

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Larry B. Hyman, Circuit Court Judge  
Fifteenth Judicial Circuit

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Case No. 2015-CP-26-3173  
Appellate Case No. 2017-002642

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**RECEIVED**  
FEB 21 2018  
SC Court of Appeals

Condo-World Development, LLC  
and Heron Point Golf Club Limited Partnership .....Respondent

vs.

Myrtle Beach Golf & Yacht Club Association, Inc. ....Appellant

AND

Myrtle Beach Golf & Yacht Club Association, Inc. ....Appellant

vs.

South State Bank .....Respondent

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**RESPONDENTS CONDO-WORLD DEVELOPMENT, LLC AND  
HERON POINT GOLF CLUB LIMITED PARTNERSHIP'S  
AMENDED REPLY TO APPELLANT'S RESPONSE TO MOTION  
TO DISMISS APPEAL DATED DECEMBER 19, 2017**

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Respondents Condo-World Development, LLC and Heron Point Golf Club Limited Partnership ("Respondents") submit this reply to Appellant Myrtle Beach Golf & Yacht Club Association, Inc.'s Response to Respondents' Motion to Dismiss Appeal.

## INTRODUCTION

The Association's 24-page response to Respondents' Motion to Dismiss, containing numerous disjointed arguments, misses the mark and does not adequately address the issues before this Court. The Association submitted a large stack of exhibits—four-inches high—attempting to support its claim that its dismissed third-party damage and indemnity claims are “inextricably intertwined” with the first party declaratory relief claims that have not been dismissed and remain to be litigated before the lower court. The claims remaining before the lower court, including the remaining third-party claim for injunctive relief, relate to the status of title to the subject property. The Association's appeal of the lower court's order allowing those claims to be litigated—so the parties can finally determine the status of title to the subject property—should be dismissed because the lower court's order is not immediately appealable.

The four third-party claims asserted by the Association against South State Bank concern an unrecorded 1988 Settlement Agreement formed in Richland County. Respondents are not parties to the unrecorded 1988 Settlement Agreement. Only South State Bank, through its predecessor, and the Association are parties to the unrecorded 1988 Settlement Agreement. The three third-party claims asserted by the Association against South State Bank that the lower court dismissed are now the subject of a separate appeal. Those third-party claims seek damages and indemnity from South State Bank based on the unrecorded 1988 Settlement Agreement. The issues subject to the separate appeal do not affect the primary title issues that remain to be litigated in the lower court—whether the deed restriction runs with the land and whether the Association can enforce the deed restriction.

The Association's dismissed claims for damages and indemnity against South State Bank all arise out a third-party complaint, but derivative liability is the essence of third-party claims.

As the Association admits and pleads in two of its dismissed claims, they apply only “to the extent the allegations contained in [Respondents’] Complaint are proven true.” As a result, those claims would not be reached until after the underlying dispute between the Association and Respondents is resolved.

The Association claims it will be burdened and prejudiced if it must first try the issues in the first-party complaint, which remain before the lower court and relate to the status of title, before a future, possible trial of its dismissed third-party claims for damages and indemnity. However, the Association is not entitled as a matter of right to a trial of all issues in a single proceeding.

The Association argues the lower court did not understand the term “bifurcate” and instead argues the lower court meant to use the term “sever.” The lower court, however, did bifurcate the issues related to the status of title from the dismissed third-party claims for damages and indemnity. Even if one can construe the lower court’s order as an order of severance, such an order is not immediately appealable.

Regardless of the Association’s attempt to show the lower court was confused, the Association agreed and consented to a scheduling order—entered after the third-party claims were dismissed—wherein the Association consented to bifurcate issues.

The Association argues the Order on appeal prevents the Association from being the “architect of [its] own complaint,” but fails to consider Respondents are the Plaintiffs in this case and they are “the architects of their own complaint.”

The Association relies heavily on Rule 19, SCRCP, but fails to inform this Court the Association failed to obtain an order on its Rule 19 motion seeking to add South State Bank as a party to the first-party case between Respondents and the Association. Instead, the Association

obtained an order merely allowing it to amend its responsive pleading to assert third-party claims against South State Bank.

This Court should find the Association is appealing matters that are not immediately appealable and should dismiss this appeal.

### ARGUMENT

**1. Bifurcation orders, including the order on appeal, are not immediately appealable.**

Because orders bifurcating issues are not immediately appealable, the Association's appeal should be dismissed. *See Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000) (holding order bifurcating issue of exclusion under insurance contract from issue of occurrence was not appealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000) (holding order bifurcating issues in contract case between liability and damages was not immediately appealable).

Moreover, despite the Association's protestations to the contrary, the order on appeal does not deprive the Association of a mode of trial. As the Supreme Court stated in *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008), "the 'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury." *Id.* at 470, 670 S.E.2d 654 (citing *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 461, 661 S.E.2d 81, 91 (2008)).

Furthermore, "trial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right." *Flagstar Corp.*, 341 S.C. at 73, 533 S.E.2d at 334 (also finding "[a]ny abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence. We therefore

hold that an order granting separate trials of issues in a contract case is not immediately appealable, either permissibly or mandatorily, pursuant to S.C. Code Ann. § 14-3-330(2).”).

The Association’s reliance on *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015), is misplaced. There, the way the lower court bifurcated issues resulted in the plaintiff being forced to establish liability twice, once against the nursing home operator and then again against corporate parent entities. The court found the order had the effect of depriving the plaintiffs of their substantial right to bring a case against the defendant of their choosing and was therefore immediately appealable.

Here, the title issues remaining to be tried before the lower court—whether the deed restriction runs with the land and is enforceable by the Association—are entirely distinct from the third-party damage and indemnity claims against South State Bank. As opposed to plaintiff’s claims in *Morrow*, which were direct liability claims, the Association’s claims in this case are third-party claims based on derivative liability. *See* Rule 14(a), SCRPC (authorizing a defending party to bring into a lawsuit “a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.”); *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) (Under Rule 14, SCRPC, a third-party claim may be asserted under Rule 14(a) only when the third-party plaintiff would have a substantive claim against the third-party defendant founded upon derivative liability and the outcome of the principal claim impacts the third-party defendant’s liability (citing *Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1446*)); *see also Laughlin v. Dell Fin. Servs., L.P.*, 465 F. Supp. 2d 563, 566 (D.S.C. 2006) (“A third-party defendant’s liability under third-party practice rule must be secondary or derivative to the original defendant’s liability to the original

plaintiff”); 6 Charles A. Wright *et al.*, *Federal Practice & Procedure* § 1446 at 157 (3d ed. 2017)) (the third-party plaintiff’s claim must be dependent upon the outcome of the main claim).

The Association argues it is entitled to immediately appeal the lower court’s order, which allows the declaratory relief claims and claims involving title to the subject property to proceed, to avoid piecemeal litigation and to prevent an alleged limitation on the Association’s remedies. However, “[t]he basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted.” *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000). As the court is aware, the determination of whether a lower court’s order is immediately appealable is governed by S.C. Code Ann. § 14–3–330. The provisions of this section have been construed to serve the underlying policy favoring judicial economy by avoiding “piecemeal appeals.” *Hagood v. Sommerville*, 362 S.C. 191, 196, 194, 607 S.E.2d 707, 709 (2005).

Appellants have failed to show how its remedies in the causes of action on appeal—all damages or indemnity claims—would be limited by proceeding with the claims left before the lower court, all of which relate to the status of title to the subject property. Whether the concern is “piecemeal litigation” or “piecemeal appeals,” the Association created this situation by seeking indemnity and contractual relief against a third-party.<sup>1</sup>

Also, the Association disingenuously claims it will not be entitled to discovery as to South State Bank, but that is simply not the case. An injunction claim remains against South State Bank. South State Bank remains a party to claims still pending before the lower court.

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<sup>1</sup> The Association argues “there will be a second trial involving the same parties, same witnesses and the majority of the same facts.” That is simply not the case. Respondents are not parties to the third-party claims on appeal, Respondents are not parties to the unrecorded 1988 Settlement Agreement, the subject of the third-party claims, and the second trial will not involve the deeds and other documents recorded before 1988.

