

# The Supreme Court of South Carolina

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

Appellants,

vs.

Parkview Apartments, a South Carolina Limited Partnership; Apartment Investment and Management Company a/k/a AIMCO; Insignia Financial Group, Inc.; AmReal Corporation a/ka 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

Appellants,

vs.

Palmetto Apartments, a South Carolina Limited Partnership; Apartment Investment and Management Company a/k/a AIMCO; Insignia Financial Group, Inc.; AmReal Corporation a/ka 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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**APPENDIX TO RECORD ON APPEAL**

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Carolina Management Corporation of Beaufort, James B. Jackson, Whaley R. Hinnant, Jr., Mary Gasser Rawl and Rhoda G. Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

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/ka 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

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/ka 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., 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

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

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2 CIRCUIT COURT  
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4 LAURANCE H. DAVIS, JR., et al, Plaintiff,  
-vs- Orangeburg County  
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6  
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11 PALMETTO APARTMENTS, a South Carolina 05-CP-07-1989  
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12  
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14 PARKVIEW APARTMENTS, a South Carolina 03-CP-07-726  
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15  
16 CAROLINA MANAGEMENT COMPANY, et al,  
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-vs- Beaufort County  
17 PINWOOD PARK APARTMENTS, et al, 05-CP-07-1990  
Defendant.  
18  
19 Heard on Monday, August 24, 2009  
Aiken, South Carolina  
20  
21 BEFORE:  
22 THE HONORABLE DOYET A. EARLY, II  
23  
24 Cheri L. Young, RPR  
Circuit Court Reporter  
P O Box 1154  
25 Aiken, SC 29802-1154

## 1 APPEARANCES:

2 Counsel on Behalf of the Plaintiffs:

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4 Joel D. Bailey, Esq.

5 Counsel on Behalf of the Defendants:

6 Ellis M. Johnston, II, Esq.

7 Calvin T. Vick, Jr., Esq.

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1 ON AUGUST 24, 2009 AT 2:05 P.M.:

2 THE COURT: All right. Mr. Vick? Mr. Johnston?

3 MR. JOHNSTON: Your Honor, may it please the  
4 Court. We're here today on two motions seeking sanctions  
5 for violation of the Court's two orders issued with regard  
6 to our motions to compel.

7 THE COURT: Mr. Johnston, I've read your memo.

8 MR. JOHNSTON: I don't have a lot else to say.

9 THE COURT: Sir?

10 MR. JOHNSTON: I'll be happy to give you --

11 THE COURT: You've said in your memo that they  
12 had neither produced nor disclosed anything pursuant to my  
13 previous orders, motions to amend or offer. You're  
14 telling me you haven't gotten anything?

15 MR. JOHNSTON: That is correct.

16 THE COURT: Mr. Pendarvis? Mr. Bailey?

17 MR. PENDARVIS: Your Honor, I'll start off.

18 THE COURT: Well, have you not given them  
19 anything?

20 MR. PENDARVIS: We have, Your Honor.

21 THE COURT: Well, why are they telling me they  
22 haven't gotten anything?

23 MR. PENDARVIS: Your Honor, as far as the  
24 supplement production from your order, it's been 35 days  
25 since the order became effective. We -- as you know, Your

1 Honor, I've been preparing, involved in another matter.

2 THE COURT: This case has been going on for six  
3 years. My patience is just about done.

4 MR. PENDARVIS: I understand that, Your Honor. We  
5 have today supplemental responses to the production. We  
6 have two new boxes of documents.

7 The issue is, Your Honor -- the difficulty in the  
8 matter is, this discovery order involves all five of the  
9 partnerships, multiple matters on cases that aren't even  
10 set for trial yet. Gathering that information from all  
11 the different clients has been very difficult.

12 THE COURT: Mr. Pendarvis, y'all brought the five  
13 cases. The cases in Orangeburg and Charleston may have  
14 some relevance to the cases for trial January in  
15 Beaufort.

16 I'm sorry that you created a nightmare for  
17 yourself but this case is set for January, the middle of  
18 January.

19 I have been as nice to all four of y'all as I  
20 know how to be. I've let y'all sort of handle discovery  
21 like you want to. We've put the case off because the  
22 discovery wasn't complete.

23 It's going to be tried January, whenever it's set  
24 for. If they don't get the discovery, I'm going to throw  
25 the case out.

1 MR. PENDARVIS: Well, Your Honor --

2 THE COURT: Let's talk about what --

3 MR. PENDARVIS: I understand that. And here's --  
4 today we have, and I'll pass over to -- let me add to  
5 this, Your Honor. I need to say this.

6 Trial in our other matter ended last Monday, a  
7 week from today. In the time since then, I've had my  
8 staff -- instead of helping, I didn't have my paralegal at  
9 the trial before Your Honor who was in the last two weeks  
10 or so, there was no --

11 THE COURT: Mr. Bailey wasn't in that trial.

12 MR. PENDARVIS: I understand that, Your Honor.  
13 My point is we've been working diligently. My staff has  
14 come in at four in the morning.

15 We are sole practitioners, Joel and I. And I  
16 understand this is difficult, complex cases but the  
17 problem we're dealing with is the new order and we're  
18 going to refer today to these two orders that Your Honor's  
19 issued. One dealing with the discovery primarily and the  
20 second order dealing with the privilege issues.

21 With regard to the discovery order, since March I  
22 have communicated with all the clients that we are able to  
23 have contact with. Since this case has been pending --  
24 well, let me also say, Your Honor, that we're dealing  
25 with, as the Plaintiffs, the majority of the original

1 partners are very old and in declining health.

2           Since this case has been filed we have lost three  
3 of the partners. Mr. Murcey, Mr. Trotter have deceased.  
4 Recently, I don't know if you saw, Mr. Rusty Wineberg has  
5 passed away. We are having difficulty getting a lot of  
6 the documents from people who can't communicate because of  
7 their health issues. For all the other people we have  
8 gathered the documents and some of the things that our  
9 objections, Your Honor, that --

10           THE COURT: The objections have been dealt  
11 with --

12           MR. PENDARVIS: I understand that, Your Honor, but  
13 my point is this. We responded everything even remotely  
14 relevant to this case. And to the extent that your new  
15 order has these clients looking for insurance applications  
16 from 40 years ago, it's -- we've done that.

17           That's been the problem is we've had to send  
18 these people out searching for materials not in their  
19 immediate control. And through the summer, since March,  
20 even though we had a motion to alter or amend pending that  
21 didn't become effective until in the month of July, excuse  
22 me, June, and the 30 days ran in July, in that time period  
23 while all these requests were out we had our clients  
24 looking for these documents.

25           We have, we have a copy today -- one other thing

1 too, Your Honor, rather than just dump truck, in other  
2 words, just deliver to the Defendants a stack of documents  
3 without any reference, we have segregated by request and  
4 we have not had this happen for our requests, but per the  
5 rules we have segregated all the documents by discovery  
6 section. I'm in the process of getting verifications for  
7 all the interrogatories for every one of the Plaintiffs.  
8 They will be ready for their depositions whenever the  
9 defense is able and can schedule them.

10 This production is all we could do. It's  
11 absolutely, I can say, Your Honor, is the best we can do.

12 And, this information -- the information that has  
13 been previously produced in this case was more than  
14 sufficient for them to take the depositions of these  
15 Plaintiffs.

16 THE COURT: That's your position. It's not their  
17 position. They're the ones that --

18 MR. PENDARVIS: I understand that, Your Honor,  
19 but we've supplemented discovery probably five times. I  
20 know four, but probably this is the fifth production.

21 Every time we've gotten new documents we have  
22 delivered them. Some of the things that we're being asked  
23 in the new order that became effective in July are things  
24 that are just not within the control of these people.

25 Life insurance applications they made back in the

1 60's. Tax returns more than three or four years ago.  
2 They're having to go back. We've gotten as many of these  
3 documents as we can. And we're going to continue to  
4 comply as we are able. I told these Plaintiffs, continue  
5 to look, get me everything you've got responsive to this.  
6 We went through every request, every interrogatory.

7           And I am -- the response from the Plaintiff,  
8 discovery response, Your Honor, is 130 pages of written  
9 material, two bankers boxes of material. I'm going to  
10 deliver those to the Defendants today.

11           Your Honor, my point is that the standard set by  
12 this recent order is so high that it's just taking that  
13 much time. And to the degree, Your Honor, that there --

14           THE COURT: Well, Mr. Pendarvis, don't blame me  
15 for that. I didn't go about this task of bringing all  
16 these lawsuits, dealing with all these complicated issues  
17 going back so far. Y'all did that.

18           And if you were on the other side, I'd give it to  
19 you. So don't fuss at me about it.

20           MR. PENDARVIS: I'm not, Your Honor. I'm just  
21 really stating the facts of the efforts the Plaintiffs  
22 have been making to comply with very high standards set in  
23 the orders of the Court to gather information that's just  
24 far afield and to the degree --

25           THE COURT: I disagree it's far afield.

1 MR. PENDARVIS: Well, that's the Court's ruling,  
2 Your Honor.

3 THE COURT: That's exactly right.

4 MR. PENDARVIS: We are complying. We have  
5 complied. And my point, Your Honor, is that we have made  
6 the very best efforts possible.

7 And we're going to continue. If there's any  
8 information that becomes available that they've not gotten  
9 to counsel, that's going to be produced when it's in our  
10 hands.

11 THE COURT: Well, no, that's not -- I mean, what  
12 if you get it on the eve of trial?

13 MR. PENDARVIS: Your Honor, we sent the requests  
14 out back when the discovery was sent. We asserted what we  
15 believed were valid objections that the Court overruled in  
16 March.

17 We asked the Court to reconsider. And during  
18 that process we told the Plaintiffs just in case, let's  
19 get this information. They have done that. And that's  
20 what I'm saying.

21 Your Honor, this is a 130-page discovery  
22 response.

23 THE COURT: Are you telling me today you're  
24 prepared to hand over to defense counsel in full  
25 compliance with all the outstanding orders?

1 MR. PENDARVIS: Yes, Your Honor. Everything  
2 within our possession, custody or control that hasn't  
3 already been produced is in these boxes and in our  
4 discovery responses.

5 Now, there's going to be a second aspect on these  
6 other, order on privilege. I'm really speaking to you  
7 more on the interrogatories and documents request.

8 Mr. Bailey is going to speak to the Court about  
9 the second order that's the subject of these motions to  
10 compel. The other thing, too --

11 THE COURT: This is not a motion to compel.

12 MR. PENDARVIS: Well, a motion for sanctions.

13 THE COURT: Striking compliant.

14 MR. PENDARVIS: My apologies, Your Honor.

15 The other disconcerting thing about where we are  
16 today --

17 THE COURT: Disconcerting?

18 MR. PENDARVIS: Disconcerting to counsel, Your  
19 Honor, is that we have been, throughout this case Joel,  
20 Mr. Bailey and I have felt like we had a very well-  
21 founded, professional relationship with counsel for the  
22 Defendants.

23 We have worked with each other on other matters.  
24 And as the Court knows, I was involved in a very lengthy,  
25 complex, seven-day trial. Actually I guess six days of

1 actual trial testimony. There were over 35 causes of  
2 action.

3 Collectively -- I mean, for the record, Your  
4 Honor, I was just that busy. We had over 500 exhibits  
5 pre marked from both sides. Two consolidated cases that  
6 were absorbing an inordinate amount of my time through the  
7 July period.

8 THE COURT: What's that got to do with being  
9 unprofessional?

10 MR. PENDARVIS: Well, it's not being  
11 unprofessional, Your Honor. I'm going to get to that  
12 point.

13 We advised counsel for the Defendants of this and  
14 when they had similar situations, we kind of laid back.  
15 The day I walked into court in the Peel versus Peel case,  
16 Monday the 17th, that day, the last thing I did is I  
17 walked out of the office I checked my e-mail. In the  
18 e-mail was the second motion for sanctions. This is the  
19 day I'm walking into trial. They knew it.

20 That's the disconcerting point, Your Honor, is  
21 that they would time their, whatever motions they needed  
22 to make in concert with serious professional obligations  
23 that they knew I was under in another matter.

24 THE COURT: Mr. Pendarvis, they can't get it out  
25 of you any other way. They had to do this. They're not

1 being unprofessional.

2 I admire the way y'all work together but it's  
3 time to fish or cut bait in this case. I've tried to be  
4 as accommodating, as pleasant, let y'all handle  
5 discovery. Y'all excellent lawyers, all four of you, but  
6 it's just time now for me to, I guess, quit being nice.  
7 I'm just going to have to -- either get it to them or  
8 dismiss the case.

9 MR. PENDARVIS: Well, Your Honor, to the extent  
10 that there's information responsive to these requests  
11 outside the privilege issues Mr. Bailey is going to speak  
12 with you about, it's being delivered today and we've got  
13 copies for counsel and copies of the discovery responses.

14 And I just wanted to say to the Court --

15 THE COURT: As an officer of the court you're  
16 telling me it's in full compliance with my order dealing  
17 with that area of discovery?

18 MR. PENDARVIS: Correct, Your Honor, to the  
19 extent this stuff is information known to my clients.  
20 We've got it, and it's being delivered.

21 THE COURT: All right. Mr. Bailey, let me hear  
22 from you.

23 MR. BAILEY: Thank you, Judge.

24 THE COURT: You're welcome.

25 MR. BAILEY: With respect to the other aspect of

1 your March 3rd order, Judge, which dealt with the items  
2 that were under privilege claims on both sides that were  
3 addressed by the special master and that you ended up  
4 issuing reports on, that's the area I'd like to talk about  
5 now because that seems to be also their part of their  
6 motion for sanctions.

7 THE COURT: Well, it is.

8 MR. BAILEY: Sir?

9 THE COURT: It is. No question about it.

10 MR. BAILEY: Right. My position on that, Your  
11 Honor, first of all there's some issue as to whether or  
12 not that order was ever properly served. But getting --  
13 setting aside that particular issue, the basic point that  
14 I want to make to you, to the Court is that that motion,  
15 that aspect of their motion for sanctions is premature at  
16 this time.

17 The reason for that, Your Honor, is because the  
18 time has not yet run for the Plaintiffs to assert any  
19 rights they may have with regard to appeal or seeking  
20 relief in the appellate courts on that order.

21 THE COURT: How can you appeal a discovery order,  
22 Mr. Bailey?

23 MR. BAILEY: There are basis for appealing the  
24 order, Your Honor, and we --

25 THE COURT: Well, has it been appealed?

1 MR. BAILEY: Not yet. The time is not --

2 THE COURT: Has the 30 days run?

3 MR. BAILEY: No, sir; it's not. And what I wanted  
4 to point out to you, Judge, is that due to the nature, I  
5 guess, and the number of the orders and the way sort of  
6 the things have taken place in the case particularly of  
7 recent, my clients are very concerned about the way the  
8 case is headed.

9 THE COURT: Well, what is their concerns?

10 MR. BAILEY: They have a number of concerns,  
11 Judge, quite frankly. But from their view, the Court has  
12 imposed somewhat of a double standard with regard to the  
13 discovery issue.

14 THE COURT: I take issue with that.

15 MR. BAILEY: I understand you do, Your Honor, but  
16 I'm just pointing out what their concerns are. You asked  
17 me their concerns and I'm just telling you what they are.

18 To the point that they are looking and seeking  
19 and, frankly, receiving other advice of other legal  
20 professionals other than Mr. Pendarvis and myself, I  
21 specifically went down, I made a trip down to  
22 Mr. Johnson's office the week before he just, a day before  
23 he filed the second sanction motion but -- to advise him  
24 of this fact.

25 And I wanted to let him know that as he had

1 basically let us know after the mediation when he said  
2 that Mr. Hilty was not pleased with his efforts, I wanted  
3 to let him know that our clients are looking and seeking  
4 other legal advice in light of some of the things that  
5 have taken place recently.

6 Quite frankly, Judge, the time has not run for  
7 them to do that. They're consulting people. I told Ellis  
8 at that time that, you know, I'm a trial lawyer and I  
9 normally don't get involved in the appellate levels,  
10 particularly if I can help it.

11 But they are consulting people who have expertise  
12 in that area. And that obviously once the time runs for  
13 them to make that decision, the time will be ripe to argue  
14 such a motion as we have here today. But the time has not  
15 --

16 THE COURT: Doesn't the filing of an appeal stay  
17 my order?

18 MR. BAILEY: Sir?

19 THE COURT: Does not filing an appeal stay my  
20 order?

21 MR. BAILEY: It does and that's why we're very  
22 reluctant --

23 THE COURT: Has there been an appeal been filed?

24 MR. BAILEY: Not yet.

25 THE COURT: Then my order is not staid. It's

1 still in effect.

2 MR. BAILEY: The time is not -- the time has not  
3 run for them to do that.

4 THE COURT: Time doesn't stay the order. Time  
5 doesn't stay it.

6 MR. BAILEY: I understand, Your Honor.

7 THE COURT: Mr. Bailey, I am as aware or whatever  
8 the words are. I mean, y'all -- this suit was filed, gosh  
9 knows when.

10 MR. BAILEY: Well the part we sued, Judge, was  
11 filed in '03.

12 THE COURT: '03.

13 MR. BAILEY: The other cases --

14 THE COURT: This is '09.

15 MR. BAILEY: -- were filed in '05.

16 THE COURT: Most clients get upset when you don't  
17 get cases heard on time.

18 MR. BAILEY: Exactly.

19 THE COURT: This case is set for January  
20 whatever. It's going to be tried unless I'm told in  
21 Columbia not to try it.

22 MR. BAILEY: I understand that, Judge.

23 THE COURT: Whether they get new lawyers or get  
24 whoever they want to get. I'm trying it and they can try  
25 it however they want to.

1 MR. BAILEY: I understand that, Judge. My only  
2 point to you --

3 THE COURT: How can they be upset with you and  
4 Thomas? Y'all, in my opinion, have been as adversarial  
5 and as diligent as you can be. You've bitten off a big  
6 load other than not getting this discovery to them. I  
7 mean, we've gone through this thing fairly smoothly.

8 They may not be satisfied with my ruling, but  
9 I've done all I know to do in the case. We sent it to a  
10 special master. I allowed y'all to appeal it. I gave and  
11 took from, as I could see it.

12 As I told Thomas last week in the case he tried,  
13 I may not be right but I promise y'all, I do what I think  
14 is right with all due respect to everybody involved, the  
15 lawyers, the parties, the Defendant, the Plaintiffs. And  
16 it's not easy sitting up here doing it, but --

17 MR. BAILEY: Well, I don't mean --

18 THE COURT: -- there's some significant issues in  
19 this case from day one when I first got in it dealing with  
20 the statute of limitation problem. And I found that it  
21 was an issue of fact. And I still struggle with that  
22 somewhat but I just think they're entitled to discovery  
23 dealing with statute problem. And I thought -- I'm just  
24 calling it like see it, Mr. Bailey.

25 MR. BAILEY: I understand.

1 THE COURT: I may be wrong. I don't know.

2 MR. BAILEY: I understand, Your Honor. There's  
3 always a 50/50 chance either way. So I understand that.  
4 I'm just telling you we're --

5 THE COURT: I hope there's better than a 50/50  
6 chance I'm right.

7 MR. BAILEY: I'm just telling you that that's the  
8 situation with our clients. I did give Mr. Johnston a  
9 courtesy call. Actually not a call, I visited him  
10 personally.

11 THE COURT: I can promise you one thing. I'm  
12 sure that Mr. Johnston and Mr. Vick did not lightly file  
13 this motion. And I think they obviously got clients to  
14 represent. And they were sort of getting their self  
15 painted in a corner with a trial date coming and a vast  
16 amount of work to be done between now and January.

17 MR. BAILEY: It seems to me, Your Honor, that when  
18 the 30 days that they have to make their decision runs in  
19 a few days, that we'll know whether they've taken any  
20 advice or what advice has been given, quite frankly,  
21 because I'm not always totally inside the loop.

22 I know what advice I can give to them and what  
23 Thomas can give them, but they are seeking other advice.  
24 And that's where I am and that's where we are.

25 THE COURT: You want to hold that in abeyance

1 until they decide whether or not they want to appeal it?

2 MR. BAILEY: I do.

3 THE COURT: Or do you want to argue it in the  
4 event they don't appeal it? And even if they do appeal  
5 it, it still might not stay it. I don't know. I'll just  
6 have to see.

7 MR. BAILEY: I think maybe we're putting the cart  
8 before the horse to see if we even have a problem. It  
9 seems to me that they're either going to comply with the  
10 order or they're going to seek some other form of relief.  
11 And that's kind of where we are.

12 I don't know of any other way to deal with it,  
13 Judge, quite frankly.

14 THE COURT: Well, I do. I can move forward until  
15 it's appealed.

16 MR. BAILEY: That's true.

17 THE COURT: That's what I'm going do. So let me  
18 hear from you.

19 MR. BAILEY: That's true. You can do that.

20 THE COURT: I am.

21 MR. BAILEY: All right. Then I would point out,  
22 Judge, that the time has not yet run for a Rule 59 motion  
23 to be submitted with regard to your last order changing

24 --

25 THE COURT: I thought my last order was in

1 response to a Rule 59-E.

2 MR. BAILEY: Well, it was but it significantly  
3 changed the earlier order of another judge.

4 THE COURT: But y'all asked me to do that,  
5 Mr. Bailey.

6 MR. BAILEY: The point is, Judge, when we realized  
7 that that was not permitted under the rules, we pointed  
8 that out.

9 THE COURT: What's not permitted?

10 MR. BAILEY: To change the report of a special  
11 master. I'll be candid with you. I didn't realize that.  
12 I didn't do the research on it before all of this came  
13 about but that --

14 THE COURT: I respectfully disagree with you.  
15 Y'all sent me an order referring it to a master with  
16 permission for me to review it. I didn't want to review  
17 it. Y'all's the ones that filed a motion for 59-E.s from  
18 here.

19 Go ahead. I'm listening.

20 MR. BAILEY: My point is, Judge, is that aside  
21 from that, the time for filing a 59 has not yet run. It  
22 runs in a few days apparently.

23 THE COURT: A 59 from what?

24 MR. BAILEY: From your order altering Judge  
25 Clary's findings and conclusions.

1 THE COURT: I've never heard that you can file a  
2 59, Rule 59 motion in response to a ruling on a Rule 59  
3 motion. You got any law that says I can do that?

4 MR. BAILEY: Evan versus Department of  
5 Transportation.

6 THE COURT: I know that one right off the top of  
7 my head, Mr. Bailey.

8 MR. BAILEY: That permits it in certain  
9 circumstances. We think this falls within it.

10 We really think, Judge, quite frankly, it's  
11 something that the Court really ought to consider because  
12 we really need -- we're at a point it seems to me when you  
13 got lawyers filing these kinds of motions, somebody needs  
14 to step back, take a real hard look at this thing and  
15 let's just see if there's some way that all of this can be  
16 avoided.

17 That may be something that can be addressed in a  
18 59 motion.

19 THE COURT: You want me to change my prior  
20 order?

21 MR. BAILEY: Yes, sir. I think it should be  
22 changed.

23 THE COURT: On what basis?

24 MR. BAILEY: The basis that we had previously told  
25 Your Honor. That is, number one, that the authority to

1 alter or amend the findings and conclusions of a special  
2 master apply only to the appellate courts, not to the  
3 circuit courts. So it's a usurpation of jurisdiction  
4 under that rule.

5 The second basis, Your Honor, is that that  
6 particular order will significantly change the mode of  
7 trial and trial preparation and we think --

8 THE COURT: Mr. Bailey, you don't like it because  
9 it's opened up wide open the issue of the statute of  
10 limitations.

11 MR. BAILEY: That's certainly one reason, Judge.  
12 And quite frankly --

13 THE COURT: And that's a viable defense but I  
14 think anything that's a viable defense that you're  
15 entitled to look at stuff that's relevant.

16 MR. BAILEY: But that's not the way you opened it  
17 up, Judge. You didn't open it up because it's a viable  
18 defense. You opened it up on the theory that we waived  
19 it, that we waived any claim of attorney-client privilege  
20 by filing the lawsuit. That's what your order says,  
21 Judge.

22 THE COURT: You can take it to Columbia. Do  
23 whatever you want to do with it, Mr. Bailey. I'm moving  
24 forward.

25 I don't know of any -- y'all -- I suggested using

1 Judge Clary. Y'all agreed to do that. You went up  
2 there. Neither one of you liked his ruling. Both of you  
3 filed 59-E's. I ruled on that. Now you don't like that.

4 So go to Columbia if you don't like it. I don't  
5 know what else to tell you to do. My patience is -- I  
6 gave y'all -- is this the same hearing I gave y'all a  
7 three-hour hearing the other night --

8 MR. JOHNSTON: Yes, Your Honor.

9 THE COURT: -- in Barnwell?

10 MR. BAILEY: If it's any consolation, Judge, I've  
11 been involved since 2000.

12 THE COURT: Well, there's no consolation on this.

13 MR. BAILEY: My patience gets a little frayed at  
14 times, too.

15 THE COURT: I understand.

16 MR. JOHNSTON: Your Honor.

17 THE COURT: Anything else?

18 MR. BAILEY: I would point out, Judge, that the  
19 order also materially changes the duty of a fiduciary in  
20 this state.

21 That's another reason that, quite frankly,  
22 they're looking considerably at advice of other counsel.  
23 So for those reasons --

24 THE COURT: What am I supposed to? Just sit  
25 around and wait until they decide what they're going to

1 do, or should I keep this lawsuit moving?

2 MR. BAILEY: Well, Judge, that's obviously your  
3 decision. My point to you is that there's only a limited  
4 few number of days.

5 THE COURT: How many more days is it?

6 MR. BAILEY: Your order as I understand it, Judge,  
7 was sent to the clerk on the 30th. I don't know when it's  
8 been entered to be honest with you.

9 THE COURT: They've had that problem in Beaufort,  
10 that's for sure.

11 MR. BAILEY: Yeah. I think you can take judicial  
12 notice of that one, Judge.

13 THE COURT: All right. Mr. Johnston, we got  
14 about three minutes. Tell me what you want to tell me.

15 MR. JOHNSTON: Just a couple things, Your Honor.

16 Number one, the only way to make that order  
17 appealable is to issue the sanctions under Rule 37 that we  
18 asked for and/or find the Plaintiffs in contempt.

19 Okay. That will make it appealable without --  
20 either one of those sanctions will make it appealable.

21 Number two, we served that order on the  
22 Plaintiffs on the July 30th, Ted?

23 MR. VICK: Yes, Your Honor.

24 MR. JOHNSTON: That was, that's 22 days or 24 --  
25 25 days ago. So this 59-E. stuff, you know, we sent the

1 order to them. They had physical possession of it.

2 THE COURT: 59-E. you have to file it within how  
3 many days?

4 MR. JOHNSTON: Ten.

5 MR. BAILEY: Judge, with all due respect, it's ten  
6 days from the entry of the order and that requires it be  
7 filed with clerk of court.

8 Just to be candid, when I started this I pointed  
9 out there was some question about service. Anyway, to be  
10 candid about it, neither Mr. Pendarvis's office nor my  
11 office can find a copy that was served by mail. It was  
12 served by e-mail.

13 THE COURT: All right, gentlemen. I'm not  
14 getting into all of that.

15 MR. JOHNSTON: Judge, the Court -- you entered  
16 the order that adopted Judge Clary's report. That was  
17 June, June 7th. And the order specifically provided that  
18 each side could then file a Rule 59-E. motion.

19 THE COURT: Which you did.

20 MR. JOHNSTON: Which we did.

21 THE COURT: And I heard it.

22 MR. JOHNSTON: And the Court ruled. You heard it  
23 and ruled on it.

24 THE COURT: And now you don't like that.

25 MR. JOHNSTON: And that Rule 59-E. motion sort of

1 like what's going on here. Now we have a real significant  
2 problem.

3 I mean, we have about 15 Plaintiffs that we need  
4 to depose. We got to go through these documents, get  
5 ready. Assume their schedule meets with ours, it takes  
6 maybe three, four weeks to get through the documents, get  
7 them ready, get ready for the Plaintiffs, 15 of them.

8 So we've gone from August the 24th to September  
9 the 24th to probably mid to late October and we've just  
10 gotten the Plaintiffs done.

11 I'm assuming they have responded on their experts  
12 in the way that they should have the first time. Not,  
13 he's going testify to valuation and his, the basis of his  
14 opinion is his extensive career in real estate.

15 THE COURT: Well, Mr. Johnston, let me ask you  
16 this. I assume you haven't gotten anything on my latest  
17 order concerning what was to come under the privilege  
18 information; have you?

19 MR. JOHNSTON: No, sir.

20 THE COURT: And, Mr. Bailey, you haven't given it  
21 to him; have you?

22 MR. BAILEY: No, sir. We have not, pending the  
23 decision by the clients as to what the intent --

24 THE COURT: Well, I don't know when a judge  
25 sitting up here is supposed to wait on your clients to

1 make his decision as to whether or not they're supposed to  
2 comply with my order. That seems a little strange.

3 MR. BAILEY: The only thing I can say, Judge, it  
4 just seems to me that the rules provide that they have 30  
5 days in which to make that decision. And --

6 THE COURT: Why 30 days?

7 MR. BAILEY: To file any appeal for appellate  
8 relief, Judge, they've got 30 days under the rules.

9 MR. JOHNSTON: There is --

10 MR. BAILEY: Even though your order says seven, I  
11 understand that.

12 THE COURT: When's the 30 days up?

13 MR. BAILEY: Like I said, Judge, I'm not sure  
14 exactly when --

15 THE COURT: You can't even tell me that.

16 MR. BAILEY: Well, I can't tell you because I  
17 don't know when it was entered with the clerk of court.

18 THE COURT: That's fine.

19 MR. BAILEY: If I knew that I'd give you an  
20 answer, but I don't know the date it was entered with the  
21 clerk of court.

22 THE COURT: Mr. Johnston, you want me to issue an  
23 order striking their complaint --

24 MR. JOHNSTON: Yes, sir.

25 THE COURT: -- for failure to comply with it?

1 MR. JOHNSTON: Yes, sir.

2 Your Honor, I don't know what else to do. To be  
3 honest, as I sit here right now, I see the remainder of  
4 this month and the first part of September getting through  
5 the documents to get it prepared for the Plaintiffs. I  
6 see then at least a month to get those 15 Plaintiffs done,  
7 some of them will be very short. Some of them will be  
8 very long.

9 We then have the experts. Okay. And then  
10 hopefully these new answers to interrogatories are going  
11 to tell us a little more than they're going to testify  
12 about valuation and their, you know, they have extensive  
13 real estate experience. They have a HUD expert. What's  
14 he going testify about.

