

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2016-CP-26-4464

RECEIVED
JUN 29 2018
SC Court of Appeals

Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson Plaintiffs,

v.

Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc. Respondents,

v.

Great American Insurance Company Appellant.

**RETURN IN OPPOSITION TO APPELLANT’S EMERGENCY MOTION FOR A
PROTECTIVE ORDER**

Respondents, Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White, and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc. (collectively, “Insured Defendants”) submit this return in opposition to the emergency motion for a protective order filed by Great American Insurance Company (“Great American”). In its continuing efforts to avoid discovery and to delay a

resolution of the underlying matters, Great American has taken the position that all discovery in this case is stayed by its filing of its notice of appeal of the Circuit Court's order granting judgment on the pleadings as to the portion of the Insured Defendants' Third-Party Complaint relating to the duty to defend. This is simply not the case. The order on appeal stands on its own and does not include any other or further relief as to the remaining claims; as such, nothing outside the duty to defend is stayed pending the appeal.

BACKGROUND

Great American has not provided the Court with a copy of either the current Amended Complaint (the "Third Amended Complaint") or the Third-Party Complaint in this matter.¹ A review of these documents is crucial to the determination of the issue raised by Great American's motion: Does the order granting judgment on the pleadings as to Great American's duty to defend affect the remaining claims in this case? If the answer is no, there is no stay as to those claims pursuant to Rules 205 and 241, SCACR.

I. The Claims.

A. The Third Amended Complaint.

The underlying action in this matter is a dispute between certain condominium owners and the Tilghman Beach and Racquet Club Condominium Association, Inc. ("Association") and its board of directors ("Board"). The causes of action include negligence / gross negligence, breach of master deed covenants and restrictions, declaratory judgment, injunction, specific performance, *ultra vires* actions on the part of certain individual defendants, indemnification, and appointment of a receiver.

Contrary to the statements provided in Great American's motion, the allegations of the Third Amended Complaint go well beyond "damage to the common elements." Instead, and as

¹ Attached as Exs. 1 and 2 (both without voluminous exhibits).

noted by the Circuit Court in the order on appeal, the Third Amended Complaint alleges that the Board and its members breached their duties by failing to properly maintain the property, which has resulted in the common elements deteriorating over time, and that the deterioration has caused diminution in value of the Plaintiffs' individual units. (Order at 11). In addition, the Third Amended Complaint also contains allegations of breach of duty unrelated to deterioration of the common elements, including failing to maintain adequate repair reserves, failing to replace sliding doors at the end of their useful life, failing to conduct proper reserve studies and failing to maintain proper repair records. (See Ex. 1 at ¶¶ 28-29, 32-33, 36, 46, 52-54, 64, 71).

B. The Third-Party Complaint.

After Great American denied coverage, the Insured Defendants brought a Third-Party Complaint for: (1) breach of contract for failure to provide coverage “and / or” a defense in the underlying action; (2) attorney’s fees pursuant to S.C. Code Ann. § 38-59-40; (3) bad faith; and (4) declaratory judgment as to the insured’s rights under the subject policy with respect to: (a) the duty to defend; and (b) the duty to indemnify. (Ex. 2).

II. The Order on the Motion to Dismiss or, in the alternative, to Sever.

Following service of the Third-Party Complaint, Great American moved to dismiss, or in the alternative, to sever on the grounds that the Third-Party Complaint alleged direct claims against it, rather than derivative claims. (Motion at Ex. 1). In response, the Insured Defendants argued that the Third-Party Complaint was addressed to two different duties of the Insured Defendants, the duty to defend and the duty to indemnify. (Motion at Ex. 2, p. 7). The Insured Defendants further noted that the duty to defend is determined by the allegations of the underlying complaint while the duty to indemnify is determined by the findings of fact in the underlying action. (*Id.*). As a result, the liability on the duty to defend was direct and the duty on the duty to indemnify was derivative. (See *id.* at pp. 7-11). Given this backdrop, the Insured

Defendants argued that the Third-Party Complaint was appropriate under Rule 14(a), SCRCF because the issue of liability on the duty to indemnify was contingent on the ultimate facts found in the underlying action. (*Id.* at p. 11).

In addition, Insured Defendants argued as follows with respect to the motion to sever:

Great American contends that the Third-Party Complaint should be severed from the underlying action because Third-Party Plaintiffs' claims against Great American will be "unnecessarily complicated" by the joinder. Quite the contrary is true. The anticipated discovery in the underlying action will likely be directly relevant to whether Great American has coverage for some or all of the claims in the underlying action. Additionally, considering that the underlying action is in the preliminary stages of discovery, it is premature to make a determination as to severance. If a determination as to severance is to be made, it should be made closer to trial to allow discovery to bear out whether the continued joinder of Great American would unnecessarily complicate the trial of the underlying action and the instant coverage dispute.

(*Id.* at 12). When this paragraph is viewed in the context of the response as a whole, it is clear that the discovery will only relate to the duty to indemnify and bad faith claims because the duty to defend is determined solely by comparison of the allegations in the complaint to the policy. No discovery is—or ever was—needed on the duty to defend issue. Rather, it is a simple matter of contract interpretation combined with a review of the Plaintiffs' Third Amended Complaint. Thus, there is no reason to hold up claims actually subject to discovery during the pendency of this appeal.

The Circuit Court accepted this logic and denied the motion on the grounds that the claims relating to the duty to indemnify were properly asserted under Rule 14(a), SCRCF. (Motion at Ex. 3, p. 4). The Court declined to sever the action, but did order that there would be separate trials. (*Id.* at 5).

III. The Order on Appeal.

Consistent with the arguments raised by the Insured Defendants in opposition to the motion to dismiss, the Insured Defendants then moved for judgment on the pleadings with

respect to their Third-Party claims against Great American for breach of contract and declaratory judgment on the duty to defend. (Motion at Ex. 4). The trial court granted the Insured Defendants' motion solely as to the declaratory judgment cause of action on the duty to defend, and in doing so, made several statements showing that the order was not intended to result in delay, as follows:

- First, Rule 12(c), SCRCP, clearly contemplates that a plaintiff may move for judgment on the pleadings because it provides that, “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” (emphasis added). (Order at 7).
- However, Great American ignores the provisions of the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10 *et seq.*, which is the basis for the Fourth Cause of Action in the Third-Party Complaint. Specifically, § 15-53-20 provides that “[c]ourts of record within their respective jurisdiction shall have power to declare rights, status or other legal relations whether or not further relief is or could be claimed.” (*Id.* at 8, footnote omitted).
- Further, a judgment on the Fourth Cause of Action for declaratory judgment is appropriate under Rule 54(b), SCRCP, because there is no reason for delay given that the duty to defend is determined by the allegations of the underlying Complaints and the 2016 Great American Policy, both of which are admitted by Great American. (*Id.*)

The order makes no findings as to the duty to indemnify, bad faith, or as to the underlying case.

ARGUMENT

The order on appeal relates solely to the duty to defend and does not affect any of the other claims in the underlying action or on the remaining claims of the Third-Party Complaint. As such, none of the other claims were stayed by the filing of the notice of appeal.

Great American correctly calls the Court's attention to Rules 205 and 241, SCACR, each of which provide that a notice of appeal does not stay matters not affected by the appeal.² The automatic stay does not apply to matters not directly addressed in the order being appealed. *South Carolina National Bank v. Blossom*, 321 S.C. 110, 113, 467 S.E.2d 767 (Ct. App. 1996) (finding that because the appealed-from order of foreclosure did not address the statutory right to an appraisal, "appraisal of the subject property was not a matter decided in the order on appeal and the automatic stay provisions ... are inapplicable"); *Metts v. Mims*, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009) ("Pursuant to Rule 205, the service of a notice of appeal gives the appellate court exclusive jurisdiction over the appeal. Nonetheless, this rule also provides that a Circuit Court may proceed 'with matters not affected by the appeal.' Here, the contempt order resulted from Newspapers' refusal to comply with a discovery order compelling it to provide financial data relevant to petitioner's punitive damages claim. Newspapers' motion for summary judgment, however, was on the merits of petitioner's libel claim. We find the summary judgment matter was unaffected by the appeal of the contempt order."); Jean H. Toal, *Appellate Practice in South Carolina* 340 (3rd ed. 2016) ("matters not decided in the order on appeal are not subject to the provisions of [Rule 241, SCACR]").

As the Insured Defendants have consistently argued in this case, an insurer's duty to defend is determined by the allegations of the underlying complaint. *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009) (citing references omitted). "If the facts alleged in a complaint against the insured bring a claim within policy

² As a procedural matter, the Insured Defendants believe that Great American should have first brought any issue relating to a stay before the Circuit Court pursuant to Rule 241, SCACR and Rule 62, SCRCP; however, they are providing a full response to the motion here as this Court has the power "to stay proceedings during the pendency of an appeal . . ." under Rule 62(g), SCRCP.

coverage, the insurer has a duty to defend.” *Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs.*, 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) (citing *South Carolina Medical Malpractice Liab. Ins. v. Ferry*, 291 S.C. 460, 354 S.E.2d 378 (1987)). If the underlying complaint against the insured creates “a possibility of coverage under the policy, the insurer is obligated to defend.” *City of Hartsville*, 382 S.C. at 543, 677 S.E.2d at 578 (citing *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38 (1980)) (emphasis added). “[T]he duty to defend is triggered where the underlying complaint includes any allegation that raises the possibility of coverage.” *Auto-Owners Ins. Co. v. Newsome*, No. 4:12-cv-00447-RBH, 2013 WL 3148334, at *4 (D.S.C. June 19, 2013) (emphasis added). In this analysis, the underlying complaint and the insurance policy are construed liberally in favor of the duty of the insurance company to defend its insured, with all doubts resolved in the insured’s favor. *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010); *Darwin Nat. Assur. Co. v. Matthews & Megna LLC*, 36 F.Supp.3d 636, 655 (D.S.C. 2014).

This determination is separate and distinct from the factual and legal issues presented with respect to the underlying action and the duty to indemnify. The Circuit Court’s ruling as to this cause of action, therefore, does not affect the remaining claims.

Great American’s motion generally discusses the Third-Party claims with no mention of the distinction among the claims relating to the duty to defend, the duty to indemnify, and the elements of proof for each. The duty-to-defend issues have been decided based on the policy and the allegations of the Third-Party Complaint. That is the order on appeal. The remaining issues will proceed based on a fully developed factual record. There is no reason to delay the resolution of those claims while this appeal is pending. Such a ruling would be inconsistent with

the directives of the Declaratory Judgments Act, Rule 54, SCRPC, and Rule 1, SCRPC and its general directive that “[t]hese rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.”

CONCLUSION

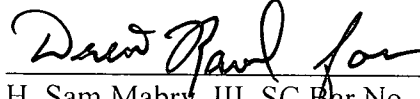
Great American’s desire to avoid further discovery is irrelevant to this motion, as is the time and expense associated with discovery.³ If Great American wanted to control how this case was defended for the Insured Defendants, it could have accepted the defense when it was tendered. It refused. Great American should not be allowed to hold this entire case hostage on unrelated claims while it pursues its appeal on the duty to defend. There is no reason to hold up discovery on the remaining issues, which will ultimately be tried. For the reasons above, Great American’s motion should be denied and the underlying action and the remaining Third-Party claims should continue consistent with the Rules of Civil Procedure and the South Carolina Appellate Court Rules.