There is no bar to discovery, unlike the situation in *Morrow*, where plaintiff was barred by court order from seeking discovery against the corporate parent.

Here, to the extent the Order on appeal is construed as denying the Association's motion to stay, or determines whether a stay exists, the Order does not involve the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken. *See Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529 (2006) (an order on a motion to stay is not immediately appealable).

**2. Orders severing causes of action are generally not immediately appealable.**

The Association argues the effect of the lower court's order was to sever causes of action. Respondents disagree. As referenced above, the lower court's order bifurcated issues.<sup>2</sup> The lower court bifurcated the title issues from the damage issues. However, to the extent this Court disagrees and believes the lower court's order severed claims, the majority rule is that such orders are not immediately appealable. *See* 4 Am. Jur. 2d *Appellate Review* § 137 (2018) ("Orders granting severance or separate trials in state civil cases generally are not immediately appealable. . . . The issue of whether the grant or denial of a separate trial has prejudicially affected the outcome of the case ordinarily may be reviewed after a final decision."); Gary D. Spivey, Annotation, *Appealability of state court order granting or denying consolidation, severance, or separate trials*, 77 A.L.R.3d 1082 (1977) ("the generalization that orders granting or denying consolidation, severance, or separate trials in state civil cases ordinarily have not been regarded as immediately appealable is supported by most cases which have passed upon the question. Thus, such orders have been deemed nonappealable both for want of finality and for

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<sup>2</sup> Rule 42(b), SCRPC provides" "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State."

failure to come within the terms of special statutes or rules permitting immediate appeal to be taken from certain exceptional classes of interlocutory orders.”).

**3. The Association’s Rule 19 Argument is misplaced.**

The Association seeks relief from this Court under Rule 19, SCRCP, arguing South State Bank is a necessary party. The Association claims the lower court’s order deprives the Association of obtaining full relief in one action, and that somehow implicates Rule 19, SCRCP. To support this argument, the Association argues the lower court’s order prevents the Association from being the “architect of [its] own complaint, and deprives [it from] bringing [its] case against the defendant of [its] own choosing.”

Although the Association filed a Rule 19 motion with the lower court, the lower court never granted that motion. Instead, the Association obtained an order allowing it to amend its answer. The Association did so and asserted third-party indemnity and damage claims against South State Bank. The Association’s appeal is an attempt to delay the underlying first-party case involving title issues while it proceeds with an appeal of its dismissed contractual, indemnity, and damages claims against South State Bank. The Association argues it will be deprived of being the architect of its own complaint, when it is not the plaintiff in the first-party case, and by its actions, is depriving the Respondents, the actual plaintiffs who filed the complaint, from being the architect of their own complaint.

The Association’s arguments in this regard are without merit.

**4. This Court should reject the Association’s appeal of an order bifurcating issues when the Association, in a prior order, consented to bifurcation.**

As referenced in Respondents’ motion, on October 9, 2017, Judge Hyman, with the consent of counsel for the parties, entered an Amended Scheduling Order where the lower court and the parties agreed to bifurcate some of the issues in the case. He agreed to hear the primary

issue in the underlying case, but not the Association’s dismissed third-party claims. This order was entered after Judge Hyman dismissed most of the third-party claims against South State Bank.

The Association now claims bifurcation is improper when it previously agreed to bifurcation. This Court should reject the Association’s attempt to appeal an order that sets forth a procedural ruling to which the Association previously agreed—in a consent order—making it the law of the case. *See Johnson v. Johnson*, 310 S.C. 44, 46, 425 S.E.2d 46, 48 (Ct. App. 1992) (stating that generally, where a judgment or order is entered by consent, it is binding and conclusive and cannot be attacked by the parties by direct appeal); *Hooper v. Rockwell*, 334 S.C. 281, 290, 513 S.E.2d 358, 363 (1999) (providing a party “may not appeal [a] consent order because such orders are not appealable”); *McAleese v. McAleese*, 309 S.C. 548, 551, 424 S.E.2d 558, 559–60 (Ct. App. 1992) (explaining law of the case refers to the idea the terms of orders which are not appealed become the law of the case regardless of whether those terms are legally correct).

**5. The dismissed third-party indemnity and damage claims are not “inextricably intertwined” with the first party declaratory relief claims.**

The third-party claims asserted by the Association against South State Bank, and which are the subject of a separate appeal, are as follows:

<u>Claim</u>	<u>Factual Basis</u>	<u>Relief Sought</u>
Breach of Contract	The Association and South State Bank’s predecessor agreed in the unrecorded 1988 Settlement Agreement to cause a restriction to be placed on the property. The Association claims South State Bank breached the unrecorded 1988 Settlement Agreement because it executed the 2005 Waiver of Restrictions.	Actual damages, consequential damages, punitive damages, attorney’s fees, and costs.

Contractual Indemnity	Same as above, but the Association references the indemnity provisions of the unrecorded 1988 Settlement Agreement.	Contractual indemnity for incurring expenses in defending the first-party claims.
Equitable Indemnity	Same as above.	Equitable indemnity for incurring expenses in defending the first-party claims.

All the above-referenced third-party claims concern the unrecorded 1988 Settlement Agreement. Respondents are simply not parties to the unrecorded 1988 Settlement Agreement. The issues being litigated between the Association and Respondents all relate to whether the deed restriction runs with the land; whether the Association can enforce the deed restriction; whether other alleged restrictions or covenants that pre-date the unrecorded 1988 Settlement Agreement encumber the property; and whether the 2005 Waiver of Restrictions effectively released the restrictions on the golf course.

Neither party seeks monetary damages or indemnity in the first-party claims. The Association's counterclaims seek the exact opposite of what Respondents seek. All the relief sought relates to the status of title to the property.

The Association muddies the water by alleging it will be unfairly burdened by having to possibly try two separate cases (assuming its appeal of the dismissed claims will be successful). But, the Association fails to articulate why that is the case. The damage and indemnity claims, the subject of the Association's separate appeal, concern the lower court's simple interpretation of the unrecorded 1988 Settlement Agreement. If that matter is further litigated at trial, the lower court will need to determine the rights of the parties to the Agreement, South State Bank and the Association, *not Respondents*. The Association has already admitted in its motion for summary judgment, attached as Exhibit A, that, "[d]ue to the passage of time, there is *de minimis* evidence

available regarding the 1988 Settlement Agreement.” Accordingly, any remaining litigation regarding the damages and indemnity sought regarding the unrecorded 1988 Settlement Agreement will most likely only involve the court’s interpretation of that agreement.

Rule 205, SCACR, provides the appellate court shall have exclusive jurisdiction over the appeal, but further provides “Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.”

Our courts have interpreted these rules to provide that “the lower court’s power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a ‘matter affected by the appeal’ under Rules 205 and 241(a).” *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012);

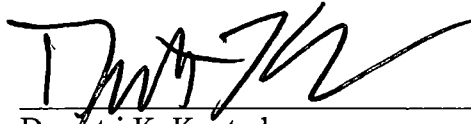
The matters pending before the lower court, competing declaratory relief claims between the Association and Respondents regarding whether claimed restrictions apply to the subject property, are not matters affected by the appeal of the dismissal of the Association’s third-party damage and indemnity claims against South State Bank. The Association’s third-party claims for breach of contract, contractual indemnification, and equitable indemnification against South State Bank are not “inextricably intertwined” with the underlying claims between the Association and Respondents.

### **CONCLUSION**

For the above-mentioned reasons, and the reasons set forth in Respondents’ motion to dismiss, this Court should find the Association is appealing matters that are not immediately appealable.

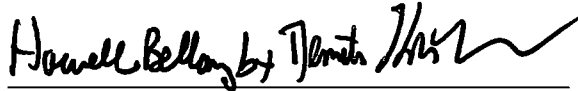
Accordingly, this Court should dismiss this appeal.

Respectfully submitted,



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February 21, 2018

# **EXHIBIT A**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
  
Civil Action No. 2015-CP-26-03173

Condo-World Development, LLC and  
Heron Point Golf Club Limited Partnership,

Plaintiffs,

vs.