15 THE COURT: Well, I'm more now concerned about  
16 this information that comes out of the order dealing with  
17 the privilege information because Mr. Bailey says he  
18 hasn't given it to you. And apparently they don't intend  
19 to give it to you unless some other lawyers tell them to  
20 give it to you or whether they're going to appeal it.

21 So if I dismiss the case for failing to comply  
22 with my order as a sanction in this matter, that may be  
23 playing right into what they want. I don't know what they  
24 --

25 MR. JOHNSTON: It may be but, you know, that's an

1 issue. The only way that can be appealable, I mean, the  
2 only way these orders may be appealed as I read the law is  
3 exactly that. Dismissal.

4 THE COURT: That's an awful drastic remedy. You  
5 agree with that?

6 MR. JOHNSTON: Without any question, Your Honor.  
7 We briefed it fully in our -- I mean, I tried to craft,  
8 think to myself what short of dismissal, okay, would work  
9 in this case. And, I mean, I thought about lesser  
10 sanctions, you know. If the Court holds the sanction is  
11 going to be, I hold that the time for the statute of  
12 limitations began to run in 1998 or '99, okay, and we have  
13 their letters in your file.

14 THE COURT: I'm not going to rule that,  
15 Mr. Johnston. I already ruled that's a factual issue.  
16 What I may rule though is that since they haven't complied  
17 and they take the position they're taking, that Mr. Bailey  
18 says that they're waiting on other outside counsel to tell  
19 them whether to or not to.

20 I've got an order in effect I may just say, if  
21 they don't provide that information within ten days from  
22 today's date the complaint is stricken. I'll give them  
23 the chance to get it to me or they can take their chances  
24 in Columbia.

25 I don't know how else to deal with litigants who

1 are not compliant with the order. And it's -- I've just  
2 never heard in all my 35 years that you can do a 59 motion  
3 on an order that was a result of a 59 motion. I just  
4 don't know where that's coming from.

5 In all due respect to Mr. Bailey, he and I go  
6 back a long way, and it's certainly not anything personal  
7 to me and him, but there's no way for this case to be  
8 tried in January and it's going to be tried without the  
9 discovery being there.

10 So I'm going to take it under advisement. I'm  
11 going to let you two talk and I'm going to send an e-mail  
12 tomorrow and the e-mail very well could be that my order  
13 is, as drastic as it may be is that I will dismiss the  
14 action for failure to comply. I'll give them X. amount of  
15 days to comply with it to remedy that.

16 I'd rather not do that but I'm backed into a  
17 corner

18 MR. JOHNSTON: I understand. The startling thing  
19 to me is this discovery dispute is controlling whether  
20 this case will get tried when. I mean, we had the trial  
21 date set for May or a tentative one set for May and we  
22 couldn't do it because of discovery.

23 Now the Plaintiffs are controlling the trial  
24 date, once again. And it is -- just puts us in a heck of  
25 a mess. We've got -- I mean, if this thing's going to be

1 tried in January --

2 THE COURT: It's going to be tried in January. I  
3 don't have any choice, unless it's dismissed.

4 MR. JOHNSTON: Good reason to dismiss it. My  
5 client isn't going to like me very much.

6 THE COURT: In all due respect to you and  
7 Mr. Pendarvis, I just got out of a lengthy trial with  
8 Thomas. He knows I try to be fair to everybody. I am  
9 fair to everybody. I even try to be, but I need you to  
10 report to your clients that I'm taking this under  
11 advisement this afternoon with strong leans towards  
12 dismissing the action for them failing to comply.

13 And if they want to take that chance and go to  
14 Columbia that I'm wrong on what I did, that's the chance  
15 they can take. Or they can comply with my discovery order  
16 and let's move forward and try the case straight up on the  
17 facts.

18 Y'all are certainly in a position to be ready to  
19 go. You've been living with the thing for a long time.

20 MR. BAILEY: We were ready to go, Your Honor,  
21 until these latest rulings. And, quite frankly, they  
22 changed everything. They may well require counsel to be  
23 out of the case and testifying.

24 The latest order, quite frankly, and I'm sure  
25 Your Honor doesn't realize the implications, but the

1 implications are far reaching even beyond this case. I  
2 mean, they go to the very substantive issues of law in  
3 this state relating to attorney-client privilege and duty  
4 of fiduciaries and things of that nature.

5           So it's not something, you know, that we take  
6 lightly.

7           THE COURT: I'm not suggesting that you take it  
8 lightly. I never have suggested that.

9           MR. BAILEY: Yes, sir.

10           THE COURT: I'm dealing with a case that's a  
11 major, major issue. From the day I got this case, one of  
12 the first things I had to do was decide a motion for  
13 summary judgment on the statute problem.

14           MR. BAILEY: Yes, sir.

15           THE COURT: And that, I ruled in your favor  
16 against Mr. Johnston on those that it was a factual issue.

17           MR. BAILEY: Yes, sir.

18           THE COURT: I think that they're entitled to  
19 whatever documents they can to develop that defense as  
20 well as you saying it was brought within the statute. If  
21 my ruling creates some problems in that regards, I have to  
22 live with it.

23           MR. BAILEY: But my only comment in that regard,  
24 Judge, is that it's -- as I mentioned earlier it was the  
25 nature of the ruling. The way the law is historically

1 involved is that the Defendants assert the statute of  
2 limitation as an affirmative defense in their responsive  
3 pleadings.

4           If they ask for documents from the Plaintiff's  
5 lawyers or the Plaintiffs that are protected by the  
6 attorney-client privilege, historically case law is that  
7 the assertion of the statute of limitation defense does  
8 not trump the attorney-client privilege. They don't get  
9 documents that are privileged between attorney and  
10 client.

11           What they have done in this case is try to get  
12 around that by stating that, well, the statute of  
13 limitations is an issue in the case not because we have  
14 raised it but because the Plaintiffs in their pleading  
15 impliedly waived it.

16           There's never been a case in this state that  
17 adopted this implied waiver theory under this situation,  
18 Judge. And so your order adopting that premise creates a  
19 whole new legal principle in the State of South Carolina  
20 that completely undermines the existing statute of  
21 limitations law.

22           And that's one of the reasons that it's so  
23 important to consider the import of what your order does.

24           I mean, your order would require us to produce  
25 letters to clients, and from clients, back and forth

1 between clients that set forth trial strategy, that set  
2 forth mental impressions. It basically gives the defense  
3 an entire game book right before the game for the opposing  
4 party.

5           So that's the difficulty that I see with it.  
6 It's not that they, that they raised it in a traditional  
7 manner because had they done it in a traditional manner  
8 the law is very clear. You know, the statute of  
9 limitations defense being raised by a defendant doesn't  
10 trump the attorney-client privilege.

11           But the way they did it through the back door and  
12 claiming that we impliedly waived it, first of all, which  
13 we dispute. There's nothing in the complaints that would  
14 indicate that. But secondly, that premise has not been  
15 adopted by the courts of this state.

16           So that's a whole different ball game we're  
17 into. That's one of the reasons that I think if Your  
18 Honor would be willing to sit back and take a longer look  
19 at this thing under a 59, it might help get everything  
20 resolved and avoid any considerations of review and that  
21 type of thing.

22           THE COURT: Mr. Bailey, I have listened to y'all  
23 for three hours the other night, way into the evening in  
24 Barnwell after my court over there.

25           And I've ruled like I think it should be done

1 under the facts of this case, under the pleadings, and I'm  
2 not going to go back on that. Y'all know what my  
3 situation is.

4 I urge you to tell your clients that I've ruled  
5 on it. I may be wrong, I may be right. But that's the  
6 ruling. And if they don't want to comply with it, then  
7 it's a good chance this case is going to get tossed.

8 MR. BAILEY: I understand, Your Honor. For the  
9 record, Your Honor, we'd like to just go on record now and  
10 just ask you pursuant to Rule 59 and/or 60, to vacate that  
11 order and basically go back and take a second look at  
12 these issues.

13 THE COURT: Thank you. Respectfully denied.

14 MR. BAILEY: Okay.

15 THE COURT: All right. I look to hear from you  
16 gentlemen. I'm just going to issue the order. Please  
17 tell your clients what's going on, and they have a right  
18 to know before I do anything.

19 MR. BAILEY: Yes, sir. I just want to make sure I  
20 understand your ruling. Is it your ruling that --

21 THE COURT: I'm not ruling. I'm telling you that  
22 I am thinking very seriously --

23 MR. BAILEY: I understand.

24 THE COURT: -- that if they choose not to comply  
25 with my order that I am going to dismiss the action. And

1 I will probably issue some type of order saying that  
2 failure to comply within 30 days, not 30 days -- 15 days  
3 or something of that nature will result in dismissal as a  
4 sanction, and attorney's fees.

5 MR. BAILEY: All right, sir.

6 THE COURT: I'll leave attorney's fees open until  
7 I decide what to do.

8 MR. JOHNSTON: All right.

9 THE COURT: Thank y'all.

10 MR. JOHNSTON: Thank you, Your Honor.

11 MR. VICK: Thank you, Judge.

12 MR. BAILEY: Thank you, Your Honor.

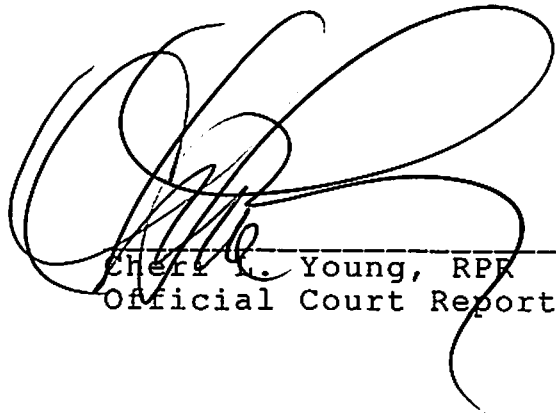
13 END OF PROCEEDINGS : 2:45 p.m.

14 CERTIFICATE OF REPORTER

15 I, Cheri L. Young, Registered Professional  
16 Reporter, and Official Court Reporter for the State of  
17 South Carolina, do hereby certify that the foregoing  
18 transcript of proceedings heard on Monday, August 24,  
19 2009, in Aiken, South Carolina, was reported by me using  
20 machine shorthand and realtime computer-aided translation  
21 and is a true, accurate and complete transcript of the  
22 proceedings had and evidence introduced in the hearing of  
23 the matter.

24 I do further certify that I am neither of kin,  
25 counsel nor interest to any party hereto.

1 I have hereunto set my hand this Saturday, the  
2 5th day of September, 2009.



3  
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6 Cheryl V. Young, RPR  
7 Official Court Reporter  
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STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT )

Civil Action No. 2005-CP-07-1989

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; )

**DEFENDANTS' MOTION TO DISMISS  
COUNTS 1 THROUGH 7**

Plaintiffs, )

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; )

Defendants. )

**TO: JOEL D. BAILEY, Attorney for the Plaintiffs**

PLEASE TAKE NOTICE that the undersigned, as attorney for the Defendants above named, will move before the Presiding Judge of the Fourteenth Judicial Circuit, at the Beaufort County Courthouse, Beaufort, South Carolina, at such time as is designated by the court, for an order dismissing Counts 1 through 7 of the Complaint as captioned above. This motion will be made based on the pleadings filed, the Common and Statutory Law of the State of South Carolina, and such other matters as the court may deem appropriate.

The basis for these motions are as follows:

1. Counts 1 through 7 should be dismissed for failure to state sufficient facts to constitute a claim for relief on behalf of the Plaintiffs, in that the individual Plaintiffs have sued claiming an injury to the Partnership, which is a claim of the Partnership, not the individual Plaintiffs, and must be brought, either by the Partnership itself, or by Plaintiffs in a derivative capacity. Plaintiffs have not brought this suit in a derivative capacity, but individually, and the claims should therefore be dismissed.

2. Counts 1 through 7 should be dismissed for failure to join a necessary party, Palmetto Apartments Limited Partnership, as a Plaintiff.

3. Counts 1 through 7 should be dismissed on the basis that they are not ripe for adjudication until an accounting is first completed. In the alternative, such counts should be stayed pending such an accounting.

4. Count 1, civil conspiracy, should be dismissed for failure of the Complaint to state sufficient facts to constitute a claim for relief for civil conspiracy. The Complaint is deficient in that it does not plead facts from which a combination or agreement can be inferred, does not plead facts from which it can be inferred that Defendants entered into an agreement for the specific purpose of injuring the Plaintiffs, and fails to allege special damages, a necessary element of a civil conspiracy.

5. Count 5, negligence/recklessness, should be dismissed for failure to state sufficient facts to constitute a claim for relief. This count is deficient in that, the obligations of the Defendants to the Plaintiffs, or to the Partnership, arise out of the Partnership Agreement, and there is no duty separate and apart from the Partnership Agreement. There being no common law duty, the negligence/recklessness count should be dismissed.

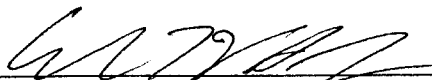
6. Count 7, Unfair Trade Practices Act, should be dismissed for failure to

state sufficient facts to constitute a claim for relief. This count is deficient in that it fails to allege a wrongful act in the conduct of trade or commerce on behalf of the Defendants which affects the Plaintiffs. The effect of any alleged wrongful act on behalf of Defendants would be to the Partnership, and Plaintiffs have failed to sue on its behalf. Further, the conduct of the General Partners with respect to the affairs of the Partnership is not "trade or commerce" within the ambit of the Unfair Trade Practices Act and no facts are alleged that would give rise to an inference that any such conduct affects a public interest, only the interest of the Partnership itself. Finally, because Plaintiffs must sue in a representative capacity (bring a derivative suit on behalf of the Partnership), such a claim fails under S.C. Code Ann §39-5-140.

7. Plaintiffs' legal claims, counts 1 through 7, should be dismissed, because Plaintiffs or their predecessors knew, or reasonably should have known, that their legal claims, if any, accrued more than three (3) years before the commencement of this action, and Plaintiffs' legal claims are, therefore, time barred pursuant to the applicable statutes of limitation, to include, but not be limited to, S.C. Code §15-3-530, §15-3-540, and §39-5-150.

8. To the extent Plaintiffs' claims are brought in a derivative capacity, and therefore sound in equity, counts 1 through 7 should be dismissed as being time barred under the doctrine of laches.

HAYNSWORTH SINKLER BOYD, PA



Ellis M. Johnston, II, SC Bar #3065

Jesse C. Belcher, SC Bar #621

Calvin T. Vick, SC Bar #68187

Post Office Box 2048

Greenville, South Carolina 29602

(864) 240-3217

Attorneys for Defendants

January 12, 2006  
Greenville, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF ORANGEBURG )  
 )  
 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; )  
 )  
 Plaintiffs, )  
 )  
 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; )  
 )  
 Defendants. )  
 )

IN THE COURT OF COMMON PLEAS  
 FIRST JUDICIAL CIRCUIT

Civil Action No. 2005-CP-38-1131

**DEFENDANTS' MOTION TO DISMISS  
 COUNTS 1 THROUGH 7**

**TO: JOEL D. BAILEY, Attorney for the Plaintiffs**

PLEASE TAKE NOTICE that the undersigned, as attorney for the Defendants above named, will move before the Presiding Judge of the First Judicial Circuit, at the Orangeburg County Courthouse, Orangeburg, South Carolina, at such time as is designated by the court, for an order dismissing Counts 1 through 7 of the Complaint as captioned above. This motion will be made based on the pleadings filed, the Common and Statutory Law of the State of South Carolina, and such other matters as the court may deem appropriate.

The basis for these motions are as follows:

1. Counts 1 through 7 should be dismissed for failure to state sufficient facts

to constitute a claim for relief on behalf of the Plaintiffs, in that the individual Plaintiffs have sued claiming an injury to the Partnership, which is a claim of the Partnership, not the individual Plaintiffs, and must be brought, either by the Partnership itself, or by Plaintiffs in a derivative capacity. Plaintiffs have not brought this suit in a derivative capacity, but individually, and the claims should therefore be dismissed.

2. Counts 1 through 7 should be dismissed for failure to join a necessary party, Roosevelt Gardens Limited Partnership, as a Plaintiff.

3. Counts 1 through 7 should be dismissed on the basis that they are not ripe for adjudication until an accounting is first completed. In the alternative, such counts should be stayed pending such an accounting.

4. Count 1, civil conspiracy, should be dismissed for failure of the Complaint to state sufficient facts to constitute a claim for relief for civil conspiracy. The Complaint is deficient in that it does not plead facts from which a combination or agreement can be inferred, does not plead facts from which it can be inferred that Defendants entered into an agreement for the specific purpose of injuring the Plaintiffs, and fails to allege special damages, a necessary element of a civil conspiracy.

5. Count 5, negligence/recklessness, should be dismissed for failure to state sufficient facts to constitute a claim for relief. This count is deficient in that, the obligations of the Defendants to the Plaintiffs, or to the Partnership, arise out of the Partnership Agreement, and there is no duty separate and apart from the Partnership Agreement. There being no common law duty, the negligence/recklessness count should be dismissed.

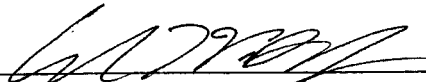
6. Count 7, Unfair Trade Practices Act, should be dismissed for failure to state sufficient facts to constitute a claim for relief. This count is deficient in that it fails to allege

a wrongful act in the conduct of trade or commerce on behalf of the Defendants which affects the Plaintiffs. The effect of any alleged wrongful act on behalf of Defendants would be to the Partnership, and Plaintiffs have failed to sue on its behalf. Further, the conduct of the General Partners with respect to the affairs of the Partnership is not "trade or commerce" within the ambit of the Unfair Trade Practices Act and no facts are alleged that would give rise to an inference that any such conduct affects a public interest, only the interest of the Partnership itself. Finally, because Plaintiffs must sue in a representative capacity (bring a derivative suit on behalf of the Partnership), such a claim fails under S.C. Code Ann §39-5-140.

7. Plaintiffs' legal claims, counts 1 through 7, should be dismissed, because Plaintiffs or their predecessors knew, or reasonably should have known, that their legal claims, if any, accrued more than three (3) years before the commencement of this action, and Plaintiffs' legal claims are, therefore, time barred pursuant to the applicable statutes of limitation, to include, but not be limited to, S.C. Code §15-3-530, §15-3-540, and §39-5-150.

8. To the extent Plaintiffs' claims are brought in a derivative capacity, and therefore sound in equity, counts 1 through 7 should be dismissed as being time barred under the doctrine of laches.

HAYNSWORTH SINKLER BOYD, PA

  
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Attorneys for Defendants

January 17, 2006  
Greenville, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H. Davis, Jr., et al., Plaintiffs, )  
v. )  
Parkview Apartments, a South Carolina Limited )  
Partnership, et al., Defendants. )

Beaufort County  
C.A. No. 2003-CP-07-726

ATTEST: TRUE COPY

Laurance H. Davis, Jr., et al., Plaintiffs, )  
v. )  
Roosevelt Gardens, a South Carolina Limited )  
Partnership, et al., Defendants. )

Orangeburg County COURT  
C.A. No. 2005-CP-38-103 COUNTY, SC

Rhonda G. Rentz, et al., Plaintiffs, )  
v. )  
Orleans Gardens, a South Carolina Limited )  
Partnership, et al., Defendants. )

Charleston County  
C.A. No. 2005-CP-10-2229

Laurance H. Davis, Jr., et al., Plaintiffs, )  
v. )  
Palmetto Apartments, a South Carolina Limited )  
Partnership, et al., Defendants. )

Beaufort County  
C.A. No. 2005-CP-00-1689

Carolina Management Corporation of Beaufort, )  
et al., Plaintiffs, )  
v. )  
Pinewood Park Apartments, a South Carolina )  
Limited Partnership, et al., Defendants. )

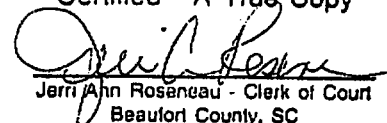
Beaufort County  
C.A. No. 2005-CP-07-1990

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JERRI AHN ROSENEAU  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION, ALTERATION OR AMENDMENT OF THE COURT'S APRIL 6, 2010 ORDER GRANTING SANCTIONS**

Plaintiffs have now filed a motion/memorandum (the "Motion") seeking reconsideration, alteration or amendment of this Court's Sanctions Order of April 6, 2010 ("Sanctions Order"), pursuant to Rule 59, SCRCF. The Sanctions Order was issued after Plaintiffs repeatedly failed to comply with the "General Discovery Order" issued on March 3, 2009, and the "Privilege Discovery Order" issued on July 28, 2009 (collectively, "Discovery Orders") despite several

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Jerri Ahn Roseneau - Clerk of Court  
Beaufort County, SC

warnings from the Court regarding impending sanctions and the Court affording Plaintiffs several "second chances." Each of those Discovery Orders have been the subject of numerous hearings, motions, memoranda, arguments and rulings, including rulings denying Plaintiffs' Rule 59/60 motions seeking reconsideration or relief from the Discovery Orders. In the entirety of their Motion, Plaintiffs do not present any evidence or arguments that the Court has not already fully considered, with the exception of Plaintiffs' inappropriate attempt to belatedly introduce "evidence" that is immaterial to any of the Orders, that was available to Plaintiffs prior to the entry of the Sanctions Order but not filed of record or provided to the Court for its consideration, and which cannot be considered by the Court now as a matter of black letter law (discussed below in Section III).

Despite the Court's repeated affirmation of the Discovery Orders, a substantial portion of Plaintiffs' Motion is devoted, not to the Sanctions Order, but to repetitive, tedious and inappropriate collateral attacks on the Discovery Orders, which are not now subject to continuing attacks under Rule 59. Thus, this Memorandum will primarily address Plaintiffs' claim that the Court erred in issuing the Sanctions Order, i.e., Plaintiffs' claims that they have complied with the Discovery Orders and that the sanctions imposed are not appropriate. In addition, Defendants address some of the more blatant misrepresentations,<sup>1</sup> mischaracterizations and inaccuracies contained in Plaintiffs' Motion. In the interests of *relative* brevity, however, Defendants will refrain from responding, blow-by-blow, to each of the unsubstantiated and groundless claims, allegations and misrepresentations contained in the Motion.<sup>2</sup>

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<sup>1</sup> By way of example, Plaintiffs claim that Defendants' counsel never informed them of their representation of Pinewood in claims against the purchaser made in 2002-2004 (Motion, p. 47). This is utterly false. See Section IV (E.), below, at pp. 26-29, and Exhibits E and F hereto.

<sup>2</sup> Incredibly, the Motion contains more than 200 paragraphs, including subparts, which purport to criticize the Discovery Orders and the 28-page Sanctions Order that is the subject of the Motion. That does not include the

Notwithstanding Plaintiffs' lengthy submissions, each finding of fact contained in the Sanctions Order is true, accurate and in accordance with the evidence of record, no material facts necessary to the Court's analysis are omitted from the Sanctions Order, and the conclusions of law are fully supported by the evidence and the applicable law cited in the Sanctions Order. Plaintiffs have not complied with the General Discovery Order or the Privilege Discovery Order, and the sanction of dismissal is the only sanction that can adequately address Plaintiffs' contempt of court under the circumstances.

**I. Plaintiffs Have Failed to Comply with the Discovery Orders**

**A. General Discovery Order**

Plaintiffs argue the Court erred in finding that their responses to numerous document requests and interrogatories were "incomplete and inadequate" (see e.g. Motion, ¶ 1, p. 4), because they have produced lots of documents, have responded to Defendants' discovery requests since 2005, and have supplemented those responses, as if sheer volume is a substitute for substance and *responsive* answers. The Rules of Civil Procedure and this Court's General Discovery Order require answers and responses that fairly meet the discovery requests. Plaintiffs have not provided such responsive answers.<sup>3</sup> A few examples of Plaintiffs' consistently non-responsive answers are demonstrated below by an abridged version of Defendants' Memoranda

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accompanying affidavit from Mr. Pendarvis, which contains more than 100 paragraphs and 93 exhibits, or the other affidavits filed by Plaintiffs after entry of the Sanctions Order.

<sup>3</sup> Incidentally, Plaintiffs' claim that the Sanctions Order erroneously characterizes "Plaintiffs' complete failure to comply with the General Discovery Order" is entirely without merit (see e.g. Motion at ¶ 4, pp. 6-7). As is the case with many of Plaintiffs' arguments in the Motion, Plaintiffs take the Order's language completely out of context to try to generate an argument that the Court erred in its findings. The sentence objected to by Plaintiffs actually states, "Defendants filed their Motion for Sanctions on July 24, 2009, as a result of Plaintiffs' complete failure to comply with the General Discovery Order." See Sanctions Order at p. 7. That statement is indisputably correct. The General Discovery Order was issued March 3, 2009, and the Plaintiffs failed to provide any supplementation of their prior responses until they produced their Second Supplemental Response at the August 24, 2009 hearing on the Motions for Sanctions. Plaintiffs' first Supplemental Response was provided in January, 2009, well before entry of the General Discovery Order, which specifically found those responses to be inadequate and incomplete.

dated August 27, 2009, and February 11, 2010, each of which is incorporated herein by reference.

**(1) Experts**

Interrogatories requesting the identity, opinions, bases for opinions, and facts relied upon for the opinions of Plaintiffs' experts have been outstanding since November, 2004 with respect to Parkview, and since August, 2008 for the remainder. Plaintiffs' initial response to the November, 2004 Parkview interrogatories identified one expert, who has now been withdrawn. Their November 14, 2008 responses to the interrogatories served in all cases identified a number of experts. Among those specifically retained by Plaintiffs for the purposes of these cases were William O. Higgins, J. D., Henry Chambers, and Billy Keyserling. Plaintiffs' responses further noted that these gentlemen had an opinion, but did not disclose what it was, the bases for it (whatever it was), nor the facts upon which these witnesses relied. After a hearing on Defendants' Motion to Compel, discussions with Plaintiffs' counsel concerning the deficiencies in Plaintiffs' discovery responses, and promises of supplementation which, when finally received, did not correct the deficiencies, this Court issued its Order of March 3, 2009, which provided, *inter alia*:

"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 basis for such opinions. A description of the expert's general experience is not sufficient."

Rules 26, 33 and 34 require nothing less. See also S.C. Highway Dept. v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973).

With respect to Mr. Higgins, Plaintiffs' First, Second and Third Supplemental Responses identify him and state that he is expected to give an opinion regarding the relationship between HUD and AIMCO based upon his general knowledge and experience with HUD. Incredibly,

Plaintiffs do not disclose what his opinions are, the basis for them, or the facts upon which he relied. This is directly contrary to the Court's General Discovery Order.

With respect to Mr. Chambers and Mr. Keyserling, Plaintiffs' First and Second Supplemental Responses identified them as having an opinion on the value of the Parkview and Palmetto apartments, although the responses failed to disclose what that opinion was. Plaintiffs' Third Supplemental Response finally stated what that opinion of value was, but failed to state the bases for those opinions, or the facts upon which the experts relied. Instead, as with Mr. Higgins, they stated it was based upon the experts' general experience in the area, which is precisely the type of response the General Discovery Order warned was insufficient.

For Plaintiffs to contend that they have complied with the Rules of Civil Procedure and this Court's General Discovery Order and that their responses are not "incomplete and inadequate" is, to borrow a euphemism of the Honorable Alex Macaulay, "Incredible." Plaintiffs have not complied, and the evidence of record fully supports the Court's findings in the Sanctions Order.

**(2) Discovery Requests concerning when each Plaintiff knew or should have known of their alleged claim against Defendants.**

Plaintiffs have also failed to provide complete and responsive answers to interrogatories 9, 10 and 12, which concern their initial communications among themselves and with attorneys regarding the investigation or pursuit of claims against Defendants. Plaintiffs' group response to these requests, not individual as required by the General Discovery Order, basically says "we don't recall." Plaintiffs cannot each avoid answering these interrogatories by failing to avail themselves of readily available information, which the record shows clearly exists (including without limitation the documents wrongfully withheld in violation of the Privilege Discovery Order, which obviously contain responsive information concerning the dates and purpose of

Plaintiffs' retention of attorneys, which information is clearly not privileged). Plaintiffs' grossly inadequate response is more fully addressed in Defendants' Second Supplemental Memorandum in Support of Motion for Sanctions Re: General Discovery Order, dated February 11, 2010 (pp. 3-8), and Supplemental Memorandum in Support of Defendants' Motions for Sanctions, dated August 27, 2009 (pp. 11-12), both of which are incorporated herein by reference, as well as the Court's Sanction's Order.

In their Motion, while arguing that they have complied with the General Discovery Order, Plaintiffs paradoxically argue that their non-compliance should be excused for a number of reasons. Plaintiffs' excuses are addressed under Section IV, Excuses, Misstatements, Mischaracterizations and Other Matters.

**B. Privilege Discovery Order**

Plaintiffs spend much of their Motion re-arguing their same claims that the Privilege Discovery Order was decided in error, or that the Court was without authority or jurisdiction to enter the Order, and that the Order should be modified or withdrawn. Defendants have responded to these arguments *ad nauseam* and continue to rely on their various memoranda and the evidence of record. The Court has considered Plaintiffs' arguments on several occasions and repeatedly affirmed the Privilege Discovery Order. On April 6, 2010, the Court determined that the time had come to impose the sanctions the Plaintiffs had been warned of since at least August 24, 2009. The Privilege Discovery Order remains in effect, and all of Plaintiffs' complaints and excuses do not change the undisputed fact that Plaintiffs simply have not produced any of the 96 documents they are compelled to produce under the Privilege Discovery Order.

Plaintiffs claim that they are prepared to produce the documents that they were required to produce under the Court's June 2, 2009 Order, which adopted the findings and conclusions of

retired Judge Gary Clary. (See e.g. Plaintiffs' Motion at p. 43, ¶ 21(b)). Thirty-two (32) of the 96 documents the Plaintiffs have been compelled to produce under the July 28, 2009 Privilege Discovery Order were also required to be produced under the June 2, 2009 Order adopting Judge Clary's findings and conclusions, and they were compelled for reasons unrelated to "at issue" implied waiver of privilege. (See June 2, 2009 Order, Clary Reports and Privilege Discovery Order). Yet, despite Plaintiffs' professed willingness to produce such documents, **they have not produced a single document!** Plaintiffs' actions speak louder than their words, and their claim that they are willing to comply with the Discovery Orders to the best of their ability is nothing more than pretense.