(Signature Page Follows)

³ Great American’s protestations about the scope of discovery in this matter are quite interesting given that Insurer has failed to have an attorney attend any of the depositions in person and, while attending by phone, Great American’s attorneys have not asked a single question of any witness.

Respectfully submitted,

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June 29, 2018

EX. 1

COPY

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
Jill Keck Humphries, Dennis L. Johnson,)
Jr., Delona Penny Rice, Whitmel L. Brown,)
Jr., Gary Steven Robinson, Elizabeth Erin)
Humphries, and Nancy H. Johnson,)
)
)
)

Plaintiffs,)

vs.)

Tilghman Beach and Racquet Club)
Condominium Association, Inc., James H.)
Austin, III, Daniel G. Coe, C. Doug)
Madison, George P. White and Steele Brice)
Windle, III, individually and as Members)
of the Board of Directors of the Tilghman)
Beach and Racquet Club Condominium)
Association, Inc.,)
)
)

Defendants.)
)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2016-CP-26-4464

**THIRD AMENDED COMPLAINT OF
THE PLAINTIFFS, JILL KECK HUMPHRIES,
DENNIS L. JOHNSON, JR., DELONA PENNY
RICE, WHITMEL L. BROWN, JR., GARY
STEVEN ROBINSON, ELIZABETH ERIN
HUMPHRIES, AND NANCY H. JOHNSON
(NEGLIGENCE/GROSS NEGLIGENCE,
BREACH OF CONTRACT, DECLARATORY
JUDGMENT RELIEF, INJUNCTIVE RELIEF,
ULTRA VIRES CONDUCT, SPECIFIC
PERFORMANCE, INDEMNIFICATION,
APPOINTMENT OF A RECEIVER BY THE
CIRCUIT COURT)**

(JURY TRIAL REQUESTED)

FILED
HORRY COUNTY
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CLERK OF COURT
HORRY COUNTY, SC

The Plaintiffs, by and through their attorneys, Howell V. Bellamy, III., and Howell V. Bellamy, Jr., of the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, PA., complaining of the Defendants, Tilghman Beach and Racquet Club Condominium Association, Inc. (the "Association"), and James H. Austin, III., Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III., individually and in their official capacities as the current Board Directors of the Council of Co-Owners (collectively, the "Directors") state as follows:

JURISDICTION AND VENUE

1. At all times relevant the Plaintiff, Jill Keck Humphries (“Humphries”), was and is an interest owner of fee simple title to Condominium Unit No. 219 in Building IV of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina. Humphries is a citizen and resident of Chatham County, North Carolina.

2. At all times relevant the Plaintiff, Dennis L. Johnson, Jr. (“Johnson”), was and is an interest owner of fee simple title to Condominium Unit No. 367 in Building VIII of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina. Johnson is a citizen and resident of Mecklenburg County, North Carolina.

3. At all times relevant the Plaintiff, Delona P. Rice (“Rice”), was and is an interest owner of fee simple title to Condominium Unit No. 227 in Building I of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina. Rice is a citizen and resident of Alamance County, North Carolina.

4. At all times relevant the Plaintiff, Whitmel L. Brown, Jr. (“Brown”), was and is an interest owner of fee simple title to Condominium Unit No. 353 in Building XI of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina. Brown is a citizen and resident of Horry County, South Carolina.

5. At all times relevant the Plaintiff, Gary Steven Robinson (“Robinson”), was and is an interest owner of fee simple title to Condominium Unit No. 219 in Building IV of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina. Plaintiff Robinson is a citizen and resident of Chatham County, North Carolina.

6. At all times relevant the Plaintiff, Elizabeth Erin Humphries (“Elizabeth Humphries”), was and is an interest owner of fee simple title to Condominium Unit No. 219 in Building IV of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina. Upon information and belief, Plaintiff Elizabeth Humphries is a citizen and resident of Chatham County, North Carolina.

7. At all times relevant the Plaintiff, Nancy H. Johnson (“Nancy Johnson”) was and is an interest owner of fee simple title to Condominium Unit No. 367 in Building VIII of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina. Plaintiff Nancy Johnson is a citizen and resident of Mecklenburg County, North Carolina.

8. That Plaintiffs have attempted in good faith to resolve all differences with the Defendants, regarding the particular assertions made in this Complaint; however, because of the varied, different, and inconsistent interpretations argued by the parties concerning the proper administration, maintenance, and repair of the regime property in accordance with governing documents, the Act, and South Carolina law, no resolution could be reached on the allegations raised by Plaintiffs in this Third Amended Complaint.

9. At all relevant times, the Plaintiffs above were and are shareholders and/or members of the Tilghman Beach and Racquet Club Condominium Association, Inc., when the Defendant Association and individual Defendants Austin, Coe, Madison, White, and Windle, acting individually, failed to act in good faith, and/or committed their improper, illegal, and unauthorized conduct as set forth below in the subsequent paragraphs.

10. Defendant Association is a nonprofit corporation organized and existing in the State of South Carolina, County of Horry. Defendant Association was and is at all times relevant hereto responsible for the management and operation of the condominium regime commonly known as the Tilghman Beach and Racquet Club Horizontal Property Regime ("Project") consisting, in part, of twelve (12) residential buildings commonly referred to as Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII, and related common facilities, all being more particularly described and delineated by the Master Deed recorded on February 2, 1982, and all amendments thereto (the "Master Deed").

11. Defendant Association acts by and through its Board of Directors ("Board"), the members of which are elected by a majority vote of the co-owners. The Board is charged with the general administration, operation, and maintenance and repair of the condominium regime on behalf of and for the benefit of all Co-owners and with due regard for (a) the rights of each Co-owner and (b) the terms of the Act, the Master Deed, and By-Laws of the Condominium Project. As part of those duties, the Board is responsible for the selection and supervision of a "Manager of the Regime" as that term is defined in the By-Laws of the Defendant Association.

12. Defendant Steele Brice Windle, III ("Windle") is holder of the fee simple title to Condominium Unit No. 127 in Building I of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of

Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. At all times relevant hereto, Defendant Windle acted individually and/or in his official capacity as an agent, representative, and member of the Board of Directors of the Defendant Association. Defendant Windle's specific acts, omissions, failures to act, and/or breaches of affirmative duties are described in detail hereinbelow. Further, the acts of Defendant Windle, while acting individually, were "independent acts" as that term is described the under South Carolina case law. Upon information and belief, Defendant Windle is a citizen and resident of York County, South Carolina.

13. Defendant Daniel P. Coe ("Coe") is holder of the fee simple title to Condominium Unit No. 361 in Building IX of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. At all times relevant hereto, Defendant Coe acted individually and/or in his official capacity as an agent, representative, and member of the Board of Directors of the Defendant Association. Defendant Coe's specific acts, omissions, failures to act, and/or breaches of affirmative duties are described in detail hereinbelow. Further, the acts of Defendant Coe, while acting individually, were "independent acts" as that term is described under the South Carolina case law. Upon information and belief, Defendant Coe is a resident and citizen of Horry County, South Carolina.

14. Defendant C. Doug Madison ("Madison") is holder of the fee simple title to Condominium Unit No. 106 in Building II of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant

Association. At all times relevant hereto, Defendant Madison acted individually and/or in his official capacity as an agent, representative, and member of the Board of Directors of the Defendant Association. Defendant Madison's specific acts, omissions, failures to act, and/or breaches of affirmative duties are described in detail hereinbelow. Further, the acts of Defendant Madison, while acting individually, were "independent acts" as that term is described the under South Carolina case law. Upon information and belief, Defendant Madison is a citizen and resident of Iredell County, North Carolina.

15. Defendant George P. White ("White") is holder of the fee simple title to Condominium Unit No. 133 in Building III of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. At all times relevant hereto, Defendant White acted individually and/or in his official capacity as an agent, representative, and member of the Board of Directors of the Defendant Association. Defendant White's specific acts, omissions, failures to act, and/or breaches of affirmative duties are described in detail hereinbelow. Further, the acts of Defendant White, while acting individually, were "independent acts" as that term is described under the South Carolina case law. Upon information and belief, Defendant White is a citizen and resident of Pender County, North Carolina.

16. Defendant, James H. Austin, III ("Austin") is holder of the fee simple title to Condominium Unit No. 357 in Building X of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. At all times relevant hereto, Defendant Austin acted individually and/or in his

official capacity as a member of the Board of Directors of the Defendant Association. Defendant Austin's specific acts, omissions, failures to act, and/or breaches of affirmative duties are described in detail hereinbelow. Further, the acts of Defendant Austin, while acting individually, were "independent acts" as that term is described under the South Carolina case law. Upon information and belief, Defendant Austin is a citizen and resident of Moore County, North Carolina.

17. The real property which is the subject of this matter is located in Horry County, South Carolina, and more particularly described as follows:

A. Legal Description of Real Property Submitted to Regime by the Execution and Recording of the Master Deed:

PHASE I:

ALL AND SINGULAR, those certain pieces, parcels, or tracts of land, situate, lying, and being in Little River Township, the City of North Myrtle Beach, Horry County, South Carolina, and being more particularly described and delineated as Phase 1, Block 22, and Phase 1, Block 2, as shown on that certain plat prepared to set out and delineate the property for Phase 1 of the Tilghman Beach and Racquet Club Condominium Project located on Blocks 2 and 22, Tilghman Estates, as more particularly shown and depicted on a plat of this property prepared by C. B. Berry, R. L. S., South Carolina No. 2075 and dated January 20, 1982, and filed for record in the office of the Clerk of Court for Horry County, South Carolina, in Real Estate Plat Book 72 at Page 237, which plat contains the most current and accurate description of the parcels, and which plat description is reference to herein and incorporated by reference herein, for the most full, complete, and accurate description of the premises being submitted herewith to the Horizontal Property Regime for Phase I, Tilghman Beach and Racquet Club.

B. Legal Description of Real Property Which Developer May Elect to Submit to the Regime by the Execution and Recording of a Subsequent Appropriate Instrument, but Which is Not Submitted by the Master Deed:

PHASE II:

ALL AND SINGULAR, those certain pieces, parcels, or tracts of land, situate, lying, and being in Little River Township, the City of North Myrtle Beach, Horry County, South Carolina, and being more particularly described and delineated as the remainder of Block 22, and the remainder of Block 2, as shown on that certain plat prepared to set out and delineate the property for Phase I of the Tilghman Beach and Racquet Club Condominium Project, located on Blocks 2 and 22, Tilghman Estates, as more particularly shown and depicted on a plat of this property prepared by C. B. Berry, R.L.S., South Carolina No. 2075, and dated January 20, 1982, and filed for record in the Office of the Clerk of Court for Horry County, South Carolina, in Real Estate Plat Book 72 at Page 237, which plat contains the most correct and accurate description of the parcels, and which plat description is referred to herein and incorporated by reference herein, for the most full, complete and accurate description of the premises to be submitted to the Horizontal Property Regime for Phase II, Tilghman Beach and Racquet Club.

Derivation of Title:

These two blocks were conveyed to Summey Building Systems, Inc. by deed of Charles T. Tilghman, M. W. Tilghman, Catherine H. Tilghman, and Mary Elizabeth T. Dent by deed dated September 2, 1982, filed for record September 4, 1981, and recorded in Real Estate Deed Book 722 at Page 711, Office of the Clerk of Court for Horry County, South Carolina.