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Defendant/Third Party  
Plaintiff

vs.

South State Bank,

Third Party Defendant.

**NOTICE OF MOTION AND  
MEMORANDUM IN SUPPORT OF  
DEFENDANT MYRTLE BEACH GOLF &  
YACHT CLUB ASSOCIATION, INC.'S  
MOTION FOR SUMMARY JUDGMENT**

**TO: PLAINTIFFS CONDO-WORLD DEVELOPMENT, LLC, HERON POINT GOLF CLUB LIMITED PARTNERSHIP, AND THEIR ATTORNEYS, HOWELL V. BELLAMY, II, ESQUIRE, AND HOWELL V. BELLAMY, III, ESQUIRE**

The Defendant Myrtle Beach Golf & Yacht Club Association, Inc. (hereinafter, "MBG&YC"), by and through its undersigned counsel, hereby submits this Memorandum in Support of its Motion for Summary Judgment. For the reasons set forth below, counsel would show that the Motion for Summary Judgment dismissing Plaintiffs Condo-World Development, LLC ("CWD") and Heron Point Golf Club Limited Partnership ("Heron Point," together with CWD, "Plaintiffs") claims for Declaratory Judgment should be granted as a matter of law. The basis for this motion is that there is no dispute of material fact(s) in that the declaratory judgments sought by Plaintiffs are barred by the equitable doctrines of laches. This Motion is made pursuant to Rule 56, South Carolina Rules of Civil Procedure, and applicable law pertaining thereto.

### STATEMENT OF CASE

Plaintiffs seek a declaratory judgment that a restrictive covenant<sup>1</sup> contained in a 1992 Indenture Deed - “[t]he only permitted use of this property is as a golf course, country club, or other ancillary use relating to golf course or country club use” - is a personal covenant and, thus, they can otherwise redevelop the property subject to the restrictive covenant for residential use. MBG&YC contends that the deed restriction at issue is a real covenant that arises out of a 1988 Settlement Agreement and the property is restricted in its use. However, due to the passage of time since the 1988 Settlement Agreement was executed and the 1992 Indenture Deed was recorded, Plaintiffs cannot support their claim and MBG&YC cannot defend against it. Plaintiffs claim is barred by laches.

When distilled to its essential elements, this case concerns a 1988 Settlement Agreement, which required the restrictive covenants, and a 1992 Indenture Deed, which incorporates those restrictive covenants, and whether the restrictive covenants contained therein are real covenants or personal covenants. The law on this issue is unequivocal – whether the restrictive covenants are a real covenant or a personal covenant is determined based on the intent of the parties – and *the intent of the parties is determined at the time the covenants are created*. It is undisputed that the Plaintiffs have no knowledge of the circumstances concerning either the 1988 Bankruptcy Agreement or 1992 Indenture Deed. In fact, Plaintiffs designated 30(b)(6) SCRCP witnesses stipulated that they (i) have no knowledge of these documents and (ii) have no knowledge of the intent of the parties to these documents. Indeed, Plaintiffs have failed to produce a scintilla of evidence regarding the intent of the parties when creating the restrictive covenants. Accordingly, Plaintiffs cannot prove a crucial element of their case.

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<sup>1</sup> See Plaintiffs’ Complaint.

Similarly, despite diligently seeking witnesses and documents to illuminate events that occurred at a minimum 10 years ago, MBG&YC has been unable to locate evidence to prove the intent of the parties. The vast majority of witnesses are dead or have no recollection of the salient events. Files have been lost or destroyed. Even the United States District Court District of South Carolina - Bankruptcy Court's documents regarding the underlying bankruptcy case have been lost. Plaintiffs unreasonable delay in bringing this action has caused extreme prejudice to MBG&YC because the relevant evidence to defend against this action no longer exists because of that delay.

Despite the lack of evidence regarding a key element in their case, Plaintiffs now seek a declaratory judgment, 27 years after the 1988 Bankruptcy Agreement and 23 years after the 1992 Indenture Deed and 10 years after obtaining an alleged waiver of those same restrictions, that the Deed Restrictions are personal covenants. The Court should grant the motion dismissing the Complaint based on the affirmative defense of laches.

### **FACTUAL BACKGROUND**

#### **A. The Original Development of Myrtle Beach Golf & Yacht Club**

On or about February 29, 1984, an Option Agreement was executed, by and between James N. Dusenbury, as Nominee, for Seller, and Justice, Inc., as Buyer, and consented to by Ponderosa, Inc. Canal Land Co, W.F. Sledge and Gibson Wall Investment Co. The Option Agreement was filed with the Register of Deeds ("R.O.D.") in Deed Book 834 at Page 321. The Option Agreement states in relevant part:

The Buyer intends to develop the Property into a planned unit development consisting of a **residential community (composed of single-family and multifamily residences, an associated golf course, club house, lakes, marina, boat storage areas and various other recreational amenities and associates shops.** The Seller approves of the general development plan described herein,

and will impose, in the deed to each Tract from the Seller to the Buyer, **reasonable restrictive covenants upon the Property in keeping with the general development plan described above.** The restrictive covenants so imposed shall be released by the Seller upon Seller's approval of the final development plan (consisting of subdivision survey and restrictive covenants) for each Tract, and the restrictive covenants imposed by the Seller in such deed(s) shall so provide.

(Attached hereto as Exhibit A is a true and accurate copy of the Option Agreement) (emphasis added).

In or around February 1984, at or about the same time the Option Agreement was executed, Justice, Inc. ("Justice") and Peoples Federal Savings and Loan ("Peoples") agreed to enter into a real estate development project (the "Project") to develop a large tract of land located in Horry County, South Carolina otherwise known as the Myrtle Beach Golf & Yacht Club. (Corrected Second Amended Answer, Counterclaims, and Third Party Complaint of MBG&YC (the "Counterclaims") ¶ 33.) Peoples funded the Project through various loans and were to receive profits from the development of the Project at which time it incorporated a wholly owned subsidiary known as Peoples Joint Venture Group, Inc.. At that same time, Justice incorporated MBG&YC. (*Id.* ¶ 34.)

On February 29, 1984, MBG&YC and Peoples Joint Venture Group, Inc. entered into a general partnership, named the "Myrtle Beach Golf & Yacht Club, a General Partnership" (the "Partnership"), and a general partnership agreement the ("Agreement") to develop the Project. The Agreement was filed with the Horry County Register of Deeds Office (the "R.O.D.") on March 13, 1984 in Deed Book 855 at Page 758. (Counterclaims, Ex. 2). Article 1 of the Agreement provided, *inter alia*, that the Partnership would acquire certain tracts of land, defined as "Tract 1" and "Tract 2," and "...develop recreational facilities comprised of a club house facility, entry guardhouse, nine hole golf course ....". (Counterclaims, Ex. 2., Art 1. (a),(c)).

This Project was to be developed on a +/- 1,035 acre tract of land otherwise known as the Enterprise Landing Tract as further described by a recorded Plat filed with the R.O.D. in November 1983 in Plat Book 79 at Page 166. Tract I was to be composed of not less than 295 single family lots and multi-family lots and represented the initial first phase of the construction of the development. (Counterclaims, Ex. 2, Art 1 (b).) Tract II contained additional lands that was to be developed as an eighteen-hole golf course, tennis courts, and a swimming pool. (Counterclaims, Ex. 2, Art 1 (c).) Tract II became known as the Amenities Tract (hereinafter, the "Golf Course Property" or "Tract II") as further described by a recorded Plat filed with the R.O.D. in February 1984 in Plat Book 79 at Page 208. (Counterclaims. ¶37).

In furtherance of the Partnership's stated purpose and in accordance with the Option Agreement, on February 29, 1984, the Partnership, purchased Tract I and Tract II, from James H. Dusenbury, as Nominee. The Tract I Deed and Tract II Deed were filed with the R.O.D. in Deed Book 855, respectively, at Page 764 and Page 769. The deeds for both Tract I and II contain express restrictions:

**(b): The Property shall be used for a residential community (composed single-family and multi-family residences), an associated golf course, open areas, parks, lakes, and various other recreational amenities and retail shops.**

(Attached hereto as Ex. B and is a true and complete copies of Dusenbury Deed for Tract I (emphasis added); Counterclaims, Ex. 3 (emphasis added)).

