also contend that Judge Early has a picture of Caldwell Johnston in his office (see e g Orleans App Br , 37) This is indicative of the length which Appellants will go The picture is one of Judge Early's *son*, Ross, jumping off a bungee jump with Caldwell in the *background* clapping (R 1220 17-20)

spring of 2008 and that he said he had no objection to the Judge attending the trip)) Caldwell's uncle paid for the fuel and Judge Early paid for the meals (R 1222 15-18) **Two years later, they complained about it**

- Johnston has been a member of the Carolinians since 2008, and Judge Early since 2000 The Carolinians holds an annual white tie dinner dance It is composed of some 300 to 400 members (R 1221 19-1222 6, 1225 9-18)

- Ross Early's Facebook page lists Annie Johnston, Mr Johnston's daughter, as one of 285 "friends "[79] (R 3711)

- Annie Johnston's Facebook page lists Ross Early as one of 607 "friends " (R 3719) Contrary to Bailey's representation in his affidavit, Annie Johnston has never posted a photograph of Judge Early on her Facebook page (R 3717-3720) [80]

- Despite Appellants' "shitty job" comment and associated conspiracy theory (see App Br (Parkview, Palmetto, Orleans, Roosevelt), 38, App Br (Pinewood), 37-38), Johnston has served as lead counsel in these cases from their inception in April 2003 until the present He has never been asked to step down or otherwise modify his role (R 3819-3820 (¶3), R 3800-3801 (¶5))

- Other than as set forth above, ***none*** of Respondents' counsel have ever interacted or socialized with Judge Early They have never hunted, fished, golfed, had dinner with, been to the house of, hosted in their homes, had any financial interest or mutual interest with, had lawsuits with or against, or, with the exception of the five cases on appeal, had a matter before Judge Early (R 1218 4-1228 1)

The above should be compared to Judge Early's disclosures with respect to his relationships with Appellants' attorneys, Pendarvis and Bailey (R 1218 15-1219 18, 12255 19-20 (Pendarvis, including Judge Early describing Pendarvis as a friend, former co-worker, and unofficial mentor to the Judge's sons), R 1219 19-1220 12, 1225 20-24 (Bailey))

The "relationships" complained of by Appellants are just not the type of matters that give rise to an inference of partiality, bias or prejudice If they were, it is hard to imagine a judge, especially in the small and close-knit Bar of the State of South Carolina, who would not be subject to recusal at the whim of one party or another and at any time during the

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[79] It is unknown how many of his other "friends" might have a parent who is an attorney

[80] The only photo of Judge Early appearing there is part of Ross Early's photo identification (R 3718 (7/31/09 Facebook page)) And, even this does not appear on Annie Johnston's 2/23/10 Facebook page (R 3718 (2/23/10 Facebook page))

litigation (in these cases, **two years after** Appellants became aware of most of the things they now claim is evidence of partiality, bias or prejudice) [81]

B South Carolina's Standard for Recusal

The well-settled recusal standard in South Carolina is that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he has a personal bias or prejudice against a party" Koon v Fares, 379 S C 150, 156, 666 S E 2d 230, 234 (2008) (citing Patel v Patel, 359 S C 515, 524, 599 S E 2d 114, 118 (2004)) **In addition**, the party seeking recusal "*must show some evidence of bias or prejudice*" Id (emphasis added) He cannot simply allege the existence of bias without evidence thereof Id "If there is *no evidence* of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal" Id (emphasis added) "To compel recusal, the alleged bias of the judge must be personal, as distinguished from judicial, in nature" Christensen v Mikell, 324 S C 70, 74, 476 S E 2d 692, 694 (1996) "A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record" Patel 359 S C at 524, 599 S E 2d at 118 (citing Ellis v Procter & Gamble Distrib Co , 315 S C 283, 285, 433 S E 2d 856, 857 (1993)) "'*The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge even if it is later held the judge committed error in his rulings*'" Mortgage Elec Sys , Inc v White, 384