18. Venue is proper in Horry County, South Carolina.
19. This Court has subject matter and personal jurisdiction over the above-named parties hereto.

BACKGROUND FACTS

A. RELEVANT PROVISIONS OF THE MASTER DEED AND BY-LAWS

20. The Tilghman Beach and Racquet Club Horizontal Property Regime (“Regime”) was established in 1982 in the manner provided for by the South Carolina Horizontal Property Act, as amended, S.C. Code Ann. §§ 27-31-10 et seq. (2007) (“Act”) by the execution and recording of Master Deed in Deed Book 736, at page 360 on February 2, 1982 in the Office of

Clerk of Court for Horry County, South Carolina. The Master Deed and By-Laws are the governing documents of the Regime and define various aspects and duties of the Co-owners, Association, and Property Manager regarding the maintenance, replacement, and repair of the Common Elements. A copy of Regime's Master Deed and By-Laws is attached hereto as (Exhibit "A") and incorporated by reference as part of this Complaint.

21. Insofar as is relevant to the assertions in this Third Amended Complaint, Article XXXIV defines certain terms used in this Master Deed and its Exhibits as follows:

"Apartment" means a part of the property intended for any type of independent use (whether it be for residential, recreational, storage, or business) including one or more rooms or enclosed spaces located on one or more floors (or parts thereof) in a building or if not in a building in a separately delineated place whether open or enclosed and whether for the storage of an automobile, moorage of a boat, or other lawful use, and with a direct exit to a public street or highway, or to a common area leading to such street or highway.

"Co-owner" means a person, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns an apartment within the building.

"Majority of co-owners" means fifty-one percent or more of the basic value of the property as a whole, in accordance with the percentages computed in accordance with the provisions of S.C. Code Ann. §27-31-60.

"Building" means an existing or proposed structure or structures, containing in the aggregate two or more apartments, comprising a part of the property.

"Property" means and includes (1) the land whether leasehold or in fee simple and whether or not submerged, (2) the building, all improvements, and structures on the land, in existence or to be constructed, and (3) all easements, rights, and appurtenances belonging thereto.

"Master deed" or **"master lease"** means the deed or lease establishing and recording the property of the horizontal property regime.

22. Article V of the Master Deed defines the "Boundaries of Unit in Phase I" and as subdivided into subparts (a), (b) and (c). The following statements are included in the paragraphs of this Article in pertinent part:

Each Unit is comprised of the interior cubic space, fixtures, appliances, furnishings, walls, floors, ceilings, and building material enclosed within the following boundaries:

- (a) The upper boundary of the Unit shall extend to the unfinished surface of the structural slab constituting the ceiling of the Unit. The lower boundary of the Unit shall extend to the unfinished surface of the structural slab constituting the floor.
- (b) The perimetrical boundaries of the Unit shall extend to the unfinished interior surfaces of the perimeter walls of the Unit, excluding load-bearing structural interior walls or components.
- (c) Each Unit shall also encompass and include and each Co-owner shall be responsible for maintenance and repair of the following: (i) the doors [including screen doors] opening into the Unit and onto any balcony reserved to the use of a Unit, including the frames, casings, hinges, handles, and other fixtures which are part of the doors; (ii) the window glasses, screens, frames, and casings which are part of window openings of the Unit; (iii) the plumbing, wiring, and mechanical vents which exclusively serve the Unit; (iv) the appliances, air conditioning and heating units, hot water heaters, lavatories, bath tubs, toilets, carpeting, floor covering, trim finished surface of ceilings and walls, insulation, and other fixtures and furnishings which are within or serve the Unit when delivered to the initial Co-owner; (v) all appurtenances which are integral and exclusive to the Unit, including but not limited to lamps attached to the exterior of the Unit, and water and sewer pipes exclusively serving the Unit.

23. Article V of the Master Deed also defines the "Common Elements" by the following statement:

The Common Elements include all of the property submitted to the condominium ownership which is not included within the Units. Exhibits "A" and "B"¹ of this Master Deed graphically depict the areas encompassing the Common Elements in Phase I.

- a) **General Common Elements** means and includes:
 - (1) The Real Property (excluding the Limited Common Elements and the Apartments), including but not limited to the land on which the buildings containing the Apartments are constructed;

¹ Exhibits A and B of the Master Deed are referred to throughout the Master Deed. Exhibit A is maps and surveys of the Regime Property, while Exhibit B is floor plans indicating the Load Bearing (Structural) Walls, Unit boundaries, Common Elements, and Limited Common Elements.

- (2) The foundations, main walls, roofs, halls, lobbies, stairways, and entrance and exit or communication ways;
- (3) The basements, flat roofs, yards and gardens, except as otherwise provided or stipulated;
- (4) The premises for the lodging of janitors or persons in charge of the property, except as otherwise provided or stipulated;
- (5) The compartments or installations of central services such as power, light, gas, cold and hot water, refrigeration, reservoirs, water tanks and pumps, and the like;
- (6) Any elevators, garbage incinerators and, in general, all devices and installations existing for common use;
- (7) All other elements of the property rationally of common use or necessary to its existence, upkeep and safety, including but not necessarily limited to the following:
 - (a) The additional improvements designated as General Common Elements on **Exhibit "B"** attached hereto;
 - (b) All swimming pools, tennis courts and related and supporting facilities, all parking areas, roads, walkways, paths, trees, shrubs, yards, gardens, bodies of water, bridges, gazebos, and Regime entrance signs and lighting on the Real Property (outside of the Apartments); and
 - (c) A non-exclusive easement and right-of-way for access, egress and ingress to and from the Regime and each Apartment and Improvements contained therein across the public roads and streets of Ocean Drive Section, North Myrtle Beach, to and from U.S. Highway 17, and any other public streets or highways adjoining or abutting such private roads and streets of Ocean Drive Section of North Myrtle Beach;

b) **Limited Common Elements** means and includes:

- (1) Those Common Elements which are agreed upon by all the Apartment owners to be reserved for the use of a certain number of Apartments to the exclusion of the other Apartments, such as special corridors, stairways, elevators, balconies, sanitary services common to the Apartments of a particular floor, and the like; and

- (2) The additional improvements designated as Limited Common Elements on Exhibit "B" attached hereto. Maintenance and repair of Limited Common Elements rest with the owner(s) of the Apartment to which they abut, adjoin, or service.

24. Article XX of the Master Deed states specific requirements regarding the maintenance and repair of each Apartment by the owner. This Article provides in pertinent part:

Every Co-owner must perform promptly all maintenance and repair work within his Apartment, . . . if omitted, could adversely affect the Regime in its entirety or in a part belonging to other Co-owners, being expressly responsible for the damages and liability which, his failure to do so may engender. . . . Such Co-owner shall . . . be responsible and liable for maintenance, repair and replacement of any and all window glass, wall, ceiling and floor exterior surfaces The floor and interior walls and windows or screens of any balcony or deck attached to his Apartment shall be maintained by the Co-owner at his expense.

25. Article XXI of the Master Deed states specific requirements regarding the maintenance and repair of the Common Elements by the Association. This Article provides in pertinent part:

The Association, at its expense, shall be responsible for the maintenance, repair and replacement of all of the Common Elements, including those portions thereof which contribute to the support of any building, and all conduits, ducts, plumbing, wiring and other facilities located in the Common Elements for the furnishing of utility service to the Apartments and the Common Elements, and should any incidental damage be caused to any Apartment by virtue of any work which may be done or caused to be done by Association in the maintenance, repair, or replacement of any Common Elements, the Association shall, at its expense, repair such incidental damage.

26. Article XXVII of the Master Deed provides remedies for described defaults committed by the Co-owner or Co-owners of any Apartments, or the Association due to their failure to discharge their duties under the governing documents. The following described

defaults in Paragraphs A and B of this Article entitles an *aggrieved Co-owner or Co-owners of other Apartments* to the following legal² and/or equitable relief:

- A. Failure to comply with any of the terms of the Master Deed or other restrictions and regulations contained in the Charter, or By-Laws of the Association, or its rules and regulations, *shall be grounds for relief which may include, but not be limited to an action to recover sums due for damages, injunctive relief, foreclosure of lien or any combination thereof and which relief may be sought by Association, or, if appropriate, by an aggrieved Co-owner of an Apartment, or both.*
- B. The Co-owner or Co-owners of each Apartment *shall be liable for the expense of any maintenance, repair or replacement rendered necessary by his act, neglect, or carelessness*, or by that of any member of his family, or his or their guests, employed, agents or lessees, but only to the extent that such expense is not met by the proceeds of insurance carried by Association.

27. The By-laws of the Regime further define the specific duties and responsibilities of the Association's Board of Directors ("Board") regarding the operation, funding, maintenance, repair, and replacement of the Common Elements. Specifically, Article I, Paragraph 4(j) (ii) of the By-Laws addresses the Board's affirmative duties regarding its *"maintenance, repair, and replacement . . . of the general and limited elements"*:

The Board of Directors shall manage and direct the affairs of the Association and subject to any restrictions imposed by law, by the Master Deed, or these By-Laws . . . The Board of Directors *shall* exercise such duties and responsibilities as *shall* be incumbent upon it by law, the Master Deed, these By-Laws, or as it *may deem necessary* or appropriate in the exercise of its powers and *shall* include, without limited the generality of the foregoing, the following:

- (ii) *To carry out the maintenance, care, upkeep, repair, replacement, operation, . . . and the management of the general and limited elements, services and facilities or the Regime wherever the same is required to be done and accomplished by the Association for the benefit of its members.*

² Murphy v. Yacht Cove Homeowners Ass'n., 289 S.C.367, 345 S.E.2d 709 (1986)(The South Carolina Court found "that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association" for failure to discharge its duties related to maintenance and repair of the common elements under the Master Deed and Bylaws. Id. at 369, 345 S.E.2d at 710).

28. Article I, Paragraph 7 of the By-Laws defines the Board's affirmative duties and responsibilities for the "fiscal management" of the Association. Specifically, the Board's budgetary funding responsibilities *necessary for maintenance and operation of Common Elements* are addressed in subparagraph 7(b) in pertinent part:

The Board of Directors shall adopt a budget for each calendar year which shall contain estimates of the cost of performing the functions of the Association, including, but not limited to, the following items:

- (i) Common expense budget, which shall include without limiting the generality of the foregoing, the estimated amounts *necessary for maintenance and operation of Common Elements*, landscaping, street and walkways, office expense, swimming pool, utility services, casualty insurance, liability insurance, *administration and reserves (operating and replacement)*; and

29. Lastly, Article I, Paragraph 11 of the By-Laws addresses the Association's authority to make, levy, and collect assessments to pay the costs and expenses for the operation, management, and maintenance of the Regime. Specifically, Paragraphs 11(d) and (e) address the Board's affirmative duties to establish an annual operating budget for the maintenance and repair of the Regime's Common Elements, and to collect and maintain a reserve fund for the future replacement of structural common elements:

- (d) The Board of Directors of the Association, in establishing said annual budget for operation, management and maintenance of the project *shall include therein a sum to be collected and maintained as reserve fund for replacement of Common Elements, which reserve fund shall be for the purpose of enabling the Association to replace structural elements and mechanical equipment constituting a part of the Common Elements* as well as the replacement of personal property which may constitute a portion of the Common Elements held for the joint use and benefit of all of the co-owners of all Apartments. *The amount to be allocated to such reserve fund for replacements shall be established by said Board of Directors so as to accrue and maintain at all times a sum reasonably necessary to anticipate the need for replacements of said Common Elements.*
- (e) The Board of Directors of the Association, in establishing said annual

budget for operation management and maintenance of the Project, shall include therein a sum to be collected and maintained as a general operating reserve which shall be used to provide a measure of financial stability during periods of special stress when such sums may be used to meet deficiencies from time to time existing as a result of delinquent payment of assessments by Co-owners of Apartments, as a result of emergencies or for other reason placing financial stress upon the Association.