The deeds also contain an express restriction that "[t]he maximum density of dwelling units on the property shall be in accordance with the Grantee's development plan as approved by the Grantor." (See Ex. B and Counterclaims, Ex. 3)

On October 26, 1984, the Declaration of Covenants and Restrictions for Myrtle Beach Golf & Yacht Club Subdivision, with the Partnership as the developer, was filed with the R.O.D.

in Deed Book 1351 at Page 858. (Counterclaims, Ex. 5). On January 21, 1985, the Amended and Restated Declaration of Covenants and Restrictions for Myrtle Beach Golf & Yacht Club Subdivision, again with the Partnership as developer, was filed with the R.O.D. in Deed Book 981 at Page 563. (Counterclaims, Ex. 6).

On April 25, 1989, James H. Dusenbury, as Nominee, sold certain parcels of land to Heron Point Golf Club, Inc. The deed was filed with the R.O.D. in Deed Book 1306 at Page 642. (Counterclaims, Ex 4). The 1989 Dusenbury Deed to Heron Point includes express restrictions:

**The property shall be used for a residential community (composed of single-family and multi-family residences), an associated golf course, open areas, parks, lakes, and various other recreational amenities and retail shops, utilities, provisions, administrative complex, storage of boats and related trailers and the like.**

Id. (emphasis added). This is almost identical language to the language used in the deeds for Tract I and II. (See Ex B; Counterclaims, Ex. 3). James H. Dusenbury, Esq., however, no longer has any recollection of the negotiations of the deeds or other facts that may be pertinent to this case. (Attached hereto as Exhibit C are excerpts of the Deposition of James Dusenbury, dated July 15, 2016 (“Dusenbury Dep.”) at 17:16-17:7; 18:17-19:7; 19:25-19:12; 20:22-21:12; 25:7-11.)

**B. The Bankruptcy of the Partnership,  
the 1988 Settlement Agreement, and the Foreclosure**

(i) The Bankruptcy and the 1988 Settlement Agreement

On June 3, 1988, American Community Development Corp. put the Partnership into involuntary bankruptcy. (Counterclaims ¶ 45.) As part of the resolution of the involuntary bankruptcy, on or about July 25, 1988, the Partnership, Peoples, Property Consultants, Inc., and

MBG&YC entered into an agreement (the “1988 Settlement Agreement”) whereby Peoples agreed to cause the following deed restriction on the property, including the Amenities Parcels:

**The only permitted use of this property is a golf course, country club, or other ancillary use relating to golf course or country club use.**

(Counterclaims, Ex. 7) (emphasis added).

Due to the passage of time, there is *de minimis* evidence available regarding the 1988 Settlement Agreement. The 1988 Settlement Agreement was executed by (i) Robert E. Seane on behalf of Property Consultants, Inc. and the Partnership, (ii) George N. Magrath Jr., Senior Vice President, on behalf of Peoples, and (iii) Raymond Kane, President and Director, and Thomas M. Robinson, Secretary and Director, on behalf of MBG&YC. Of the four signatories, only George Magrath was deposed because the other signatories are deceased or unable to be located. Mr. Magrath recalled that the 1988 Settlement Agreement was the sole agreement that came out of the bankruptcy process. (Attached hereto as Exhibit D are excerpts of the Deposition of George N. Magrath, Jr., dated August 18, 2016. (“Magrath Dep.”) at 37:3-7). Mr. Magrath did not otherwise have any personal knowledge or recollection of the negotiations regarding the 1988 Settlement Agreement. Id. at 30:16-32:19.

Similarly, the attorneys involved in the bankruptcy / 1988 Settlement Agreement have no recollection of the events surrounding the 1988 Settlement Agreement and the files of the attorneys involved in the transaction no longer exist. (Attached hereto as Exhibit E are true and complete excerpts of the Deposition of Attorney Mike Battle, dated August 19, 2016, (“Battle Dep.”) at 36:2-23.) Lawrence Johnson was unable to provide the location of his files and he had little to no recollection of his work on the bankruptcy. (Attached hereto as Exhibit F is a true and complete copy of the Affidavit of L. Raymond Wells, dated August 15, 2017, see ¶¶7-8).

Significantly, the United States District Court District of South Carolina – Bankruptcy Division cannot locate the file regarding the Partnership’s bankruptcy. Id. ¶¶4-6.

(ii) Peoples Files for Foreclosure

Upon best information and belief, the 1988 Settlement Agreement basically permitted the release of the Golf Course Property from the automatic stay of Bankruptcy Code § 362. Upon information and belief, this occurred prior to September 12, 1988 and allowed Peoples to foreclose on the Golf Course Property. On September 12, 1988, Peoples filed for foreclosure on the Golf Course Property against the Partnership. Peoples was the successful bidder for the property at the subsequent judicial sale and a Master’s Deed was issued by the Court as a result thereof.<sup>2</sup> (Counterclaims ¶ 48.) The case was appealed, in part, and ultimately affirmed, on the issues of lender liability and equitable subordination of lender’s mortgage. Peoples Fed. Savings & Loan Ass’n v. Myrtle Beach Golf & Yacht Club, et al, 310 S.C. 132, 425 S.E.2d 764 (Ct. App. 1992).

(iii) The 1990 Easement Maintenance Agreement  
References the 1998 Settlement Agreement

On September 12, 1990, Peoples and MBG&YC entered into an Easement Maintenance Agreement (“Easement Agreement”) to memorialize the terms of a negotiated agreement made between them and Property Consultants, Inc., on or about July 25, 1985. (Counterclaims, Ex. 11; Counterclaims ¶ 48.) Significantly, the Easement Agreement expressly references the 1988 Settlement Agreement’s incorporation into an Order of the United States District Court for South Carolina Bankruptcy Division:

Whereas, Peoples Federal Savings and Loan Association, Property Consultants, Inc. and Myrtle Beach Golf and Yacht Club Association,

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<sup>2</sup> Portions of the Court’s foreclosure rulings were subject to certain appellate processes between the parties.<sup>2</sup> See (Counterclaims, Exhibits 8, 9 and 10).

Inc. entered an Agreement dated July 25, 1985, which was incorporated into an Order of the United States District Court for South Carolina Bankruptcy Division.

Id. (First Whereas Clause.) Despite the reference to a 1985 agreement, it is clear that the year “1985” was a scrivener’s error, that 1988 was the intended date and that the 1988 Settlement Agreement is the agreement referenced therein.

Peoples continued to own and operate the subject Golf Course for a period of years thereafter in full cooperation with MBG&YC and its members. (Counterclaims ¶ 49.)

### **C. The Sale to Heron Point and the 1992 Indenture Deed**

Thereafter, Peoples sold the Golf Course Property to Heron Point as evidenced by the Indenture Deed (“1992 Indenture Deed”) recorded April 15, 1992 in the R.O.D. in Deed Book 1540 at Page 483. (Counterclaims, Ex. 12).

The 1992 Indenture Deed between Peoples and Heron Point contains specific, express limitations on the future use of the property and expressly states:

The property conveyed herein shall be subject to the following covenants:

The property conveyed herein shall be subject to the following covenants:  
 (a) **The only permitted use of this property is as a golf course, country, club, or other ancillary use relating to golf course or country club use;**  
 (b) [g]rantee, its Successors and Assigns agree to offer memberships to members of Myrtle Beach Gold and Yacht Club Association, Inc., its successors and assigns on the same basis that it offers memberships to the public at large, provided, however, that there shall be no requirement to offer memberships.

(Counterclaims, Ex. 12 (emphasis added)).

This deed restriction is the same deed restriction that the 1988 Settlement Agreement required be placed onto any subsequent deed concerning the property. The deed restriction is also consistent with the Dusenbury deed restrictions. Indeed, the 1992 Indenture Deed was made subject to those restrictions.