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[81] Appellants also raise as evidence of partiality an *ex parte* telephone communication initiated from Judge Early to Vick on 02/17/10, in which Judge Early gave Vick instructions with respect to changes to a proposed order previously forwarded by Respondents to Judge Early and Appellants' counsel He was without his law clerk that day, and therefore asked Vick to perform the ministerial task, and to immediately notify Appellants' counsel of the call and his instructions which Vick did (See R 3598-3599 (Vick e-mail, 2/17/10)) This was no different than the procedure followed by Appellants' counsel, Bailey, when he received an *ex parte* telephone communication from Judge Early on 1/5/07 instructing him to prepare an order denying Respondents' motions to dismiss and to transfer venue (R App 162 (Bailey e-mail, 1/5/07)) Though such communications are certainly frowned upon, this Court has **refused to "adopt, *per se*, the view that all orders consequently emanating therefrom in part or in whole are rendered invalid"** Burgess v Stern, 311 S C 326, 331, 428 S E 2d 880, 884 (1993) (emphasis added)

S C 606, 616, 682 S E 2d 498, 503 (Ct App 2009) (quoting Mallett v Mallett, 323 S C 141, 147, 473 S E 2d 804, 808 (Ct App 1996) (emphasis added))

Here, there is no evidence of bias or prejudice,[82] all of the court's orders are amply supported by the record, and the record clearly reveals that Appellants sought recusal as a last ditch effort to avoid sanctions for their persistent disobedience of the Discovery Orders **two years after** they learned of the "relationships" they now claim are evidence of bias See Duplan Corp v Deering Milliken, 400 F Supp 497, 510 (D S C 1975) ("Timeliness is essential to any recusal motion To be timely, a recusal motion must be made at counsel's *first opportunity after discovery* of the disqualifying facts ") (emphasis in original)

Appellants argue that Canon 3(E)(1) of the Code of Judicial Conduct ("CJC") requires an entirely objective standard whereby a judge, without any evidence of bias or prejudice, should be automatically disqualified if his impartiality might reasonably be questioned They rely heavily on the 1996 amendment of Canon 3(E)(1), which on its face changed the language from advisory ("should") to mandatory ("shall") [83] However, both before and after the 1996 amendment of Canon 3(E)(1), this Court has consistently and repeatedly held that there must be evidence of bias or prejudice to require recusal If there is no such evidence, the ruling on a recusal motion is entirely within the judge's discretion and will not be disturbed on appeal See Koon, 666 S E 2d at 234 (2008), Patel 599 S E 2d at

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[82] Appellants argue that Judge Early improperly rejected the allegations upon which they based their recusal motion, citing 46 Am Jur 2d Judges §§ 95 and 214 (1994) While the cited materials support the proposition that a judge should not pass on the truth of the *facts* alleged in a motion for recusal or supporting affidavit, Appellants' opinions, conjecture and speculation *are not facts* Judge Early's observation that Appellants "continue to harass and prod me to recuse myself" is a far cry from passing on the truth of the sparse facts alleged in support of the motion for recusal The following statement of law is more pertinent to the materials relied upon by Appellants "Allegations of facts that are merely frivolous or fanciful will not support a motion to disqualify on the ground of prejudice, nor will conclusory statements, conjecture, or innuendo be sufficient to support a motion for disqualification " 46 Am Jur 2d Judges § 208 (1994)

[83] The language was changed from "should" to "shall" effective 10/1/96 S C Sup Ct Order dated 4/18/96

118 (2004), Christensen, 476 S E 2d at 694 (1996), Roche v Young Bros , 332 S C 75, 84-85 504 S E 2d 311, 316 (1998), see also White, 682 S E 2d at 503 (Ct App 2009), State v Jackson, 353 S C 625, 627, 578 S E 2d 744, 745 (Ct App 2003)

The Code of Judicial Conduct is entirely consistent with the case law Canon 3(E)(1)(a) contemplates recusal where "the judge **has** a personal bias or prejudice ," implying proof of bias or prejudice Canon 3(E)(1)(a), CJC, Rule 501, SCACR (emphasis added) More importantly, the Preamble of the Code of Judicial Conduct expressly provides, "The Canons and Sections are rules of reason *They should be applied consistent with* constitutional requirements, statutes, other court rules and *decisional law and in the context of all relevant circumstances* " Preamble, CJC, Rule 501, SCACR (emphasis added)