B. THE GENERAL PLAN OF DEVELOPMENT OF THE PROJECT

30. Tilghman Beach and Racquet Club Condominium Regime ("TB&RC") is a phased horizontal property regime containing two hundred thirteen (213) Units in twelve (12) buildings. The Developer Summey Building Systems, Inc., ("Summey") submitted Phase I to the Regime on or before February 2, 1982, and later submitted Phase II to the Regime on May 6, 1982. The twelve (12) buildings were certified for occupancy ("CO") between 1982 and 1983.

31. There are six (6) building design types which consist of two (2) stairwells, common area corridors, and two (2) balconies per Apartment, as graphically depicted in the certified architect's plans ("Plans"), recorded in the Horry County Register of Deeds in Plat Book 1, Page 42. Specifically, the twelve (12) buildings are pre-fabricated structures located above timber pilings with ground-floor parking areas. Several buildings are jointed with cross walk corridors. Buildings I, II, III, IV, and V are located on the east side of Ocean Boulevard, while Buildings VI, VII, VIII, IX, X, XI and XII are located on the west side of Ocean Boulevard.

C. EVALUATIONS OF BUILDINGS PRIOR TO 2010

32. Since completion of the Condominium Project, the Board has failed to implement or to require the Manager of the Regime to implement a program for the inspection, maintenance and repair of the Project's Common Elements that would have timely identified and thereby minimized the cost of remediating the current damage to Buildings I, II, III, IV, V, VI, VII, VIII,

IX, X, XI and XII, all in breach of the Board's obligations to the Co-owners under the Master Deed and By-Laws. Further, this factual proposition is supported by the building, inspection, and zoning records of the City of North Myrtle Beach.

33. The Board, from its inception, also consistently failed to establish a reasonable reserve for the payment of future Common Expenses costs arising out of damage to Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII as a consequence of the effects of the ocean environment of which they were or should have been aware.

D. EVALUATIONS OF BUILDINGS SINCE 2010

34. Extensive evaluations of Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII have been made since 2010 as the result of historic and persistent concerns raised by various Co-owners, past board members, managers, and consultants. Specifically, the following consultants were engaged for the purpose of evaluating and/or developing various repair and reconstruction plans for the deficient and defective condition in the buildings since 2010:

- a. Kyzer & Timmerman Engineers, Inc;
- b. Criterium-Giles Engineers, Inc;
- c. Martinez & Associates Structural Engineers, PA;
- d. SGA Architecture, LLC;
- e. Procon & Associates, Inc;
- f. Spann Roofing & Sheet Metal, Inc;
- g. ABS, Inc;
- h. Keystone R&C, Inc;
- i. Sutton-Kennerly and Associates, Inc;
- j. Maxey P. Nolan III, PhD., Entomologist;
- k. A & I Construction;
- l. Shoreline/Stewart Construction; and
- m. Reserve Advisors, Inc.

35. The above listed consultants identified numerous defective and deficient conditions resulting in building distress in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII, which can be separated into structural, building envelope,

interior, and roofing conditions. A general summary³ of the deficient conditions, by category, found by them includes:

Structural Items of Concern

- a. Balcony Railings have corroded at base of supports. Pickets were missing;
- b. Balcony decks exhibited sponginess;
- c. Connection hardware was corroded and delaminating;
- d. Balcony beams are corroded and decayed;
- e. Stair areas exhibited corrosion, rot and decay;
- f. Split Stringers on stairs;
- g. Delaminated and decayed band boards around perimeter of buildings;
- h. Post anchorage connections have severe metal loss and are corroded at the balconies and corridors;
- i. Post to top rail connections have severe metal loss and are corroded at the balconies and corridors;
- j. Wood Post base have decayed and corroded at the balconies and corridors;
- k. Connections of cradle beams to wood piling have severe metal loss and are corroded;
- l. Connections of diagonal bracing to timber piling have severe metal loss and are corroded;
- m. Cantilever cradle beams are decayed and delaminating;
- n. Spandrel beams are corroded and decayed at the balcony framing;
- o. Floor joists have deteriorated and are deflecting at the balcony framing;
- p. Module connections to the cradle beams have metal loss and are corroded;
- q. Connectors of the metal connecting plate to the module have corroded;
and
- r. Soffits are corroded and decayed.

Building Envelope Items of Concern

- a. Moisture penetration behind exterior siding, trim, and flashing;
- b. Delaminated exterior siding, trim, and flashing;
- c. Delaminating stucco below gable end walls;
- d. Cracking in stucco below gable end walls;
- e. Moisture penetration/leaking ocean side facing windows;
- f. Moisture penetration/leaking ocean side facing sliding glass doors;
- g. Moisture penetration/leaking sliding glass doors;
- h. Corroded window and sliding glass door casings;
- i. Corroded sliding glass door sills;
- j. Moisture affected and rotten wood framing around sliding glass doors;
- k. Rotting fascia boards; and

³The Plaintiffs have photographed the numerous defective and deficient conditions existing in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII, which are attached hereto as (Exhibits "G-1, G-2, and G-3") and incorporated by reference as part of this Third Amended Complaint.

- l. Moisture affected and rotten band boards around perimeter of buildings.

Interior Items of Concern

- a. Moisture damaged sheetrock;
- b. Moisture damaged interior paint, wall paper and textured ceiling materials;
- c. Microbial growth in Unit interiors;
- d. Moisture affected floor coverings;
- e. Moisture damaged paint, wall paper and textured ceiling materials;
- f. Moisture damaged carpet padding and carpet;
- g. Moisture damaged and rotting carpet tack strips; and
- h. Corrosion of tack strip fasteners.

Roofing Items of Concern

- a. Missing shingles;
- b. Numerous patches;
- c. Distressed flashing;
- d. Rotting fascia boards;
- e. Leaking around skylights;
- f. Lack of properly fastened and installed singles;
- g. Lack of drip edge at rakes and peaks;
- h. Poor attic ventilation;
- i. A number of existing hurricane ties are missing, corroded and/or improperly installed;
- j. Soft areas and visible deflections in roof deck;
- k. Tarps on Roofs; and
- l. Rotten eaves/soffits.

36. Based upon the severe level of distress in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII, the consultants agreed that these defective conditions did not just develop within the past few years. The consultants' repair and replacement recommendations and approaches for executing the repairs and replacements varied, but typically included:

- a. Replacement of the floor sheathing and flashing, and installation of waterproofing on all balconies and corridors;
- b. Replacement of the remaining stucco on the gable ends with fiber cement siding to prevent future water intrusion and reduce maintenance;
- c. Remove and replace deteriorated cedar siding, trim, and flashing on all balconies and corridors;

- d. Remove and replace deteriorated and damaged guardrails on all balconies and corridors;
- e. Replacement of the deteriorated post connections on all balconies and corridors;
- f. Replacement of the delaminated cradle framing on all balconies and corridors;
- g. Replacement of all balcony sliding glass doors that have exceeded their typical life expectancy (greater than 20 years since installed);
- h. Replacement of all corroded bolts, nuts, and washers with stainless steel;
- i. Remove and replace windows and sliding glass doors and contiguous damaged framing;
- j. Repair or replace distressed exterior trim, siding, and flashing;
- k. Replacement of the roofing systems and/or defective roofing components on all buildings;
- l. Replacement of visible and/or hidden termite damage in all buildings;
- m. Repair and replacement of all leaks currently occurring in all building envelopes; and
- n. Replacement of all existing defective building components in violation of §23-129.3(1) of the Zoning Code for the City of North Myrtle Beach.

E. THE BOARD'S SUBSEQUENT ACTIONS IN 2016

37. In June of 2015, the Board hired Saul Martinez, P.E. ("Martinez") of Martinez & Associates Structural Engineers, PA ("Martinez & Associates"), and requested that it assess the current condition of the structural systems and the exterior envelope of the Project's twelve (12) buildings.

38. Martinez & Associates' field observations of the maintenance and repair condition of the various building components was itemized in a "Building Summary and Field Itemization Table" for each building included in its investigative report entitled Phase I: Existing

Condition Evaluation of Assessment for Tilghman Beach & Racquet Club Ocean Front & Second Row Buildings, submitted by Martinez & Associates Structural Engineers, PA dated June 2015 (“Investigative Report of Martinez & Associates”).

39. In January of 2016, the Board hired Steve Goggans, AIA of SGA Architecture, LLC, (“SGA”) to prepare a comprehensive capital improvement plan to complete all the necessary repair and restoration work on Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII. This restoration plan for the remaining eleven (11) building was based upon the reports prepared by professional engineers focusing on the structural systems and exterior envelope systems of the buildings in the Regime as well as the combined experience and knowledge gained from making and completing all necessary repairs to Building III. Specifically, SGA agreed to provide professional management services to assemble the contract documents, put the project out to competitive bid, and provide construction administration through the duration of the construction. A copy of their AIA Document B101-2007 Standard Form Agreement is attached hereto as (Exhibit “B”) and incorporated by reference as part of this Third Amended Complaint.

40. In January of 2016, Goggans issued a Letter from SGA Architecture to the Tilghman Beach & Racquet Club Homeowners Association, Inc., (“Association”) which provides in pertinent part:

3. Given the damage to Building 6, which is similar to Building 2, *my concern at this point is that the structural problems are systemic throughout the whole property. The damage to Building 6 is severe. Further delay in curing these problems will lead to further damage, increasingly costly repairs, and ultimately, structural failure.* Therefore, I respectfully recommend that the Board convene a meeting to discuss a more comprehensive and expeditious approach to affecting a long term repair and stabilization solution for the entire property. I will make myself as available as possible for such a meeting. Given the issues and damage observed thus far, this matter should be treated with urgency. A copy of the January 2016 Letter from SGA to the Association, Inc., is attached

hereto as (Exhibit "C") and incorporated by reference as part of this Third Amended Complaint.

41. At the February 6, 2016 special meeting, in response to questions from Co-owners, the Board's consultants, Martinez and Goggans, concurred in advising the Board and the Co-owners regarding the urgency of making necessary repairs to the Project's defective and deficient buildings. A summary of their opinions and recommendations, recorded and accepted by former Board President Carl W. Atkinson, Jr., is as follows:

- a. That TB&RC has major structural and water intrusion damage issues;
- b. The problems with water intrusion in the eleven (11) buildings are at a point where the damage is increasing at an even greater acceleration rate;
- c. The handrail systems in the eleven (11) buildings are dangerous and unsafe;
- d. Unless major corrective action is taken immediately the buildings are likely to have a life expectancy of not more than four (4) years after which they will be unrepairable due to the prohibitory cost of repair;
- e. That the best repair approach would be a systematic, comprehensive approach to repairs for each building. Stated differently, repair all defects and/or problems with each building in its entirety as you proceed;
- f. That a systemic comprehensive repair approach is needed to accomplish the repairs for the defective buildings rather than a piecemeal, patch and repair approach; and
- g. That a systemic comprehensive repair approach would also be the most economical and cost effective restoration plan for the defective buildings in the long run.