To wit: the Golf Course property was subject, *inter alia*, to the:

(f) Restrictions, covenants, and conditions contained in Deed from James H. Dusenbury, as Nominee to [the Partnership] dated February 29, 1984, ... [and]

(g) Restrictions, covenants and conditions contained in deed from James H. Dusenbury as Nominee, to Heron Point Golf Club, Inc. dated April 25, 1989...

Id.

Despite extensive and diligent discovery, no evidence could be located as to whether the restrictive covenants contained within the 1992 Indenture Deed were real or personal because the parties with knowledge are deceased or do not recall any relevant information. Plaintiffs have failed to produce a scintilla of evidence as to intent as whether the restrictive covenant is real or personal.

Most significantly, Plaintiffs 30(b)(6) witnesses have no knowledge of the intent of the restrictive covenant. Plaintiff Condo-World Development, LLC's 30(b)(6) witness, Roy Clyburn testified that prior to 2003 he was not familiar with "any of the dealings or operation or formation Heron Point Golf Club Limited Partnership." (Attached hereto as Exhibit G are portions of the deposition of Roy Clyburn, dated February 18, 2016, ("Clyburn Dep.") at 32:25-33:6.) Plaintiff Heron Point's 30(b)(6) witness, Jerry Spearman Jr. testified he had not seen the 1992 Indenture Deed nor had any knowledge of the contents. (Attached hereto as Exhibit H are excerpts of the Deposition of Jerry Spearman, Jr, dated February 18, 2016, ("Spearman Dep.") at 10:10-11:13.

With respect to the 1992 time period, on behalf of Heron Point, Jerry Spearman, Sr. and Millon Plyler were the individuals with knowledge of the 1992 transaction that resulted in the 1992 Indenture Deed. (Attached hereto as Exhibit H are Douglas Brown deposition, dated November 4, 2016, ("Brown Dep.") at 10:14-11:3; 14:7-15). Both are now deceased. Id. at

10:21-11:1. Attorney Douglas Brown, corporate counsel for Heron Point, represented Heron Point with respect to the 1992 transaction and sale of the Heron Point Golf Course from Peoples to Heron Point. Id. at 10:2-13. Mr. Brown, however, does not have a strong recollection of the 1992 transaction nor recollect any discussions or negotiations regarding the 1992 Indenture Deed leading up to closing. Id. at 13:7-12; 36:16-21.

Attorney Brown testified during his deposition that based upon the language in the contract for sale in the above-referenced 1992 transaction, Jerry Spearman, Sr. and Millon Plyler, and therefore, Heron Point, would have been aware of the restrictive language in the 1992 Indenture Deed: “the only permitted use of this property is a golf course, country club or other ancillary use relating to golf course or country club use.” Ex. H, Brown Dep. at 20:19-23:17; 37:21-39:10. Attorney Brown, also testified that the deed restrictions were necessary because of how the deal was structured and the buyer was required to agree to them. Id. at 23:18-24:11. Although Attorney Brown produced his “closing file” relative to the 1992 transaction, no documents contained therein provide evidence of whether the restrictive covenants were intended to be real or personal covenants.

On behalf of Peoples, Mr. Magrath was involved with the negotiations leading up to the sale of the golf course to Heron Point. (Ex. D, Magrath Dep.). However, Magrath’s recollection of the negotiations are very limited. Id. at 83: 8-25. Magrath did, however, recollect the restrictive covenants from the 1988 Settlement Agreement being included in the 1992 Indenture Deed. Id. at 86: 14-20. He further testified that “there was never any doubt that language would be in the Deed because that’s what was agreed to earlier.” Id. at 87:5-9.

Attorney Mike Battle’s firm, Lovelace and Battle L.L.P., was involved with the Indenture Deed, but Attorney Battle does not recollect being involved with the deed in any capacity. Ex. E,

Battle Dep. at 21:12-25. Moreover, the files from Lovelace and Battle L.L.P. were destroyed in a warehouse fire. Id. at 36:1-23.

**D. The Mortgaging of the Golf Course Property and Assignment to Condo-World**

In connection with the 1992 Indenture Deed, on April 15, 1992, Heron Point Golf Club L.P. as mortgagor executed a Promissory Note secured by a First Mortgage and Security Agreement with Peoples as mortgagee. (Complaint, Ex. B). In said First Mortgage and Security Agreement, Heron Point covenanted as follows: **“Mortgagor shall not remove, demolish, materially alter, or materially change the use of the golf course without the prior consent of the Mortgagee.”** Id. (emphasis added). The Note and Mortgage were assigned twice, with the last assignment occurring on August 30, 2012 from VFC Partners 15, LLC to Plaintiff Condo World Development, which transaction was recorded May 18, 2012, in Mortgage Book 5402 at Page 2786. (Complaint ¶ 10.)<sup>3</sup> Plaintiff Condo-World performed no due diligence with respect to this transaction. (Ex. G., Clyburn Dep. 38:4 – 16.)

**E. The Quit Claim Deeds from Peoples to MBG&YC**

At or about the same time that Peoples sold their interest in the Golf Course Property, on June 10, 1992, Peoples executed two quit claim deeds to MBG&YC, quit-claiming their interest (i) in “all gores or slivers of property” surrounding and/or adjacent to the Golf Course Property and (ii) all boulevards, road, streets, courts and common areas. The quit-claim deeds were recorded in the R.O.D.in Deed Book 1554, respectively, at Page 782 and Page 786. (Counterclaim, Exs. 13, 14). The property sold to MBG&YC is reasonably significant. Moreover, the property quit-claimed to MBG&YC by Peoples is in the chain of title of the Dusenbury deeds.

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<sup>3</sup> Condo-World is also the controlling general managing general partner in Heron Point Golf Club and has had an interest in the Golf Club since somewhere between 2002-2004. [Clyburn Dep. at 20:3-14; 29:6 - 15].

**F. Heron Point Obtains a Waiver of Deed Restriction  
from First Federal Savings & Loan Association of Charleston**

Heron Point sought to sell two isolated tracts of land to Enterprise Road Development LLC in or about early 2005. In connection with that transaction, Heron Point sought a waiver of the restrictions contained in the 1992 Indenture Deed. On March 22, 2005, Heron Point obtained a Waiver of Restrictions from First Federal Savings and Loan Association of Charleston, the successor by merger to Peoples, regarding the Enterprise Tracts specifically waiving the following restriction:

- a. **The only permitted use of this property is a golf course, country club or other ancillary use relating to golf course or country club use;**

(Counterclaims, Ex. 15, Counterclaims ¶ 55.)

In addition to obtaining this waiver, as of 2005, Heron Point was already considering changing the use of the property from a golf course to a real estate development. (Attached hereto as Exhibit I is a true and complete copy of the memorandum dated, November 5, 2005.) Jerry Spearman, Sr. to Charlie Clark wherein Jerry Spearman, Sr. states: “The question must be answered: however, as to whether to attempt to change the use of the property from a golf course to real estate development. The prospects of this change would be encouraging **except for the deed restriction on the property that requires it to remain a golf course.**” *Id.* (emphasis added.)

**G. Heron Point Sells MBG&YC Portions of the Golf Course Property**

In July of 2014, Heron Point sold MBG&YC portions of the Golf Course Property, in consideration of \$30,680.90. (Attached hereto as Exhibit K is a true and complete copy of the deed, dated July 16, 2014). The property sold was a portion of the property that Heron Point was granted by the Indenture Deed. *Id.*

## H. Closing of the Golf Course

In December 2014, Plaintiffs closed the Heron Point Golf Course because it was allegedly no longer profitable. MBG&YC continues to operate and its membership includes over 1,000 homeowners whose community is inextricably intertwined with the Golf Course property at interest.