Similarly, Plaintiffs' professed willingness to produce the 96 documents required by the Privilege Discovery Order with certain information redacted from such documents is another empty promise based on their actions (or lack thereof). Plaintiffs filed a Motion for Protective Order under the pretense that they were attempting to comply with the Privilege Discovery Order as best they can, but it is clear from that motion that Plaintiffs were actually seeking, once again, to have the Court modify or withdraw the Privilege Discovery Order, well after their time for filing a motion under Rule 59 had passed.<sup>4</sup> See Defendants' Memorandum Opposing Plaintiffs' Motion for Protective Order, dated March 1, 2010. Plaintiffs have not produced even one of the 96 documents, with or without redactions.

If the Court were to take the actions urged by Plaintiffs in their Motion for Protective Order, it would clearly undercut the Court's rulings in the Privilege Discovery Order, the grounds upon which such rulings were made, and a critical purpose of the Defendant's Motion to

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<sup>4</sup> Plaintiffs' Motion for Protective Order was their third attempt to have the Court modify or withdraw the Privilege Discovery Order, following Plaintiffs' oral motion on August 24, 2009 and their Rule 60(b) Motion dated January 28, 2010, both of which were denied.

Compel and the Court's rulings on the alleged privileged materials. Plaintiffs argue that production of the 96 documents compelled would result in disclosure of their attorneys' litigation and trial strategies in these cases. See e.g. Plaintiffs' Motion for Protective Order in Parkview, p. 2 (seeking redaction of "mental impressions, conclusions, opinions or legal theories of Plaintiffs' counsel concerning this litigation" (emphasis added)). The most critical import of these documents is what did each Plaintiff know, and when did he know it, such that his causes of action accrued and the statute of limitations began to run. Each of the 96 documents was created more than three years before the Palmetto, Orleans, Roosevelt and Pinewood cases were filed. Many of these documents were created more than three years before the Parkview case was filed. The Plaintiffs in these cases admittedly collaborated and shared information with one another regardless of their particular limited partnership affiliations, and they have all been represented by the same attorney, Mr. Bailey, whose knowledge is imputed to each of his clients, since some time in 2000. If the subject documents reveal that the Plaintiffs' attorneys were developing litigation and trial strategies for these cases more than three years before the suits were filed, as Plaintiffs have indicated, they could not be more relevant and important to the statute of limitation issues presented in these cases. Further, the Court has found (and repeatedly reaffirmed) that any claimed privileges or protections that may have attached to these documents were waived by Plaintiffs. Plaintiffs' Motion for Protective Order was not a good faith attempt to comply with the Privilege Discovery Order. It was yet another attempt by the Plaintiffs to have the Court modify or withdraw the Privilege Discovery Order, not unlike the Plaintiffs' previous attempts, which the Court considered and denied.

## II. Sanction of Dismissal Is Necessary and Appropriate

The law cited in the Sanctions Order concerning the award of expenses (including attorneys' fees), the imposition of sanctions under Rule 37(b)(2), SCRCP, findings of contempt, and the imposition of sanctions as a result of contempt is the applicable law in South Carolina. Plaintiffs do not appear to contest this, or at least they do not cite any contrary authority. The authority cited in the Order was previously cited to the Court in Defendants' memoranda in support of their Motions for Sanctions and, in the case of some of the law concerning contempt, in Mr. Vick's letter to Judge Early, dated February 16, 2010 (See Vick Affidavit, Ex. GG thereto at pp. 7-9). The findings of fact contained in the Sanctions Order are true, accurate and in accordance with the evidence of record. The Court instructed Defendants' counsel to draft and submit a proposed order finding Plaintiffs in contempt for their failure to comply with the Discovery Orders and imposing the specific sanctions set forth in the Sanctions Order. Clearly, the Court has determined that, in light of the evidence in the record of these cases, and the applicable law governing sanctions and contempt in South Carolina, the sanction of dismissal is reasonable, necessary and appropriate in these cases. The lengthy record of the events that transpired between the filing of the Motions for Sanctions and the entry of the Sanctions Order certainly reflects the Court's patient and deliberate consideration of these matters, and no objective person could say the Court took these actions lightly.

It is worth noting that, while Plaintiffs argue that lesser sanctions would be appropriate to address their misconduct and contempt of court, they fail to identify any such lesser sanctions (see e.g. Plaintiffs' Motion, ¶ 13(a), p. 34). Instead, Plaintiffs urge the Court to make a finding that they are merely in contempt of court, but to do so without imposing any sanction for

Plaintiffs' contempt. Apparently, Plaintiffs believe the mere finding of contempt, without more, is an appropriate sanction. They are wrong.

The finding of contempt is not a sanction in and of itself. Rather, the finding of contempt is a precursor to sanctions designed to correct (or, in the case of criminal contempt, to punish) the contemptuous conduct. The mere finding of contempt does nothing to encourage the Plaintiffs to comply with the Court's Discovery Orders, which is the very purpose of a civil contempt order such as the Sanctions Order in these cases. In fact, a finding of contempt coupled only with an instruction to comply with the Discovery Orders would have no more effect than the terms of the Discovery Orders themselves, which already direct the Plaintiffs to comply.<sup>5</sup> Plaintiffs could simply continue their non-compliance, resulting in the case remaining frozen or the Defendants being forced to trial without critical evidence the Court has determined they are entitled to receive. A simple finding of contempt, without the corresponding *appropriate* sanction to encourage correction of the contemptuous conduct, would be an incomplete and meaningless exercise of the Court's powers to compel compliance with its orders. The Court's contempt power is clearly not intended to be exercised as a mere shortcut or circuitous route for parties to avoid the black letter law that discovery orders are interlocutory and not subject to immediate appeal. Yet, that is exactly what Plaintiffs are asking the Court to do in this instance. Such a ruling could not be reconciled with this State's law governing contempt or the unavailability of an immediate appeal of interlocutory discovery orders.

Plaintiffs' repeated assumptions in their Motion that the Court simply did not read the Sanctions Order or the Discovery Orders before signing them, or that the Court did not exercise its own judgment in signing the Sanctions Order and Discovery Orders, are incredibly arrogant.

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<sup>5</sup> Months of warning of the impending dismissal sanctions were not enough to bring Plaintiffs into compliance with either of the Discovery Orders.

See e.g. Plaintiffs' Motion, Section B, ¶¶ 1(c), 4(a), 7(a), 8(a), 10(f), 15(b), pp. 4-19; Section C, ¶ 14(a), p. 35. More importantly, Plaintiffs' assumptions are completely without merit or any evidentiary support. It is this type of self-righteous indifference to the Court's orders that has resulted in the Court having no viable alternative but to find Plaintiffs in contempt of court and dismiss the cases as sanctions.

Responding further, Defendants rely on the memoranda filed in support of their Motions for Sanctions, and respond to some of Plaintiffs' criticisms of the Sanctions Order more specifically below, in Section IV.

### **III. "Evidence" Not Filed or Submitted to the Court Before Entry of the Sanctions Order Cannot Be Considered as a Matter of Law**

The Sanctions Order was signed by the Court on April 6, 2010, immediately transmitted to the appropriate Clerks of Court for filing, and entered by the Clerks of Court in each of the above-captioned cases no later than April 9, 2010.<sup>6</sup> After the Court issued the Sanctions Order, which dismissed each of the above-captioned cases, Plaintiffs filed numerous affidavits by their attorneys and the Plaintiffs themselves, attempting to interject into the record purported evidence that was available to the Plaintiffs prior to April 6, 2010, but which was not filed of record or provided to the Court for its consideration prior to that date. Plaintiffs state in their Motion (pp. 2-3) that they rely on such materials in support of the Motion, but the law is clear that Plaintiffs may not introduce such materials in support of their Rule 59 motion.

As a matter of black letter law, Plaintiffs' newly introduced "evidence" may not be considered in conjunction with Plaintiffs' Motion for Reconsideration or any subsequent appeal of the Sanctions Order. "Evidence that is available to a party prior to entry of judgment ... is not

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<sup>6</sup> The Clerk of Court for Orangeburg County entered the Sanctions Order in the Roosevelt case on April 8, 2010, and the Clerks of Court for Charleston County and Beaufort County entered the Sanctions Order in the other four cases on April 9, 2010.

a basis for granting a motion for reconsideration as a matter of law.” Boryan v. United States, 884 F.2d 767, 771 (4<sup>th</sup> Cir. 1989) (emphasis added). Further, the United States Court of Appeals for the Fourth Circuit has held:

“[T]he standard governing relief on the basis of newly discovered evidence is the same whether the motion is brought under rule 59 or rule 60, and rule 60 requires that a party demonstrate: (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended. Thus, in order to support a motion for reconsideration, ‘the movant is *obliged* to show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing.’”

Id. at 771 (internal citations omitted) (emphasis in original). See also Pacific Insurance Co. v. American Nat’l Fire Insurance Co., 148 F.3d 396, 403 (4<sup>th</sup> Cir. 1998) (holding that there are three grounds for amending an earlier judgment under Rule 59(e): intervening change in controlling law, new evidence not available at trial, and to correct clear error of law or prevent manifest injustice; also citing authority to the effect that Rule 59 is not intended to allow a party to complete presenting his case after the court has ruled against him, or to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of the judgment). South Carolina precedent is consistent with the Fourth Circuit opinions discussed above. In Brailsford v. Brailsford, 380 S.C. 443, 669 S.E.2d 342 (Ct. App. 2008), the Court of Appeals held, “Generally, ‘a party cannot use a motion ... to alter or amend a judgment to present an issue that could have been raised prior to judgment but was not.’” Id. at 345 (citation omitted) (holding issue not presented prior to Rule 59(e) motion was not preserved for appeal).

**A. Plaintiffs' Affidavits are not newly discovered evidence**

All of the newly introduced "evidence" objected to in this Memorandum was either known to the Plaintiffs and their counsel before entry of the Sanctions Order, or it could have been discovered and produced prior to April 6, 2010, if Plaintiffs had exercised reasonable diligence.<sup>7</sup> In light of the above, the Court should decline to consider the affidavits filed by Plaintiffs after April 6, 2010, in their entirety, with the lone exception being certain exhibits to the Pendarvis affidavits, dated April 22, 2010, which are discussed separately below. The materials objected to by Defendants are not relevant evidence. They are, for the most part, merely argument and opinion that Plaintiffs submitted in the form of affidavits. Nonetheless, to the extent any of the affidavits' contents could be considered evidence, such evidence had to have been filed of record or provided to the Court prior to April 6, 2010 in order for it to be considered by the trial court or the appellate courts in conjunction with the Sanctions Order. As a matter of law, it would be error for the Court to consider such materials now. Between the filing of the Motions for Sanctions in the summer of 2009 and the issuance of the Sanctions Order on April 6, 2010, Plaintiffs had many opportunities to provide their purported evidence to the Court. They cannot create a different record now, after entry of the Sanctions Order.

**B. Pendarvis Affidavits**

The Pendarvis affidavits, dated April 22, 2010, are a set of five identical affidavits (one filed in each case), containing the exact same arguments, opinions, statements and exhibits (hereinafter collectively referred to as "Pendarvis Affidavit"). The Pendarvis Affidavit is a mixed bag of the following: re-argument of Plaintiffs' opposition to the Discovery Orders and the Motions for Sanctions (not evidence); Mr. Pendarvis' opinions (not evidence); his

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<sup>7</sup> Plaintiffs have not satisfied the third (not merely cumulative or impeaching), fourth (material evidence) and fifth (would require judgment to be amended) inquiries required under Borvan, either.

conspiracy-theory-laden interpretations of events, as well as documents and recorded testimony that speak more accurately for themselves (not evidence); documents that were filed of record prior to the Sanctions Order and are re-filed with the affidavit (redundant, but no objection); documents that were not filed of record prior to April 6, 2010, but were provided to and considered by the Court prior to that date (no objection); and documents that were neither filed of record prior to the Sanctions Order, nor provided to the Court prior to the Sanctions Order. Defendants do not object to the inclusion of documents that were not filed of record prior to the Sanctions Order, but which were provided to the Court prior to April 6, 2010. The Court acknowledges in the Sanctions Order that it did, in fact, consider all of the “letters from counsel ... relating to the underlying discovery disputes and the current Motions for Sanctions.” See Sanctions Order at p. 3. However, Defendants do object to the consideration of the following documents attached to the Pendarvis Affidavit (and any discussion of such documents within the body of the affidavit or elsewhere), because these documents were neither filed of record prior to the Sanctions Order, nor provided to the Court for its consideration prior to April 6, 2010, and Defendants further request that such documents be stricken from the record:

- November 3, 2007 deposition notices; Pendarvis Aff. ¶ 11, Ex. 8;
- November 6, 2007 Plaintiffs’ Supplemental Answers to Defendants’ First Set of Interrogatories and First Request to Produce; Pendarvis Aff. ¶ 13, Ex. 10 and 11;<sup>8</sup>
- November 12, 2007 Plaintiffs’ Supplemental Answers to First Interrog. and RFP; Pendarvis Aff. ¶ 15, Ex. 13 and 14;
- November 14, 2007 Plaintiffs’ Supplemental Answers to First Interrog. and RFP; Pendarvis Aff. ¶ 17, Ex. 16;

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<sup>8</sup> None of the Plaintiffs’ supplemental responses to discovery objected to herein are supplemental responses to the August 28, 2008 discovery requests served by Defendants, which are the basis of the March 3, 2009 General Discovery Order and one of the bases for the Sanctions Order. Plaintiffs’ supplemental responses to the August 28, 2008 discovery requests were provided to the Court prior to the issuance of the Sanctions Order and are properly a part of the record in these cases.

- November 30, 2007 Defendants' Responses to Plaintiffs' Discovery Requests; Pendarvis Aff. ¶ 20, Ex. 19;
- December 10, 2007 Plaintiffs' Supplemental Discovery Responses; Pendarvis Aff. ¶ 22, Ex. 21;
- December 12, 2007 Plaintiffs' Supplemental Discovery Responses; Pendarvis Aff. ¶ 23, Ex. 22;
- December 19, 2007 Plaintiffs' Supplemental Discovery Responses; Pendarvis Aff. ¶ 24, Ex. 23;
- February 27, 2008 Defendants' Privilege Log; Pendarvis Aff. ¶ 29, Ex. 28;
- March 4, 2008 Plaintiffs' Supplemental Answers to Interrog. and RFP; Pendarvis Aff. ¶ 30, Ex. 29 and 30;
- June 27, 2008 Defendants' Second Supplemental Responses to Plaintiffs' First Set of Interrogatories; Pendarvis Aff. ¶ 36, Ex. 36;
- July 22, 2008 Amended Notice of Deposition; Pendarvis Aff. ¶ 40, Ex. 39;
- August 5, 2008 Second Amended Notice of Deposition; Pendarvis Aff. ¶ 42, Ex. 41;
- January 5, 2009 Plaintiffs' Memorandum to Special Master; Pendarvis Aff. ¶ 54, Ex. 52;
- January 12, 2009 Defendants' Supplemental Memorandum (to retired Judge Gary Clary); Pendarvis Aff. ¶ 57, Ex. 54;
- January 16, 2009 Plaintiffs' Second Supplemental Memorandum to Special Master and Memorandum to Special Master in Opposition to Defendants' Motion to Compel; Pendarvis Aff. ¶ 59, Ex. 56;
- January 22, 2009 Plaintiffs' Supplemental Answers to Interrog. and RFP; Pendarvis Aff. ¶ 60, Ex. 57;
- January 26, 2009 Defendants' Privilege Log; Pendarvis Aff. ¶ 62, Ex. 59;
- February 3, 2009 Plaintiffs' Discovery Requests; Pendarvis Aff. ¶ 65, Ex. 62;
- March 9, 2009 Defendants' Responses to Plaintiffs' Discovery Requests; Pendarvis Aff. ¶ 69, Ex. 66;
- April 2, 2009 Defendants' Response to Discovery Pursuant to Court Order Dated March 3, 2009; Pendarvis Aff. ¶ 73, Ex. 70;
- January 14, 2009 Transcript of Patrick Foye Deposition (partial); Pendarvis Aff. ¶ 97, Ex. 90; and

- Pinewood Park v. Pinewood Housing lawsuits in Greenville County and all associated documents; Pendarvis Aff. ¶ 102, Ex. 93.

In opposition to the Plaintiffs' arguments set forth in the Motion and the Pendarvis Affidavit, Defendants are filing herewith the Affidavit of Calvin T. Vick, Jr. ("Vick Affidavit") as a supplement to this Memorandum. In paragraph 3 of the Vick Affidavit, Mr. Vick identifies several documents that were apparently not filed of record in these cases, but which were provided to (or received from) the Court prior to April 6, 2010. As with similar documents entered into the record by Plaintiffs via the Pendarvis Affidavit (i.e., documents that were provided to the Court prior to April 6, 2010), the documents identified in paragraph 3 of the Vick Affidavit, and attached thereto as exhibits, may be properly considered in conjunction with Plaintiffs' Motion. Such documents were considered by the Court prior to issuance of the Sanctions Order, they are responsive to arguments and evidence submitted by Plaintiffs in connection with the current Motion, and Defendants rely upon such documents in further opposition to Plaintiffs' Motion.

In rebuttal to some of the documents improperly introduced by Plaintiffs via the Pendarvis Affidavit (i.e., the documents objected to and listed above), Defendants are filing herewith the Affidavit of Ellis M. Johnston, II ("Johnston Affidavit"). The Johnston Affidavit, and the documents attached thereto, conclusively show: (1) the Pinewood documents attached to the Pendarvis Affidavit as Exhibit 93, as well as Mr. Pendarvis' related "testimony" in the body of his affidavit, are not newly discovered evidence deserving of any consideration by the Court, and (2) the Plaintiffs blatantly misrepresented the facts and evidence to the Court, in both their Motion and the Pendarvis Affidavit, with respect to the 2002-04 Pinewood suits in Greenville

County and Plaintiffs' knowledge of the same.<sup>9</sup> This is addressed more thoroughly below in Section IV, Excuses, Misrepresentations, Mischaracterizations and Other Matters.

#### **IV. Excuses, Misrepresentations, Mischaracterizations and Other Matters**

##### **A. "Excuses" for Not Complying With General Discovery Order**

Though Plaintiffs contend that they have complied with the Rules of Civil Procedure and the Court's General Discovery Order (which the record shows they have not), they paradoxically offer a host of excuses for their non-compliance and claim that these excuses make the Court's Sanctions Order a biased and unfair representation of the acts or conduct referenced therein. As discussed more fully below, these "excuses" do not exonerate Plaintiffs from their failure to comply with the Rules or the Court's General Discovery Order.

- (1) **Excuse: Some of the discovery requests required Plaintiffs to seek records and recall events going back to the late 1960's (see e.g. Motion, ¶ 9(d), pp. 11-12)**

It was Plaintiffs, in their 60-plus-page Complaints in each of these actions, that chose to make allegations stretching back more than forty years ago. Rather than addressing the one real issue (i.e., whether the General Partners exercised reasonable business judgment when they determined the properties had no value above the existing first mortgages when the Notes became due), Plaintiffs chose to allege various misrepresentations, omissions, fraud, conspiracies, and breach of fiduciary duties, stretching back decades. In order to do so, they should have had some knowledge of those events. To complain today that they are required to respond to interrogatories and requests for production testing those allegations is disingenuous.

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<sup>9</sup> Following the entry of the Sanctions Order, Plaintiffs also filed an affidavit of Joel Bailey, which also attaches the 2002-04 Pinewood documents and misrepresents the true facts relating to the Plaintiffs' attorneys' knowledge of such matters. For the same reasons, Mr. Bailey's "testimony" and the exhibits to his affidavit can not be considered in conjunction with the current Motion or an appeal of the Sanctions Order, as a matter of law.

- (2) **Excuse: Plaintiffs are elderly, or dead, or in ill health, and have limited or no memory of the events that are the subject of Defendants' discovery requests (see e.g. Motion, ¶ 11(c), p. 16)**

This "excuse" brings into question all of the allegations made in the Complaints, especially those stretching back forty years ago. However, the discovery sought, the responses to which have been declared inadequate and incomplete, is not so ancient. Some of the requests deal with experts' opinions, bases for their opinions, and facts relied upon for their opinions, which has nothing to do with Plaintiffs' ill health, elderliness, or memory. Others have to do with when Plaintiffs first knew, or should have known, that they had a claim against Defendants. This latter category of information does not have to be derived from Plaintiffs' unassisted memory, but can be derived from documents Plaintiffs claim are privileged. As discussed in Defendants' Second Supplemental Memorandum in Support of Motion for Sanctions Re: General Discovery Order (at pp. 3-8), Plaintiffs' continuing claim of privilege as to the documents can provide no excuse for Plaintiffs not apprising themselves of the non-privileged information sought and contained within those documents.

- (3) **Excuse: There are a lot of Plaintiffs to contact, and thus, a lot of time is necessary to formulate "appropriate" responses. (see e.g. Motion, ¶ 5(b), p. 7)**

Of course, there is nothing appropriate about the responses. They are incomplete, inadequate and non-responsive. However, the espoused excuse should give no comfort to the Plaintiffs. The Parkview interrogatories and requests for production were served more than five and a half years ago. The more recent discovery at issue, applying to all five cases, was served almost two years ago. According to Plaintiffs' counsel's letter of December 8, 2008 (attached hereto as Exhibit A), all Plaintiffs had already been contacted and had been requested to furnish information necessary to adequately and completely respond to Defendants' discovery by that

date.<sup>10</sup> Sixteen months later, their responses were still evasive and incomplete and the Court issued the Sanctions Order. Yet the “excuse” (i.e., did not have time to comply) continues. Given the inter-relationship among Plaintiffs in the limited partnerships/properties/cases, and the virtually identical nature of the lawsuits, discovery as to one limited partnership or case is often relevant as to another. The number of Plaintiffs can form no excuse for failing to timely and appropriately respond to the discovery requests at issue.

Throughout their Motion, Plaintiffs launch petty and meritless attacks on the specific terms of the Sanctions Order (often taken out of context) to supplement their claims of excuse, unfairness and bias. For example, in conjunction with their “not enough time to comply” excuse, Plaintiffs complain that the Court’s use of the term “piecemeal fashion” to describe the representations and promises made by Plaintiffs’ counsel during a July 28, 2009 conference call somehow mischaracterizes Plaintiffs’ promises to supplement their responses (see Motion at ¶ 5, p. 7). There is no need to debate whether Plaintiffs’ counsel actually used the term “piecemeal fashion” during that unrecorded call ten months ago, because the Court’s statement in the Sanctions Order does not purport to be a direct quote of Plaintiffs’ counsel. Further, when one considers the *Plaintiffs’* version of the representations made during that call (see Motion at ¶ 5(b), p. 7: “counsel offered to focus on the Parkview case initially, and asked for leeway in getting the information for the other cases”), the manner in which counsel proposed to supplement Plaintiffs’ responses is the very definition of “piecemeal” (*Webster’s II New Riverside University Dictionary* (1984) defines “piecemeal” as “piece by piece: gradually”).

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<sup>10</sup> See Exhibit A (“First, all Plaintiffs were contacted about Defendants’ discovery requests and input to the requests was received from the various Plaintiffs and/or their representatives. . . . Plaintiffs’ interrogatory responses reflect their recollection of the subject events.”).

- (4) **Excuse: One of Plaintiffs' attorneys had a complex trial beginning at the end of July, 2009 (see e.g. Motion, ¶ 6(a)-(b), p. 8)**

Defendants' counsel recognizes that trial commitments can sometimes interfere with timely responses to a Court's order. Plaintiffs did not apply to the Court for an extension of the time to comply with the General Discovery Order. And, even if they had, the difficulty they would have had in explaining why such an extension was necessary, almost twelve months after the discovery was served (five years after discovery was served in one of the lawsuits), four months after they were ordered to provide *responsive* answers, four years after four of the lawsuits were brought, and six years after another of the lawsuits was brought, may have proved insurmountable. Not to mention the fact that Plaintiffs have more than the one attorney who was temporarily occupied in trial. The record shows that the Court has considered this particular "excuse," along with Plaintiffs' other "excuses," and has determined that they are not legitimate excuses for Plaintiffs' non-compliance. See Transcript of August 24, 2009 Hearing, relevant portions of which are attached hereto as **Exhibit B**, at pp. 3 (lines 23-25), 4 (lines 1-3, 7-25), 5 (lines 6-11), 11 (lines 20-25) and 12 (lines 1-8).

- (5) **Excuse: Even though the General Discovery Order applied to all five cases, Plaintiffs needed only to supplement their responses in one (see e.g. Motion, ¶ 8, pp. 9-11)**

Plaintiffs apparently contend that they are excused from complying with the General Discovery Order, which required responses to discovery in all five cases, because **Plaintiffs unilaterally** chose to respond in only one (and even those responses continued to be incomplete and non-responsive). They thus contend that the Sanctions Order's statements that "Plaintiffs in the Parkview case served their Third Supplemental Responses to the Discovery Requests" and "None of the other Plaintiffs provided any supplemental response" are unfair and misleading.

This position begs the question, "Who is the judge in this case?" The judge who was assigned these cases by the Chief Justice of the South Carolina Supreme Court, or Plaintiffs' attorneys? The unmitigated gall necessary to make this argument, and to provide it as an "excuse" for failing to comply with the Court's General Discovery Order a year later, is unfathomable.

**B. Plaintiffs contend the necessity of continuing the May 19, 2009 and January 19, 2010 trial dates was the result of Defendants' misconduct and failure to conduct discovery, not that of the Plaintiffs (see e.g. Motion, ¶ 3, p. 5; ¶ 7, pp. 8-9)**

Ignoring for the moment the disputes over alleged privileged materials, Plaintiffs' failure to comply with the Rules and the General Discovery Order includes, *inter alia*:

- failure to answer ordinary and garden variety discovery requests with respect to experts;
- failure to respond to discovery requests concerning when Plaintiffs knew or should have known of their alleged claim against Defendants;
- failure to answer individually rather than vague group answers;
- Failure to identify which documents each had and when;
- refusal until the Third Supplemental Responses, received after the January 19, 2010 trial date, to identify what some (though not all) of their retained experts' opinions are; and
- their continuing refusal to provide the bases and methodology for their experts' opinions and the facts upon which they base their opinions.

Plaintiffs' non-compliance has made it impossible for Defendants to conduct necessary discovery or to properly prepare their case. This, when viewed in light of Plaintiffs' admitted rush to trial,<sup>11</sup> supplies the motive for Plaintiffs' stubborn refusal to cooperate in discovery,

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<sup>11</sup> "To hold, in light of all the relevant evidence to the contrary, that the trial delay is due solely to the conduct of Plaintiffs' counsel when, in fact, it was Plaintiffs' counsel who sought on multiple occasions to have the case tried previously, is wrong." (see Motion, ¶ 7(d) p. 9).

refusal to comply with the Rules, and refusal to comply with the General Discovery Order, *i.e.*, to unfairly gain an advantage at trial.<sup>12</sup>

Looking at the disputes over alleged privileged materials, a resolution of those issues was necessary before these cases could be ready for trial. The process of resolving those issues, however, did not impede other general discovery issues from going forward -- Plaintiffs' misconduct did that. The privilege disputes were resolved by the Court's July 28, 2009 Privilege Discovery Order, in time for the January 19, 2010 trial to go forward. However, Plaintiffs refused to abide by that resolution. The Court indicated at the August 24, 2009 hearing that it was inclined to dismiss the cases for Plaintiffs' failure to comply with the Privilege Discovery Order, but gave Plaintiffs' counsel time to consult with their clients. On September 2, 2009, the Court informed the parties, by conference call, that it was going to file an order dismissing the lawsuits that afternoon, though the dismissal would be vacated if Plaintiffs complied with the Privilege Discovery Order within 25 days. On that same day, Plaintiffs filed a Petition for Writ of Prohibition and/or Writ of Certiorari with the South Carolina Supreme Court (both denied). An appeal to the South Carolina Court of Appeals, also dismissed, soon followed. Since the date of Remittitur, Plaintiffs have filed at least five separate motions, requiring at least two hearings, in their continuing attempts to avoid the Court's orders. The net effect of Plaintiffs' various motions, petitions and appeal is clear. Defendants have been prevented from completing discovery necessary for them to properly defend the claims made by Plaintiffs. To say that it is

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<sup>12</sup> Plaintiffs claim that "the discovery dispute did not arise over the Plaintiffs' 'failure to respond to discovery,' as stated in the Order..." (see Motion, ¶ 3(d), p. 5). They are wrong. The Defendants' Motion to Compel Discovery was filed on November 6, 2008, after Plaintiffs failed to provide any response whatsoever to the August 28, 2008 discovery requests. Thereafter, they served answers and supplemental answers that were inadequate, incomplete and non-responsive, thereby continuing to fail to respond to the discovery requests or comply with the General Discovery Order.

Defendants' fault that these cases are not yet ready to go to trial is, again, to borrow the Honorable Alex Macaulay's euphemism, "Incredible."

Plaintiffs' fall back position is that "Judge Early chose to delay in issuing a ruling" (see e.g. Motion, ¶ 7(b), p. 9), so it is wrong to blame the delay on their misconduct.<sup>13</sup> Judge Early was prepared to issue his ruling on September 2, 2009 (see e-mail attached hereto as Exhibit C), but Plaintiffs' frivolous petitions, appeal and motions, and their misrepresentation at the August 24, 2009 hearing that they had, that day, fully complied with the General Discovery Order, delayed a ruling and order on both Motions for Sanctions.

Plaintiffs also take issue with the Sanctions Order's finding that, "As a result of Plaintiffs' continuing failure to comply with the Court's discovery orders, the Court was compelled to continue the scheduled trial of these cases from the January 19, 2010 trial term...", because the finding indicates that more than one case was noticed for trial at that time. The record shows that the Court's finding is true and accurate, though Defendants acknowledge that the only trial actually expected to proceed at that time was the Parkview case. Well before the continuance, the Beaufort County Clerk provided notice that the Parkview, Palmetto and Pinewood cases were all on the trial roster for the week of January 19, 2010. While Plaintiffs' petition and appeal were pending, Defendants' counsel advised the Court of this roster notice and asked that the cases be removed from the January 19, 2010 trial roster (see Vick Aff., ¶ 3(x) and Ex. Y thereto). The Court advised that it could not remove the cases from the roster until after the appellate courts ruled (see Vick Aff., ¶ 3(y) and Ex. Z thereto). Once the petitions were

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<sup>13</sup> Plaintiffs' complaint that the findings do not adequately recognize that Judge Early delayed his ruling "on the pending discovery motion of Defendants' counsel, even though he heard it in August of 2009" is astounding. The Motions for Sanctions were the only motions pending and addressed at the August 24, 2009 hearing (all discovery motions had been resolved since July 28, 2009). Are Plaintiffs actually complaining that the findings in the Sanctions Order concerning the cause of the delays necessitating continuance do not sufficiently recognize that Plaintiffs successfully delayed sanctions by their premature and meritless petitions and appeal? Or that the Court continued to afford them numerous "second chances" to comply before ruling on the Motions for Sanctions?

denied and the appeal dismissed, Defendants filed a motion for continuance of all five cases from the January 19, 2010 trial roster, in light of the Beaufort County roster notice. Not only did the Plaintiffs consent to the order granting Defendants' motion to continue all five cases from the January 19, 2010 trial roster, their counsel actually filed the Consent Order with each of the three Clerks of Court (Beaufort, Charleston and Orangeburg). See Vick Aff., ¶ 3(dd) and Ex. EE thereto.