If this Court was to ever reverse its prior opinions and adopt a purely objective standard (i e , no evidence of bias or prejudice necessary), as urged by Appellants, the present appeals would not be the appropriate cases to make such a change In Patel, this Court found no error in the family court judge's denial of husband's motion to recuse where wife had three senators write letters to the judge on the wife's behalf (two were copied to Chief Justice Toal) seeking a trial date The Court declined to adopt the federal standard in that case because the husband failed to demonstrate that he would prevail under such a standard in any event Patel, 599 S E 2d at 119 Likewise, Appellants' contrived "facts" would not require recusal under the federal standard, so there is no need for the Court to reconsider its prior opinions requiring proof of bias or prejudice

Appellants' reliance upon this Court's opinion in Ellis is misplaced In Ellis, this Court found evidence of judicial prejudice because the record did not support the trial judge's factual findings, not due to the fact of an *ex parte* communication Ellis, 433 S E 2d at 857 (involving *ex parte* memorandum to trial court addressing the merits of the case) *Cf* Burgess v Stern, 311 S C 326, 331, 428 S E 2d 880, 884 (1993) (Because the judge's order

was supported by the evidence this Court found that there was no prejudice resulting from several *ex parte* communications and affirmed the judge's refusal to recuse himself)

Appellants' reliance upon Caperton v A T Massey Coal Co , 129 S Ct 2252 (2009), is also *grossly* misplaced The Supreme Court of the United States emphasized that its decision in Caperton addressed "an extraordinary situation where the Constitution requires recusal" Id at 2265 Caperton involved a party who contributed $3 *million* to get a judge elected to the highest court in West Virginia, such that the judge would sit on that very court when the party appealed a $50 million verdict against it, and said judge denied multiple **timely** motions for recusal before casting the swing vote to reverse the verdict against his largest campaign contributor Id at 2257-58 In such extreme cases, the constitutional inquiry is "whether the **average judge** in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'" Id at 2262 (emphasis added) [84]

In stark contrast, the facts and circumstances presented in the current appeals would not cause any jurist familiar with the South Carolina Bar (or likely any Bar) to raise even an eyebrow when considering the likely impact on the "average judge" There are **no** extraordinary circumstances relating to Appellants' recusal motions This Court is the highest court in the State, not Judge Early, and this Court's review of the various orders appealed ensures Appellants due process Even if this Court were to apply the United States Supreme Court's objective "average judge" standard, it can not be said that the circumstances presented in these cases were such that an "average judge' would have been concerned that he could not conduct himself in a fair, balanced and unbiased manner As a matter of law, the "average judge" is presumed to exhibit honesty and integrity, and he is presumed to be sincere in his oath to uphold the Constitution and apply the law impartially See Caperton,

[84] Appellants' recusal efforts relied upon the opinions and beliefs expressed in the affidavits of the Appellants and their attorneys Clearly, the opinions/beliefs of a disgruntled party or his attorney cannot be the measure of whether a judge should be forced to recuse himself

129 S Ct at 2267-68 (dissenting opinion of Justice Scalia) Appellants have shown no evidence that Judge Early was in fact, biased, or that an average judge would be affected by bias under the circumstances [85] The court did not err in denying Appellants' recusal motion (R 148-153)

Appellants filed a motion to amend the court's 10/7/10 Order (denying recusal motion) in the Orleans case *only* In light of the evidence and law discussed above, the grounds for amendment set forth in the Orleans Appellants' motion were completely without merit Accordingly, the court denied the motion (R 158-159)

VI APPELLANTS' MISREPRESENTATIONS OF THE RECORD

Throughout this Brief, Respondents corrected many of the misrepresentations made by Appellants in their briefs to this Court A careful comparison of the factual claims *alleged* in their briefs with the materials they cite reveals that most of their allegations are only supported by the opinions, speculation, and conjecture of Appellants themselves or their attorneys The fact that Appellants and their attorneys presented their opinions speculation and conjecture in the form of affidavits does not transform them into *evidence* There is virtually no supporting evidence for their opinions, speculation, conjecture, and conclusory allegations Unfortunately, it is impossible for Respondents to specifically identify each such instance in this Brief due to space limitations

One of Appellants' principal concoctions (having little, if anything, to do with the appealed orders) is that Respondents elected not to accept the return of the properties due to an alleged investigation of AIMCO s practices with these and other properties by HUD and the DOJ Appellants *allege* that Respondents declined to take the properties back

[85] While Appellants appealed this Court's 3/7/06 Order (R 31-32), which assigned the five cases to Judge Early, they do not attribute any error to this Court in the issuance of that order Rather, their arguments all contend that Judge Early should have disqualified or recused himself, which relates to Judge Early's 10/7/10 Order only