## PROCEDURAL BACKGROUND

### A. The Pleadings

Plaintiffs waited approximately 27 years from date of the 1988 Settlement Agreement which was incorporated into a District of South Carolina Bankruptcy Court Order, 23 years from the date of the 1992 Indenture Deed, and 10 years from the date that Heron Point obtained a Waiver of Restrictions to file the instant action, on April 27, 2015, seeking declaratory relief that in sum and substance that the MBG&YC does not have standing to contest this action; Plaintiffs are not subject to any restrictive covenants because those covenants have been waived, relinquished and/or released; the covenants are personal; to the extent that the restrictive covenants apply, the golf course property is not subject to the declaration of covenants due to changed economic circumstances. (Complaint ¶ 18).

MBG&YC timely answered the Complaint and, ultimately, on February 14, 2017 filed the Counterclaims. MBG&YC filed a Third Party Complaint against South State Bank as successor-in-interest to Peoples Federal and sought, *inter alia*, to permanently enjoin South State Bank from waiving any deed restrictions relating to the Heron Point Golf Course property. Following a motion to dismiss by South State Bank, which was granted and denied in part<sup>4</sup>, the sole claim currently remaining against it is the permanent injunction claim. On August 4, 2017, Plaintiffs filed an Answer to MBG&YC's Counterclaims.

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<sup>4</sup> That Order is currently the subject of a motion to reconsider, alter or amend order or judgment.

## B. Discovery

Counsel for MBG&YC has engaged in diligent and exhaustive efforts to locate individuals who have knowledge of whether the restrictive covenant contained in the 1988 Settlement Agreement and 1992 Indenture Deed run with the land or are personal covenants. These efforts have been all but futile due to the unreasonable passage of time between the relevant events and the date this lawsuit was brought. Most illustrative of the complete lack of knowledge of the factual circumstances regarding the 1988 Settlement Agreement and 1992 Indenture Deed is the 30(b)(6) depositions of Plaintiffs.

### *1. The 30(b)(6) Depositions of Plaintiffs Provided No Salient Evidence Regarding this Case*

Roy Clyburn, who verified the Plaintiffs' Complaint, testified, as a 30(b)(6) witness on behalf of Plaintiff Condo-World Development, LLC, that he was not familiar with "any of the dealings or operation or formation Heron Point Golf Club Limited Partnership" prior to 2003. (Ex. G., Clyburn Dep. 32:25- 33:6.) Significantly, Condo-World's counsel stipulated that **"We're not going to offer Mr. Clyburn as a fact witness regarding the intent of the covenant that's set forth in the deed."** Id. at 51:8-56:4. (emphasis added).<sup>5</sup> Condo-World is not only the holder of the note and mortgage on the property, it is also the controlling managing general partner in the Heron Point Golf Club Limited Partnership. Id. at 20:3-14. Clyburn became an investor, individually, with Heron Point Golf Course in 2003 or 2004. Id. at 29:6-15. Neither Clyburn nor anyone on his behalf performed any due diligence on the golf course property in regard to the initial 2003 transaction. Id. at 33:12-34:15. In 2012, Clyburn

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<sup>5</sup> Notably, When asked "What facts or information or documentation do you believe supports that request or request of relief from the court; do you know?" Counsel for Plaintiffs objected on the grounds of work product privilege. Ex. G, Clyburn Dep. at 50:15-52:7. When asked, in his capacity as the party who verified the pleading, whether he would testify today about any facts, documents, or information regarding Condo-World's position as to whether it is Plaintiffs position that they have the legal right to develop the subject property, Clyburn testified "I think it premature. I don't know enough about it to discuss it." Id. at 68:9-23. See Rule 11(c), SCRCP.

transitioned from individual to corporate ownerships of Heron Point Golf Course, but again performed no due diligence other than talking to his accountants about tax implications. (Ex G., Clyburn Dep. at 5:14-36-3.) When Condo-World purchased the Note and Mortgage, it was a “standard transaction,” and again no due diligence was performed. Id. at 38:4 – 16. In sum, Condo-World and Clyburn failed to perform any due diligence at any time regarding the property, let alone the due diligence that would normally be expected in a commercial transaction. Instead, Condo-World is basically asking this Court to perform its due diligence when Condo-World was on record notice and/or inquiry notice of all instruments (and the recitals in said instruments) in its chain of title. “Property owners are charged with constructive **notice of instruments recorded** in their chain of title.” Binkley v. Rabon Creek Watershed Conservation Dist of Fountain Inn, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001) (emphasis in original). “**Notice** of a deed is **notice** of its whole contents ... and *it is also notice of whatever matters one would have learned by any inquiry which the recitals of the instrument made it one's duty to pursue.*” Id.

Similarly, Jerry Spearman, Jr. testified, on behalf of Heron Point as a 30(b)(6) witness, he had not seen the security agreement, the mortgage and the 1992 Indenture Deed nor had any knowledge as to the contents of the document. (Ex. H., Spearman Dep. at 10:10-11:13.) The parties, further, stipulated that Jerry Spearman, Jr. had no knowledge regarding their restrictions in the security agreement, the mortgage and the 1992 Indenture Deed. Id. at 10:10-11:13. Specifically, Spearman testified:

Q: What I'm trying to figure out is in Exhibit 4, which is the Verified Complaint filed by Heron Point Golf Club Limited Partnership as a Co-Plaintiff, there are references to the April 15, 1992 deed, which is where the deed restrictions aspect of this case originate, at least in part, ... But you've earlier stipulated

that you don't have any personal knowledge about those documents and such; is that true? . . .

A: That's correct.

Id. at 60: 3-18., *see Id.* at 10:10-17:18. Regardless of the fact that Spearman testified he had no knowledge of the documents, he did testify to attending meeting with his father at Peoples and, later South State with Charlie Clark. (Ex. H, Spearman Dep. 67:7 – 73:4.) Moreover, Spearman, Sr. wrote to Charlie Clark in a 2005 memorandum that states “The prospects of this change should be encouraging, would be encouraging **except for the deed restriction on the property that requires it remain a golf course.**” (Ex. J) (emphasis added). Spearman further testified that:

It was my understanding that any time we wanted to do anything with the property that was a little bit out of the ordinary, that we needed to consult with [First Federal] and get their permission for it. Your know, particularly when it comes to selling a piece of property but, ... we couldn't do any – we couldn't just --, you know, go build a go-cart track on property or anything like that without getting their permission.

(Ex H, Spearman Dep. at 48:14-24.) Per Jerry Spearman, Jr.'s own testimony, he, and, thus, Heron Point knew the property was subject to restrictions.

As this Court well knows, 30(b)(6) depositions are binding on the corporations. See, generally, McCray v. Allstate Ins. Co. and Liberty Mutual Fire Ins. Co., No. 3:14-cv-02623-TLW, 2015 WL 6408047 (D.S.C. October 22, 2015). Both Plaintiffs stipulated that they have no knowledge of the intent of the 1992 Indenture Deed restrictions and, Plaintiffs have failed to identify an individual who does have knowledge and will testify regarding that intent.

*2. Additional Discovery has not located Any Evidence that Would Create an Issue of Material Fact, as the Witness has Either Failed to Respond to Discovery, Does Not Recall Salient Facts, has No Relevant Evidence or is Deceased*

Counsel for MBG&YC has made countless efforts through various discovery processes to discover the salient facts, specifically, whether the deed restrictions in the 1992 Indenture Deed were intended to run with the property.

In addition to the 30(b)(6) witnesses, MBG&YC has deposed the following individuals:

<b>Deponent</b>	<b>Date of Deposition</b>
Jerry Spearman, Jr. (30(b)(6) witness)	February 18, 2016
Roy Clyburn (30(b)(6) witness)	February 18, 2016
James Dusenbury	July 15, 2016
Mark Davis	July 28, 2016
Charles Johnson	July 28, 2016
George Magrath	August 18, 2016
Mike Battle	August 19, 2016
Michael Buccerone	November 3, 2016
Robert F. Salvino	November 3, 2016
Douglas Brown	November 4, 2016

Moreover, subpoenas were served on the following individual and/or entities and, to date, the vast majority of these individuals and/or entities have either refused to produce documents or do not have anything relevant.