**C. Plaintiffs contend the Privilege Discovery Order gives Plaintiffs a Hobson's choice: if they comply with the Order, they waive the attorney-client and work product privileges, and if they don't comply, their cases are dismissed.**

As demonstrated *ad nauseum*, Plaintiffs have waived the attorney-client privilege and work product protection with respect to those documents identified on their Privilege Log and elsewhere as being relevant to these cases and created prior to October, 2002. Defendants' counsel recognizes that Plaintiffs contend otherwise. Thus, Plaintiffs have the choice of complying with the Privilege Discovery Order or being sanctioned for their contempt and appealing that issue to the South Carolina Court of Appeals. See Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881-82 (1986); Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 577, 582 S.E.2d 405, 406-07 (2003). See also Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213, 216-18 (Ct. App. 1997) (failure to exercise discretion to impose appropriate sanctions for discovery abuse is abuse of discretion). The Order provides that Plaintiffs have 25 days to purge their contempt and have the cases reinstated. Twenty-five days is more than sufficient time for them to make their decision, especially considering the age of the Discovery Orders and the Motions for Sanctions.

**D. Plaintiffs contend the Court has treated them differently than Defendants in the discovery process, and that this is unfair and exhibits bias on behalf of the Court (see e.g. Motion, ¶ 23(d)-(j), pp. 46-51)**

Plaintiffs' argument that there has been disparate treatment of the parties in discovery is fully rebutted in Defendants' April 3, 2009 Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend Order Granting Defendants' Motion to Compel. Rather than duplicate the contents of that Memorandum here, Defendants attach a copy of the Memorandum as **Exhibit D** hereto, and incorporate it herein by reference. The Memorandum compares and contrasts the parties' motions to compel and the opposing parties' responses to the same, and it speaks volumes as to Plaintiffs' persistent misconduct that, even though the Memorandum is more than a year old, it still accurately captures Plaintiffs' continuing non-compliance with the General Discovery Order.

In addition, to give further context to their argument, Plaintiffs claim it is unfair for the Court to order them to respond to ordinary, everyday, garden variety discovery requests, such as what are your experts' opinions and the basis for their opinions. On the other hand, Plaintiffs contend that the Court has treated them unfairly in refusing to require the Defendants to supply their "punitive damages expert" such things as:

- The names and addresses of the five highest paid executives of AIMCO (such information is available in Form 10K filed with the SEC);
- The amounts and payees of each club, social, political, professional or other membership dues paid for each such executive;
- The make, model, and cost of each automobile, airplane, helicopter or other means of conveyance provided to such executives;
- The amounts and payees of entertainment expenses paid by AIMCO for such executives;
- The amounts and payees of all allowances of reimbursement expenses provided by AIMCO to each of such executives for automobiles, travel, educational and clothing expense;

- *Ad nauseam.*

They say this information should be provided as, according to them, it is relevant to punitive damages and the information provided in AIMCO's quarterly and yearly reports (Forms 10-Q and 10-K, respectfully) is insufficient.<sup>14</sup> Plaintiffs' "double standard" argument is nonsense. The record shows that the Court's rulings on discovery issues have been fair.

**E. Advocacy has its limits, and willful and intentional misrepresentation to the Court is one of them.**

In their Motion for Reconsideration of the *Sanctions Order*, Plaintiffs attempt to resurrect their argument that the Court erred in ruling that Defendants' communications with attorneys retained by them to pursue partnership claims, which occurred after the General Partners and limited partners ceased to share the requisite mutuality of interest, were not subject to discovery under the fiduciary duty exception to the attorney-client privilege (see Privilege Discovery Order). This issue is fully addressed in the Memorandum in Support of Defendants' Motion to Alter or Amend Order, dated July 2, 2009 (at pp. 2-17), which is incorporated herein by reference. This is not an issue for consideration with regard to the Sanctions Order. However, in making the argument, Plaintiffs improperly interject "evidence" that was available to them prior to entry of the Sanctions Order, but which Plaintiffs never filed or provided to the Court until now. Each of Plaintiffs' attorneys attach this "evidence" to their affidavits, filed after the entry of the Sanctions Order, and **make willful and intentional misrepresentations to the Court** concerning the actions of Defendants' counsel and the Plaintiffs' attorneys' prior knowledge of these matters:

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<sup>14</sup> The Forms 10-Q and 10-K include, *inter alia*, the following: total revenues; total operating expenses; operating income; income from continuing operations; income from discontinued operations; net income; net income attributable to preferred unit holders or common unit holders; total consolidated properties; total consolidated apartment units; earnings per common unit; real estate net of accumulated appreciation; total assets; total indebtedness; consolidated balance sheets; consolidated statements of income; and pertinent information from its income tax returns.

"Furthermore, they [correspondence between Defendants and attorneys] were relevant and necessary to determine whether the attorneys hired by the general partners to represent the limited partnership had breached any fiduciary duties to the limited partnerships by not pursuing legal remedies to recover the partnership assets. This aspect of the present litigation becomes even more troubling when Judge Early's close extra-judicial relationships with Defendants' counsel is viewed in light of the fact that a lawsuit to recover assets due to the Limited Partnership was initiated – and then abandoned – by the very attorney and law firm which successfully persuaded Judge Early to keep the attorney retention information secret and non-discoverable by the Plaintiffs.

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Furthermore, Defendants earlier had included Plaintiffs in communications with these attorneys – with the exception of the Haynsworth firm's representation of the Pinewood limited partnership, which representation has never been revealed by Defendants or their counsel to date." Motion, p. 47 (emphasis added). See also Bailey Affidavit dated May 5, 2010, at pp. 5-6; Pendarvis Affidavit dated April 22, 2010, at ¶ 102.

The innuendo in this "argument" is bad enough. The outright knowing false representation to the Court is unpardonable. Plaintiffs and their counsel were aware at all relevant times of Haynsworth Sinkler Boyd's representation of Pinewood (see Bailey and Johnston correspondence attached hereto as composite Exhibit E), of the lawsuits (see relevant portions of Transcript of November 14, 2007 Spransy Depo., attached hereto as Exhibit F),<sup>15</sup> the

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<sup>15</sup> During the deposition of Joseph William Spransy, II, taken over two and a half years ago, the following colloquy occurred:

- Mr. Bailey: Okay. I'm a little confused. So you are saying that Pinewood Limited Partnership sued Mr. Hartman's clients [the then owners of Pinewood]?
- Mr. Johnston: Yes.
- Mr. Bailey: Is that something you guys did – I mean Haynsworth, Sinkler, Boyd – or was that something that was in California or what?
- Mr. Johnston: No, we did it.
- Mr. Bailey: Okay. Was that related to the collection of the note or return of the properties?
- Mr. Johnston: Yeah. I mean, it's part of the public record up here at the courthouse. I will be happy to furnish you copies of the Complaint.
- Mr. Bailey: Was it filed in federal or state court?

tolling agreements entered on behalf of the partnership and the then owner of Pinewood, in order to attempt to arrive at a solution satisfactory to the limited partners without the expense of litigation (see Exhibits E and F), and multiple proposals submitted to the limited partners including sale of the property, sale of the Note, renegotiation of the Note's terms, foreclosure on the partnership collateral, replacing the existing General Partners, and taking the property back (see Exhibit E). The limited partners steadfastly refused to make any decision, seeming to be more interested in a lawsuit than anything else.

Finally, in March, 2007, Mr. Bailey was notified of a pending offer and presented with a current appraisal (see correspondence attached hereto as Exhibit G). The limited partners were asked for an up or down vote (i.e. take the deal, take the property back, or tell us what you want to do) and, as they had done for the past seven years, refused to give an answer saying they needed more information, even though the appraisal included current audited financial statements, operating statements and rent rolls (see Exhibit G). The property was sold on July 5, 2007, with net proceeds to the partnership of \$425,000 (see e-mail and HUD Settlement Statement attached hereto as Exhibit H).

The Plaintiffs' and their attorneys' claims that the Defendants abandoned the Pinewood partnership's claims against the purchaser, that they were kept in the dark, and that they were unaware of the two lawsuits brought against the then owner of Pinewood are false and constitute willful and intentional misrepresentations to the Court. The only motive that can be discerned for these misrepresentations is that Plaintiffs are attempting to interject new matter into the record by claiming it was "newly discovered," when clearly it was not. See Section III of this

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Mr. Johnston: State." (Exhibit F hereto., p. 31).

Memorandum ("evidence" available to Plaintiffs before entry of Sanctions Order, but which was not filed or provided to the Court for its consideration, may not be considered on motion for reconsideration or appeal). Sanctions should be issued.

**F. Plaintiffs' unsubstantiated and erroneous claim that they have identified which Plaintiff(s) had possession of documents produced**

In their Motion (¶ 13, pp. 17-18), Plaintiffs allege error in the Sanctions Order's finding that "Plaintiffs continue to refuse to identify which documents were actually in the possession of each of the Plaintiffs..." and contend that such finding is contrary to the evidence in the record. Yet, they cite no such evidence, other than Plaintiffs' Second Supplemental Response, which identifies by Bates numbers a relatively small amount of documents in the possession of a few of the Plaintiffs. Plaintiffs' discovery responses repeatedly refer back to the entire world of documents produced by Plaintiffs *en masse*. The majority of the documents produced by Plaintiffs have not been identified with any particular Plaintiff or Plaintiffs, and this problem has not been rectified despite the mandate in the General Discovery Order.

Plaintiffs, as a group, have produced approximately 2,549 pages of documents without any Bates number or other identifying information (Bates stamped with a "P" number by Defendants *after* receipt). Defendants still do not know which Plaintiffs had these documents in their possession, or when (i.e., on or about the date of the document, after commencement of these lawsuits, or a date in between?).<sup>16</sup> Prior to serving the August 28, 2008 discovery requests,

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<sup>16</sup> Other attempts by Defendants to determine the date a Plaintiff had certain documents in his or her possession have been rebuffed. In connection with their 2006 motion for summary judgment concerning the statute of limitations, Defendants served their First Requests for Admissions in the Palmetto, Roosevelt and Orleans cases, asking Plaintiffs to admit that certain documents (including many produced by Plaintiffs *en masse*) were true and correct copies of correspondence sent or received by Plaintiffs "on or about" the dates indicated on the respective documents. Plaintiffs admitted the documents were true and correct copies, but denied "the Request to Admit with regard to the date alleged to have been received by Plaintiffs." See Defendants' First Request for Admissions, filed in the Palmetto, Roosevelt and Orleans cases in August, 2006, and Plaintiffs' Responses to same, attached to

the only other "Plaintiffs" documents Defendants had received were 38 pages stamped with a "Davis" number. Since the August, 2008 discovery requests were served, Defendants have received another 636 pages stamped with a "Davis" number, 495 pages stamped with a "Rentz" number, and 531 pages stamped with a "Reynolds" number. That totals 1,790 pages specifically identified as belonging to three Plaintiffs. No other documents identified to a specific Plaintiff have been provided (note: we are not including documents from a non-plaintiff third party, such as documents provided pursuant to a subpoena or FOIA request, and Bates stamped as such). See Vick Aff., ¶ 4.

**G. Plaintiffs' allegations of judicial bias and prejudice**

Plaintiffs again argue that the Sanctions Order and the Discovery Orders are tainted due to alleged bias and prejudice of Judge Early, just as they did at the March 29, 2010 hearing and in Plaintiffs' subsequent written Motion for Recusal and Vacation of Orders. The Court fully addressed this nonsense at the March 29, 2010 hearing, and it is not an issue in these cases, despite Plaintiffs' redundant attempts to make something out of nothing. As requested in Plaintiffs' Motion for Disclosure, Judge Early made a full disclosure of any "relationships" he had with any of the parties' attorneys at the March 29, 2010 hearing (see Transcript of March 29, 2010 Hearing, relevant portions of which are attached hereto as **Exhibit I**, at pp. 4 (lines 24-25), 5 (lines 1-3), 6 (lines 9-25), 7-11, 12 (lines 1-20), 15 (lines 18-22), 17 (lines 5-23), 18 (lines 15-17), and 22 (lines 9-13)). He also squarely addressed Plaintiffs' concerns about bias or prejudice affecting his rulings in these cases:

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Defendants' Consolidated Brief in Support of Their Motions to Dismiss, or in the Alternative for Summary Judgment, dated August 4, 2006, as Exhibit C.

“[I]f 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. . . . So, I’m very cognizant of my social relations and my former relations and I do the best I can. I don’t know of anything in this case with any of it that would cause me any concern. If it concerns your clients, I’ll be more than glad to let them come and answer any questions they got. I am doing what I think is the absolute -- is absolutely right based on the law and based on what’s as I interpret it. . . . I don’t want anybody thinking that my ruling is based on friendship. It’s not.”

(Exhibit I at pp. 14 (lines 22-25), 16 (lines 9-16), 17 (line 25) and 18 (line 1); see also Exhibit I at p. 13 (lines 7-18)). Judge Early denied Plaintiffs’ oral motion for recusal at the March 29, 2010 hearing (see Exhibit I at pp. 26 (lines 19-25) and 27 (lines 1-6)).

Plaintiffs and their attorneys are continuing their attempts to improperly characterize adverse rulings as bias against them, treading dangerously close to (if not over) the line drawn by Rule 11, SCRPC, in the process. See e.g. Motion, ¶ 12(b), p. 34 (“This statement reflects Judge Early’s biased adoption of the Defendants’ displeasure with the interrogatory response given, and his willingness to assist Defendants’ counsel in attempting to coerce and intimidate Plaintiffs into amending their answers to one which is more to the liking of Defendants’ counsel.”). In light of Judge Early’s clear statements to the contrary during the March 29, 2010 hearing, Plaintiffs’ baseless accusations and innuendoes are outrageous as they relate to counsel, the Defendants and Judge Early.<sup>17</sup> Plaintiffs resorted to the unfounded allegations in their Recusal Motion only after their substantive challenges to the Discovery Orders were considered and denied by the Court. Validating such reprehensible conduct would be a travesty.

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<sup>17</sup> In the Motion for Recusal, which was signed and filed by Mr. Bailey *immediately after* the March 29, 2010 hearing, he claims on the Plaintiffs’ behalves, *inter alia*, that Judge Early’s relationships with some of Defendants’ attorneys have improperly and unduly influenced the rulings made in these cases, have improperly and unduly influenced the conduct of Judge Early with respect to the parties and their counsel, have created a personal bias or prejudice in favor of Defendants and/or their counsel, have impaired and violated the rights of the Plaintiffs, have led to and resulted in improper *ex parte* communications with Defendants’ counsel, have led to and resulted in a double standard of conduct relating to discovery, and have resulted in actual judicial impropriety or an appearance of such impropriety. These claims can not be reconciled with Judge Early’s statements at the March 29, 2010 hearing.

H. **Plaintiffs' claim that one *ex parte* communication taints the Sanctions Order<sup>18</sup>**

Plaintiffs argue that the Sanctions Order "is the product of at least one *ex parte* communication between Judge Early and Defendants' counsel, Calvin T. Vick, which is specifically prohibited under the law of this state." The implications of this carefully worded statement (i.e., "is the *product* of") would be laughable if they were not so offensive and manipulative of the true facts. Judge Early simply gave instructions to Mr. Vick concerning the preparation of a proposed order, which was actually an updated version of the proposed sanctions order previously provided to the Court and Plaintiffs' counsel (the first proposed order was provided in August, 2009, but never signed) and was in no way a surprise to any party. Judge Early further instructed Mr. Vick to immediately advise all counsel of his instructions concerning the proposed order. Mr. Vick did as he was told, nothing more and nothing less. Defendants obtained no advantage as a result of the phone call between Judge Early and Mr. Vick, and there was no prejudice to Plaintiffs as a result of the brief, one-sided phone call.

While Defendants agree this is not the preferred method for a judge to communicate with counsel, Mr. Vick immediately disclosed the entire conversation to all counsel. **The Plaintiffs voiced no concerns when Judge Early had the exact same type of *ex parte* communication with Plaintiffs' counsel, Joel Bailey, on January 5, 2007.** According to Mr. Bailey, Judge Early called him on that date and instructed him to prepare an order denying Defendants' motion to dismiss, among other things. Mr. Bailey did exactly as Mr. Vick, immediately informing Defendants' counsel of his phone conversation with Judge Early and advising Defendants' counsel of Judge Early's instructions to Mr. Bailey (see Bailey e-mail dated January 5, 2007, and

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<sup>18</sup> True to form, Plaintiffs would like to imply there was more than one by saying, "at least one." There was only one.

Pendarvis letter to Judge Early dated January 19, 2007, attached hereto as Exhibit J). Should the order denying Defendants' motion to dismiss be called into question merely because Judge Early had an *ex parte* phone conversation with Mr. Bailey concerning the preparation of the order? Of course not. Should it matter that Judge Early and Mr. Bailey have had a cordial relationship, in and out of the courtroom, for many years? No, because there is no reason to believe one thing has anything to do with the other. Judge Early's *ex parte* phone call with Mr. Vick (whom Judge Early did *not* know prior to this litigation) is no different than his *ex parte* phone call with Mr. Bailey, and there is no reason to believe either phone call caused any prejudice to any party.

**I. Plaintiffs' argument that the Privilege Discovery Order violates Rule 53**

Once again, Plaintiffs argue that the Court exceeded its authority and jurisdiction in entering the Privilege Discovery Order, pursuant to Rule 53, SCRCPC (see e.g. Motion, Section A, p. 3; ¶ 17, pp. 20-21). This argument was addressed by Defendants in Mr. Vick's July 13, 2009 letter to the Court (see Vick Aff. at ¶ 3(n) and Ex. O thereto) and in Defendants' Return in Opposition to Petition for Writ of Prohibition or Alternatively for Writ of Certiorari (particularly at pages 18-21), which was filed in the Supreme Court and a copy provided to Judge Early (relevant portions of the Return are attached hereto as Exhibit K and incorporated herein by reference). The Court has already considered and rejected Plaintiffs' argument, and in light of the Supreme Court's denial of Plaintiffs' Petition, it appears the Supreme Court also rejected Plaintiffs' argument that the Court usurped or exceeded its jurisdiction in entering the Privilege Discovery Order.<sup>19</sup> It is also worth noting that Plaintiffs never raised their Rule 53 objection

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<sup>19</sup> In their Petition to the Supreme Court, Plaintiffs cited, "A writ of prohibition lies to prevent a lower tribunal's encroachment, excess, usurpation, or improper assertion of jurisdiction. *Ex Parte Jones*, 160 S.C. 63, 69, 158 S.E.

until after the Court advised the parties of its ruling on the parties' cross-motions to alter or amend the June 2, 2009 Order (see Judge Early's July 8, 2009 e-mail attached to Vick Aff. as Ex. M). Until they were notified of Judge Early's ruling, Plaintiffs were perfectly content to have the Court consider the parties' motions to alter the June 2, 2009 Order, which specifically contemplated just such a review and amendment process at the parties' request.

**J. Plaintiffs' claim that the Sanctions Order does not accurately state the purpose of the appointment of Gary Clary**

Plaintiffs claim that the Sanctions Order erroneously states that Gary Clary was appointed for the "limited purpose of reviewing *in camera* the documents identified on the parties' privilege logs and to issue a report of his findings and conclusions to the Court." See Motion, ¶ 16, pp. 19-20. The record shows that the language complained of in the Sanctions Order is true, accurate and in accordance with the evidence of record. It is the Plaintiffs who are mistaken or guilty of being revisionists. The appointment of retired Judge Gary Clary resulted from a suggestion made by Mr. Pendarvis at the December 9, 2008 hearing on Defendants' Motion to Compel and Judge Early's verbal ruling at that hearing. It is clear that the Court and the parties' counsel agreed that Gary Clary would be appointed to review allegedly privileged materials *in camera* and to report his findings and conclusions to Judge Early so that Judge Early may rule on that aspect of Plaintiffs' and Defendants' discovery motions.

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134, 137 (1931). The Court would be justified in issuing the writ in this scenario in light of the trial court's ongoing violation of Rule 53." See Petition, relevant portions of which are attached hereto as Exhibit L, at p. 6).

Pendarvis: I propose Your Honor appoint a discovery master.

The Court: I'll be glad to... (Dec. 9, 2008 Tr. at p. 49, lines 19-21)

\* \* \*

Pendarvis: [Y]ou would appoint a discovery master to resolve this motion to compel and make me, Ted, or whoever else go through this thing line by line or whoever the happy discovery master is going to be I think that will be able to present a report to you to make ruling and save everybody another hours of time. (Dec. 9, 2008 Tr. at p. 50, lines 19-24) (emphasis added)

\* \* \*

Pendarvis: [B]ut if Your Honor would put us in front of a master and we'll be glad to resolve all of that or get a report to you on two things: the documents and the attorney-client issue for both sides of the case. (Dec. 9, 2008 Tr. at p. 52, lines 10-13) (emphasis added)

\* \* \*

Pendarvis: I think all of that needs to be in front of a master and make a report to you. That's really my proposal tonight... (Dec. 9, 2008 Tr. at p. 53, lines 22-24) (emphasis added)

\* \* \*

The Court: Here is what I am going to do. As to the privilege log I am going to appoint somebody. Y'all can agree on who it can be, but I am going to appoint somebody...

Johnston: Judge Clary would be great...

The Court: Well, he's done it for me in a number of cases. He issues a written report...

Johnston: Does that suit you guys?

Pendarvis: That suits us. (Dec. 9, 2008 Hearing Tr. at p. 56, lines 8-23) (emphasis added)

Defendants' counsel then submitted a proposed order appointing Gary Clary for the contemplated task, and the order was signed on December 30, 2008.<sup>20</sup> The December 30, 2008 Order did not clearly reflect the parties' agreement and Judge Early's statements at the December 9, 2008 hearing, in that the Order stated that Gary Clary would "make his ruling as to whether each such document is subject to discovery and production should be compelled." As a result, the parties' counsel signed and submitted, and Judge Early entered, a subsequent Consent Order, dated January 31, 2009, which amended the December 30, 2008 Order "to provide that Special Master Clary is to provide this Court with a Report setting forth his findings and conclusions." The exact same clarifying language was included in the Court's Order dated April 9, 2009, which further amended the December 30, 2008 Order. In his e-mails to the Court, transmitting his reports, Gary Clary expressly recognizes that he was providing Judge Early with his "reports" (see Vick Aff., Ex. E, I and J thereto). The Sanctions Order is entirely accurate and correct in this regard.

**K. Plaintiffs' claim that the Privilege Discovery Order contains errors**

Plaintiffs allege error in the findings on p. 16 of the Sanctions Order concerning the January 14, 2010 hearing and subsequent events (see Motion, ¶ 18, pp. 21-23), because the findings do not include: in-chamber discussions following the hearing; a letter Mr. Bailey sent to Judge Early on January 27, 2010, responding to the proposed sanctions order Defendants submitted pursuant to the Court's instructions; alternative proposed orders submitted by Plaintiffs with Mr. Bailey's letter; or Plaintiffs' Motion for Protective Order. All of these arguments amount to a re-argument by Plaintiffs that the Court's ruling in the Privilege

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<sup>20</sup> The proposed order was provided simultaneously to Plaintiffs' counsel, but they could not be reached for comment prior to the signing of the order on December 30, 2008. Due to a death in Judge Early's family, his only opportunity to sign the order prior to Gary Clary's scheduled review of the documents was on December 30, 2008.

Discovery Order was wrong.

Plaintiffs contend the Privilege Discovery Order “contained significant errors,” that this was pointed out to Judge Early in chambers following the January 14, 2010 hearing, that Judge Early asked Defendants’ counsel about the alleged errors, and that Defendants’ counsel “acknowledged that the statements in the Order concerning language in Plaintiffs’ Complaints – which was a stated basis for the ruling that Plaintiffs had waived their attorney-client privilege – was not correct, as such language did not even exist in all the Complaints, as stated in the Order.” (See Motion, pp. 21-22). First, Defendants’ counsel did not acknowledge any errors in the Privilege Discovery Order in chambers following the January 14, 2010 hearing or at any other time. Second, the record shows that the alleged errors do not exist. The Privilege Discovery Order addresses the Plaintiffs’ waiver of privilege as follows: “The Court finds that the statute of limitations is a major issue in these cases, and, as shown in the Defendants’ Memorandum and exhibits thereto, that the Plaintiffs impliedly waived their claims of privilege with respect to documents dated (i.e., created) more than three years prior to the filing of these lawsuits.” (Privilege Discovery Order, p. 6). The referenced Memorandum in Support of Defendants’ Motion to Alter or Amend Order, dated July 2, 2009, addresses Plaintiffs’ waiver of privilege at pp. 17-20. It states that Plaintiffs waived privilege by filing the lawsuits, in light of the unusual circumstances presented in these cases. It also states that Plaintiffs waived privilege by putting the statute of limitations at issue “by their specific allegations in the Orleans and Roosevelt Complaints concerning the alleged attempts by Defendants to delay Plaintiffs in the investigation of their claims and filing of the instant lawsuits.” (Defendants’ July 2, 2009 Memorandum, p. 20). The Memorandum only cites allegations in the Orleans and Roosevelt Complaints. The Privilege Discovery Order, and the Defendants’ Memorandum referenced

therein, simply do not contain the erroneous findings or conclusions alleged by Plaintiffs.

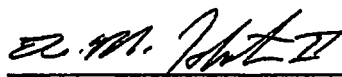
During the discussions in chambers after the January 14, 2010 hearing, Judge Early did state that the Plaintiffs would be given an opportunity to respond to the proposed sanctions order he had instructed Defendants' counsel to submit, and that Defendants would then be allowed to reply to Plaintiffs' arguments. Plaintiffs submitted Mr. Bailey's letter to Judge Early, dated January 27, 2010, several proposed alternative orders, and a Motion for Relief from July 28, 2009 Order in each of the five cases. Mr. Bailey's letter essentially found fault with the Privilege Discovery Order in various ways (including the argument that the language in the Orleans and Roosevelt Complaints could not result in waiver of privilege in the other cases), and again asked the Court to withdraw or modify the Privilege Discovery Order. Defendants responded to all of the arguments contained in Mr. Bailey's letter via Mr. Vick's letter to Judge Early, dated February 16, 2010, which is attached to the Vick Affidavit as Exhibit GG and incorporated herein by reference. Plaintiffs' Motions for Relief (purportedly under Rule 60(b)) also found fault with the Privilege Discovery Order in various ways, and asked the Court to withdraw or rescind the Privilege Discovery Order. Defendants responded to Plaintiffs' Motions for Relief in their Supplemental Memorandum in Support of Their Motion for Sanctions, and in Opposition to Plaintiffs' Rule 60(b) Motions, Re: Privilege Discovery Order, dated February 16, 2010, which is incorporated herein by reference. After considering all of the arguments made by Plaintiffs and Defendants, the Court advised that it would sign an order imposing sanctions for Plaintiffs' failure to comply with the Privilege Discovery Order and the General Discovery Order, and denying Plaintiffs' Rule 60(b) Motions for Relief, which the Court did on April 6, 2010.

All of Plaintiffs' arguments in Paragraph 18 of the Motion (pp. 21-23) were previously made by Plaintiffs, opposed by Defendants, and considered by the Court. The Sanctions Order acknowledges Plaintiffs' Rule 60(b) Motions, and actually denies those motions. Contrary to Plaintiffs' claims, there is no error in the Sanctions Order's findings relating to the January 14, 2010 hearing and subsequent events.

**V. Conclusion**

Setting aside Plaintiffs' untimely attempts to re-argue that the Discovery Orders were issued in error, their blatant misrepresentations, and their improper attempts to belatedly introduce "evidence" that, as a matter of law, cannot now be considered on a motion for reconsideration, the current Motion boils down to three questions: (1) did the Court err in finding that Plaintiffs have not complied with the General Discovery Order; (2) did the Court err in finding that Plaintiffs have not complied with the Privilege Discovery Order; and (3) did the Court err, in light of the evidence and applicable law, in holding Plaintiffs in contempt of court and imposing the sanction of dismissal? As shown above, the answer to each of these questions is a resounding "NO." Defendants respectfully request that the Court deny Plaintiffs' Motion.

HAYNSWORTH SINKLER BOYD, PA



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Ellis M. Johnston, II, SC Bar # 3065  
Calvin T. Vick, Jr., SC Bar #68187  
Post Office Box 2048  
Greenville, South Carolina 29602  
(864) 240-3200

Attorneys for Defendants

This <sup>th</sup>7 day of June, 2010.  
Greenville, South Carolina

#745956



**PENDARVIS LAW OFFICES, P.C.**  
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THOMAS A. PENDARVIS, J.D.  
ADMITTED IN SC AND GA

THOMAS@PENDARVISLAW.COM

TEL. 843.524.9500  
FAX. 843.524.9501

December 8, 2008

**VIA E-MAIL AND U.S. MAIL**

Calvin T. Vick, Jr., J.D.  
HAYNSWORTH SINKLER BOYD, P.A.  
P.O. Box 2048  
Greenville SC 29602  
[Ejohnston@hsblawfirm.com](mailto:Ejohnston@hsblawfirm.com)  
[tvick@hsblawfirm.com](mailto:tvick@hsblawfirm.com)

Re: Lawrence H. Davis, Jr., et al. v. Parkview Apartments, et al.  
Lawrence H. Davis, Jr., et al. v. Palmetto Apartments, et al.  
Carolina Management Corp. of Beaufort, et al. v. Pinewood Park Apts., et al.  
Rhoda G. Rentz, et al. v. Orleans Gardens, et al.  
Lawrence H. Davis, Jr., et al. v. Roosevelt Gardens, et al.