42. Further, current Board members Madison, Coe as well as unit owner Windle, in February 2016 recommended a construction process⁴ for the Board to follow for identifying and implementing all necessary repair work in the future at TB&RC. Specifically, the construction

⁴ A copy of the construction process for future repairs to Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII, prepared and recommended by current board members Madison, Coe and Windle, is attached hereto as (Exhibit "D") and incorporated by reference as part of this Complaint.

process proposed for future repair (outlined by Madison, Coe and Windle) included following particulars in pertinent part:

- a. The Board shall have a detailed forensic analysis performed on Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII by an architectural/engineering firm (not just a structural engineer) to determine all necessary repairs for the Project's General Common Elements and Limited Common Elements;
- b. The Board shall have an architectural/engineering firm prepare design drawings and specifications in relation to all necessary repairs for the Project's General Common Elements and Limited Common Elements; and
- c. The Board shall submit design drawings and specifications for the repairs to at least three (3) commercial contractors to obtain proposals from the contractor for the performance of the required repairs.

43. Notwithstanding the opinions and/or recommendations from Martinez and Goggans, the Defendant Association and its current individual Directors Austin, Coe, Madison, White, and Windle have failed or otherwise refused to undertake these necessary repairs to eliminate the major structural and water intrusion damage, the leaks, and to protect the General Common Elements and Limited Common Elements from future damage, or even to assess the Co-owners for the necessary repair cost thereof, all as required under the Master Deed and By-Laws.

44. The individual Defendants Austin, Coe, Madison, White, and Windle, upon information and belief, while acting outside their official capacity as Members of the Board of Directors for the Defendant Association, have conspired together for the unlawful purpose of masking the true state of disrepair of the Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII of the Defendant Association, thus deceiving Co-owners regarding the necessary repairs needed to fix the aforementioned buildings as recommended by the Defendant Association's consultants and experts as described above.

45. Furthermore, the existing and ongoing water intrusion problems and defective building conditions at the Project are the result of the Defendant Association and the individual Defendants Coe, Madison, and Windle's failure to follow their own recommended construction procedure and/or process for determining and completing all necessary repairs to defective and deficient General Common Elements and Limited Common Elements as well as their failure to comply with their expressed affirmative duties under the governing documents and State law.

46. The defects in the maintenance, replacement, and repair of the General Common Elements and Limited Common Elements complained of include, but are not limited to, the following:

- a. Failure and/or lack of a waterproofing system has caused severe damage to the structural components of the buildings by allowing water to infiltrate the buildings;
- b. Waterproofing was not installed at some areas requiring waterproofing;
- c. Lack of proper door/window flashing has caused water to infiltrate buildings;
- d. Mold has contaminated portions of the buildings due to water intrusion;
- e. Termite damage has occurred in portions of the buildings due to water intrusion;
- f. Improper maintenance and/or repair of roofs and roofing materials;
- g. Improper maintenance and/or repair of cedar siding, trim, and flashing;
- h. Improper maintenance and/or repair of the pier system's bracing connections;
- i. Improperly maintained and/or inadequately repaired guardrails throughout the Project including corridors and balconies;
- j. Improperly maintained and/or inadequately repaired guardrail posts and post connectors throughout the Project including corridors and balconies;
- k. Improperly maintained and/or inadequately repaired floor framing

throughout the Project including corridors and balconies;

- l. Improperly maintained and/or inadequately repaired cradle beam/girder systems at the first level only of the building corridors and balconies;
- m. Improperly maintained and/or inadequately repaired ceiling soffits throughout the Project including corridors and stairwells;
- n. Improperly maintained and/or repaired exterior decks and balconies which are suffering deterioration and damage to the structural components;
- o. Improperly maintained and/or repaired gable end walls and stair tower walls which are suffering deterioration and damage throughout the Project;
- p. Failure to maintain and/or repair the buildings in accordance with the applicable building codes and/or in conformance with the product manufacturer's installation instructions; and
- q. Failure to maintain detailed records of repair projects to the common elements to include dates of repair, material brand/type, color, material warranty information, and name and contact information of contractor and contractor warranty information.

47. Actual property damage to the Project has been caused by continuous and repeated exposure to moisture and water seeping into and around the walls, terminations, windows, doors, and intersections, resulting from the negligent and grossly negligent maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements performed by the Defendant Association and individual Defendants Austin, Coe, Madison, White, and Windle. Consequently, continuous, and repeated water intrusion has resulted in physical property damage, including severe damage, rot and deterioration of the buildings and their structural components. Due to the lack of proper maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements in violation of its governing documents, continuous and repeated exposure to harmful conditions,

including water intrusion, has occurred, resulting in physical and consequential damages, including but not limited to the following:

- a. physical injury to tangible property and/or the work of others caused by the continuous and repeated exposure to substantially the same harmful conditions including excessive moisture from water infiltration in and around improperly maintained, replaced, and repaired common elements, including doors and windows; and
- b. physical injury to tangible property, premature deterioration of building components and/or damage and deterioration to the work of others caused by the continuous and repeated exposure to substantially the same harmful conditions including excessive moisture from water infiltration in and around negligently maintained, replaced, and repaired exterior cladding, sealants, joints, caulk, and waterproofing systems.

48. The negligent and grossly negligent acts of omission and commission by the Association and individual Defendants and damage that resulted therefrom were foreseeable.

49. Upon information and belief, the defective maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements by the Defendants was inspected by its insurance agents, none of whom detected the inadequate maintenance nor comprehended the resulting damage therefrom. Further, upon information and belief, the damage which exists at the Project were unintended from the stand point of these Defendants.

50. As a direct and proximate result and consequence of the safety defects and structural problems at the Project, the Project has been severely damaged as a result of moisture intrusion and Plaintiffs have spent, and will continue to spend, substantial sums of money for the extraordinary repairs and reconstruction of major portions of the General Common Elements and Limited Common Elements at the Project. The buildings at the Project have suffered actual damage caused by exposure to water seeping into the walls that resulted from the grossly negligent maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements.

FOR A FIRST CAUSE OF ACTION
**(Negligence/Gross Negligence as to Tilghman Beach and Racquet
Club Condominium Association, Inc.)**

51. The Plaintiffs reiterate each and every allegation set forth above as if fully incorporated herein.

52. Defendant Association owed a duty of due care to the Plaintiffs to appropriately manage the affairs of the regime, and to investigate, maintain and repair the General Common Elements and Limited Common Elements with respect to any water intrusion problems, unsafe building conditions, and structural defects and deficiencies discovered in them. Lastly, Defendant Association had an affirmative duty to adequately assess the Co-owners to fund the reserves and make all necessary repairs in the Common Elements including building components in a timely manner, and also to prevent similar defects and deficiencies from occurring in the future.

53. Defendant Association breached its affirmative duties as set forth above, and was negligent, grossly negligent, reckless, willful and wanton in failing to discharge them in one or more of the following particulars, to wit:

- a. In failing to plan for the necessary maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements since its inception;
- b. In failing to have a detailed forensic analysis performed on Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII by an architectural/engineering firm to determine all necessary repairs for the Project's General Common Elements and Limited Common Elements;
- c. In failing to have an architectural/engineering firm prepare design drawings and specifications in relation to all necessary repairs for the Project's General Common Elements and Limited Common Elements;
- d. In failing to submit any design drawings and specifications for known defective conditions in the Project's General Common Elements and

Limited Common Elements to at least three (3) commercial contractors to obtain proposals from them for the performance of the required repairs;

- e. In failing to completely repair and replace all defective and deficient conditions in the Project's General Common Elements and Limited Common Elements in timely and code compliant manner as recommended by their consultants and legal advisors;
- f. In failing to assess the Co-owners for the necessary repairs needed to fix the Project's defective and deficient General Common Elements and Limited Common Elements as recommended by their consultants and legal advisors;
- g. In failing to adequately fund the reserves for the necessary maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements since its completion and certification of occupancy;
- h. In failing to employ experienced contractors, architects, and engineers to inspect, maintain, and completely repair the Project's defective and deficient General Common Elements and Limited Common Elements prior to 2013;
- i. In failing to pursue a recovery and institute litigation against all responsible parties for the original construction defects and deficiencies associated with the design and construction of the buildings;
- j. In failing to conduct a timely reserve study to plan and prepare for the future maintenance, replacement, and repair cost associated with the Project's General Common Elements and Limited Common Elements;
- k. In failing to assess the co-owners or otherwise adequately fund the reserves so that necessary funds would be available to mitigate the substantial damages which were and are resulting from the aforementioned defects and deficiencies in the Project's General Common Elements and Limited Common Elements due to inadequate maintenance and repairs;
- l. In failing to maintain, repair, and replace all defective building components in accordance with the applicable building codes and zoning ordinance for the city of North Myrtle Beach, and/or in conformance with the product manufacturer's installation instructions;
- m. In failing to perform timely and necessary repair work to the Project's General Common Elements and Limited Common Elements which has

caused substantial and ongoing damages to these buildings stemming from water infiltration;

- n. In failing to levy any assessment or even adequate assessment against all the co-owners needed to fix the defective and deficient General Common Elements and Limited Common Elements for Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII since the reserve fund is currently inadequate to finance the costs for fixing these buildings. This unreasonable delay in facilitating repairs to the regime property has caused substantial and ongoing damages to these buildings' Common Elements stemming from water infiltration;
 - o. In failing to fully investigate and obtain reports concerning the structural integrity of Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII as well as a complete forensic analysis and scope of repair addressing all of their water infiltration problems;
 - p. In failing to obtain competitive bids from qualified and experienced contractors for the extensive and necessary repair and reconstruction work being performed on the defective and deficient General Common Elements and Limited Common Elements of Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII. This *ultra vires* action violates State law;
 - q. In failing to ensure that current repair and reconstruction work being performed on the defective and deficient General Common Elements and Limited Common Elements for Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII complies with the applicable building codes, regulations, product specifications, and guidelines in the design and reconstruction of these buildings;
 - r. In failing to previously identify, reserve for, and implement a more rational and economically palatable program to systematically maintain the buildings' exterior building envelope over time, through normal annual assessment fee collections from the Co-owners. This inaction and violation of the governing documents resulted from the mismanagement of the Association;
 - s. In failing to pursue those responsible for the maintenance defects and damages; and
 - t. In acting unreasonably in other such ways as may be revealed during the discovery and as shown at the trial of this action.
54. As a direct and proximate result and consequence of the negligence, gross

negligence, and/or willful and wanton conduct of the Defendant Association, the Plaintiffs have suffered injuries and damages in their pro-rata share of the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structures, or, in the alternative, the loss of use, and depreciation in fair market value of their individual units, and such punitive damages as may be appropriate. Furthermore, the Plaintiffs will be subject to economic loss damages due to the budget deficits, inadequate reserves (resulting from failure to plan for future maintenance and repair of building components), and special repair and reconstruction assessment directly resulting from Defendant Association's negligent and reckless conduct. These monetary damages are a direct and proximate result of the Defendant Association's errors, omissions, and breaches of affirmative duties directly related to its management and operation of the regime property as described above. Accordingly, the Plaintiffs are entitled to recover a judgment against the Defendant Association for all direct, indirect, resulting consequential and punitive damages in an amount to be determined at trial of this case.