Subpoenas were served on the following individuals and/or entities and, to date, these individuals and/or entities have either not responded or not possessed documents responsive to the subpoenas:

<b>Name of Party Subpoenaed</b>	<b>Response</b>
Rowe Professional Services Co	Motion to Quash (resolved)
East Coast Golf Management	Produced Limited Documents
Robert Salvino, Ph.D	Produced Limited Documents
Allen Jeffcoat, Esq.	Produced Documents
Sandy Thomas	Never Responded
Murray Law Offices	Refused to Comply
Conway Title Agency	Unable to Comply due to a Warehouse Fire
South State Bank	Responded
Ponderosa, Inc.	Responded, but it had no relevant documents
Douglas Brown, Esq.	Responded
Edwin Hinds, Jr.	Still Disputing his Response
James Dusenbury, Esq.	Produced Limited Documents
Enterprise Road Development LLC	Never Responded

Canal Holdings LLC

Never Responded

Despite fourteen non-party subpoenas, twelve depositions, and standard written discovery by MBG&YC, no party or document thus far has been able to elucidate the critical issue in this case – the intent of the parties at the time of the 1998 Settlement Agreement and 1992 Indenture Deed. Plaintiffs attempts at discovery have also proved futile at proving the intent of the parties at the time of the 1988 Settlement Agreement and 1992 Indenture Deed.

### STANDARD OF REVIEW

“Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Adamson v. Richland County School Dist. One., 332 S.C. 121, 124, 503 S.E.2s 752, 753-54 (Ct. App. 1998). Furthermore, “[t]he purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). While the burden is on the moving party to demonstrate that there is no genuine issue of material fact, “[o]nce the moving party carries its initial burden, the opposing party ‘may not rest upon the mere allegations or denials of his pleading, but his response, . . . must set forth specific facts showing that there is a genuine issue for trial.’” Midland Mutual Life Ins. Co. v. Harrell, 331 S.C. 394, 397, 503 S.E.2d 189, 190-191 (Ct. App. 1998) quoting Rule 56(e), SCRCP.

### ARGUMENT

**I. The Plaintiffs’ Claim for a Declaratory Judgment is Barred by the Equitable Doctrine of Laches Because Plaintiffs Waited Over Twenty-Five Years to Bring the Present Action and the Relevant Witnesses are Either No Longer Available or Have No Recollection of the Events.**

After waiting approximately twenty-five years, while relevant evidence was destroyed or lost, while witnesses memories faded, while witnesses died, Plaintiffs now seek a declaratory judgment, in sum and substance, that the restrictive covenants contained in the 1992 Indenture

Deed as required by the 1988 Settlement Agreement are personal covenants that do not run with the land. Specifically, Plaintiffs have requested this court declare: that the deed restrictions referenced in the 1992 Indenture Deed were personal to First Federal Saving and Loan Association, the successor by merger to Peoples, and do not run with the golf course property. (Complaint, ¶ 18(c)). Plaintiffs claim is barred by laches as their inexcusable delay has caused extreme prejudice to Defendant.

***(A) Whether a Covenant is a Real Covenant is Determined from the Intent of the Parties at the Time Title is Conveyed***

“Pursuant to South Carolina law, a covenant is a real covenant that runs with the land and binds successors to the original covenantor if three elements are found: (i) an indication the covenanting parties intended the covenant to run with the land; (ii) the covenant touches and concerns the real property; and (iii) the party required to observe the covenant has actual or constructive notice of the covenant.” In re Daufasukie Island Properties LLC, 431 B.R. 612 (Bankr. D.S.C. 2009) (citations omitted).

South Carolina places the burden on the party claiming the benefit of the restrictive covenant to prove that intent that the covenant run with the land. Charping v. J.P. Scurry & Co., 926 S.C. 312, 372 S.E. 2d 120 (Ct. App. 1988). The intention of the parties in placing restriction on the lots **must be determined as of the time that the grantor conveyed the title.** Id. 926 S.C. 312, 372 S.E. 2d 120 (Ct App. 1988). In the absence of express intention, the party claiming the benefit of the restrictive covenant must show by affidavit or otherwise facts regarding the grantor’s intention to benefit the land now owned by him/ it when the restricted property was sold. Id., 926 S.C. 312, 372 S.E. 2d 120 (Ct App. 1988). “Courts tend to strictly interpret restrictive covenants and a party seeking to enforce a covenant must show the covenant applies to the property either by its express language or by plain and unmistakable implication.” Id.

(citations omitted). Accordingly, the burden to prove the restrictive covenants contained in the 1992 Indenture Deed run with the land is on MBG&YC.

***B. The Intent of the Parties to the 1992 Indenture Deed Cannot Be Determined Because of Plaintiffs' Laches***

MBG&YC cannot determine the intent of the parties to the 1992 Indenture Deed because the relevant parties are either unavailable or have no recollection of the intent of the parties and there are no documents that illuminate the intent of the parties. “The equitable doctrine of laches is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.”” Robinson v. Estate of Harris, 388 S.C. 630, 698 S.E.2d 222 (2010) citing Hallums v. Hallums, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988). “In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches.” Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009). “Whether a claim is barred by laches is to be determined in light of facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches.” Hallums v. Hallums, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988). “In sum, the party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice.” Id. at 199, 371 S.E.2d at 528.

1. Plaintiffs Delay in Bringing this Suit was Unreasonable

In this case, there is no question that Plaintiffs delayed in bringing this case. Heron Point was the grantee of the 1992 Indenture Deed, which is dated April 15, 1992 and which was recorded the same day. There can be no question that Heron Point was on actual, constructive and record notice of the deed restrictions as of that date. See Binkley v. Rabon Creek Watershed

Conservation Dist of Fountain Inn, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001). Despite being on notice, Heron Point waited 23 years to bring an action for a declaratory judgment regarding the restrictions contained in that deed. The delay is patently unreasonable.

Further, there can be no question that the delay was unreasonable. As early as 2005, Heron Point was considering changing the use of the property from a golf course to a real estate development, but knew at that point that there was an issue with the deed restrictions. In other words, Heron Point was considering changing the use of the property for ten years before it brought this lawsuit – seeking essentially a declaration that it can change the use. The ten-year delay is, likewise, patently unreasonable.

## 2. Plaintiffs Unreasonable Delay Prejudiced MBG&YC

Because Plaintiffs waited so long to bring the present action, the relevant facts to prove that the intent that the restrictive covenants in the 1992 Indenture Deed run with the land simply no longer exist.

First, the restrictive covenants in the 1992 Indenture Deed parallel the restrictive covenants contained in the Dusenbury deeds. However, Attorney Dusenbury no longer has any recollection of the negotiation of the deeds or any other salient facts. (Ex. C, Dusenbury Dep. at 17:16-17:7; 18:17-19:7; 19:25-19:12; 20:22-21:12; 25:7-11.) Thus, there are no individuals with any recollection regarding the Dusenbury deeds and the covenants contained therein.

Second, the deed restrictions are identical to the deed restriction that the Partnership, Peoples, Property Consultants, Inc., and MBG&YC agreed to cause to be placed on the property, including the Amenities Parcels, in the 1988 Settlement Agreement. However, with respect to the 1998 Settlement Agreement, the vast majority of evidence has been lost. The only individual with any recollection of the document is George Magrath and his recollection is limited to the

fact that 1998 Settlement Agreement was the only agreement that came out of the bankruptcy. (Ex. D, Magrath Dep. at 37: 3-7.) The other signatories to the document are deceased or cannot be located. Attorneys Lawrence Johnson and Mike Battle, despite having been involved in with the 1998 Settlement Agreement have no recollection of it. Furthermore, Attorney Johnson's files no longer exist and Attorney Battle's files were destroyed in a warehouse fire. The files of the United States District Court District of South Carolina Bankruptcy Division have been lost. Plaintiffs have not identified a single witness who can testify regarding the 1998 Settlement Agreement. Accordingly, no individuals are available to testify as to the 1998 Settlement Agreement's relationship to or causation of the deed restrictions in the 1992 Indenture Deed.