Dear Ellis and Ted:

This is in response to your correspondence dated December 4, 2008, concerning discovery in the above-referenced matters, and in particular, PLAINTIFFS' RESPONSES TO DEFENDANTS' DISCOVERY REQUESTS TO ALL PLAINTIFFS DATED AUGUST 28, 2008 ("PLAINTIFFS' RESPONSES"). We have attempted to address the issues raised in the correspondence, but topics raised in this letter are not addressed in the same order as your letter.

~~First, all plaintiffs were contacted about Defendants' discovery requests and input to the requests was received from the various Plaintiffs and their representatives. Plaintiffs produced long before August 28, 2008, all responsive, non-privileged, and relevant documents in their possession related to the claims and defenses in these lawsuits, as stated more precisely in PLAINTIFFS' RESPONSES. We are not aware of any relevant and responsive documents in Plaintiffs' possession that have not either been produced to Defendants or identified on a privilege log. Plaintiffs' interrogatory responses reflect their recollection of the subject events.~~



Page 2  
December 8, 2008

In several places in your correspondence you complain that "documents have not been described in the Privilege Log or produced by Plaintiffs or Defendants as a *Bates-stamped document*, . . ." The Rules of Civil Procedure do not require documents produced to have a "bates stamp". All existing responsive documents in Plaintiffs' possession have been produced or are identified on a privilege log, as stated more specifically in PLAINTIFFS' RESPONSES and as stated earlier in this correspondence. I understand that Joel produced documents that did not have bates numbers on them when they were produced. Defendants later produced those very same documents back to Plaintiffs after adding the bates prefix "P" (presumably indicating Plaintiffs as the source) followed by a bates number. Defendants have, therefore, all of Plaintiffs' documents.

In the event Plaintiffs locate any responsive documents that have not already been produced, those documents will be produced to Defendants in a timely fashion. We ask that you do the same, as this has not always been the case to date. For example, you will recall that Plaintiffs served Defendants with document requests in April 2003, and four years and four months later on August 28, 2007, we took the deposition of George Buchanan. As you know a key e-mail dated April 18, 2001, between George Buchanan and Pat Foye, and later Joan Christ was not produced to Plaintiffs until September 22, 2008, literally moments before counsel for Plaintiffs began taking the deposition of Ms. Christ and long after the deposition of Mr. Buchanan. That e-mail was responsive to PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS dated April 23, 2003, served on counsel for Defendants *five years and five months* before the e-mail was produced.

On Page 3 of your letter you address Plaintiffs' objections to the production of information "disclosed during mediation". Notwithstanding your cites to Rule 408, SCRE and S.C. ADR Rule 8(b)(5), we believe that this documents are not required to be produced. Our position is in keeping with the mediation agreement of the parties.

Plaintiffs disagree with all of Defendants' statements and assertions in the December 4, 2008, correspondence concerning attorney-client privilege, work product protection, common interest privilege, at-issue waiver, and any other form of waiver to somehow require Plaintiffs to produce any information listed on their Privilege Log. Accordingly, this will need to be addressed by Judge Early.

With regard to Plaintiffs' responses to Interrogatory No. 8, Plaintiffs assert that any information responsive to the Interrogatory was received by the Plaintiffs from the Defendants in this case. Therefore, you are already in possession of this information.

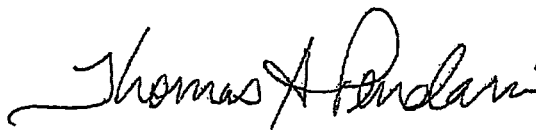
Thank you for your time and attention to this matter.

Page 3  
December 8, 2008

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink that reads "Thomas A. Pendarvis". The signature is written in a cursive style with a large, stylized initial 'T'.

Thomas A. Pendarvis, J.D.

TAP/pdh

cc: Joel D. Bailey, J.D. (via e-mail)  
Ellis M. Johnston, II, J.D. (via e-mail and U.S. Mail)  
Marvin D. Infinger, J.D. (via e-mail and U.S. mail)  
Jesse C. Belcher, J.D. (via e-mail and U.S. mail)  
Anne Ross Rosen, J.D. (via e-mail and U.S. Mail)



1 ON AUGUST 24, 2009 AT 2:05 P.M.:

2 THE COURT: All right. Mr. Vick? Mr. Johnston?

3 MR. JOHNSTON: Your Honor, may it please the  
4 Court. We're here today on two motions seeking sanctions  
5 for violation of the Court's two orders issued with regard  
6 to our motions to compel.

7 THE COURT: Mr. Johnston, I've read your memo.

8 MR. JOHNSTON: I don't have a lot else to say.

9 THE COURT: Sir?

10 MR. JOHNSTON: I'll be happy to give you --

11 THE COURT: You've said in your memo that they  
12 had neither produced nor disclosed anything pursuant to my  
13 previous orders, motions to amend or offer. You're  
14 telling me you haven't gotten anything?

15 MR. JOHNSTON: That is correct.

16 THE COURT: Mr. Pendarvis? Mr. Bailey?

17 MR. PENDARVIS: Your Honor, I'll start off.

18 THE COURT: Well, have you not given them  
19 anything?

20 MR. PENDARVIS: We have, Your Honor.

21 THE COURT: Well, why are they telling me they  
22 haven't gotten anything?

23 MR. PENDARVIS: Your Honor, as far as the  
24 supplement production from your order, it's been 35 days  
25 since the order became effective. We -- as you know, Your

1 Honor, I've been preparing, involved in another matter.

2 THE COURT: This case has been going on for six  
3 years. My patience is just about done.

4 MR. PENDARVIS: I understand that, Your Honor. We  
5 have today supplemental responses to the production. We  
6 have two new boxes of documents.

7 The issue is, Your Honor -- the difficulty in the  
8 matter is, this discovery order involves all five of the  
9 partnerships, multiple matters on cases that aren't even  
10 set for trial yet. Gathering that information from all  
11 the different clients has been very difficult.

12 THE COURT: Mr. Pendarvis, y'all brought the five  
13 cases. The cases in Orangeburg and Charleston may have  
14 some relevance to the cases for trial January in  
15 Beaufort.

16 I'm sorry that you created a nightmare for  
17 yourself but this case is set for January, the middle of  
18 January.

19 I have been as nice to all four of y'all as I  
20 know how to be. I've let y'all sort of handle discovery  
21 like you want to. We've put the case off because the  
22 discovery wasn't complete.

23 It's going to be tried January, whenever it's set  
24 for. If they don't get the discovery, I'm going to throw  
25 the case out.

1 MR. PENDARVIS: Well, Your Honor --

2 THE COURT: Let's talk about what --

3 MR. PENDARVIS: I understand that. And here's --  
4 today we have, and I'll pass over to -- let me add to  
5 this, Your Honor. I need to say this.

6 Trial in our other matter ended last Monday, a  
7 week from today. In the time since then, I've had my  
8 staff -- instead of helping, I didn't have my paralegal at  
9 the trial before Your Honor who was in the last two weeks  
10 or so, there was no --

11 THE COURT: Mr. Bailey wasn't in that trial.

12 MR. PENDARVIS: I understand that, Your Honor.  
13 My point is we've been working diligently. My staff has  
14 come in at four in the morning.

15 We are sole practitioners, Joel and I. And I  
16 understand this is difficult, complex cases but the  
17 problem we're dealing with is the new order and we're  
18 going to refer today to these two orders that Your Honor's  
19 issued. One dealing with the discovery primarily and the  
20 second order dealing with the privilege issues.

21 With regard to the discovery order, since March I  
22 have communicated with all the clients that we are able to  
23 have contact with. Since this case has been pending --  
24 well, let me also say, Your Honor, that we're dealing  
25 with, as the Plaintiffs, the majority of the original

1 actual trial testimony. There were over 35 causes of  
2 action.

3 Collectively -- I mean, for the record, Your  
4 Honor, I was just that busy. We had over 500 exhibits  
5 pre marked from both sides. Two consolidated cases that  
6 were absorbing an inordinate amount of my time through the  
7 July period.

8 THE COURT: What's that got to do with being  
9 unprofessional?

10 MR. PENDARVIS: Well, it's not being  
11 unprofessional, Your Honor. I'm going to get to that  
12 point.

13 We advised counsel for the Defendants of this and  
14 when they had similar situations, we kind of laid back.  
15 The day I walked into court in the Peel versus Peel case,  
16 Monday the 17th, that day, the last thing I did is I  
17 walked out of the office I checked my e-mail. In the  
18 e-mail was the second motion for sanctions. This is the  
19 day I'm walking into trial. They knew it.

20 That's the disconcerting point, Your Honor, is  
21 that they would time their, whatever motions they needed  
22 to make in concert with serious professional obligations  
23 that they knew I was under in another matter.

24 THE COURT: Mr. Pendarvis, they can't get it out  
25 of you any other way. They had to do this. They're not

1 being unprofessional.

2 I admire the way y'all work together but it's  
3 time to fish or cut bait in this case. I've tried to be  
4 as accommodating, as pleasant, let y'all handle  
5 discovery. Y'all excellent lawyers, all four of you, but  
6 it's just time now for me to, I guess, quit being nice.  
7 I'm just going to have to -- either get it to them or  
8 dismiss the case.

9 MR. PENDARVIS: Well, Your Honor, to the extent  
10 that there's information responsive to these requests  
11 outside the privilege issues Mr. Bailey is going to speak  
12 with you about, it's being delivered today and we've got  
13 copies for counsel and copies of the discovery responses.

14 And I just wanted to say to the Court --

15 THE COURT: As an officer of the court you're  
16 telling me it's in full compliance with my order dealing  
17 with that area of discovery?

18 MR. PENDARVIS: Correct, Your Honor, to the  
19 extent this stuff is information known to my clients.  
20 We've got it, and it's being delivered.

21 THE COURT: All right. Mr. Bailey, let me hear  
22 from you.

23 MR. BAILEY: Thank you, Judge.

24 THE COURT: You're welcome.

25 MR. BAILEY: With respect to the other aspect of

**Johnston, Ellis**

**From:** Early, Doyet A. Law Clerk (Britton All) [dearlyc@sccourts.org]  
**Sent:** Thursday, September 03, 2009 9:31 AM  
**To:** Vick, Ted; John Nichols; Early, Doyet A.  
**Cc:** baileylawfirm@charter.net; tpendarvis@pendarvislaw.com; Johnston, Ellis; Blake Hewitt; Ashleigh Hair  
**Subject:** Davis, et al. v Parkview Apartments, etc., et al.

Please see the following correspondence from Judge Early:

Gentlemen,

In light of yesterday's filing with the appellate court, I am going to hold my order of dismissal in abeyance, pending their decision.

Sincerely,

Judge Doyet A. Early, III

Britton All

Law Clerk to the Honorable D.A. Early, III  
The Circuit Court of the 2nd Judicial Circuit  
PO Box 90  
Bamberg, SC 29003  
Telephone: 803.245.4004  
Fax: 803.245.2983  
dearlyc@sccourts.org

---

**From:** Vick, Ted [mailto:tvick@hsblawfirm.com]  
**Sent:** Wednesday, September 02, 2009 2:49 PM  
**To:** John Nichols; Early, Doyet A. Law Clerk (Britton All); Early, Doyet A.  
**Cc:** baileylawfirm@charter.net; tpendarvis@pendarvislaw.com; Johnston, Ellis; Blake Hewitt; Ashleigh Hair  
**Subject:** RE: Davis, et al. v Parkview Apartments, etc., et al.

Mr. Nichols,

Would you please send us an electronic copy of everything you have filed via reply to this e-mail? Thank you for your courtesy.

Ted Vick  
Maynsworth Sinkler Boyd, P.A.  
75 Beattie Place, Eleventh Floor (29601)  
P.O. Box 2048 (29602-2048)  
Greenville, South Carolina  
Telephone 864-240-3324  
Facsimile 864-240-3336  
tvick@hsblawfirm.com

**EXHIBIT**

**C**

---

**From:** John Nichols [mailto:jsnichols@bntdlaw.com]

Sent: Wednesday, September 02, 2009 1:46 PM

To: [dearlyc@sccourts.org](mailto:dearlyc@sccourts.org); [dearlyj@sccourts.org](mailto:dearlyj@sccourts.org)

Cc: [baileylawfirm@eharter.net](mailto:baileylawfirm@eharter.net); [tpendarvis@pendarvislaw.com](mailto:tpendarvis@pendarvislaw.com); Vick, Ted; Johnston, Ellis; Blake Hewitt; John

Nichols; Ashleigh Blair

Subject: Davis, et al. v Parkview Apartments, etc., et al.

September 2, 2009

Honorable Doyet A. Early, III  
Judge  
Second Judicial Circuit

RE: *Davis, et al. v Parkview Apartments, etc., et al.*

Case No. 2003-CP-07-725

Case No. 2005-CP-38-1131

Case No. 2005-CP-4229

Case No. 2005-CP-07-1989

Case No. 2005-CP-07-1990

Dear Judge Early:

Blake Hewitt and I have been retained to assist the plaintiffs in these matters in seeking appellate review of the discovery orders you have entered as well as your ruling that you intend to sign an order dismissing these actions. I am writing to inform you that today we filed a Petition with the Supreme Court of South Carolina seeking a Writ of Prohibition directed at your orders as well as a Petition in the Court's Original Jurisdiction seeking issuance of a common law writ of certiorari to review those orders. It is my understanding you held a conference call today advising trial counsel that you intended to sign and enter the draft order provided to you by Mr. Vick and Mr. Johnston. I felt it best to advise you of the steps we have taken on behalf of the plaintiffs in the Supreme Court. We will serve these documents upon counsel for the defendants as well as the Clerk of Court, and will provide a copy to you.

If you need any additional information please let me know.

Regards,

John S. Nichols  
Bluestein Nichols Thompson & Delgado, LLC  
Post Office Box 7965  
Columbia, South Carolina 29202  
(803) 779-7599  
(803) 779-8995 fax  
[jsnichols@bntdlaw.com](mailto:jsnichols@bntdlaw.com)

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amcorp

Johnston, Ellis

From: Early, Doyet A. Law Clerk (Britton All) [dearlylc@sccourts.org]  
Sent: Wednesday, September 02, 2009 10:47 AM  
To: Vick, Ted; Early, Doyet A.; Thomas A. Pendarvis; Pamela D. Higgins; Bailey, J.D., Joel D.; Johnston, Ellis  
Subject: RE: Parkview - Conference Call Today at 11:30 (Judge Early and counsel)

Okay, great. Talk to you at 11:30!

Britton All  
Law Clerk to the Honorable D.A. Early, III  
The Circuit Court of the 2nd Judicial Circuit  
PO Box 90  
Spartanburg, SC 29003  
Telephone: 803.245.4004  
Fax: 803.245.2983  
dearlylc@sccourts.org

From: Vick, Ted [mailto:tvick@hsblawfirm.com]  
Sent: Wednesday, September 02, 2009 10:47 AM  
To: Early, Doyet A.; Early, Doyet A. Law Clerk (Britton All); Thomas A. Pendarvis; Pamela D. Higgins; Bailey, J.D., Joel D.; Johnston, Ellis  
Subject: RE: Parkview - Conference Call Today at 11:30 (Judge Early and counsel)

Update - Thomas' assistant has spoken with him and has confirmed he will be on the call at 11:30.

From: Vick, Ted  
Sent: Wednesday, September 02, 2009 10:42 AM  
To: Early, III, The Honorable Doyet A.; Early, Doyet A. Law Clerk (Britton All); Thomas A. Pendarvis; Pamela D. Higgins; Bailey, J.D., Joel D.; Johnston, Ellis  
Subject: Parkview - Conference Call Today at 11:30 (Judge Early and counsel)

The call in # is 866-842-0820. Code is 8642403228#.

We have contacted Thomas' assistant and Joel. Joel will be on the call. Thomas is attending a short hearing in Beaufort right now, but his assistant said she would contact Thomas and she expects that he will be back in time for the 11:30 call. Ellis and I will be on the call at 11:30.

Please let me know if you have any questions. Thank you.

Ted

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H. Davis, Jr., <i>et al.</i> Plaintiffs.	)	
v.	)	Beaufort County
Parkview Apartments, a South Carolina Limited Partnership, <i>et al.</i> Defendants.	)	C.A. No. 2003-CP-07-726
	)	
Laurance H. Davis, Jr., <i>et al.</i> Plaintiffs.	)	
v.	)	Orangeburg County
Roosevelt Gardens, a South Carolina Limited Partnership, <i>et al.</i> Defendants.	)	C.A. No. 2005-CP-38-1131
	)	
Rhonda G. Rentz, <i>et al.</i> Plaintiffs.	)	
v.	)	Charleston County
Orleans Gardens, a South Carolina Limited Partnership, <i>et al.</i> Defendants.	)	C.A. No. 2005-CP-10-4229
	)	
Laurance H. Davis, Jr., <i>et al.</i> Plaintiffs.	)	
v.	)	Beaufort County
Palmetto Apartments, a South Carolina Limited Partnership, <i>et al.</i> Defendants.	)	C.A. No. 2005-CP-07-1989
	)	
Carolina Management Corporation of Beaufort, <i>et al.</i> Plaintiffs,	)	
v.	)	Beaufort County
Pinewood Park Apartments, a South Carolina Limited Partnership, <i>et al.</i> Defendants.	)	C.A. No. 2005-CP-07-1990
	)	

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND ORDER GRANTING DEFENDANTS' MOTION TO COMPEL, DATED NOVEMBER 6, 2008**

Defendants oppose and respond to the Plaintiffs' Motion to Alter or Amend, which was served upon Defendants on March 13, 2009 ("Motion"), as follows:

**BRIEF SUMMARY OF BACKGROUND AND DEFENDANTS' RESPONSE**

Plaintiffs' Motion concerns the Court's Order, dated March 3, 2009, in which the Court granted Defendants' Motion to Compel, dated November 6, 2008. In essence, the Plaintiffs



argue that the Court was simply wrong and that the Court has applied a "double standard" in denying Plaintiffs' multiple motions to compel and granting the Defendants' single motion to compel. As shown by the facts cited below, it is the Plaintiffs that are simply wrong.

Without revisiting the Plaintiffs' six (6) motions to compel in full detail, the facts that are responsive to Plaintiffs' arguments in the present Motion are summarized as follow:

(1) Defendants thoroughly responded to the issues raised in Plaintiffs' Motions to Compel # 3, 4 and 5 (heard July 1, 2008) in their Brief in Opposition, dated June 30, 2008.<sup>1</sup> The Defendants identified the Bates stamped documents that contain the information responsive to Plaintiffs' requests (generally AMREAL 00001-014464, though more narrow references to documents were made in some instances). In fact, Defendants attached to their Brief, as Exhibit A, a complete breakdown of Defendants' business records by Bates number range and dates of production, as well as a breakdown of additional documents produced (acquired from other sources via subpoena, FOIA or otherwise), complete with Bates numbers and dates of production. In response to each of the motions to compel, Defendants reaffirmed their objections, but further responded that "they have provided Plaintiffs with copies of their non-privileged business records relating to the subject matter of these actions in Defendants' possession, custody or control." Defendants further responded that, "to the extent the requested information is available to Defendants, the answer to the interrogatories may be derived or ascertained from these business records and the burden of deriving or ascertaining the answer is substantially the same for Plaintiffs as it is for Defendants." Defendants responded to Requests for Production in the same manner, by referring Plaintiffs to Defendants' business records, specifically identified as AMREAL 00001-014464. So there was no misunderstanding.

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<sup>1</sup> All documents cited or discussed herein will be made available at the Court's request. The Defendants are not attaching copies of the documents cited or discussed herein, due to the volume of such documents, but all such documents were previously provided to the Court and Plaintiffs' counsel.

Defendants stated that they "don't have the answers or documents sought unless the answers or documents are contained in the business records Bates stamped AMREAL 00001-014464 or the documents obtained from third parties and shared with Plaintiffs [identified in detail in Exhibit A of the Defendants' Brief]." See Defendants' Brief in Opposition to Plaintiffs' Motions to Compel # 3, 4 and 5, pp. 3-4 (see similar statements at pp. 5-7 in response to Motions to Compel 4 and 5). In light of the Defendants' clear and unequivocal response that they had produced all of the responsive information and documents of which they were aware, the Court denied Plaintiffs' Motions to Compel # 3, 4 and 5. In contrast, the Plaintiffs repeatedly relied on their numerous and inapplicable objections, as well as their vague references to documents produced or "already in the possession of Defendants or counsel for Defendants." In doing so, the Plaintiffs made it impossible to discern whether they had withheld responsive information and documents, and, if so, the specific basis for withholding such information and documents.

(2) In response to Plaintiffs' Motion to Compel # 1 (heard July 1, 2008), the Defendants agreed to provide certain information to supplement their prior responses, which they did in Defendants' Third Supplemental Response to Plaintiffs' First Set of Interrogatories, dated July 16, 2008. Defendants' reference to their specific Bates stamped business records, in response to Interrogatories 14 and 22, were deemed to be responsive and appropriate, pursuant to Rule 33(c), SCRPC. The only issue that remained had to do with the parties' dispute over the reasonable scope of Interrogatory Nos. 12 and 24 and Request for Production No. 6. This issue was eventually resolved by the Court's Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel, dated March 3, 2009. As with Plaintiffs' Motions to Compel # 3, 4 and 5, Defendants responded to Plaintiffs' Motion to Compel # 1 by reaffirming their objections, but also clarifying that they had or would provide the non-privileged responsive information or

documents (except with respect to Interrogatories 12 and 24, to which Defendants continuously objected on specific grounds). They then provided the supplemental information and documents within 15 days of the motion hearing, making an order compelling discovery unnecessary.

(3) In response to Plaintiffs' Motion to Compel # 2 (heard November 19, 2007), the Defendants defended their objections to Plaintiffs' discovery of the documents on Defendants' Privilege Log on the grounds of the attorney-client privilege and work product doctrine. After considering the parties' written briefs and oral arguments, and taking the matter under advisement for approximately six (6) months, the Court determined that the subject documents were privileged and not subject to production, and denied the Plaintiffs' motion. The Court also held that Plaintiffs' argument was not ripe with respect to questions that may be asked of Defendants' former attorneys at future depositions. The Court verbally denied the motion on July 1, 2008, and signed the Order on December 17, 2008. Nonetheless, on December 30, 2008, the Court issued an Order requiring that the Defendants' privileged documents be reviewed *in camera* by Special Master Clary, "subject to and in light of this Court's Order dated December 17, 2008," since he was going to undertake the *in camera* review of Plaintiffs' alleged privilege documents pursuant to Defendants' Motion to Compel. Special Master Clary's report concerning his *in camera* review is still pending. The denial of Plaintiffs' Motion to Compel # 2 has nothing to do with the Court's Order granting Defendants' Motion to Compel, or Plaintiffs' instant Motion.

(4) Plaintiffs' Motion to Compel # 6 concerned Plaintiffs' invasive, irrelevant, overly broad and unduly burdensome discovery requests concerning Defendants' finances and other matters Plaintiffs sought in connection with their punitive damages claim. The Defendants responded by reasserting their objections and showing the Court that sufficient information was

available in the public domain. The Court provided the Plaintiffs and their expert witness, Dr. Wood, with ample opportunity to show that the information in the public domain was insufficient and the invasive discovery sought by Plaintiffs was necessary. The Court entered an Order denying the Plaintiffs' motion, following the issuance of an e-mail to counsel, dated August 13, 2008, in which the Court stated, "I have considered Dr. Wood's affidavit, the Plaintiffs' Motion to Compel and the 'Definitive Proxy Statement.' I deny Plaintiffs' Motion to Compel. I find there is sufficient information in the statement and the public domain for an expert to render an opinion on punitive damages." The denial of Plaintiffs' Motion to Compel # 6 has nothing to do with the Plaintiffs' instant Motion.

(5) Plaintiffs' representation to the Court that the parties never agreed to Bates stamp all documents produced in these actions is false. At the conclusion of the July 1, 2008 hearings on Plaintiffs' various motions to compel, the Court instructed Defendants' counsel to submit proposed orders to the Court in accordance with the Court's verbal rulings during the hearings. On July 16, 2008, Defendants' counsel sent the proposed orders concerning Motions to Compel # 1, 2, 3, 4 and 5 (# 6 was held in abeyance at the time) to Judge Early and Plaintiffs' counsel, via e-mail. The proposed order granting in part and denying in part Plaintiffs' Motion to Compel # 1 reflects statements made by counsel and Judge Early during the hearings: "Further, counsel for the Plaintiffs and Defendants have agreed, and the Court hereby orders, that Plaintiffs and Defendants shall consult and cooperate with one another to devise a common system for Bates numbering of the documents produced in these actions by Plaintiffs..." On July 17, 2008, Mr. Bailey responded by e-mail to Judge Early and Defendants' counsel, stating, "I have reviewed Ted's proposed orders relating to Judge Early's earlier rulings and have no real problem other than the language relating to the ruling concerning interrogatories 12 and 24...." Plaintiffs'

counsel never disputed that the proposed order accurately reflected the agreement of counsel, and Judge Early's verbal ruling, concerning the Bates stamping of documents produced in these cases. In fact, Mr. Pendarvis sent a letter to Defendants' counsel, dated July 30, 2008, in an attempt to explain Plaintiffs' system of Bates numbering their documents and to comply with the parties' agreement and the Court's verbal order.

#### DEFENDANTS' RESPONSES TO PLAINTIFFS' NUMBERED ARGUMENTS

First, it is important to note that the trial court has considerable discretion in addressing discovery matters. "It is well-settled that 'the 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, 319 S.E.2d 695, 698 (1984) (citing and quoting Marroquin-Marriguez v. I.N.S., 699 F.2d 129 (3rd Cir. 1983)). "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, 559 S.E.2d 327, 335 (Ct. App. 2001) (citing Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001)). In light of the facts stated above, and the discretion afforded the trial court in such matters, Defendants briefly respond to Plaintiffs' arguments, in the order in which they appear in Plaintiffs' Motion:

1. There is no evidence that the Court applied a different standard in ruling on Plaintiffs' Motions to Compel than it did in ruling on Defendants' Motion to Compel. In fact, the record reflects that the Plaintiffs' Motions to Compel were denied (or denied in part) for good reason, but that the Plaintiffs failed to adequately address the deficiencies in their own discovery responses (including, among numerous other deficiencies, the failure to disclose any of the opinions held by Plaintiffs' multiple expert witnesses, or the bases for the experts' opinions), despite having several opportunities to do so. As discussed in Defendants' Memorandum in

Support of Motion to Compel. the Plaintiffs were served with the subject discovery requests on August 28, 2008, the Motion to Compel was filed on November 6, 2008 (after Plaintiffs failed to serve any responses), and Defendants' counsel wrote a letter to Plaintiffs' counsel on December 4, 2008 to address the specific deficiencies in Plaintiffs' discovery responses. Further, after the December 9, 2008 hearing on the motion, Plaintiffs were afforded additional time to resolve the discovery dispute with Defendants, and the Court did not enter its Order granting Defendants' motion until March 3, 2009. That is more than six (6) months from the time the discovery requests were served to the time the Order was entered.<sup>2</sup> The Plaintiffs were afforded numerous opportunities to adequately clarify and/or supplement their deficient discovery responses before the Court entered its Order, but they stubbornly refused to do so in any meaningful way.

2. The Defendants' mere contention that their discovery responses were adequate do not make them so. The Court heard arguments from Plaintiffs and Defendants, verbally and in writing, and gave Plaintiffs every opportunity to avoid an order granting Defendants' Motion to Compel. The Court specifically found, in its Order, that the subject discovery responses were "incomplete and inadequate." Further, Plaintiffs' argument that their "responses also provide substantially more information than do any of Defendants' discovery responses" (factually inaccurate as it is) misses the point. The question is one of responsiveness, not quantity. Whereas the Defendants made it crystal clear that they had responded to the discovery requests with all non-privileged information and documents in their possession, custody or control, the Plaintiffs did not.

3. Contrary to Plaintiffs' contention, the Order states, "At the hearing of the Motion, the Court directed the parties to make further attempts to resolve the discovery disputes presented by this second set of issues, but the parties' attempts have not resulted in a resolution

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<sup>2</sup> And the Plaintiffs contend that the *Defendants* are responsible for the delays in preparation for trial!

of their disputes." The Order also acknowledges that Plaintiffs subsequently served "Supplemental Response to the Discovery Requests, as well as documents Bates stamped Davis 007134-007192." More importantly, the Order recognizes that:

"Though the Defendants' Discovery Requests were directed to each of the Plaintiffs in the five (5) above-captioned actions, the Plaintiffs' Supplemental Response expressly provides that it is made only by the Plaintiffs in the Parkview action, and that the Plaintiffs in the other actions will supplement their responses to the Discovery Requests "at a later date." Further, the documents produced along with the Supplemental Response were the financial statements of only one of the Plaintiffs, Laurance Davis. As for the content of the Supplemental Response, very little additional information is provided, and Plaintiffs reaffirm their objections contained in their previous responses to the Discovery Requests."

After receiving Plaintiffs' Supplemental Response, Defendants' counsel advised Plaintiffs' counsel that the Parkview Plaintiffs' "partial supplemental response was not acceptable, and that the Defendants need supplemental responses on behalf of all of the Plaintiffs subject to the Discovery Requests." See Letter from Calvin T. Vick, Jr. to Judge Early, dated February 27, 2009, at p. 2 (letter simultaneously provided to Plaintiffs' counsel). These facts, coupled with the facts discussed above concerning the ample opportunities Plaintiffs were given to satisfactorily resolve the dispute, show that further consultation between the parties' counsel would have likely been an exercise in futility. The Plaintiffs had more than six (6) months to fully and completely answer the discovery requests, but repeatedly refused to do so.

4. Contrary to Plaintiffs' contention, the Order correctly finds that the Supplemental Response served by Plaintiffs was wholly inadequate, and this is self-evident from the Supplemental Response, not to mention the specific inadequacies pointed out by Defendants to the Plaintiffs and the Court. See Letter from Calvin T. Vick, Jr. to Judge Early, dated February 27, 2009.

5. Plaintiffs' representation to the Court that the parties never agreed to Bates stamp

the documents produced in these cases is false, as shown above.

6. Plaintiffs' contention that they identified documents responsive to discovery requests just as clearly and concisely as Defendants identified their responsive documents is false, as shown above. There is a substantial difference between referring to a specific range of Bates stamped documents produced in the litigation (Defendants) and vaguely referring to documents produced or "already in the possession of Defendants or counsel for Defendants" (Plaintiffs).