FOR A SECOND CAUSE OF ACTION

**(Gross Negligence as to Individual Defendants James H. Austin, III,
Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III)**

55. The Plaintiffs reiterate each and every allegation set forth above as if fully incorporated herein.

56. At all times relevant hereto, the individual Defendants Austin, Coe, Madison, White, and Windle, as the current Board of Directors for the Association, owed a duty of due care to the Plaintiffs to appropriately manage the affairs of the Association, and to investigate, maintain and repair the General Common Elements and Limited Common Elements with respect to any water intrusion problems, unsafe building conditions, and structural defects and

deficiencies discovered in them. Lastly, the individual Defendants Austin, Coe, Madison, White, and Windle had an affirmative duty to adequately assess the Co-owners to fund the reserves and make all necessary repairs in the Common Elements in a timely manner, and also to prevent similar defects and deficiencies from occurring in the future.

57. The individual Defendants Austin, Coe, Madison, White, and Windle, while acting outside their official capacity as members of the Board of Directors for the Defendant Association, have breached and continue to breach their affirmative duties and State law as set forth above, and were grossly negligent, reckless, wilful, and wanton in failing to discharge them in one or more of the following particulars, to wit:

- a. In failing to have a detailed forensic analysis performed on Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII by an architectural/engineering firm to determine all necessary repairs for the Project's General Common Elements and Limited Common Elements;
- b. In failing to prepare a comprehensive capital improvement plan to complete all the necessary repair and restoration work on Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII including hiring an architectural/engineering firm to prepare design drawings and specifications in relation to all necessary repairs for the Project's General Common Elements and Limited Common Elements;
- c. In failing to submit any design drawings and specifications for known defective conditions in the Project's General Common Elements and Limited Common Elements to at least three (3) commercial contractors to obtain proposals from them for the performance of the required repairs;
- d. In failing to completely repair and replace all defective and deficient conditions in the Project's General Common Elements and Limited Common Elements in timely and code compliant manner as recommended by their consultants and legal advisors;
- e. In failing to assess the Co-owners for all necessary repairs needed to fix the Project's defective and deficient General Common Elements and Limited Common Elements as recommended by their consultants and legal advisors;

- f. In failing to adequately fund the reserves for the necessary maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements since its completion and certification of occupancy from February 26, 2016 to the present;
- g. In failing to employ experienced contractors, architects, and engineers to inspect, maintain, and completely repair the Project's defective and deficient General Common Elements and Limited Common Elements from February 26, 2016 to the present date;
- h. In failing to pursue a recovery and institute litigation against all responsible parties for the original construction defects and deficiencies associated with the design and construction of the buildings from February 26, 2016 to the present date;
- i. In failing to conduct a timely reserve study to plan and prepare for the future maintenance, replacement, and repair cost associated with the Project's General Common Elements and Limited Common Elements from February 26, 2016 to the present date;
- j. In failing to assess the Co-owners or otherwise adequately fund the reserves so that necessary funds would be available to mitigate the substantial damages which were and are resulting from the aforementioned defects and deficiencies in the Project's General Common Elements and Limited Common Elements due to inadequate maintenance and repairs from February 26, 2016 to the present;
- k. In failing to maintain, repair, and replace all defective building components in accordance with the applicable building codes and zoning ordinance for the city of North Myrtle Beach, and/or in conformance with the product manufacturer's installation instructions from February 26, 2016 to the present;
- l. In failing to perform timely and necessary repair work to the Project's General Common Elements and Limited Common Elements which has caused substantial and ongoing damages to these buildings stemming from water infiltration from February 26, 2016 to the present;
- m. In failing to levy any assessment or even adequate assessment against all the co-owners needed to fix the defective and deficient General Common Elements and Limited Common Elements for Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII since the reserve fund is currently inadequate to finance the costs for fixing these buildings. This unreasonable delay in facilitating repairs to the regime property has caused substantial and ongoing damages to these buildings' Common

Elements stemming from water infiltration from February 26, 2016 to the present;

- n. In failing to fully investigate and obtain reports concerning the structural integrity of Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII as well as a complete forensic analysis and scope of repair addressing all of their water infiltration problems;
- o. In failing to obtain competitive bids from qualified and experienced contractors for the extensive and necessary repair and reconstruction work being performed on the defective and deficient General Common Elements and Limited Common Elements of Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII after terminating the employment. This *ultra vires* action violates State law; and
- p. In failing to ensure that current repair and reconstruction work being performed on the defective and deficient General Common Elements and Limited Common Elements for Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII complies with the applicable building codes, regulations, product specifications, and guidelines in the design and reconstruction of these buildings.

58. The actions, omissions, and/or failures to act of individual Defendants, Austin, Coe, Madison, White, and Windle, acting individually as set forth hereinabove, were not in good faith and involved gross negligence and reckless conduct on their part as well as knowing violations of State law as described above. Further, individual Defendants Austin, Coe, Madison, White, and Windle as the current Board members have participated in, authorized, or otherwise directed affairs of the Association through their acts, omissions, and/or failures to discharge their affirmative duties in good faith under the Master Deed and By-laws.

59. As a direct and proximate result and consequence of gross negligence, and/or willful and wanton conduct of the individual Defendants, Austin, Coe, Madison, White, and Windle, while acting outside their official capacity, the Plaintiffs have suffered injuries and damages and continue to suffer the same in the amount of their pro-rata share of the extraordinary repair, maintenance and reconstruction cost required and to be

required over the expected life of the structures, the loss of use, and depreciation in fair market value of their individual units, and such punitive damages as may be appropriate.

60. For the foregoing reasons, the Plaintiffs are entitled to a judgment against the individual the Defendants, Austin, Coe, Madison, White, and Windle, acting individually, for all direct, indirect, resulting consequential and punitive damages in an amount to be determined at trial of this case.

FOR A THIRD CAUSE OF ACTION

(Breach of the Master Deed's Covenants and Restrictions as to Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III)

61. The Plaintiffs reiterate each and every allegation set forth above as if fully incorporated herein.

62. The condominium's recorded documents, such as declarations or By-Laws, constitute a contract between the Regime on the one side and the Co-owners on the other side. The failure of the Defendant Association and individual Defendants Austin, Coe, Madison, White, and Windle to comply with the provisions of the restrictions and/or the governing documents gives rise to an action for breach of contract by an aggrieved Co-owner.⁵ Specifically, Article XXVII of the Master Deed provides in pertinent part:

Failure to comply with any of the terms of the Master Deed or other restrictions and regulations contained in the Charter, or By-Laws of the Association, . . . *shall be grounds for relief which may include, but not be limited to an action to recover sums due for damages . . . by an aggrieved Co-owner of an Apartment.*

63. Article VIII of the Master Deed makes "[e]ach every apartment and the Common

⁵ See Murphy v. Yacht Cove Homeowners Ass'n., 289 S.C. 367, 345 S.E.2d 709 (1986), where the South Carolina Supreme Court held "*that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association*" for failure to discharge its duties under the Bylaws related to the maintenance and repair of the common elements. 289 S.C. at 369, 345 S.E.2d at 710.

Elements . . . subject to the restrictions, easements, conditions and covenants prescribed and established herein, . . . set[s] forth the obligations and responsibilities incident to ownership of each Apartment. . . .”

64. Defendant Association and individual Defendants Austin, Coe, Madison, White, and Windle have breached their affirmative duties as set forth above, and have specifically violated and continue to violate §§§ 4(j)(ii) and (vii), 7(b)(I), and 11(a)(b) and (e) of the By-Laws and Articles XX, XXI, and XXVII of the Master Deed by failing to discharge their affirmative duties through inadequate maintenance, repair, and replacement of the Project’s General Common Elements and Limited Common Elements, and also failing to adequately fund the reserves to rectify all known defects and deficiencies in the Common Elements, and to prevent similar defects and deficiencies in the future.

65. As a direct and proximate result and consequence of the Defendant Association and individual Defendants Austin, Coe, Madison, White, and Windle’s failure to discharge their above-referenced affirmative duties in good faith, the Plaintiffs have suffered and continue to suffer injuries and damages in a pro-rata share of the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structures, or, in the alternative, the loss of use and depreciation in fair market value of their individual units; therefore, they are entitled to recover from Defendants all their direct, consequential, and actual damages in amount to be proven at trial.

FOR A FOURTH CAUSE OF ACTION

(Declaratory Judgment as to Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III)

66. The Plaintiffs reiterate each and every allegation set forth above as if fully incorporated herein.

67. This is an action for declaratory judgment relief pursuant to the Uniform Declaratory Judgment Act of South Carolina, as set forth in §15-53-10 et seq., of the South Carolina Code of Laws, 1976, as amended, to determine the rights, status or other legal relations of the parties regarding the current and future maintenance, repair, and replacement of the Project's defective and deficient General Common Elements and Limited Common Elements.

68. Specifically, § 15-53-30 provides:

Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

69. A justiciable controversy exists between the parties regarding their rights, status, and legal relations with respect to Project's Master Deed and By-Laws, the Act, and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach for the reasons described in Paragraphs 31 through 47 of the Third Amended Complaint.

70. Plaintiffs may not have an adequate remedy at law.

71. Plaintiffs desire a judicial determination for one or more of the following declarations as relief:

- a. For a declaration that the TB&RC's governing documents impose an affirmative duty on the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to timely repair and replace all defective and deficient General Common Elements and Limited Common Elements identified and currently existing in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII. To find and declare the Defendants have failed to timely maintain, repair and replace the defective and deficient General Common Elements and Limited Common Elements located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII, and thereby are responsible for the extraordinarily high cost of the repairs or restoration of these

deficient buildings, which have and will increase substantially over the structures' remaining useful life.

b. For a declaration that the TB&RC's governing documents, as well as State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to take immediate action to effectuate the complete removal and replacement of all distressed building components, including, but not limited to:

- (1) All the defective balcony systems in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
- (2) All the defective corridor structural elements (plywood, joists and beams) in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
- (3) All the defective corridor railing systems (railings, posts and pickets) in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
- (4) All the defective connectors with the loss of metal in excess of Twenty-Five (25) percent in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
- (5) The defective roofing systems on Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII identified by the Defendants' consultants and the Plaintiffs' expert;
- (6) All the decayed and rotten exterior wood siding/trim and flashing in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert; and
- (7) All the defective sliding glass doors in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert.

c. For a declaration that the TB&RC's governing documents, together with State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to

develop a systematic and comprehensive plan for the timely and economically feasible removal and replacement of all defective building components located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII instead of piecemeal approach that is currently being utilized by the Defendants which is not cost effective reconstruction.