Third, with respect to the 1992 Indenture Deed, there are no witnesses available to testify with any substance regarding the 1992 Indenture Deed, let alone its intent. Jerry Spearman, Sr. and Millon Plyler were the individuals, on behalf of Heron Point, with knowledge of the 1992 transaction and 1992 Indenture Deed. (Ex. I, Brown Dep. at 14:7-15). Both are now deceased. Id. at 10:21-11:1. Attorney Douglas Brown, corporate counsel for Heron Point, represented Heron Point with respect to the 1992 transaction and sale of the Heron Point Golf Course from Peoples to Heron Point. Id. at 10:2-13. Mr. Brown, however, does not have a strong recollection of the 1992 transaction nor recollect any discussions or negotiations regarding the 1992 Indenture Deed leading up to closing. Id. at 13:7-12; 36:16-21. Attorney Brown did testify during his deposition that based upon the language in the contract for sale in the above-referenced 1992 transaction, Jerry Spearman, Sr. and Millon Plyler, and therefore, Heron Point, would have been aware of the restrictive language in the 1992 Indenture Deed: "the only permitted use of this property is a golf course, country club or other ancillary use relating to golf course or country club use." (Ex. I, Brown Dep. at 20:19-23:17; 37:21-39:10.) Attorney Brown, also testified that the deed

restrictions were necessary because of how the deal was structured and the buyer was required to agree to them. Id. at 23:18-24:11. Attorney Brown produced his closing file relative to the 1992 transaction, but no documents contained therein provide evidence as to whether the covenants were intended to run with the land.

Most significantly, the Plaintiffs 30(b)(6) SCRCP witnesses from Heron Point and Condo-World have no knowledge of the 1992 Indenture Deed or transaction. As 30(b)(6) SCRCP deponents bind the corporations, Heron Point and Condo-World cannot testify as to whether the restrictive covenants were intended to run with the land. See, generally, McCray v. Allstate Ins. Co. and Liberty Mutual Fire Ins. Co., No. 3:14-cv-02623-TLW, 2015 WL 6408047 (D.S.C. October 22, 2015).

Separate and apart from Heron Point, Mr. Magrath who would have been involved in the transaction on behalf of Peoples testified that he does not have much recollection of the negotiations regarding the sale. Magrath did, however, recollect the restrictive covenants from the 1988 Settlement Agreement being included in the 1992 Indenture Deed. (Ex. D, Magrath Dep. 86: 14-20). He further testified that “there was never any doubt that language would be in the Deed because that’s what was agreed to earlier.” Id. at 87:5-9. Attorney Battle testified that he did not recollect being involved with the 1992 Indenture Deed, despite his firm’s involvement in it. (Ex E, Battle Dep. at 21:12-25.) Again, the files related to the transaction were destroyed in a warehouse file.

In sum, Plaintiffs have failed to produce a witness who can testify as to the intent of the restrictive covenants in the 1992 Indenture Deed. Plaintiffs have failed to produce a witness who can testify as to the key issue in this case because they delayed in bringing this lawsuit. Because Plaintiffs delayed in bringing this lawsuit, MBG&YC has been unable to locate anyone who can

testify regarding this key issue. MBG&YC is extremely prejudiced by the unreasonable delay because the individuals who would have knowledge of the 1992 transaction are either dead or have no recollection of the salient events. Similarly, the documents related to the 1992 transaction no longer exist.

Fourth, in 2005, Plaintiff sought a waiver of the very restrictions at issue in this case, but failed to produce witnesses who could testify regarding that very waiver. Plaintiffs knew there was an issue with the deed restriction in 2005 as evidenced not only by the waiver of deed restrictions but based on the memorandum that states “The prospects of this change should be encouraging, would be encouraging except for the deed restriction on the property that requires it remain a golf course.” Ex. I. However, once again, Plaintiffs failed to bring suit -- when witnesses with knowledge, such as Jerry Spearman, Sr., were alive. Instead, Plaintiffs sat on their rights and waited another ten years before doing anything to determine whether the deed restrictions were real or personal.

This case presents the textbook example of laches. Twenty-seven, twenty-five years, and ten years have elapsed since the relevant documents were executed. During that time, the relevant parties died or forgot the relevant facts. Over the course of years, documents have been destroyed and lost – including a court file and attorneys’ files – files that would normally be available at least for some duration after a transaction. Plaintiffs delay was unreasonable and prejudicial to Defendants, their request for a declaratory judgment that the real covenant contained in the 1992 Indenture Deed is personal should be dismissed on the basis of laches.

Similarly, Plaintiffs other requests for declaratory relief should be dismissed based on laches. As explained in detail above, the relevant witnesses concerning the relief requested in the Complaint are dead or do not have any recollection of the relevant events. Also, as explained

in detail above, the documents that could shed light on the relevant events are missing. These are the documents and individuals that are relevant to each of Plaintiffs' requests for declaratory judgment. Quite simply, the evidence to determine the relief requested in the Complaint no longer exists. Plaintiffs sat on their rights – to the extent they had any – and cannot be heard to complain some twenty-seven, twenty-five years, and ten years after the relevant events occurred.

**CONCLUSION**

For the foregoing reasons, Myrtle Beach Golf & Yacht Club Association, Inc.'s Motion for Summary Judgment dismissing the Complaint in its entirety should be granted.

THE PEARCE LAW GROUP, P.C.

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ATTORNEYS FOR DEFENDANT MYRTLE  
BEACH GOLF & YACHT CLUB  
ASSOCIATION, INC.

August 17, 2017

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Larry B. Hyman, Circuit Court Judge  
Fifteenth Judicial Circuit

Case No. 2015-CP-26-3173  
Appellate Case No. 2017-002642

**RECEIVED**  
FEB 21 2018  
SC Court of Appeals

Condo-World Development, LLC  
and Heron Point Golf Club Limited Partnership .....Respondent

vs.

Myrtle Beach Golf & Yacht Club Association, Inc. ....Appellant

AND

Myrtle Beach Golf & Yacht Club Association, Inc. ....Appellant

vs.

South State Bank .....Respondent

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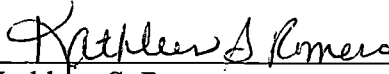
**CERTIFICATE OF SERVICE**

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I, Kathleen S. Romero, an employee of Callison Tighe & Robinson, LLC, do hereby certify that, on this date, I served the foregoing **Condo-World Development, LLC and Heron Point Golf Club Limited Partnership's Amended Reply to Appellant's Response to Motion to Dismiss Appeal Dated December 19, 2017** upon counsel of record, by depositing a copy of the same in the United States mail with proper first-class postage affixed thereon, addressed as follows:

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Kerry K. Jardine, Esquire  
Charles B. Jordan, Jr., Esquire  
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\_\_\_\_\_  
Kathleen S. Romero

February 21, 2018

5320.134\Appeal\COS-AmendedReply

**Demetri "Jim" K. Koutrakos**

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February 21, 2018

**RECEIVED**  
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SC Court of Appeals

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
SC Court of Appeals  
1220 Senate Street  
P. O. Box 11629  
Columbia, SC 29211

RE: Condo-World Development, LLC and Heron Point Golf Club Limited Partnership vs. Myrtle Beach Golf & Yacht Club Association, Inc.  
Case No. 2015-CP-26-3173  
Appellate Case No. 2017-002642

Dear Ms. Kitchings:

Enclosed herewith please find an original and seven (7) copies of Respondents Condo-World Development, LLC and Heron Point Golf Club Limited Partnership's Amended Reply to Appellant's Response to Motion to Dismiss Appeal Dated December 19, 2017 in the above-referenced matter. Pursuant to my assistant's telephone discussion this morning with Jessica in your office, this Amended Reply is being filed solely to include the Exhibit A referenced therein, which was inadvertently omitted from the Reply filed on February 20, 2018. Kindly file the Amended Reply and return a clocked-in copy to the courier.

By copy of this letter, the enclosed Amended Reply is being served upon counsel of record.

Please feel free to contact my office with any questions.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC



Demetri "Jim" K. Koutrakos

DKK:ksr

Enclosures

cc: Christopher H. Pearce, Esquire  
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