7. A review of the many discovery responses served by the parties in these cases shows that, since the first discovery responses served by Plaintiffs and Defendants, both parties have routinely used the same, or practically the same, general and specific objections in their respective discovery responses. The critical difference is that, when questioned, the Defendants plainly stated whether any documents or information had been withheld based on their objections, and, if so, the specific basis for withholding the documents or information. In contrast, the Plaintiffs stubbornly refused to reveal whether responsive documents or information had been withheld, and, if so, the specific basis for withholding documents or information. As an example, Plaintiffs have carefully crafted their words, stating that they "are not aware of any relevant and responsive documents" (emphasis added), rather than unequivocally stating that they have produced all documents responsive to the discovery requests.

8. Please see response to Plaintiffs' argument in paragraph 7.

9. The Court's prior comment that it intended to "feed both parties out of the same spoon" (if that is a correct quote of the Court) was specifically made in the context of the Court's order that documents on the parties' respective privilege logs be reviewed *in camera* by Special Master Clary. It does not mean, regardless of merit or lack thereof, that the Defendants' motion

to compel must be denied since the Plaintiffs' motions to compel were denied. If anything, it would seem that the Plaintiffs are looking a gift horse in the mouth. At the time the Court ordered the *in camera* review of Defendants' privileged documents, it had already considered the written briefs and oral arguments of the parties with respect to Plaintiffs' motion to compel the production of Defendants' privileged documents, as well as the entries on Defendants' privilege log, and had denied Plaintiffs' motion in a written order. The record shows that the Court has been more than fair to the Plaintiffs in all discovery disputes. The Plaintiffs' argument concerning the parties' use of essentially the same standard and general objections is answered above in paragraph 7.

10. Plaintiffs' arguments that they should have 60 days, rather than 30 days, to supplement their responses and production of documents is surprising, to say the least. First, Plaintiffs have now had eight (8) months to fully and completely respond to Defendants' discovery requests, which were served on August 28, 2008. Second, Plaintiffs' counsel has previously represented to the Court and Defendants' counsel that they had consulted with each of the Plaintiffs concerning responses to the Defendants' discovery requests. Third, Plaintiffs argue that there is no hardship to Defendants in that the Parkview trial has been rescheduled for trial in January 2010, yet they continue to take every opportunity to accuse the Defendants of being the sole cause of delays in preparation for trial. Throughout Plaintiffs' most recent motion to alter or amend, Plaintiffs unabashedly place full blame on the Defendants for delaying the preparation of the Parkview case for trial, despite substantial evidence to the contrary. Fourth, Plaintiffs' comment that the Defendants will now have almost seven (7) years to complete their discovery before trial oddly ignores the fact that Plaintiffs shall have (and apparently need) the same amount of time. In fact, the Plaintiffs served new discovery requests as recently as February 3,

2009. In any event, Defendants suspect that, as a result of the instant Motion, Plaintiffs will have had well beyond 30 days from the date of the Court's March 3, 2009 Order to fully and completely supplement their discovery responses and production of documents.

11. Considering that each of Plaintiffs' six (6) motions to compel have been denied, or at least denied in part, Defendants are puzzled as to how the Court had any legitimate choice but to deny the Plaintiffs' requests for fees and costs pursuant to Rule 37, SCRPC. In stark contrast, the Court has granted Defendants' motion to compel, after giving Plaintiffs every opportunity to avoid the entry of such an order, and Defendants submit that Plaintiffs' stubborn refusal to fully and completely respond to the discovery requests in a meaningful way over the course of the last eight (8) months (more than 6 months at the time the March 3, 2009 Order was entered) smacks of bad faith, or at least lack of good faith, as well as purposeful delay by the Plaintiffs. Defendants submit that, between their Memorandum in Support of their Motion to Compel, the oral argument of counsel, and the facts set forth in Defendants' counsel's letter to Judge Early, dated February 27, 2009, the Defendants have clearly shown that the Plaintiffs have made no meaningful attempt to comply with Defendants' discovery requests in the last eight (8) months.

In light of the above, Defendants respectfully request that the Court deny Plaintiffs' Motion to Alter or Amend.

HAYNSWORTH SINKLER BOYD, PA



Ellis M. Johnston, II, SC Bar # 3065  
Calvin T. Vick, SC Bar #68187  
Post Office Box 2048  
Greenville, South Carolina 29602  
(864) 240-3200

Attorneys for Defendants

This 3 day of April, 2009.  
Greenville, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H. Davis, Jr., *et al.*, Plaintiffs, )  
v. ) Beaufort County  
Parkview Apartments, a South Carolina Limited ) C.A. No. 2003-CP-07-726  
Partnership, *et al.*, Defendants. )

Laurance H. Davis, Jr., *et al.*, Plaintiffs, )  
v. ) Orangeburg County  
Roosevelt Gardens, a South Carolina Limited ) C.A. No. 2005-CP-38-1131  
Partnership, *et al.*, Defendants. )

Rhonda G. Rentz, *et al.*, Plaintiffs, )  
v. ) Charleston County  
Orleans Gardens, a South Carolina Limited ) C.A. No. 2005-CP-10-4229  
Partnership, *et al.*, Defendants. )

Laurance H. Davis, Jr., *et al.*, Plaintiffs. )  
v. ) Beaufort County  
Palmetto Apartments, a South Carolina Limited ) C.A. No. 2005-CP-07-1989  
Partnership, *et al.*, Defendants. )

Carolina Management Corporation of Beaufort, )  
*et al.*, Plaintiffs. )  
v. ) Beaufort County  
Pinewood Park Apartments, a South Carolina ) C.A. No. 2005-CP-07-1990  
Limited Partnership, *et al.*, Defendants. )

I HEREBY CERTIFY that true and correct copies of the attached DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND ORDER GRANTING DEFENDANTS' MOTION TO COMPEL, DATED NOVEMBER 6, 2008 were served upon counsel of record via e-mail and by depositing copies in the United States mail, first class postage affixed, this 3rd day of April, 2009, addressed as follows:

Joel D. Bailey  
The Bailey Law Firm  
Post Office Box 1437  
Beaufort, SC 29901-1437  
Email: Baileylawfirm@charter.net

Thomas A. Pendarvis  
Pendarvis Law Offices, P.C.  
500 Carteret Street, Suite A  
Beaufort, SC 29902-5066  
Email: Thomas@PendarvisLaw.com

April 3, 2009  
Greenville, South Carolina

  
Deborah L. Herring  
Legal Assistant to Calvin T. Vick, Jr.

**Haysworth**  
**Simkins & Boyd, P.A.**

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VIA U.S. MAIL, FACSIMILE and E-MAIL

June 4, 2003

Joel Bailey  
Bailey Law Firm  
705 Prince Street  
Post Office Box 1437  
Beaufort, South Carolina 29901-1437

**Re: Pinewood Park Apartments, a limited partnership**

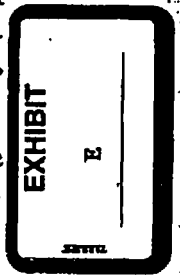
DEAR Joel:

I represent AmReal Corporation ("AmReal") and N. Barton Tuck, Jr., the general partners in Pinewood Park Apartments, a limited partnership (the "Partnership"). This letter is being addressed to your attention as you have informed AmReal that you represent all of the limited partners in the Partnership. For the past several years, Amreal has made proposals to the limited partners including the sale of the Partnership's note, the renegotiation of the note's terms, foreclosure on the Partnership's collateral, and the replacement of the existing general partners. Each proposal has been either rejected or ignored by the limited partners, with no alternative courses of action suggested.

Over the past 6 months, subject to the terms of the partnership agreement and any approvals it may require, the general partners have endeavored (1) to find a substitute general partner and (2) to negotiate a return of the physical property. The general partners have been unsuccessful in finding a substitute general partner. We are informed, however, that the current owner of the property is willing to substitute as collateral under the note, a mortgage on the property, in lieu of the presently existing collateral (i.e. the purchaser's limited partnership interest). If this is done, the partnership could then foreclose or take a deed in lieu of foreclosure, and again become owner of the property.

As the general partners have expressed in the past, and continue to believe today, they do not believe it is in the best interest of the Partnership to own and continue to operate the property. The general partners understand that the limited partners are of a contrary view. Accordingly, the general partners propose:

- (1) that the limited partners immediately find a substitute general partner to whom the current general partners will relinquish their interest in the Partnership, and that the new general



partner consummate the collateral substitution (or such other action as it may find appropriate);  
or,

(2) that the limited partners accept the resignation of the general partners at which time, it is my understanding of South Carolina Law, the limited partnership would then become a general partnership, with the limited partners becoming general partners. These new general partners could then consummate the collateral substitution and foreclose, or take a deed in lieu of foreclosure, and become the owners of the physical property, or take such other action as they deem appropriate.

If the limited partners remain unwilling to authorize either of these courses of action, or to suggest any other reasonable course of action, then the general partners will have no choice but to move to have the partnership terminated and that they be removed from the partnership by the courts.

Please inform me no later than June 11, 2003 of the limited partners' intentions regarding the partnership.

With kind regards, I remain,

Very truly yours,



Ellis M. Johnston, II

EMJ/kmf



THE  
BAILEY LAW FIRM

A PROFESSIONAL ASSOCIATION

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June 27, 2003

Ellis M. Johnston, II, Esquire  
Haynsworth-Sinkler Boyd, P.A.  
P.O. Box 2048  
Greenville, South Carolina 29602-2048

Re: Pinewood Apartments Limited Partners vs. AIMCO, et al.

Dear Ellis:

Please be advised that I have now received a majority consensus from the limited partners of the Pinewood Apartments Limited Partnership, and am in a position to provide an initial response to your recent proposal to have the apartment complex in Allendale returned to the LP. The limited partners are interested in pursuing this goal with certain *conditions*. In essence, the limited partners have been kept in the dark by the general partners concerning this matter for years and, before making this decision, additional information is required.

In this regard, please provide me with the following information at this time in order to assist the limited partners in making an informed decision regarding your proposal:

1. Identify specifically the persons or entities who currently own the subject real estate, and advise of any ties or affiliations, past or present, with any of our general partners;
2. List all liens, mortgages or other encumbrances which relate to the subject real estate, including the identities of the lienholders and the amount(s) of such lien(s);
3. Provide any documentation in the possession or control of the general partners which reflects the financial condition of the entity which purchased the property from our LP and, specifically, its ability and/or willingness to pay the current outstanding debt to the LP;
4. Provide documentation regarding the history and status of the HUD reserve account(s) relating to the subject property;
5. Provide the latest financial data for the subject property, showing cash flow, receipts, disbursements, appraisals of the property, and estimates of any immediate repairs or renovations needed;

Elmer M. Johnston, II, Esquire

2/10/2009

Page 1/2

6. Set forth the current status of the subject property vis-a-vis HUD, i.e., is it still in the HUD program? If not, what happened to the HUD funds allocated for the property? If so, what is HUD's position regarding the reconveyance of the subject property?

It may be that additional information will be required before a final decision can be made regarding your proposal, but this information is certainly essential to enable the limited partners to intelligently discuss the proposal.

As you are aware, I am in the process of preparing a lawsuit on behalf of the limited partners against the general partners. Return of the subject property may or may not alleviate the necessity of that litigation, but it could certainly be a step in the right direction as, at the very least, it may serve to substantially mitigate our existing damages. Therefore, your prompt attention and cooperation in getting this information to us will be greatly appreciated.

With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P.A.



Joel D. Bailey

JDB/lcm

cc: Limited Partners

BAILEY LAW FIRM, P.A.

Haynsworth  
Sinkler Boyd, EA

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July 7, 2003

Joel Bailey, Esq.  
Bailey Law Firm  
Post Office Box 1437  
Beaufort, South Carolina 29901

Re: Pinewood Park Apartments  
Our Client No. 11471-0007

Dear Joel:

Enclosed please find the following:

- (1) Year end operating statements for the period ending December 25, 2002;
- (2) Year to date operating statement for the period ending May 31, 2003; and
- (3) a Phase One Environmental Site Assessment.

I would like to get this property transferred to the limited partners, this month.

Please advise of their desires.

With kind regards, I remain,

Very truly yours,



Ellis M. Johnston, II

EMJ/kmf  
Enclosures



THE  
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August 27, 2003

Ellis M. Johnston, II, Esquire  
Haynesworth Sinkler Boyd, P.A.  
P.O. Box 2048  
Greenville, South Carolina 29602-2048

Re: Pinewood Apartments Limited Partners vs. AIMCO, *et al.*

Dear Ellis:

This will confirm receipt of your letter of August 20<sup>th</sup> in the above-referenced matter. You correctly note that you wrote to me on June 4<sup>th</sup> concerning this limited partnership. While you also correctly state that this was over two months ago, I do not share the implication that there has been some sort of delay on our part. You will recall that I responded to your letter on June 27<sup>th</sup>, requesting specific information needed for the limited partners to evaluate your offer to have the real estate reconveyed to the Limited Partnership. You responded on July 2d, but your response did not specifically address some of the information we had requested. In that regard, please consider:

1. I asked for information regarding any ties or affiliations between the current owners and our general partners. You have provided no information responsive to that request.
2. I asked for the latest financial data on the subject property relative to cash flow, receipts, disbursements, appraisals and estimates of repairs or renovations needed. Your response was that the owner's attorney would check with the property manager and provide what information is available. I have now received some financial information for December 2002 and May 2003. Is this all you have which is responsive to this request?
3. I asked for information concerning HUD's position concerning the reconveyance. Your response was that you do not know. Obviously, this is a major concern, since the highest and best use of this property may well be as subsidized housing.
4. I asked for information concerning the HUD reserve funds. Your response was that these funds "have been released to the partnership, and have been used to take care of operating expenses." You do not say which partnership received these funds, but I assume it was not ours, since our general partners have not advised us of any monies recovered. This revelation raises additional questions which must be answered in order for us to make a decision on the reconveyance offer, including but not limited to the following:

- a. How much money was available in these reserve accounts when the offer to reconvey the property was first made, and how much was available when the most recent offer was made?
- b. What operating expenses were taken care of with the HUD reserve account monies?
- c. The financial documents which you have recently provided indicate that the present owners have an account receivable due from their principals of over Ninety Eight Thousand (\$98,000.00) dollars. Did these principals borrow money from the operating account? Were the reserve monies used to fund these loans? Have these loans been repaid? Were the monies used to pay off the prior mortgage?

As you can see, the documents and information which the general partners finally gave us through you have raised as many questions as they have answered. In order to address some of these issues, the limited partners met last week. Based on that meeting, I am prepared to respond to your offer to reconvey the property to the limited partners as follows:

1. The limited partners are willing to take the Pinewood Apartments property back, subject to the following conditions:
  - a. There must be no adverse tax consequences to the limited partners resulting from the reconveyance. In this regard, a CPA with knowledge of the past history of the Limited Partnership is being retained by the limited partners in order to evaluate the tax consequences to them, and will hopefully have an opinion for us in the very near future.
  - b. We require full Profit & Loss statements of the owner and manager relating to the operation of Pinewood Apartments from 1999 to date.
  - c. Provide restitution of the operating capital in a sum equal to the highest amount of any funds which were or should have been in the HUD reserve accounts between the due date of the note in 1999 and a like date in 2002, together with operating capital of the owner as of such dates. These funds are essential to the operation of the apartments, whether as subsidized or non-subsidized housing, and it makes no sense to have the property back without sufficient capital to operate them. These would have been assets of the owner subject to attachment had our general partners acted to protect our Limited Partnership, as they promised they would.
  - d. The real estate must be returned via a General Warranty deed, free and clear of all liens and encumbrances.

BAILEY LAW FIRM, P.A.

Ellis M. Johnston, II, Esquire

November 2, 2009

Page 10 of 10

- e. Return of the real estate and operating funds does not relieve or release the general partners from any existing liability to the limited partners, but may be considered a mitigation of the total damages which may be due.
- f. The general partners must waive and relinquish any claim or entitlement to the recovered real estate and operating funds, or to participate in any future disbursements to premises of our Limited Partnership.
- g. Upon completion of the transfer of the real estate and operating funds, the general partners will submit their resignation as general partners and transfer their interests in the Limited Partnership to such persons or entities as may be designated by the limited partners.
- h. HUD must approve of this transfer and agree that the property may be continued as subsidized housing if the limited partners desire such continued use of the property.


2. Alternatively, the limited partners will accept a liquidated settlement of all claims equivalent to (a) the full amount due under the outstanding note as of three (3) years from the due date thereof in 2002, or (b) the fair market value of the real estate based upon its appraised highest and best use as of November 2002, together with (i) the highest sum which was in the HUD reserve and operating accounts between 1999 and 2002, and (ii) payment of their litigation costs and attorneys fees in this matter. The attorney's fee would be based upon 1/3 of the total value of the recovery to the limited partners as stated herein.

Please discuss this with your clients and advise me of your position at your earliest convenience.

With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P.A.



Joel D. Bailey  
JDB/lcm

cc: Limited Partners

BAILEY LAW FIRM, P.A.

GREENVILLE CHARLESTON COLUMBIA FLORENCE

Haynsworth  
Simler Boyd, PA

ATTORNEYS AND COUNSELORS AT LAW

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VIA AIR MAIL, FACSIMILE and E-MAIL

September 2, 2003

Joel Bailey  
Bailey Law Firm  
705 Prince Street  
Post Office Box 1437  
Beaufort, South Carolina 29901-1437  
Fax No. (843)525-6070  
E-Mail: baileylawfirm@charter.net

Re: Pinewood Park Apartments, a limited partnership

Dear Joel:

Receipt of your letter of August 27, 2003 is acknowledged. I will attempt to respond to your additional inquires, to the best of my ability. The numbers below correspond to those in your letter.

1. We are aware of no "tie or affiliation" between the current owners and the general partners, though I am not precisely sure what you mean by "tie or affiliation".
2. You have the latest financial information that we have available. As you are aware, the general partners are not the general partners of the present owners of the project.
3. I am unaware of what HUD's position might be. That may well depend on who the new general partner is, as well as other considerations. As attorney for the general partners of Pinewood Apartments limited partnership, I am afraid I just cannot answer the question for you.
4. You have all of the information that we have.

With regard to your first demand, I will respond to the lettered paragraphs as follows:

- (a) The general partners cannot guarantee what, if any, tax consequences may occur from a reconveyance of the property.
- (b) You have all of the financial information that we have, either provided to you by my earlier correspondence or produced to you.

(c) The general partners are not responsible for restitution of operating capital necessary for the apartments' continued operation.

(d) Agreed.

(e) If the limited partners feel that they have other claims against the general partners, then perhaps you should state what they are. However, the return of the real estate, as well as the 5% general partners' interest to the limited partners, is without condition.

(f) See (e) above.

(g) Agreed.

(h) The general partners cannot guarantee this.

Alternative 2 is rejected.

Joel, the general partners have done virtually everything that they could to satisfy the limited partners in this matter. They sought and obtained an offer to purchase the property, which apparently was rejected. They have obtained an offer to return the property to the partnership. Under the documents executed in 1984, these are essentially the only remedies available to the partnership.

Please give me a call upon receipt of this letter in order that we might finalize a transfer of the property, or decide what other avenue the limited partners might wish to pursue.

With kind regards, I remain,

Very truly yours,



Ellis M. Johnston, II

BMJ/kmf

P.S. You mentioned the implication in my letter of August 20 that you had been remiss in responding to my letter of June 4, because we had not fully responded to your letter of June 27, 2003. My response of July 2 and July 7, 2003, provided all information that we had available to us at this time. It was 8 weeks later that you claimed that that was insufficient.



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PHONE: 843-525-6090  
FAX: 843-525-6070

September 7, 2003

VIA FACSIMILE and U.S. MAIL

Ellis M. Johnston, II, Esquire  
Haynsworth Sinkler Boyd, P.A.  
P.O. Box 2048  
Greenville, South Carolina 29602-2048

Re: Pinewood Apartments Limited Partners vs. AIMCO, *et al.*

Dear Ellis:

This will confirm receipt of your email in the above-referenced matter. The short answer is that the Limited Partners do want this property back. Unfortunately, due to the scarcity of information which has been provided to us by the General Partners, we are not in a position to agree to take the property back by the September 8<sup>th</sup> deadline you have imposed.

Our tax advisor has indicated that we will need considerable financial data relating to the operation of this partnership in order to determine the extent of any tax consequences associated with the return of the property. We have requested a portion of this data, but it has not been provided by the General Partners. We feel this is the type of data which should have been secured by the General Partners as part of their due diligence in seeking to have the property reconveyed to our Limited Partnership.

If the present owners are willing to cooperate fully concerning our request for financial information, and to extend their current deadline, we will be glad to explore further the possibility of the return of the property. Otherwise, we will continue to look to the General Partners for compensation for the damages sustained by the Limited Partners.

In this regard, I have not heard from you concerning any of the details which you proposed at our last meeting in Beaufort. If you still wish to seek a combined settlement along the lines discussed in our last meeting, please advise me. I will be out of the office all week, but will be back on Monday, September 15<sup>th</sup>. With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P.A.

Joel D. Bailey  
JDB/lom

cc: Limited Partners  
John P. Linton, Esquire

GREENVILLE CHARLESTON COLUMBIA FLORENCE

**Haynesworth  
Simkins Boyd & P.A.**

ATTORNEYS AND COUNSELORS AT LAW

VIA AIR MAIL AND U.S. MAIL

September 8, 2003

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Joel Bailey  
Bailey Law Firm  
705 Prince Street  
Post Office Box 1437  
Beaufort, South Carolina 29901-1437  
Fax No. (843)525-6070

Re: **Pinewood Park Apartments, a limited partnership**

Dear Joel:

~~Receipt of your letter of September 7, 2003 is acknowledged. I am not certain that I will be able to obtain an additional extension of the Tolling Agreement, but will endeavor to do so.~~

What specific information does your tax advisor need? We have provided year end operating statements, and operating statements through May, 2003. This was done in June or July, if memory serves me correctly.

Please be advised that I did not impose a September 8 deadline. That is when the Tolling Agreement expires.

The tone of your letter implies that the limited partners are more interested in a lawsuit, than a return of the property.

With kind regards, I remain,

Very truly yours,

*Ellis M. Johnston, II*  
Ellis M. Johnston, II

EMJ/kmf

GREENVILLE

CHARLESTON

COLUMBIA

FLORENCE

**J. Haysworth**  
**Simler Boyd, P.A.**

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September 17, 2003

Joel Bailey  
Bailey Law Firm  
705 Prince Street  
Post Office Box 1437  
Beaufort, South Carolina 29901-1437

Re: Pinewood Park Apartments, a limited partnership

Dear Joel:

This letter will confirm our telephone conversation of September 17, 2003 with regard to the above. As I discussed, I have been able to obtain a short extension from the current owners. Under the current proposal, there would be a substitution of collateral (mortgage on the property in substitution of the present interest in the purchasers' limited partnership). If this is accomplished, then the limited partners may take a deed in lieu of foreclosure and have the property returned to them.

As I also mentioned to you, the attorney for the present owners mentioned that they might have some interest in purchasing the property to avoid adverse tax consequences. I do not know how adverse those consequences would be to the present owners. It would seem that they would only have two years of accrued but unpaid interest payable, and even with accelerated depreciation, I don't think the tax consequences would be that severe. But, again, neither you nor I are tax attorneys.

In any event, I have e-mailed the owners' attorney and asked what amount they might be willing to pay.

With kind regards, I remain,

Very truly yours,



Ellis M. Johnston, II

EMJ/kmf

Haynsworth  
Sinkler Boyd, P.A.

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December 9, 2003

Joel Bailey, Esq.  
Bailey Law Firm  
705 Prince Street  
Post Office Box 1437  
Beaufort, South Carolina 29901-1437

Re: Pinewood Park Apartments, a limited partnership

Dear Joel:

I have finally heard back from the current owner's attorney with respect to possible purchase of the project. Their offer was \$300,000.00. Please let me know on or before December 15, 2003 as to what your clients wish to do. The options are to accept the \$300,000.00, or to take the property back.

With kind regards, I remain,

Very truly yours,



Ellis M. Johnston, II

EMJ/kmf

cc: Johnny Linton  
Haynsworth Sinkler Boyd, P.A.  
Post Office Box 340  
Charleston, South Carolina 29402

Patricia Banks Morrison  
Haynsworth Sinkler Boyd, P.A.  
Post Office Box 340  
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PHONE: 843/525-6090  
FAX: 843/525-8070

December 22, 2008

VIA FACSIMILE and U.S. MAIL

Ellis M. Johnston, II, Esquire  
Haynsworth Sinkler Boyd, P.A.  
P.O. Box 2048  
Greenville, South Carolina 29602-2048

Re: Pinewood Apartments Limited Partners vs. AIMCO, et al.

Dear Ellis:

This will confirm receipt of your letter of December 19th in the above-referenced matter. I have forwarded the same to my clients and have received responses from all but Judge Rawl. Their decision is that, as indicated to you in September, the Limited Partners do want this property back, but not based upon the scarcity of information which has been provided to us by the General Partners. For example, we have still not received the financial data relating to the operation of this partnership which we requested from the General Partners in order to determine the extent of any tax consequences associated with the return of the property.

Furthermore, return of the property without return of the monies in the HUD reserve and the operating accounts is not satisfactory. If we can come to a resolution regarding the return of these funds, to which our Limited Partnership would have been entitled had the General Partners pursued the litigation promised, return of the underlying real estate may be a viable settlement option. Otherwise, it probably is not.

With respect to the offer of \$300,000.00, we have likewise not been provided with any reliable documentation to support such an offer. As you know, AIMCO's own appraisal of this property was over three (3) times that amount. I feel that my clients would be willing to discount the fair market value slightly in order to avoid future litigation costs, but a 2/3 reduction is not acceptable. Accordingly, we must reject the \$300,000.00 offer. If your clients are interested in a counter-proposal, I will be happy to discuss this with my clients.

Very truly yours,

THE BAILEY LAW FIRM, P.A.

Joel D. Bailey  
JDB/lom

cc: Limited Partners  
John P. Linton, Esquire

GREENVILLE

CHARLESTON

COLUMBIA

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December 22, 2003

VIA U.S. MAIL and FACSIMILE

December 19, 2003

Joel Bailey, Esq.  
Bailey Law Firm  
705 Prince Street  
Post Office Box 1437  
Beaufort, South Carolina 29901-1437  
Fax No. (843)525-6070

Re: Pinewood Apartments, Limited Partners

Dear Joel:

Receipt of your letter of December 22, 2003 is acknowledged. I am still not certain whether the limited partners want the property back. Your letter is not very specific.

As explained to you in prior correspondence, return of the property to the limited partners is not in return for a general release by them of the general partners, or anything else. I assume the general partners, because they are giving up their interest in the partnership properties, would be entitled to a credit for the value of their interest, should any litigation ensue.

Further, you have all of the information that we have. We are not the owners in possession of these properties. We have provided to the limited partners all of the information that we have available to us.

Unless I hear differently from you, we will pursue the return of the property to the limited partners.

With kind regards, I remain,

Very truly yours,



Ellis M. Johnston, II

EMJ/kmf

GREENVILLE CHARLESTON COLUMBIA FLORENCE

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VIA FEDERAL EXPRESS

July 9, 2004

Joel Bailey, Esq.  
Bailey Law Firm  
705 Prince Street  
Beaufort, South Carolina 29901-1437

Re: Pinewood Apartments, Limited Partners

Dear Joel:

Enclosed please find a Loan Modification, Substitution of Collateral, Mortgage, and Security Agreement in connection with Pinewood Park Apartments. In negotiations with the purchaser, Pinewood Housing Limited Partnership, it has agreed to this Loan Modification, Substitution of Collateral, Mortgage, and Security Agreement.

As you have indicated that you represent the limited partners in Pinewood Park Apartments, I would appreciate your review and any comments you may have with respect to the enclosed document.

I have spoken with Alex Park of Ernst & Young, and it is his belief that execution of this agreement would constitute a material modification of the original note, and may therefore be a "taxable event" to the partnership. He informed me, that the same result would occur, if we sued the purchasing limited partnership, were successful in the lawsuit, and received its interest in Pinewood Park Apartments.

We would like to conclude this matter before the end of July. Please provide your comments at your earliest convenience.

With kind regards, I remain,

Very truly yours,



Ellis M. Johnston, II

EMJ/kmf  
Enclosures

AMREAL 013489

GREENVILLE CHARLESTON COLUMBIA FLORENCE

Haynsworth  
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VIA U.S. MAIL and FACSIMILE

July 30, 2004

Joel Bailey  
Bailey Law Firm  
705 Prince Street  
Post Office Box 1437  
Beaufort, South Carolina 29901-1437  
Fax No. (843)525-6070

Re: Parkview Apartments, et al vs. AIMCO, et al  
Our Client/Matter No. 11471-0010

Dear Joel:

Receipt of your fax letter of July 29, 2004 is acknowledged. I would like to clarify several things. First, as I expressed to you earlier and in our conversation of July 29, 2004, my clients are willing to proceed with mediation. However, they are not willing to do so based on the information which has been developed to date, to include Chris Denato's appraisals. As I expressed, those appraisals, as well as values placed on other properties which were to be subject to the mediation, do not have sufficient historical data upon which a reasonable person might make a determination as to their value at the appropriate dates. For that reason, and that reason only, we were unwilling to proceed on the dates chosen. We did discuss trying to mediate in mid October, and, if sufficient information can be developed, would like to proceed at that time.

I will attempt to respond to your discovery requests on or before August 20, 2004.

I am developing a proposed scheduling order, and will e-mail it to you as soon as it has been completed.

With respect to your request that I accept service of the lawsuits except the one for Pinewood, I will ask my client if I have permission to do so, and will advise.

It probably makes sense to consolidate, for the purposes of discovery only, the other potential lawsuits. However, each of those lawsuits will have various other defenses, and venue issues. I think we will need to work through those, before consolidation.

My view of Chris Denato's bill, is that we should pay it. Though I have problems with his appraisals, this is probably a result of his lack of historical information. Though that historical information may be to the detriment of my client, or yours, our inability to furnish it to him is not his fault. It may well be that, after we have the historical information, and both sides have had

AMREAL 013485

an opportunity to discuss it with him, that he can still act as an independent appraiser for both sides.

Finally, with respect to Pinewood, as I have discussed on a number of occasions before with you, the property is available for the partnership to take back. Thus far, despite my requests that your clients tell us what they want to do, you have not indicated whether your clients are willing to take it back, or not, accept the loan modification agreement, sell the note, or what. Accordingly, the general partner will exercise its best judgment as to how to proceed.