- d. For a declaration that the TB&RC's governing documents, together with the State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require to the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to thoroughly investigate all known and/or reasonably suspected defective and deficient conditions in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII without delay in order to avoid a complete failure of the building systems rendering them unsafe as well as economically unfeasible to reconstruct.
- e. For a declaration that the TB&RC's governing documents impose an affirmative duty on the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to adequately fund reserves for the necessary maintenance, repair and replacement of the General Common Elements and Limited Common Elements of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII.
- f. For a declaration that the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, have failed to adequately fund reserves for the necessary maintenance, repair and replacement of the General Common Elements and Limited Common Elements of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII. To find and declare that the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, have failed to adequately fund reserves for the necessary maintenance, repair and replacement of the defective and deficient General Common Elements and Limited Common Elements of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII, and thereby are responsible for the extraordinarily high cost of the repairs or restoration of these deficient buildings, which have and will increase substantially over the structures' remaining useful life.
- g. For a Declaration that the TB&RC's governing documents, together with the State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively provide the Plaintiffs with the right to consider and decide whether Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII are repairable from a practical standpoint, as well

as whether it is economically feasible to reconstruct these deficient and defective buildings under the current building code.

- h. For a declaration that the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle's bad faith conduct, *ultra vires* acts, and failure to discharge their affirmative duties, regarding the maintenance, repair, and replacement of the regime's General Common Elements and Limited Common Elements, are not protected by the business judgment rule.
- i. For a declaration that the TB&RC's governing documents as well as State law impose an affirmative duty on the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as directors, as the underlying agents and representatives of the Co-owners, to levy an assessment against all Co-owners for establishing the necessary repair funds to fix the defective and deficient General Common Elements and Limited Common Elements of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII stemming from past and ongoing water infiltration.
- j. Any and all other relief that deemed to be necessary and proper by the Court.

72. Such declarations are necessary and proper at this time in order that the Plaintiffs may ascertain their rights and duties as co-owners against the Defendants.

FOR A FIFTH CAUSE OF ACTION

(Injunctive Relief as to Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III)

73. The Plaintiffs reiterate each and every allegation set forth above as if fully incorporated herein.

74. Plaintiffs have suffered injuries, harm, and damages in an amount equal to their pro-rata share of the extraordinary repair, maintenance and reconstruction cost required to fix their structures, including depreciation in value of their units as a result of the Defendant Association and Defendants Austin, Coe, Madison, White, and Windle's continual failure to discharge their affirmative duties related to the inadequate maintenance, repair, and replacement of the Project's defective, deficient, and unsafe General Common Elements and Limited

Common Elements. These allegations are supported by the factual findings set forth in the Amended Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs Expert John Simko, P.E., attached hereto as (Exhibits “E” and “F”) and incorporated by reference as part of this Third Amended Complaint.

75. Injunctive relief is necessary to remedy the past violations of the Defendants’ conduct and to prevent future injury, harm, and depreciation in value to the Plaintiffs’ property interest including their individual units and the Regime’s Common Elements.

76. Both S.C. Code Ann. § 27-31-170 (2007) and Article XXVII of Master Deed authorize the Plaintiffs as “aggrieved Co-owners” with the contractual right to bring an action for injunctive relief to compel the Board to comply with its affirmative duties under the By-Laws to repair and replace the Project’s defective and deficient General Common Elements and Limited Common Elements. Specifically, Article XXVII of the Master Deed provides in pertinent part:

Failure to comply with any of the terms of the Master Deed or other restrictions and regulations contained in the Charter, or By-Laws of the Association, . . . shall be grounds for relief which may include, but not be limited to an action to recover sums due for damages, injunctive relief, . . . which relief may be sought, . . . by an aggrieved Co-owner of an Apartment

77. Plaintiffs have no adequate remedy at law for the above-described acts of omission and commission of the Defendants, and Plaintiffs will suffer irreparable harm as evidenced by the findings set forth in the Amended Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs Expert John Simko, P.E., attached hereto as (Exhibits “E” and “F”) unless they obtain injunctive relief for the reasons described below.

78. Plaintiffs seek injunctive relief from the Court in one or more of the

following particulars:

- a. To issue a mandatory injunction requiring the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to immediately comply with their affirmative duties, under the TB&RC's governing documents, State law, and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, to completely replace and totally repair all distressed building conditions in the Project's General Common Elements and Limited Common Elements previously identified by the Defendant's consultants and the Plaintiffs' expert, including, but not limited to:
 - (1) All the defective balcony systems located in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII;
 - (2) All the defective corridor structural elements (plywood, joists and beams) located in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII;
 - (3) All the defective corridor railing systems (railings, posts and pickets) located in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII;
 - (4) All the defective bolts, and/or connectors with the loss of metal in excess of Twenty-Five (25) percent located in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII;
 - (5) The defective roofing systems installed on Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII;
 - (6) All the decayed and rotten exterior wood siding/trim and flashing located in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII; and
 - (7) All the defective sliding glass door systems located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII.
- b. To issue a mandatory injunction requiring the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to immediately comply with their affirmative duty, under the TB&RC's governing documents, State law, and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, to completely investigate all known and/or reasonable suspected defective conditions currently existing in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII in

order to determine the proper scope of repair as well as the actual replacement cost needed for all of the damaged buildings components;

- c. To issue a mandatory injunction requiring the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to obtain reports concerning the structural integrity of Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, the current state of the subflooring, balcony systems, and other structural elements. To also obtain reports regarding the performance standards of the windows and sliding glass door systems, the mold content of each building, and then fund the remediation of any problems noted through the use of reserves and a subsequent assessment applicable to all co-owners;
- d. To issue a mandatory injunction requiring the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to levy an assessment against all the co-owners for the necessary repairs to fix the defective and deficient General Common Elements and Limited Common Elements of Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII due to the fact that the reserve fund is currently inadequate to finance the costs for fixing these defective and deficient buildings ; and
- e. For such other and further injunctive relief as this Court may deem just and proper.

FOR A SIXTH CAUSE OF ACTION

(Specific Performance as to Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, aniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III)

79. The Plaintiffs reiterate each and every allegation set forth above as if fully incorporated herein.

80. Defendant Association and Defendants Austin, Coe, Madison, White, and Windle in their capacity as directors have breached and continue to breach their affirmative duties and obligations owed to the Plaintiffs through their failure to repair damage to the General Common Elements and Limited Common Elements, as prescribed by the Project's Master Deed and By-Laws.

81. Defendant Association and individual Defendants Austin, Coe, Madison, White,

and Windle, acting individually, and/or as the underlying agents and representatives of the Co-owners, have further breached their affirmative duties and obligations owed to the Plaintiffs by failing to effect the necessary repairs to the damaged General Common Elements and Limited Common Elements located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII as evidenced by the factual findings set forth in the Amended Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs Expert John Simko, P.E., attached hereto as (Exhibits “E” and “F”) and incorporated by reference as part of this Third Amended Complaint.

82. Plaintiffs request an Order of the Court entering a judgment on their behalf requiring the Defendant Association and Defendants Austin, Coe, Madison, White, and Windle, acting individually, and/or as the underlying agents and representatives of the Co-owners, to specifically perform their affirmative duties and obligations under the Master Deed and By-Laws by making all necessary repairs to the defective and deficient General Common Elements and Limited Common Elements and individual units located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII.

FOR A SEVENTH CAUSE OF ACTION
(Ultra Vires Acts as to Daniel G. Coe and C. Doug Madison)

83. The Plaintiffs reiterate each and every relevant allegation set forth above as if fully incorporated herein.

84. Individual Defendants Coe and Madison, as members of the Board of Directors of the Defendant Association from March 2015 through present date, voted (along with Plaintiffs, Jill Humphries and Dennis Johnson, Jr.) to make necessary repairs approximately in the amount of Five Hundred and Fifty-Three Thousand No/100 (\$553,000.00) Dollars to Building III of the TB&RC pursuant to the advise and recommendations of their consultants,

Martinez & Associates Structural Engineers, PA, and A & I Construction as well as their construction attorney Amanda Bailey.

85. However, the Defendant Association now asserts a Counterclaim against the Plaintiffs, Jill Humphries and Dennis Johnson, Jr., for allegedly committing *ultra vires* acts, specifically in Paragraph 135, by contending that "[t]he work performed on Building 3 altered, modified, and improved upon that which was there and substantially changed the aesthetics, or "look" of Building 3," violated Article XIX of the Master Deed. Defendant Association further alleges that the "*alterations, modifications, and improvements*" which violated of Article XIX of the Master Deed included "a new roof, new skylights, new gutters, new PVC handrails, new steel beams (the cost of which exceeded the cost of utilizing new wood beams), changing the paint color, changing the screened in porches by using a metal grid system as opposed to the wooden system, and decreasing the size of each screened in porch."

86. Pursuant to Article XIX of the Master Deed any "*alterations, modifications, and improvements*" that exceed ten (10%) percent of the Association's budget for the prior year must be approved by fifty-one (51%) percent of the Association's ownership.

87. Defendant Association alleges, specifically in Paragraph 135 of its Answer and Counterclaim that "alterations, modifications, and improvements" were approved by Plaintiffs, Jill Humphries and Dennis Johnson, Jr., without obtaining the approval of fifty-one (51%) percent of the Association as required by the Master Deed and in breach of the Master Deed which is expressly denied by them.

88. Assuming the allegations are true in Paragraphs 133 through 138 of Defendant Association's Answer and Counterclaims, which is expressly denied, then the individual Defendants Coe and Madison, acting individually, would also be liable too for their direction,

authorization, or otherwise direct participation in the alleged *ultra vires* conduct as described above. For the record, the Plaintiffs Jill Humphries and Dennis Johnson, Jr., specifically deny all allegations asserted in Paragraphs 133 through 138 of Defendant's Answer and Counterclaims

FOR AN EIGHTH CAUSE OF ACTION

(*Ultra Vires* Acts and Reckless, Wilful, and Wanton Conduct as to James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III)

89. The Plaintiffs reiterate each and every relevant allegation set forth above as if fully incorporated herein.

90. As of March 17, 2016, the individual Defendants Austin, Coe, Madison, White and Windle were serving as the current Board of Directors for the Defendant Association.

91. Article I, Paragraph 4(j) (ii) of the By-Laws addresses the Board's affirmative duties regarding its "*maintenance, repair, and replacement . . . of the general and limited elements*":

Paragraph 4(j) (ii) of the By-Laws addresses the Board's affirmative duties regarding its "*maintenance, repair, and replacement . . . of the general and limited elements*":

The Board of Directors shall manage and direct the affairs of the Association and subject to any restrictions imposed by law, by the Master Deed, or these By-Laws . . The Board of Directors *shall* exercise such duties and responsibilities as *shall* be incumbent upon it by law, the Master Deed, these By-Laws, or as it *may deem necessary* or appropriate in the exercise of its powers and *shall* include, without limited the generality of the foregoing, the following:

. . .

(ii) To *carry out the maintenance, care, upkeep, repair, replacement, operation, . . and the management of the general and limited elements*, services and facilities or the Regime wherever the same is required to be done and accomplished by the Association for the benefit of its members.