(1) Not because BFG, Respondents and an independent broker determined the properties had no value above the existing mortgage,

(2) Not because of adverse tax consequences that would inure to the detriment of the limited partners,

(3) Not because additional capital contributions would be required, and

(4) Not because HUD's "Mark-to-Market" program would reduce the subsidies on these properties (R 3118-3119),

but, because (according to Appellants)

(1) HUD and DOJ were investigating AIMCO over a management fee kickback scheme,

(2) "These" properties were also subject to management fee kickbacks, and

(3) If AIMCO took them back, it would have had to pay a much higher fine (See e g Orleans App Br , 8, R 3739-3740 (¶36))

Appellants presented **no legitimate evidence** to support these conclusions and allegations [86]

What the evidence does show is that, during the period 1997 through 2002, HUD *approved* every Transfer of Physical Asset application ("TPA") and 2530 Previous Participation Certification submitted by AIMCO, for a total of 1,629 properties (R 5268-5273, 5286-5292) These included 2530 applications for Parkview, Palmetto, Roosevelt and Orleans, which were granted on 4/16/99 after AIMCO took over management of the properties (R 5288-5292) [87]

HUD instituted an inquiry and claim against National Housing Partnership ("NHP") in 1997, an entity that was acquired by AIMCO in December of that year, for supervisory

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[86] The unsubstantiated conspiracy theories and conjecture contained in Appellants' briefs to this Court not only distort the materials cited, but those materials were either filed or presented to the lower court **after** the 4/6/10 Sanctions Order (see *supra* at 48-49) **or** they were **never** filed or presented in the lower court (see the following motion/briefs filed in these appeals Resp Mot to Stay, Dismiss and/or Strike 7/13/11, 5-8, App Return 7/25/11, 13-16, Resp Reply Br 8/1/11, 4-12 & Ex 2-7) As a matter of law, this Court should not consider such materials or issues in these appeals (see *supra* at 48-49)

[87] AIMCO did not have any ownership interest in, nor did it manage, the Pinewood property, so it was not, and had no reason to be, included in the 2530 applications The Pinewood Appellant's assertion that it was part of the alleged "kickback scheme" (Pinewood App Br , 7) is as curious as it is false

management fee agreements NHP entered into during the period 1977 to 1984 None of the properties here were involved, nor were any Respondents, except as a result of the subsequent acquisition of NHP A preliminary settlement was reached in September 1998 for those claims against NHP, and was completed in July 2001 (R 5268-5273, 5275) [88]

Appellants' conspiracy theories have no basis in fact How Appellants draw their conclusions is an enigma [89]

VII CONCLUSION

For the reasons set forth above, and on any other grounds appearing in the record, Respondents respectfully request that the Court affirm all orders appealed and remit these cases to the trial court for a determination of the amount of the award of expenses to Respondents pursuant to the 4/6/10 Sanctions Order

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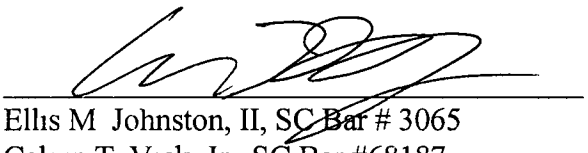
[88] A more detailed debunking of Appellants' conspiracy theories (which are allegedly supported by materials that they **never** filed or presented in the lower court, or that were only filed after the 4/6/10 Sanctions Order, see *supra* at 77 (note 86)) is contained in Respondents' Reply Brief (at 15-21 & Ex 8-20), which was filed in these appeals on 8/1/11

[89] Appellants' many mischaracterizations, misrepresentations and contrived arguments in this Court and the lower court (eleventh hour recusal motions and all) bring to mind the advice given by the lawyer to Chichikov in Gogol's Dead Souls

> Remain calm, let nothing embarrass you, however bad things may get Never despair of anything, there is no case that can't be saved If you see that the matter is approaching decision, don't try to justify and defend yourself no, just mix things up by bringing in new elements Mix things up, and mix them up again, that's all Introduce extraneous factors, so that the first thing to do is to complicate them Why, you can complicate things, if you want to, so that no one will ever be able to make head or tail out of them after all, you can only catch crayfish in muddy waters

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, PA



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This 7th day of February, 2012
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