With kind regards, I remain,

Very truly yours,



Ellis M. Johnston, II

EMJ/kmf

cc: Johnny Linton  
Haynsworth Sinkler Boyd, P.A.  
Post Office Box 340  
Charleston, South Carolina 29402

Patricia Banks Morrison  
Haynsworth Sinkler Boyd, P.A.  
Post Office Box 340  
Charleston, South Carolina 29402

AMREAL 013496

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS  
14TH JUDICIAL CIRCUIT  
Case No 2003-CP-07-726

2 COUNTY OF BEAUFORT

3 Laurance H. Davis, Jr.; et  
al.,

4 Plaintiffs,

5 vs.

CONSOLIDATED CASES  
CASE NO. 2005-CP-07-1990  
CASE NO. 2005-CP-07-1989  
CASE NO. 2005-CP-10-4229  
CASE NO. 2005-CP-38-1131

7 Parkview Apartments, a South Carolina Limited  
8 Partnership; Apartment Investment and Management  
9 Company a/k/a AIMCO; Insignia Financial Group,  
10 Inc.; AmReal Corporation a/k/a and f/k/a USS  
11 Corporation a/k/a and f/k/a U.S. Shelter  
12 Corporation; ISTC Corporation; N. Barton Tuck, Jr.;  
and John Doe, a generic designation for a party or  
parties whose true identity is unknown,  
Defendants.

12 30 (B) (6)  
13 DEPOSITION OF: JOSEPH WILLIAM SPRANSY, II

14 DATE: November 14, 2007

15 TIME: 9:52 a.m.

16 LOCATION: Law Offices of  
Haynsworth, Sinkler, Boyd  
75 Beattie Place, Suite 1100  
Greenville, SC

18 TAKEN BY: Counsel for the Plaintiffs

19 REPORTED BY: Susan M. Valsecchi, RPR  
Certified Realtime Reporter

20 Computer-Aided Transcription By:

21 A. WILLIAM ROBERTS, JR., & ASSOCIATES

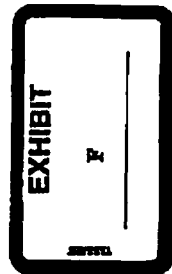
22 Charleston, SC  
23 (843) 722-8414

Columbia, SC  
(803) 731-5224

24 Myrtle Beach, SC  
(843) 839-3376

25 Greenville, SC  
(864) 234-7030

Charlotte, NC  
(704) 573-3919



1 MR. BAILEY: Okay. I just want to get  
2 a point of clarification, Ellis. The notebook that  
3 you gave to Thomas before the deposition started is  
4 in response to the subpoena; is that correct?

5 MR. JOHNSTON: Let me look at it.  
6 There have been so many document requests and  
7 everything else, I'm still trying to figure out  
8 who's on first.

9 In response to your question, I'm not  
10 certain at what -- start out -- years ago we  
11 produced a massive number of documents, many of  
12 which I think would be responsive to this subpoena.

13 In September and then again on November  
14 the 12th -- September 6th, I think it was -- and  
15 November the 12th -- we also produced documents  
16 that may be responsive to some of the areas.

17 This morning I gave you the book that  
18 contained essentially two topics. One was  
19 correspondence between you and I, both ways. And  
20 the other was correspondence and e-mails.

21 When I say correspondence,  
22 correspondence and e-mails between Mr. Roger  
23 Hartman, who was the attorney for the owners of the  
24 Parkview Apartments, that relate to efforts to  
25 either have the apartments returned to Parkview.

1 Apartments, a South Carolina Limited Partnership,  
2 or to get them to offer some amount for the demand  
3 note. It also contains a number of tolling  
4 agreement extensions.

5 There is, as a matter of public record,  
6 a lawsuit that was filed against them, I'm trying  
7 to say in November of -- it was sometime in 2003.

8 MR. BAILEY: Against them, meaning --

9 MR. JOHNSTON: The then owners. That  
10 is what resulted in a tolling agreement. That  
11 lawsuit was dismissed for lack of prosecution, as  
12 we were trying to work through things. I then  
13 filed another one. I don't know whether it's been  
14 dismissed for lack of prosecution yet or not, but  
15 we ultimately worked out an agreement that was  
16 presented to the limited partners and AIMCO as the  
17 general partner thought -- well, I will just leave  
18 it right there.

19 There was an agreement worked out that  
20 was presented to the limiteds. And I understand  
21 that you and I have a difference of opinion as to  
22 whether -- we never got a clear answer from them as  
23 to what they wanted to do is, you know...

24 MR. BAILEY: When you say a lawsuit was  
25 brought against the owners that were represented by

1 Mr. Hartman, a lawsuit by whom?

2 MR. JOHNSTON: By -- I'm pretty sure it  
3 was Parkview Apartments Limited Partnership.

4 MR. BAILEY: Parkview.

5 MR. JOHNSTON: I mean Pinewood. This  
6 says Parkview. Pinewood, yes. This being the  
7 subpoena you just handed to us that --

8 MR. BAILEY: Okay. I'm a little  
9 confused. So are you saying that Pinewood Limited  
10 Partnership sued Mr. Hartman's clients?

11 MR. JOHNSTON: Yes.

12 MR. BAILEY: Is that something you guys  
13 did -- I mean Haynsworth, Sinkler, Boyd -- or was  
14 that something that was in California or what?

15 MR. JOHNSTON: No, we did it.

16 MR. BAILEY: Okay. Was that related to  
17 the collection of the note or the return of the  
18 properties?

19 MR. JOHNSTON: Yeah.

20 I mean, it's part of the public record  
21 up here at the courthouse. I'll be happy to  
22 furnish you copies of the Complaint.

23 MR. BAILEY: Was it filed in federal or  
24 state court?

25 MR. JOHNSTON: State.

GREENVILLE CHARLESTON COLUMBIA FLORENCE

Haynsworth  
Sinker & Boyd, PA

ATTORNEYS AND COUNSELORS AT LAW

ELLIS M. JOHNSTON, II  
DIRECT DIAL NUMBER (864)240-3217  
EMAIL [ejohnston@hsblawfirm.com](mailto:ejohnston@hsblawfirm.com)

75 BEATTIE PLACE, 11TH FLOOR (29601-2119)  
POST OFFICE BOX 2048 (29602-2048)  
GREENVILLE, SOUTH CAROLINA  
TELEPHONE 864.240.3200  
FACSIMILE 864.240.3300  
[www.hsblawfirm.com](http://www.hsblawfirm.com)

VIA FEDERAL EXPRESS and E-MAIL

March 16, 2007

Thomas A. Pendarvis  
Pendarvis Law Office, P.C.  
500 Carteret Street, Suite A  
Beaufort, South Carolina 29902-5006  
E-Mail: [Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)

Joel Bailey  
The Bailey Law Firm  
510 Ribaut Road  
Post Office Box 1437  
Beaufort, South Carolina 29901-1437  
E-Mail: [Baileylawfirm@charter.net](mailto:Baileylawfirm@charter.net)

Re: Pinewood

Dear Thomas and Joel:

I enclose three items which I would appreciate you forwarding to your clients.

(1) The current owners of Pinewood have a contract with an unaffiliated third party for the sale of the property for the gross amount of \$500,000, subject to Pinewood Park Apartments Limited Partnership's ("Partnership") approval. I enclose a copy.

(2) I enclose an e-mail from Roger C. Hartman laying out the proposed disposition of the proceeds of that sale. As you will see, the sale price is \$500,000, with estimated escrow, closing costs, and seller's legal fees being \$45,000 leaving net proceeds of \$455,000. The net to the Partnership (labeled "AIMCO loan payoff") would be \$425,000.

(3) An appraisal of Pinewood with detailed attachments reflecting the financial condition of the property. The appraised value is \$525,000.

Although the general partner of the Partnership has the authority under the terms of the limited partnership agreement to sell or exchange all or any part of the real property owned by the partnership and to sue on and/or compromise the Partnership's claim on the 1984 Note, my client desires for the limited partners of the Partnership to advise it whether they (a) approve the proposed sale to an unaffiliated third-party under the conditions outlined above allowing the Partnership to recover \$425,000 of its non-recourse note, or (b) foreclose on its secured interest to take back ownership of the property.

EXHIBIT

6

Option A: Under this option, it would be the new buyer's responsibility to obtain HUD approval of the transfer of ownership interest. Although the Partnership would incur some transaction costs going forward, those costs would be minimal. Because the general partner believes that this option maximizes the Partnership's sole remaining asset (the Note), the general partner recommends that the Partnership approve the sale.

Option B: As we have discussed on numerous occasions over the past years, the Partnership may exercise its ability to take the property back. The limited partners should be aware, however, that should the property be transferred back to the limited partnership, there would be transactional costs incurred by the partnership associated with taking the property back. There would be further transactional costs associated with obtaining 2530 HUD approval for the Partnership to own the property once again. Additionally, the individual limited partners that have 25% interests (Jackson, Hinnant, and Rawl) would individually need to receive HUD 2530 approval. Once the Partnership owned the property again, in order to liquidate the asset, the Partnership would incur additional transaction costs associated with a sale.

I will need a response from the limited partners indicating which option they prefer no later than March 29, 2007.

With kind regards, I remain,

Very truly yours,



Ellis M. Johnston, II

EMJ/kmh  
Enclosures



# THE BAILEY LAW FIRM

A PROFESSIONAL ASSOCIATION

THE ELLIOTT HOUSE • 708 P. O. BOX 1437 • 1907 BAY STREET

POST OFFICE BOX 1437 • BEAUFORT, SOUTH CAROLINA 29501-1437

EMAIL ADDRESS:  
BAILEYLAWFIRM@CHARTER.NET

PHONE: 843-525-6090  
FAX: 843-525-6070

March 21, 2007

VIA TELECOPIER AND FIRST CLASS MAIL

Ellis M. Johnston, II, J.D.  
LAWNSWORTH SINKLER BOYD, P.A.  
P.O. Box 2048  
Greenville SC 29602

Re: Pinewood Apartments in Allendale

Dear Ellis:

Thank you for your correspondence dated March 16, 2007, with its enclosures, proposing that my clients either approve the Partnership's proposed sale of Pinewood Park Apartments or for the Partnership to proceed with foreclosure on its secured interest to take back ownership of the property. Thomas Pandaris and I met today concerning your proposal, and we wanted to get back with you as quickly as possible, given the March 29<sup>th</sup> deadline you set for our response.

As has been the case with previous sales proposals, the proposed transaction and accompanying materials raise quite a number of material questions, the answers to which are critical and necessary before my clients can respond to your proposal. We are in the process of disseminating your materials to the Limited Partners, but we are certain that we will not be able to meet with our clients and have an informed decision responding to your proposal by your deadline of March 29, 2007. The deadline simply does not give us sufficient time to evaluate and respond, as you know, this is a very complex, multifaceted proposal concerning a real estate limited partnership with over 30 years of history, all of which is further compounded by issues involved with the pending litigation.

We believe the Limited Partners need additional information in order to properly evaluate and respond to the proposal. For example, more information is needed about the valuation and appraisal that was included with your March 16, 2007 correspondence; the ATMCO loan, promissory note, etc.; the current ownership of the property; and current financial information regarding the Pinewood Apartments. Also, we believe the most efficient means by which this information can be obtained would be to take "limited depositions" of the appraisers, representatives of the current owners of the property, and the on-site manager. By "limited depositions" we mean very abbreviated depositions limited to issues directly related to the proposed transactions, with leave for any party to resume the deposition in the event the sale was not consummated and the lawsuit was not resolved. In addition, and assuming we reach agreement on taking these depositions, we would also need copies of some of the documents and materials related to these issues. With such limitations in place and provided all of the deponents can be made available at one location, we believe that all of these depositions can be taken in one day.

DM # 11471-0007  
Docketed  
ID#

Ellis M. Johnston, II, J.D.

March 16, 2007

Page Two

Please let us know as soon as possible if you and your clients are amenable to our proposal, and if so we will provide you with a short list of the documents and materials needed for these depositions. Also, if you concur with this opinion, please let us know if you can arrange for all three deponents to be present at one location on a single date. We would have no objection, for example, to doing the depositions at any of your firm's offices. Again, assuming we are able to reach agreement on this limited discovery proposal and these depositions proceed as proposed, we believe the Limited Partners would be able to respond to the transaction proposed in your March 16, 2007 correspondence within seven to 10 days of the depositions.

Looking forward to your response and with kind regards, I remain

Sincerely,

THE BAILEY LAW FIRM, P.A.

  
Joel D. Bailey  
JDB/acm

cc: Thomas A. Pendarvis, J.D. (via e-mail)  
Calvin T. Wick, J.D. (via e-mail)

BAILEY LAW FIRM, P.A.

ROA\_APP00136

**Johnston, Ellis**

**From:** Thomas A. Pendarvis  
**Sent:** Thursday, July 19, 2007 08:12 PM  
**To:** Johnston, Ellis  
**Subject:** RE: FW: Pinewood Closing.

Thank you very much.

Thomas A. Pendarvis  
PENDARVIS LAW OFFICES, P.C.  
500 Carteret St., Suite A  
Beaufort, SC 29902-5066  
843.524.9500 tel.  
843.524.9501 fax.  
Thomas@PendarvisLaw.com

-----Original Message-----

**From:** Johnston, Ellis  
**Sent:** Thursday, July 19, 2007 3:16 PM  
**To:** Thomas A. Pendarvis

forgot to send to you. sorry.

-----Original Message-----

**From:** Johnston, Ellis  
**Sent:** Thursday, July 19, 2007 1:49 PM  
**To:** Joel D. Bailey, J.D.; Vick, Ted; 'Hilty, Eric (Denver)'  
**Subject:** FW: Pinewood Closing.

Joel, attached is the HUD closing statement for Pinewood. We are looking at the expenses to the partnership in connection with this transaction and will let you know what they are.

-----Original Message-----

**From:** Roger C. Hartman [mailto:rhartman@haalaw.com]  
**Sent:** Friday, July 06, 2007 3:07 PM  
**To:** Hilty, Eric (Denver); Johnston, Ellis  
**Cc:** Thomas Mann  
**Subject:** Pinewood Closing.

Dear Eric and Ellis,

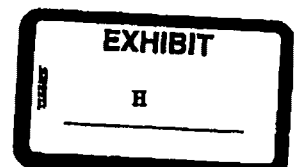
The sale of Pinewood Apartments closed on Thursday July 5, 2007. Attached hereto is a copy of the HUD-1 settlement statement.

You will note that the HUD-1 specifies that \$425,000 was to be sent to Aimco. That Settlement Statement also provided that the sum of \$3,891.00 was to be paid to Seller. This latter sum was inadvertently combined with the \$425,000 and sent to AIMCO's bank. Please confirm that AIMCO acknowledges that they are only entitled to \$425,000 pursuant to the Note Satisfaction Agreement. Please also advise me if you wish to return the excess to the escrow agent, or forward it to my Clients Trust Account.

Your earliest reply will be appreciated.

Roger

ROGER C. HARTMAN  
HARTMAN AND ASSOCIATES  
12401 Wilshire Blvd. Suite 200  
Los Angeles, CA 90025  
Voice: (310) 207-9100  
Facsimile (310) 207-5101  
Mobile (310) 710-1200



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Attachment(s): Roger C. Hartman.vcf; Pinewood HUD-1 Executed.pdf

<b>A. U.S. DEPARTMENT OF HOUSING &amp; URBAN DEVELOPMENT</b> <b>SETTLEMENT STATEMENT</b>		<b>B. TYPE OF</b> 1. <input type="checkbox"/> FHA 2. <input type="checkbox"/> FmHA 3. <input checked="" type="checkbox"/> CONV.	
<b>C. FILE NUMBER:</b> 888 GRAND INVEST <b>8. MORTGAGE INSURANCE NUMBER:</b>		1. <input type="checkbox"/> COV. INS 2. <input type="checkbox"/> UNINSURED	
<b>C. NOTE:</b> This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the items marked "(PO)" were paid outside the closing; they are shown here for informational purposes only.			
<b>D. NAME AND ADDRESS OF BORROWER:</b> GRAND INVESTMENTS LIMITED PARTNERSHIP 1322 GADSDEN STREET COLUMBIA, SC 29201		<b>E. NAME AND ADDRESS OF SELLER:</b> PARKEIDE VILLAGE LIMITED and PARTNERSHIP 12401 WILSHIRE BLVD STE 200 LOS ANGELES, CA 90025	
<b>G. PROPERTY LOCATION:</b> PINWOOD APARTMENTS ALLENDALE, SC ALLENDALE County, South Carolina JOHN B. MCPHERSON APRIL 15, 1972 Plat Book 21 page		<b>H. SETTLEMENT AGENT:</b> MANN & MOGEE, LLC  <b>PLACE OF SETTLEMENT</b> 1627 RICHLAND STREET COLUMBIA, SC 29201	
		<b>I. SETTLEMENT DATE:</b> July 2, 2007	
<b>J. SUMMARY OF BORROWER'S TRANSACTION</b>		<b>K. SUMMARY OF SELLER'S TRANSACTION</b>	
<b>100. GROSS AMOUNT DUE FROM BORROWER:</b>		<b>400. GROSS AMOUNT DUE TO SELLER:</b>	
101. Contract Sales Price	600,000.00	401. Contract Sales Price	600,000.00
102. Personal Property		402. Personal Property	
103. Settlement Charges to Borrower (Line 1400)	66,833.81	403. LEAD PAINT & SEC DEPOSITS	25,000.00
104.		404.	
105.		405.	
<b>Adjustments For Items Paid By Seller in Advance</b>		<b>Adjustments For Items Paid By Seller in Advance</b>	
106. City/Town Taxes	to	406. City/Town Taxes	to
107. County Taxes	to	407. County Taxes	to
108. Assessments	to	408. Assessments	to
109.		409.	
110.		410.	
111.		411.	
112.		412.	
<b>120. GROSS AMOUNT DUE FROM BORROWER</b>	<b>666,833.81</b>	<b>420. GROSS AMOUNT DUE TO SELLER</b>	<b>625,000.00</b>
<b>200. AMOUNTS PAID BY DR IN BEHALF OF BORROWER:</b>		<b>500. REDUCTIONS IN AMOUNT DUE TO SELLER:</b>	
201. Deposit of original money	20,000.00	501. Excess Deposit (See Instructions)	
202. Principal Amount of New Loan(s)	660,000.00	502. Settlement Charges to Seller (Line 1400)	601,109.00
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first Mortgage	
205.		505. Payoff of second Mortgage	
206.		506. Deposit retained by seller	20,000.00
207.		507.	
208.		508.	
209.		509.	
<b>Adjustments For Items Unpaid By Seller</b>		<b>Adjustments For Items Unpaid By Seller</b>	
210. City/Town Taxes	to	510. City/Town Taxes	to
211. County Taxes	to	511. County Taxes	to
212. Assessments	to	512. Assessments	to
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
<b>220. TOTAL PAID BY/FOR BORROWER</b>	<b>670,000.00</b>	<b>520. TOTAL REDUCTION AMOUNT DUE SELLER</b>	<b>621,109.00</b>
<b>300. CASH AT SETTLEMENT FROM/TO BORROWER:</b>		<b>600. CASH AT SETTLEMENT TO/FROM SELLER:</b>	
301. Gross Amount Due From Borrower (Line 120)	666,833.81	601. Gross Amount Due To Seller (Line 420)	625,000.00
302. Less Amount Paid By/Fer Borrower (Line 220)	(670,000.00)	602. Less Reductions Due Seller (Line 520)	(621,109.00)
<b>303. CASH ( FROM ) ( X TO ) BORROWER</b>	<b>4,198.19</b>	<b>603. CASH ( X TO ) ( FROM ) SELLER</b>	<b>3,891.00</b>

AMREAL\_017853

L. SETTLEMENT CHARGES				PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
<b>700. TOTAL COMMISSION Based on Price</b>					
<i>Division of Commission (line 700) as Follows:</i>					
701. Commission: Seller					
702. Commission: Buyer					
<b>800. ITEMS PAYABLE IN CONNECTION WITH LOAN</b>					
801. Loan Origination Fee	0.1818 %	to AMERIS BANK		1,000.00	
802. Upfront Fee		to AMERIS BANK		3,200.00	
803. Origination Fee		to			
804. Underwriting Fee		to AMERIS BANK		180.00	
805. Title Underwriting Fee		to			
806. Arranging Fee		to			
807. Underwriting Fee		to			
808. Underwriting Fee		to			
809. Underwriting Fee		to			
810. Underwriting Fee		to			
811. Service Yield Premium		to			
<b>900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE</b>					
901. Interest from 07/02/07 to 08/01/07	@ \$	/day ( 90 days %)			
902. Mortgage Insurance Premium for	months to				
903. Hazard Insurance Premium for	1.0 years to				
904.					
905.					
<b>1000. RESERVES DEPOSITED WITH LENDER</b>					
1001. Hazard Insurance	months @ \$	per month			
1002. Mortgage Insurance	months @ \$	per month			
1003. City/Town Taxes	months @ \$	per month			
1004. County Taxes	months @ \$	per month			
1005. Assessments	months @ \$	per month			
1006.	months @ \$	per month			
1007.	months @ \$	per month			
1008. AGGREGATE ESCROW	months @ \$	per month			
<b>1100. TITLE CHARGES</b>					
1101. Settlement or Closing Fee	to MANN & MCGEE		1,500.00		
1102. Abstract or Title Search	to TITLE-ABSTRACTORS OF COLUMBIA		380.00		
1103. RESIDUAL NOTE FINANCING	to AMCO PROPERTIES, LP			425,000.00	
1104. Title Insurance/Binder	to MANN & MCGEE, LLC		85.00		
1105. ATTORNEY'S FEES	to HARTMAN & ASSOCIATES			50,000.00	
1106. EXPRESS MAIL/FAX FEE	to MANN & MCGEE, LLC		45.00	45.00	
1107. E-MAIL /COPY FEE	to MANN & MCGEE, LLC		40.00		
<i>(includes above item numbers:</i>					
1108. Title Insurance	to INVESTORS TITLE INSURANCE COMPANY		1,160.00		
<i>(includes above item numbers:</i>					
1109. Lender's Coverage	\$ 550,000.00	1,160.00			
1110. Owner's Coverage	\$ 550,000.00				
1111.					
1112.					
1113.					
<b>1200. GOVERNMENT RECORDING AND TRANSFER CHARGES</b>					
1201. Recording Fees: Deed \$ 10.00; Mortgage \$ 26.00; Releases \$			35.00		
1202. City/County Tax/Stamp: Deed ; Mortgage					
1203. State Tax/Stamp: Revenue Stamp 1,850.00; Mortgage				1,850.00	
1204. MISSING DEEDS	to ALLENDALE COUNTY TREASURER.			20.00	
1205. SATISFACTION					
<b>1300. ADDITIONAL SETTLEMENT CHARGES</b>					
1301. Survey	to				
1302. Pest Inspection	to				
1303. LEAD PAINT-CONTRACTS	to GRAND INVESTMENTS, LLP			18,420.00	
1304. PURCHASE OF CONTRACT RIGHTS	to TED O. MCGEE, JR.		60,288.81		
1305. SECURITY DEPOSITS	to GRAND INVESTMENTS			4,774.00	
<b>1400. TOTAL SETTLEMENT CHARGES (Enter on Lines 103, Section J and 802, Section K)</b>				89,833.81	601,109.00

By signing page 1 of this statement, the signatories acknowledge receipt of a completed copy of page 2 of this two page statement.

*[Signature]*  
MANN & MCGEE, LLC  
Settlement Agent

Certified to be a true copy.

( 5199 GRAND INVEST / 5199 GRAND INVEST / 12 )

AMREAL\_017854



State of South Carolina

) The Court of Common Pleas

Laurance H. Davis, Jr., et  
al.,

Plaintiffs  
vs.

Beaufort County  
2003-CP-07-726

Parkview Apartments, a South  
Carolina Limited Partnership,  
et al.,

Defendants

Laurance H. Davis, Jr., et al.,

Plaintiffs  
vs.

Orangeburg County  
2005-CP-38-1131

Roosevelt Gardens, a South  
Carolina Limited Partnership,  
et al.,

Defendants

Rhonda G. Rentz, et al.,

Plaintiffs  
vs.

Charleston County  
2005-CP-10-4229

Orleans Gardens, a South  
Carolina Limited Partnership,  
et al.,

Defendants

Laurance H. Davis, Jr., et  
al.,

Plaintiffs  
vs.

Beaufort County  
2005-CP-07-1989

Palmetto Apartments, a South  
Carolina Limited Partnership,  
et al.,

Defendants

EXHIBIT

I

Carolina Management  
Corporation of Beaufort, et  
al.,

Plaintiffs  
vs.

Beaufort County  
2005-CP-07-1990

Pinewood Park Apartments, a  
South Carolina Limited  
Partnership, et al.,

Defendants

March 29, 2010  
Bamberg, South Carolina

**B E F O R E:**

The Honorable Doyet A. Early, III, Judge.

**A P P E A R A N C E S:**

Joel D. Bailey, Esq.  
Thomas A. Pendarvis, Esq.  
Attorneys for the Plaintiffs

Ellis M. Johnston, II, Esq.  
Calvin T. Vick, Jr., Esq.  
Attorneys for the Defendants

Lisa H. Davenport  
Official Court Reporter

1 (Whereupon, on March 29, 2010 the following  
2 proceedings were held:)

3 THE COURT: On the record. I have before me filed in  
4 February -- late February -- a motion by the Plaintiff for  
5 protective order and for disclosure and discovery.  
6 Mr. Pendarvis and Mr. Bailey.

7 MR. BAILEY: Yes, Your Honor. I suppose we should  
8 take up the motion for disclosure and discovery --

9 THE COURT: That will be fine.

10 MR. BAILEY: -- first, if we can. This is an area  
11 which, quite frankly, I did not anticipate we would ever  
12 be in in this this case, but now that we're here --

13 THE COURT: Well, neither did I.

14 MR. BAILEY: Right.

15 THE COURT: And I hate it.

16 MR. BAILEY: I hate it, also, Judge.

17 THE COURT: Mr. Bailey, do your job. You have an  
18 obligation to your client and I have known you for I'd say  
19 36 years professionally and I have always known you to be  
20 an outstanding lawyer, always represented your clients  
21 with zeal, and I certainly understand the position that  
22 you're in, and you can rest assured and tell your clients  
23 that I have not taken it personally and I will listen to  
24 you and I intend to make on the record today as full a  
25 disclosure as I can with my relationship to Ellis

1 Johnston, Ted Vick, Ann Ross, Marvin Infinger, Joel  
2 Bailey, and Thomas Pendarvis and anybody else y'all want  
3 to know about within reason.

4 So, I mean, and let's just -- you know, let's all of  
5 us approach today as you're representing your client. I  
6 understand and promise you that I take it no personal  
7 animosity. I have thought about this and I understand and  
8 I'll be glad to hear you out.

9 MR. BAILEY: Thank you, Your Honor. Judge, the  
10 Plaintiffs in this case are concerned about possible  
11 extra-judicial affiliations or relationships that you as  
12 the judge assigned to these cases may have with defense  
13 counsel of record.

14 THE COURT: Okay. And tell me what your -- what you  
15 -- what are you concerned about? I'll try to address it.

16 MR. BAILEY: They are concerned, Your Honor, that  
17 these extra-judicial affiliations would have created a  
18 bias or prejudice on the part of you or certainly when  
19 viewed in the light of the information that is available  
20 to them that a reasonable person would come to that  
21 conclusion and as a result they have asked that you make  
22 the disclosure on the record that you have just mentioned  
23 and that the counsel of record make the disclosures under  
24 oath as well and that they be permitted to do some  
25 discovery -- very limited discovery -- with regard to

1 counsel concerning this.

2 THE COURT: Very well.

3 MR. BAILEY: I would point out -- yes, Your Honor.

4 So, that pretty much, I think, is the motion. You have

5 already indicated you were prepared to make such

6 disclosure. So I don't see that I need to get too much

7 more involved until after that if that's all right with

8 you.

9 THE COURT: Well, let me just tell you. I'll start

10 with Marvin Infinger.

11 MR. BAILEY: Yes, sir.

12 THE COURT: I'm trying to remember the first time I

13 met Marvin Infinger, but he was a friend of Steve Darling

14 and I was in Steve Darling's wedding 35 years ago perhaps,

15 30 years ago. It is the first time I met Marvin Infinger,

16 and I think that the night after the wedding or the night

17 of the wedding we were all coming back to Bamberg and he

18 was going to Charleston. Anyway, we all -- a pile of

19 people ended up at my lake house and spent the night -- me

20 with my wife and he with a girlfriend and several other

21 couples and since that time I have just known Marvin in

22 passing in seeing him. He and I were members of ABODA

23 together. I don't think I ever had a case with or against

24 him but consider him a friend.

25 As to Anne Ross I guess I've known her since she was

1 born. Her Dad is a local surgeon. They moved to town  
2 shortly after my wife and I moved to Bamberg and our  
3 careers sort of grew side by side over the years. I don't  
4 believe I ever did any legal work with Dr. Ross nor -- he  
5 performed -- to get real personal, he performed a  
6 colonoscopy on me one time or two times and referred me to  
7 a surgeon when I had some diverticulitis.

8 Of course, I knew Anne. She and my baby boy were the  
9 same age and went through school together -- baby boy  
10 being Ross. I don't think I have ever been in Dr. Ross'  
11 or Anne's house while they were living in Bamberg.  
12 Dr. Ross worked all of the time and was not on the social  
13 circle. Anne went off to college, went to law school. I  
14 sort of lost contact with her and knew that she had gone  
15 to work with Justice Burnette and when I first went on the  
16 bench I was asked to sit on the Supreme Court and saw Anne  
17 there and that was the first time I had seen her in a  
18 long, long time.

19 She asked me -- she and her fiance John Rosen who is  
20 the son of Richard Rosen, grandson of Morris Rosen, asked  
21 me to perform their wedding. I couldn't figure out why  
22 and I can only surmise that the Rosens have a Jewish  
23 background and Anne has a Protestant background and they  
24 wanted somebody who wasn't a baptist preacher or rabbi to  
25 perform the wedding and I did. My wife and I went to the

1 wedding. My son Ross went with us and they provided us a  
2 room for one night at a condominium at Fripp. They --  
3 that was Dr. Ross.

4 I don't think Anne has ever had anything in my court.  
5 I was already on the bench when she started practicing and  
6 as far as Anne and Marvin go I have never ever had  
7 anything financially involved with them. I'll be glad to  
8 answer anything specific you got on Marvin Infinger and  
9 Anne Ross.

10 As to Ted Vick -- sorry, Ted, I just met you when  
11 this litigation started, but you're a lot younger so you  
12 don't go back with me over the years. I think that's  
13 correct. I can't ever remember anything that I have ever  
14 had any association with you socially or professionally.

15 As to Thomas Pendarvis, I can't remember when I met  
16 him, but I have always maintained what I consider to be a  
17 very cordial social relationship. Thomas has had a case  
18 with me -- he and Jim Moss -- that we all slugged through  
19 and Thomas can certainly appreciate the use of that  
20 word -- a case with two brothers who fought and fought,  
21 literally fist fought. And then I had Jim Moss and Thomas  
22 that I had to keep separated, and I say that tongue in  
23 cheek.

24 Both of my boys -- Will who is now 37, Ross is 32 --  
25 I think I'm correct, Thomas, they both worked with you

1 when you were with Cam Lewis when they were in either  
2 undergraduate -- Ross in undergraduate school and Will in  
3 law school and I guess it was because you were closer to  
4 their age, but anyway they just thought the world of you  
5 and used to brag about you all the time. I am not sure  
6 what kind of advice that you were giving them, but I could  
7 sort of read between the lines that it was more than legal  
8 advice and I say that very fondly. You know the  
9 relationship that you have with my boys. In fact, you ask  
10 about them everytime we meet and they talk about you all  
11 the time.

12 I don't think I ever had a case with Mr. Pendarvis as  
13 a lawyer -- with or against. I have enjoyed an excellent  
14 relationship as a judge, particularly in the Peel case.  
15 It was hotly contested and tried for a week and I don't  
16 think even with Jim Moss and Thomas involved have I ever  
17 had to raise my voice at all and we tried it without any  
18 events.

19 Mr. Bailey, I don't know how much of this I should  
20 put on the record. I say that tongue in cheek, but I  
21 think my first associations with you were as a very, very  
22 young lawyer when I started practicing in the mid 70's.  
23 Terry Richardson and Ron Motley got me involved in the  
24 Trial Lawyers and I became rather active in that  
25 association. I was convention chairman one year and I am

1 not sure if you were president one year or not. Were you?

2 MR. BAILEY: Yes, sir.

3 THE COURT: You were president and always, always  
4 have had a, I felt, wonderful relationship with you. I  
5 don't know that we ever had a case together. I don't  
6 think we did, but I know that we've shared a lot of social  
7 time together over the years -- cocktails, perhaps dinner,  
8 and certainly at the Trial Lawyers around the pool and  
9 enjoying fellowship and discussing cases and I followed  
10 your career and have always been very -- always considered  
11 you one of the better lawyers in the state and I've always  
12 considered you to do an outstanding job to your clients.

13 As to Ellis Johnston, I hadn't known Ellis that long.  
14 His son Caldwell and my boy Ross went to Carolina together  
15 and were fraternity brothers and they went to Europe  
16 ostensibly to study one summer. I don't think they  
17 studied a whole lot. The first picture I got back -- I  
18 got it in my office. Y'all can look at it. Ross is  
19 jumping off of a bungee jump in the Alps with Caldwell  
20 down there clapping.

21 Ellis married Mary who I have known since college.  
22 because she was married to one of my fraternity brothers  
23 and subsequently they were divorced and I guess that's the  
24 first time I knew who Ellis Johnston was when he married  
25 Mary, but I don't think we ever had anything legally. Of

1 course, he was in the upper part of the state and I am in  
2 the lower part of the state. I am not sure if my son Ross  
3 was in Caldwell's wedding or not. I know he attended. I  
4 did not attend.

5 I have never been in Mary and Ellis' home. We have  
6 never had anything financially involved with each other.  
7 Caldwell and his now wife Mary Claytor have visited in my  
8 beach house I know of one occasion. Of course, they were  
9 guests of Ross, but, you know, guests of Ross are guests  
10 of mine. As a result of Caldwell's and Ross' friendship  
11 Ellis' brother Jim invited Ross and me to come down to  
12 Islamorada, Florida in March of 2008 to go fishing which  
13 we did and fished for two days.

14 I think I disclosed that to y'all on the record when  
15 I first took over the case. I think I disclosed my  
16 participation in Anne Ross' wedding to y'all when I took  
17 over the case.

18 Ellis and Mary have never visited in my home. They  
19 would be welcome as any of you would be. My wife and I, I  
20 guess 10 years ago, were asked to join a social club  
21 called the Caroliniana Ball. They had one social function  
22 a year. It has people from all over the state in the  
23 club. I guess membership is 350 or 400 people. They have  
24 a white-tie ball, one dance a year. Ellis and Mary became  
25 members two years ago, perhaps -- three years ago?

1 MR. JOHNSTON: Two.

2 THE COURT: Two years ago. And I have seen them at  
3 the ball. We have huge formal place settings for people  
4 to sit. They normally have about eight people per table.  
5 Ellis and Mary have never sat with me and my wife. Of  
6 course, I speak to them when they're down there.

7 I have never been out to eat with any of y'all that I  
8 can remember.

9 Perhaps, Joel, I went with you down at the Trial  
10 Lawyers. It would have been with a crowd, but I can't  
11 specifically remember that.

12 I have had absolutely no financial interest with any  
13 one of you and the only thing anybody has ever done for me  
14 financially was Dr. Ross paid for my condo to perform his  
15 daughter's wedding and Ellis' brother would not let me pay  
16 for any fuel on the boat, but I took he and his wife out  
17 both nights we were there I guess to ease my conscience  
18 for fishing on the boat for not paying for any fuel.

19 I don't know of any fuller disclosure I can make in  
20 regards to all four of you -- five, six of you. I took  
21 this job six years ago. I went on the bench it will be  
22 six years ago next month May 1. I left what I considered  
23 to be a very lucrative practice. I started practicing  
24 here in Bamberg in 1974. I went out on my own in '75 and  
25 when I went out on the bench I had two other partners and

1 three associates and four paralegals and an office full of  
2 secretaries.

3 I left a very lucrative job, but I felt like I could  
4 give back. I had experience and I wanted to do the job,  
5 and when Judge Peoples decided to retire he asked me  
6 personally if I would be interested and with a lot of  
7 input from my wife I decided to do it and from day one  
8 because I had 30 years of practice practically every  
9 lawyer that comes before me except these young people I  
10 had cases with, I have socialized with, I have been  
11 friends with, and I have -- I can look in the mirror every  
12 morning and say that I try my cases and make my decisions  
13 on what I think in my heart is right, in my gut is right,  
14 and what the law supports, and I have never ever allowed  
15 any personal friendships, past acquaintances, children's  
16 relationship with other people's children to influence  
17 anything that I've done. I do what I think is best, what  
18 I think is right.

19 Mr. Pendarvis, Mr. Bailey, in this case I have  
20 struggled with my decision. I certainly struggled with  
21 the motion for summary judgment on the issue of statute of  
22 limitations and I felt like there were some factual issues  
23 involved to preclude granting that motion at that time.  
24 It was awfully close. Because of that I encouraged and  
25 made Mr. Johnston and Mr. Vick bring the, quote,

1 money-man, unquote, or who we thought was down to my  
2 office and I tried to get this case settled to no avail.  
3 I tried to insulate myself from the discovery mountain by  
4 letting Judge Clary conduct his review, and, of course,  
5 both of you asked for reviews of Judge Clary and I  
6 conducted that and I have made a decision in this case I  
7 know the Plaintiffs do not like, maybe don't understand,  
8 and I may be completely wrong, but it is my decision and I  
9 believe in my decision and I think it is supported by the  
10 law.

11       If I am wrong, Columbia will tell me, but I don't  
12 like dismissing the lawsuit because somebody won't comply  
13 with an order. I mean, I was almost forced into that when  
14 it was just -- not forced into it, but I don't have any  
15 other choice when there was total noncompliance with the  
16 order. Since that happened and, of course, the case went  
17 to the Court of Appeals, it's come back. We've had  
18 motions to reconsider. I've sat on it, and this motion  
19 for disclosure and protective order you asked me not to  
20 sign the order that I intend to sign until we can have  
21 this hearing today and I have honored that request, but,  
22 gentleman, if I thought for one minute that my position as  
23 Judge was being compromised because of any relationship  
24 that I have with any of y'all I would step out in a second  
25 and I say that from the bottom of my heart.

1 I don't know how else to put it and as I said earlier  
2 I have no personal animosity to this type of motion being  
3 filed. I understand, but if anybody -- Ellis,  
4 particularly you -- if you think I have left out anything  
5 with our relationship, I can't think of anything.

6 MR. JOHNSTON: I suppose the only thing I would add,  
7 Your Honor, is that we have never hunted, fished, or  
8 golfed together to my knowledge or engaged in any other  
9 sports activities. A little further disclosure on the  
10 Caroliniana Ball for y'all's information, we get to pay  
11 \$500 a year so we can dress up like penguins, buy our  
12 wives expensive dresses, eat mediocre food, have a few  
13 drinks, and pretend like we can dance.

14 THE COURT: That's about it. They have it all over  
15 the state. We have people in it -- we have one other  
16 circuit court judge that I know of and a federal judge, a  
17 number of lawyers, a number of doctors, people in their  
18 70's to 30's, but, no I have never played golf with any of  
19 you. I don't play golf. I have hunted with Thomas' dad  
20 down at Estill on a couple of occasions. I don't think I  
21 have fished with Joel because he got rid of his boat and  
22 wouldn't ask me.

23 Didn't you have a boat?

24 MR. BAILEY: Several years ago, yes, sir.

25 THE COURT: You know, fellows, I guess being in a

1 small bar as South Carolina is -- My wife always says  
2 South Carolina is a small town. Y'all saw that crowd in  
3 here earlier today with the James Brown case. I have had  
4 cases with 75 percent of those people over the years and  
5 had some social interactions with them and it even gets --  
6 you know, I have cases in the Second Circuit. Gracious,  
7 I've had -- everybody that comes before me I've practiced  
8 with or against and in the 14th Circuit.

9 So, I'm very cognizant of my social relations and my  
10 former relations and I do the best I can. I don't know of  
11 anything in this case with any of it that would cause me  
12 any concern. If it concerns any of your clients, I'll be  
13 more than glad to let them come and answer any questions  
14 they got. I am doing what I think is the absolute -- is  
15 absolutely right based on the law and based on what's as I  
16 interpret it. I might be completely wrong.

17 I am not going to require any of the other lawyers to  
18 go under oath for deposition. If I have left anything out  
19 today, y'all can supplement it. That's sort of where we  
20 are.

21 I'll be glad, Mr. Bailey and Mr. Pendarvis, if y'all  
22 have any particular questions or anything that concerns  
23 you, I'll be glad to answer.

24 MR. BAILEY: There was one question that was asked of  
25 me, Your Honor, that I obviously don't know the answer to

1 and I would ask that you answer it for my clients and that  
2 was whether there was any relationship by kin or marriage  
3 to any of the counsel of record for the case.

4 THE COURT: Certainly. I hope not.

5 MR. BAILEY: Let me point out, Judge, one of the  
6 reasons for that is, obviously, your son's name is Ross  
7 and there's Anne Ross Rosen and that's why there's --

8 THE COURT: Absolutely. That's an understandable  
9 question. I'm not that I'm aware of related to any  
10 members in this litigation, any lawyers in this  
11 litigation. My son Ross is named for his -- my Daddy's  
12 Mama who is Jessie Mae Ross. She was a Ross from Jackson,  
13 South Carolina. Her family was displaced from the bomb  
14 plant and moved from Old Ellenton to New Ellenton to  
15 Jackson.

16 Anne Ross, John Ross -- I don't know where they're  
17 from. We're not kin to them that I know of in any shape,  
18 form, or fashion. I don't know of any kin you and I are,  
19 Mr. Bailey or Mr. Pendarvis or anybody else.

20 MR. BAILEY: Thank you, Judge. I appreciate you  
21 clearing that up for the record.

22 THE COURT: Anything else? I want to get this all on  
23 the table.

24 MR. BAILEY: Sure.

25 THE COURT: I don't want anybody thinking that my

1 ruling is based on friendship. It's not.

2 MR. BAILEY: First of all, let me say, Judge, that  
3 the law I believe on these things and probably rightfully  
4 so is that it's not really whether you believe that there  
5 is, in fact --

6 THE COURT: It is the perception.

7 MR. BAILEY: -- a bias. It is whether a reasonable  
8 person confronted with all of the attentive facts would  
9 come up with a perception as to doubt the impartiality of  
10 the Court.

11 THE COURT: Sure.

12 MR. BAILEY: That's the thing that, quite frankly,  
13 gives me some concern with all of the things that were  
14 known and that have been, frankly, disclosed today.

15 THE COURT: You would agree with me I disclosed the  
16 Anne Ross wedding and I disclosed the fishing trip long  
17 ago to all of you.

18 MR. BAILEY: But let me tell you what I recall,  
19 Judge, and it could be that it differs with what you  
20 recall, but -- and I think the timing of this is somewhat  
21 important to my clients. First of all, your name was one  
22 of several names that was submitted on a list jointly by  
23 Mr. Johnston and I to Chief Justice Toal as being someone  
24 that we thought would be qualified to preside over these  
25 cases because, obviously, there's a lot of complexity to

1 Mrs. Rosen was going to be involved, and you made the  
2 comment that I think your quote was I married her, and  
3 it's our understanding, Judge, and our recollection that  
4 none of that occurred on the record which is why our  
5 clients have asked us for specifics and we were unable to  
6 really give them anything other than recollections which  
7 is why we had the motion for disclosure on the record, but  
8 at any rate they were -- they were not apprised of this  
9 affiliation going back to Bamberg or the relationship  
10 between Mrs. Ross at the time maybe and your son -- the  
11 same age. You said I don't know but they went to school  
12 together, I assume, in Bamberg and things of that nature.

13 THE COURT: They did go to school together.

14 MR. BAILEY: So, our initial thought when you  
15 mentioned that you married her was that that is not  
16 uncommon for a circuit judge to marry any member of the  
17 bar in this state. Certainly, if you wear the robe, you  
18 got the right to marry people. You know, we didn't see  
19 anything particularly at time, but it's not our perception  
20 that matters. It is the perception of our clients and  
21 what a reasonable person would perceive, and we have  
22 coupled with that, Judge, basically what has transpired in  
23 this case throughout the rulings, and please don't get the  
24 idea that I'm here to argue the rulings or re-argue --

25 THE COURT: I am not going to hear it. I have heard

1 sitting over there on my desk and I needed to give you a  
2 hearing. That's a why all of that came about.

3 MR. BAILEY: My only comment was it was a little  
4 confusing to exactly what was going to be heard, but, so,  
5 that's maybe the reason they're not here, but the bottom  
6 line is you're correct that the only motion that had been  
7 filed for protective order was the motion that we filed.

8 THE COURT: Sure.

9 MR. BAILEY: So, I would like to have the  
10 opportunity -- a brief period of time -- to get a  
11 transcript of the disclosures made today, get it to my  
12 clients so they can evaluate it and then they can make  
13 a determination as to what, if anything, they intend to  
14 do.

15 THE COURT: Well, but on the other side of the coin  
16 is that I have delayed in signing the order that I intend  
17 to sign. Well, it's signed. It just hadn't been filed.  
18 I got to do that. I mean, I got to fish or cut bait.

19 MR. BAILEY: I understand, Judge. Maybe the solution  
20 to the dilemma is I should maybe at least at this time  
21 make a verbal motion for recusal. You can mark it heard  
22 and allow us to then go back and meet with them and  
23 determine whether that's going to be the case. I am  
24 trying to figure out a way that I can protect them and at  
25 least let you go forward.

1 THE COURT: Anything else?

2 MR. BAILEY: I don't know if they makes any sense,  
3 but that's what we would ask on that.

4 THE COURT: I respectfully deny it, Mr. Bailey. I  
5 don't know how else to put on the record rather than what  
6 I put on the record. I can't help that Anne Ross grew up  
7 in Bamberg and she went to school with my son as you said.  
8 So did 200 other people. They didn't go to college  
9 together. You know --

10 MR. BAILEY: Well --

11 THE COURT: -- you've known me a long time, and,  
12 quite frankly, you talk about this thing getting off  
13 track. The statute of limitations is a big issue in the  
14 case and that's my reason for ruling the way I did. It  
15 becomes an issue in the case and the way I look at it from  
16 up here, you know, your clients didn't start getting jumpy  
17 until I said I was going to sign that order and I don't  
18 know how else I could have been any more cognizant of  
19 their rights than to say I'm not going to sign it for "X"  
20 amount of days and then I am not going to put it in effect  
21 until so many other days to give them an opportunity to  
22 comply with it and they'll still have the opportunity to  
23 comply with it if they want to or they may want to take a  
24 chance and say that Judge didn't know what he's talking  
25 about and we're going to get it reversed in Columbia, but

Vick, Ted

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From: Johnston, Ellis  
Sent: Monday, January 08, 2007 3:21 PM  
To: 'eric.hilty@aimco.com'  
Cc: Vick, Ted  
Subject: Fw: AIMCO Order

----- Original Message -----

From: Joel Bailey <baileylawfirm@charter.net>  
To: Johnston, Ellis  
Cc: Thomas A. Pendarvis <Thomas@PendarvisLaw.com>  
Sent: Fri Jan 05 17:58:23 2007  
Subject: AIMCO Order

Ellis:

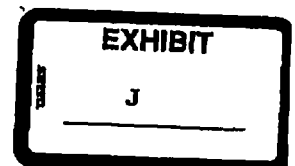
This will confirm our telephone conversation of this afternoon wherein I informed you of the telephone call I had just received from Judge Early. Judge Early instructed me to prepare an order which (1) denies your motions to dismiss and to transfer venue insofar as they are based on the grounds previously asserted and ruled upon by Judges Buckner and Coltrane, and (2) denies your motion to dismiss insofar as it is based upon the newly asserted ground of the statute of limitations. Insofar as the former is concerned, Judge Early feels compelled to follow the earlier rulings; as to the latter ground, he stated that he feels it is premature at this stage to dismiss the claims. He asks that we agree upon a new scheduling order which incorporates a reasonable discovery timetable, followed by a mediation date. If there is no settlement following the mediation, a realistic trial date is requested.

Thomas Pendarvis will prepare our proposed Order denying the motions to dismiss and change venue, and will forward a copy to you via e-mail prior to transmitting the same to Judge Early. Per Judge Early's request, we will send the proposed Order to him by the end of next week. In the meantime, I ask that you consider some dates for the new scheduling order and suggest that we set a time to discuss the same between you, Thomas and myself.

I look forward to hearing from you at your earliest convenience.

Joel

Joel D. Bailey  
The Bailey Law Firm, PA  
PO Box 1437  
Beaufort, SC 29901-1437  
843-525-6090  
843-525-6070 (fax)  
email: baileylawfirm@charter.net



Vick, Ted

**From:** Thomas A. Pendarvis [tpendarvis@pendarvislaw.com]  
**Sent:** Friday, January 19, 2007 4:47 PM  
**To:** Johnston, Ellis; Vick, Ted  
**Cc:** Joel Bailey; Pamela Higgins  
**Subject:** Re: Davis v Parkview Apartments  
**Attachments:** 2007-01-19 TAP to Judge Early - submitting proposed Order Denying Defendants' Motions.pdf

Ellis and Ted:

Attached please find a copy of correspondence that is being sent via U.S. Mail today to Judge Early with a proposed Order Denying Defendants' Motions. Thank you for your attention to this matter and have a great weekend.

Thomas A. Pendarvis  
PENDARVIS LAW OFFICES, P.C.  
500 Carteret St., Suite A  
Beaufort, SC 29902-5066  
843.524.9500 tel.  
843.524.9501 fax.  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)

5/5/2010



**PENDARVIS LAW OFFICES, P.C.**  
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**THOMAS A. PENDARVIS, J.D.**  
ADMITTED IN SC AND GA

**THOMAS@PENDARVISLAW.COM**

**TEL. 843.524.9500**  
**FAX. 843.524.9501**

January 19, 2007

**VIA U.S. MAIL**

The Honorable Doyet A. Early, III  
PO Box 90  
Bamberg SC 29003  
[dearlyj@sccourts.org](mailto:dearlyj@sccourts.org)

Re: Lawrence H. Davis, Jr., et al. v. Parkview Apartments, et al.  
Lawrence H. Davis, Jr., et al. v. Palmetto Apartments, et al.  
Carolina Management Corp. of Beaufort, et al. v. Pinewood Park Apts., et al.  
Rhoda G. Rentz, et al. v. Orleans Gardens, et al.  
Lawrence H. Davis, Jr., et al. v. Roosevelt Gardens, et al.

Dear Judge Early:

My co-counsel, Joel Bailey, advises that you instructed counsel for Plaintiffs to prepare a proposed Order on the pending motions as per your instructions, which Joel previously communicated to counsel for the Defendants. In that regard, enclosed please find a proposed Order for your review and consideration. Please let me know if you wish for me to transmit to you the word processing version of this proposed Order should you wish to make any changes. Otherwise, if the proposed Order meets with your approval, please sign the same and return it to me in the envelope I have enclosed for your convenience. I will take care of filing the Order with all the appropriate Clerks of Court. By the way, the proposed Order was transmitted via e-mail with immediate delivery to counsel for Defendants on the same day this correspondence was placed into the U.S. mail.

As you requested, we are communicating with counsel for Defendants in an effort to agree upon a new scheduling order that incorporates a reasonable discovery timetable, followed by a mediation date, and if mediation is unsuccessful, a proposed date for trial. We plan on submitting a revised, proposed Scheduling Order for your consideration very soon.

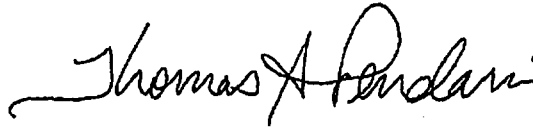
Thank you for your attention to this matter, and please contact me or Joel if you need anything further.

Page 2  
January 19, 2007

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink that reads "Thomas A. Pendarvis". The signature is written in a cursive style with a long horizontal flourish extending to the left.

Thomas A. Pendarvis, J.D.

TAP\pdh

Enclosures

cc: Ellis M. Johnston, II, J.D. (via e-mail w/ enclosure)  
Calvin T. Vick, J.D. (via e-mail w/ enclosure)

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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ORIGINAL JURISDICTION

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Ex Parte:

Laurance H. Davis, Jr., *et al.*,..... Petitioners,

In Re:

Laurance H. Davis, Jr., *et al.*,..... Plaintiffs,

v.

Parkview Apartments,  
*et al.*,..... Defendants.

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DEFENDANTS' RETURN IN OPPOSITION  
TO PETITION FOR WRIT OF PROHIBITION  
OR ALTERNATIVELY FOR WRIT OF CERTIORARI

---

Ellis M. Johnston, II  
Calvin T. Vick, Jr.  
HAYNSWORTH SINKLER  
BOYD, PA  
Post Office Box 2048  
Greenville, SC 29602  
(864) 240-3200  
(864) 240-3336 facsimile



1998). Further, "the lawyer-client privilege does not bar questions about the nature of the legal services rendered." See Weinstein's Federal Evidence, § 503.14(5)[f]. See also Exhibit 7 at pp. 11-12 (discussion of Petitioners' failure to fully and completely respond to the interrogatories described above).

**B. Trial Court Has Not Usurped or Exceeded Its Jurisdiction**

Despite the fact that *the Petitioners* suggested and agreed to enlist former Judge Gary Clary to review the documents *in camera*, and to issue a *report* to Judge Early so that he, as the presiding judge, could enter an order resolving the privilege disputes, and despite the fact that *the Petitioners* filed a motion asking Judge Early to alter or amend *his* June 2, 2009 Order, which he did, the Petitioners now claim that the trial court had no jurisdiction under Rule 53, SCRPC, to:

- (a) enter its Order of June 2, 2009; or
- (b) consider Petitioners' and Defendants' subsequent Rule 59(e) Motions; or
- (c) issue its July 28, 2009 Order granting in part and denying in part both Plaintiffs' and Defendants' Rule 59(e) Motions; or
- (d) enforce its Order with appropriate sanctions.

An examination of Rule 53 shows this claim to be specious.

First, Rule 53 applies only to Masters (defined in Rule 53(a) as "master-in-equity for the county," which former Judge Clary is not) and Special Referees, defined by Rule 53(a) 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 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 for which cause could be shown. Former Judge Clary was not appointed a "Special Referee" under S.C. Code Ann. §14-11-60, nor could he have been within the meaning of the Rule. By its own terms, Rule 53, SCRCP, does not apply.

Second, Rule 53 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.

In an action where the parties consent ... some or all of the causes of action in a case may be referred to a master or special referee... In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case... A case shall not be referred to a master or special referee for the purpose of making a report to the circuit court.

Rule 53(b), SCRCP (emphasis added). 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 (Appeals from final judgment of masters-in-equity), which provides:

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, and an appeal from an order or judgment of the master or referee must be to the Supreme Court or the court of appeals as provided by the South Carolina Appellate Court Rules.

No "cause of action" or "case," as contemplated by Rule 53, SCRCP, and S.C. Code Ann. §14-11-60, 85, was referred to former Judge Clary. He was merely asked to review *in camera* allegedly privileged documents, and provide a report of his findings to the trial court. Again, Rule 53, SCRCP, does not apply by its own terms.

Third, Petitioners apparently now claim that it was inappropriate (though they requested that it be done) that privileged documents be reviewed by former Judge Clary and a "report" issued, arguing that Rule 53 and S.C. Code Ann. §14-11-85 prohibit such a reference for the purpose of issuing a "report" when clearly they do not. Rule 53's prohibition against referring a matter to a Master or Special Referee (as those terms are defined in Rule 53(a)) to issue a report applies to a "case" or "cause of action;" not, as here, to a review of allegedly privileged documents. See Rule 53(b), SCRCF ("A case shall not be referred to a master or special referee for the purpose of making a report to the circuit court." (emphasis added)).

Fourth, former Judge Clary never issued an "order or judgment," and none was filed with the Clerk of Court. See Rule 53(e), SCRCF ("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)). Thus, except for Judge Early's Orders, no enforceable order exists resolving Plaintiffs' and Defendants' privilege disputes, nor does an order exist from which either side could appeal. Instead, as instructed, and pursuant to the trial court's Orders of December 30, 2008, January 31, 2009, and April 9, 2009, former Judge Clary made a report to the trial court with respect to his review of the subject documents. The trial court, at Plaintiffs' and Defendants' request and without argument, entered an Order adopting the report's findings and conclusions, and specifically reserving to Plaintiffs and Defendants an opportunity to object through Rule 59 Motions to any part of it. Both sides timely made Rule 59(e) Motions, a lengthy hearing was held (and no objection was made as to the trial court's authority to hear the Motions), and, on July 8, 2009, Judge Early informed the

parties' counsel of his decision, granting in part and denying in part both parties' Rule 59(e) Motions. Only then did Petitioners mention by letter, and *not* by motion, their contrived Rule 53 jurisdictional issue. The trial court issued its Order on July 28, 2009, and it was forwarded to Petitioners by U.S. Mail and e-mail on July 30, 2009. The Defendants simultaneously sent the Order to the Clerks of Court for Beaufort, Charleston, and Orangeburg for filing, where it was entered on August 3, August 3, and August 6, 2009, respectively.<sup>3</sup> See Exhibit 2. The only orders deciding the "privilege" issues and from which an appeal, when appropriate, might be taken are those of Judge Early.

As for the Petitioners' claim that the trial court was without authority to enter the July 28, 2009 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)), that rule does not apply here, because (1) former Judge Clary was not a trial judge when he conducted his review of the documents and (2) he did not enter an order at all. In sum, this Court specifically assigned Judge Early to preside over all aspects of this litigation, and he has not relinquished his authority or jurisdiction to former Judge Clary or anyone else. It is beyond dispute that the trial court had jurisdiction to enter the June 2, 2009 and July 28, 2009 Orders, and it has the authority and jurisdiction to enforce those orders. Petitioners have no grounds for a writ of prohibition in this case.

C. Adequate Remedy of Appeal Available to Petitioners

As discussed above, where the Petitioners have an adequate remedy by appeal, a

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<sup>3</sup> Plaintiffs claim to have first received written notice of the "entry" of the Order on August 14, 2009, by letter from the Charleston County Clerk's office, and Defendants have no reason to doubt this. Clearly, though, they were on notice no later than July 30, 2009 (15 days earlier) when they received a copy of the signed Order, and even agreed to a hearing date on Defendants' motions for sanctions on August 13, 2009.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

SEP 04 2009

ORIGINAL JURISDICTION

S.C. SUPREME COURT  
Ex Parte:

Laurance H. Davis, Jr., *et al.*, ..... Petitioners,

In Re:

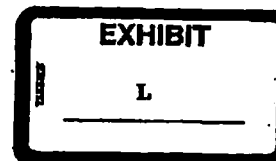
Laurance H. Davis, Jr., *et al.*, ..... Plaintiffs,

v.

Parkview Apartments,  
*et al.*, ..... Defendants.

PETITION FOR WRIT OF PROHIBITION  
OR ALTERNATIVELY  
FOR WRIT OF CERTIORARI

John S. Nichols  
Blake A. Hewitt  
BLUESTEIN NICHOLS  
THOMPSON & DELGADO, LLC  
Post Office Box 7965  
Columbia, SC 29202  
(803) 779-7599  
(800) 779-8995 facsimile



not applying, the rule). These violations are acutely damaging in this case because the trial court has overruled the special master's findings in several respects.

A writ of prohibition lies to prevent a lower tribunal's encroachment, excess, usurpation, or improper assertion of jurisdiction. *Ex Parte Jones*, 160 S.C. 63, 69, 158 S.E. 134, 137 (1931). The Court would be justified in issuing the writ in this scenario in light of the trial court's ongoing violation of Rule 53. This violation is now taking the form of preparing to dismiss Petitioners' lawsuits. The Court should issue an order prohibiting the trial court from doing so. A disposition on these grounds alone would not address any of the substantive aspects of the trial court's order. Stated differently, if the Court grants this relief, Petitioners' position is that the Court would not review the merits of the trial court's order. The Court should instead instruct the trial court to enforce the special master's decision.

**II. Alternatively, Because It Orders The Disclosure Of Privileged Information, The Trial Court's Order Warrants Immediate Appellate Review**

If the Court desires a more detailed review of the trial court's order, Petitioners' alternative request to a writ of prohibition is that the Court issue a writ of common law certiorari. Discovery orders are interlocutory orders and are generally not immediately appealable because they do not "involve the merits" or "affect a party's substantial rights." *Grosshuesch v. Cramer*, 377 S.C. 12, 30-31, 659 S.E.2d 112, 122 (2008). In the past, this Court has used a common law writ of certiorari,