92. Article I, Paragraph 7 of the By-Laws defines the Board's affirmative duties and

responsibilities for the “fiscal management” of the Association. Specifically, the Board’s budgetary funding responsibilities for the *necessary maintenance and operation of Common Elements* are addressed in subparagraph 7(b) in pertinent part:

The Board of Directors shall adopt a budget for each calendar year which shall contain estimates of the cost of performing the functions of the Association, including, but not limited to, the following items:

- (i) Common expense budget, which *shall include* without limiting the generality of the foregoing, the estimated amounts *necessary for maintenance and operation of Common Elements*, landscaping, street and walkways, office expense, swimming pool, utility services, casualty insurance, liability insurance, *administration and reserves (operating and replacement)*; and

93. Lastly, Article I, Paragraphs 11(d) and (e) address the Board’s affirmative duties to establish an annual operating budget for the operation, maintenance and repair of the Project’s Common Elements, and to collect and maintain a reserve fund for the future replacement of structural common elements. These paragraphs provide in pertinent part:

- (d) The Board of Directors . . . *shall include therein a sum to be collected and maintained as reserve fund for replacement of Common Elements, which reserve fund shall be for the purpose of enabling the Association to replace structural elements and mechanical equipment constituting a part of the Common Elements* as well as the replacement of personal property which may constitute a portion of the Common Elements held for the joint use and benefit of all of the co-owners of all Apartments. *The amount to be allocated to such reserve fund for replacements shall be established by said Board of Directors so as to accrue and maintain at all times a sum reasonably necessary to anticipate the need for replacements of said Common Elements*; and
- (e) The Board of Directors . . . *shall include therein a sum to be collected and maintained as a general operating reserve which shall be used to provide a measure of financial stability during periods of special stress* when such sums may be used to meet deficiencies from time to time existing as a result of delinquent payment of assessments by Co-owners of Apartments, as a result of emergencies or *for other reason placing financial stress upon the Association.*

94. Based upon the above cited provisions of the By-Laws, the individual

Defendants Austin, Coe, Madison, White and Windle, have the exclusive responsibility to investigate, maintain and repair, and replace the Common Elements and other building components in a timely manner. These affirmative duties and other non-delegable duties cannot be assigned to a Third-Party, nor can they be delegated to a majority of Co-owners under Article XIX of the Master Deed.

95. Further, current Board members Austin, Coe, Madison, White and Windle all agree admittedly that any necessary repairs, including, but not limited to: *water intrusion problems, safety and health issues, and replacement of all structural defects and deficiencies, including correcting all building code violations*, shall require immediate attention and correcting and are not subject to “51% vote of the Co-owners” under Article XIX of the Master Deed.

96. As of March of 2016, the individual Defendants Austin, Coe, Madison, White and Windle had actual knowledge of and were already aware of Martinez and Goggan’s opinions and recommendations, which were recorded and accepted by former Board President Carl W. Atkinson, Jr. A summary of Martinez and Goggan’s opinions and recommendations as discussed in Paragraph 41 provides in pertinent part:

- a. That TB&RC has major structural and water intrusion damage issues;
- b. The problems with water intrusion in the eleven (11) buildings are at a point where damage is increasing at an even greater acceleration rate;
- c. The handrail systems in the eleven (11) buildings are dangerous and unsafe; and
- d. Unless major corrective action is taken immediately the buildings are likely to have a life expectancy of not more than four (4) years after which they will be unrepairable due to the prohibitory cost of repair.

97. Further, the individual Defendants Austin, Coe, Madison, White and Windle

had actual knowledge of and were already aware that the City of North Myrtle Beach (“City”) had sent a letter dated February 16, 2016 to KA Diehl & Assoc., Inc. on behalf of Tilghman Beach and Racquet Club HOA regarding violations § 23-129.3⁶ of their Property and Building Maintenance and Appearance Ordinance. Specifically, the City’s letter to the Association cited multiple violations of § 23-129.3 on multiple buildings at the TB&RC as follows:

- Siding – exterior coverings shall be properly maintained and provide the building with a weather resistant exterior – wood siding is decayed and/or rotted in some areas – replace all decayed/rotted siding;
- Torn screens in windows – screens shall be maintained in good condition – repair, remove or replace all screens that are torn;
- Decks (stairways) – missing spindles and loose railings – decks (stairways) shall be maintained in a safe condition – replace all missing spindles and replace or reinforce loose railings;
- Roof – roofing shall be properly maintained and provide the building with a weather resistant exterior – several tarps are attached to roofs/skylights – remove tarps and repair/replace skylights;

98. City’s letter further provided that all corrective measures had to comply with the ordinance and that all of the above stated violations had to be repaired within ninety (90) days of receipt of its February 17, 2016 letter. A copy of the City of North Myrtle

⁶§ 23-129.3 of the Property and building maintenance and appearance ordinance of the City of North Myrtle Beach sets forth the standard of maintenance for buildings in pertinent part as follows:

- (1) Exterior siding and roofing shall be properly maintained and provide the building with a weather resistant exterior wall envelope.
- (2) Window frames and glass shall be reasonably weather tight and shall have panes without cracks or holes and the sash shall fit properly. Missing or broken panes shall be promptly repaired. Windows and any other structural openings in the building shall not be boarded up for a period exceeding thirty (30) calendar days in any given calendar year.
- (6) Platforms, landings, decks and steps shall be provided, where appropriate, to serve exits and shall be maintained in safe condition.

Beach's letter dated February 17, 2016 is attached hereto as (Exhibit "H") and incorporated by reference as part of this Third Amended Complaint. Upon information and belief, the individual Defendants Austin, Coe, Madison, White and Windle, acting individually, have not yet corrected any of the above cited violations under § 23-129.3.

99. From March 8, 2016 through August 25, 2016, the City of North Myrtle Beach has issued the following "Stop Work Orders" for maintenance and repair work that was done by the current Board members in violation of the applicable building codes:

- a. Stop Work Order #2206 on March 8, 2016 for failure to obtain building permits and performing work required to be performed by a licensed South Carolina General Contractor;
- b. Stop Work Order #2244 on June 14, 2016 for repairs to thresholds without required permit;
- c. Stop Work Order #2245 on June 14, 2016 for complete sections of guardrails removed without being brought up to 2012 IBC Codes;
- d. Stop Work Order #2001 on June 22, 2016 for exterior walls and balconies being repaired without permit;
- e. Stop Work Order #2014 on August 25, 2016 for sliding glass door frames being removed from opening without being brought up to code on Unit 339; and
- f. Stop Work Order #2015 on August 25, 2016 for sliding glass door frames being removed from opening without being brought up to code on Unit 121.

Upon information and belief, the individual Defendants Austin, Coe, Madison, White and Windle, acting individually, were aware of all "Stop Work Orders" issued by the City of North Myrtle Beach between March 8, 2016 through August 25, 2016, but chose to ignore them and not correct the applicable building code violations. A copy of the Stop Work Orders issued by the City of North Myrtle Beach between March and August of 2016 are attached hereto as (Exhibit "I") and incorporated by reference as part of this Third Amended Complaint.

100. Further, factual and professional opinions of structural engineers, Martinez and Simko, recorded in July of 2016 and also served on the current Board that same month, establish with a reasonable degree of engineering certainty the dire condition and total state of disrepair of the building components as well as parts of the individual units in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII as follows:

- a. All the balconies of the project are to be immediately removed and replaced, or totally repaired, except for Building III.
- b. All the corridor structural elements (plywood, joists and beams) are to be immediately repaired.
- c. All the corridor railing systems (railings, posts and pickets) are to be immediately replaced.
- d. All the connections with the loss of metal in excess of Twenty-Five (25) percent are to be immediately replaced with stainless steel hardware.
- e. The existing balcony areas do not meet the Code and represent a high level of overstress, except for Building III.
- f. Mold and rot in the closed in areas are accumulating and could possibly cause health concerns in the future if not repaired.
- g. The missing spindles and loose guardrails in all corridors are unsafe and violate § 23-129.3(6) of the Zoning Code for the City of North Myrtle Beach.
- h. The exterior wood siding and trim is decayed and rotten at many locations at all Twelve (12) buildings. This current condition for all buildings violates § 23-129.3(1) of the Zoning Code for the City of North Myrtle Beach.
- i. The roofing systems on Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII are not properly maintained and further do not provide the buildings with a weather resistant exterior wall envelope. Additionally, tarps on buildings VIII, IX, X, XI, and XII are attached to roofs/skylights. As such, the delaminated roofing and water intrusion problems associated with these defective conditions violate §23-129.3(1) of the Zoning Code for the City of North Myrtle Beach.

- j. Complete replacement of the roofing systems on Buildings IV, V, VI, VII, VIII, IX, X, XI and XII. Partial replacement of the roofing components on Buildings I and II.
- k. All visible termite damage has not been repaired in the buildings. Further, the Board has failed to adequately investigate and uncover all hidden termite damage probably existing in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII. See termite damage inspection report including pictures.
- l. Unless a major comprehensive and/or complete repair and reconstruction action is not immediately implemented by the Board to correct all defective building envelope conditions as well as structural problems currently existing in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII, the eleven (11) buildings which have a life expectancy of probably less than four (4) years, will become unrepairable due to the total cost of restoration exceeding the current fair market value of the buildings.
- m. The Plaintiffs and other similar situated Co-owners will suffer irreparable injury, harm, and loss due to the diminution in value of their buildings as well as their inability to repair them due to the prohibitory cost of restoration if a comprehensive and/or complete repair and reconstruction plan is not immediately implemented by the Board to correct all defective building envelope conditions as well as structural problems currently existing in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII.

101. Upon information and belief, the individual Defendants Austin, Coe, Madison, White and Windle, acting individually, have not yet repaired any of the structural defects, nor fixed all the water intrusion problems, and/or otherwise started a major comprehensive and/or complete repair and reconstruction action of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII as described above in subparts (a through o).

102. Furthermore, as additional evidence of their abdication of their affirmative maintenance, repair, and replacement duties, the current Board members Austin, Coe, Madison, White and Windle, acting individually, have participated in, directed, or otherwise adopted the annual budget for 2017 without levying an assessment against the Co-owners for all necessary repairs previously identified in Paragraphs 35, 36, 37, 38, 39, 40, 41, 93, and 95 of Plaintiffs'

Third Amended Complaint, including Exhibits C, D, E, F, and G, H, I, J, K, and L. A copy of the Board's Annual Budget for 2017 is attached hereto as (Exhibit "J") and incorporated by reference as part of this Third Amended Complaint. Lastly, based upon the investigation and recommendation made by the Board's prior consultants and experts, they have calculated that cost to perform all necessary repairs to Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII will probably exceed Six Million and No/100 (\$6,000,000.00) Dollars.

103. The January 6, 2017 letter from Henry H. Beckham, GAA of Beckham Appraisal Service, LLC ("Beckham Letter") addresses the decline in value of condominium regime and units in TB&RC due to lack of repairs and typical maintenance being performed at the Project by the current Board members. The Beckham letter provides in pertinent part:

Based upon our preliminary inspection and review of sales activities, it is my opinion that the condition and appeal of the property *due to lack of repairs and typical maintenance has led to a decline in values*. The lack of repairs and typical maintenance is confirmed by a review of a series of property maintenance violation reports and stop-work orders by the City of North Myrtle Beach. A copy of the January 6, 2017 letter from Henry H. Beckham, GAA of Beckham Appraisal Service, LLC is attached hereto as (Exhibit "K") and incorporated by reference as part of this Third Amended Complaint.

104. For the foregoing reasons, the individual Defendants Austin, Coe, Madison, White and Windle, acting individually, have acted and continue to act in a grossly negligent, reckless, wilful and wanton manner in failing to discharge their affirmative duties as described above in one or more of the following particulars:

- a. In failing to make all necessary repairs identified in the Affidavits of structural engineers Martinez and Simko, which were recorded in the Office of the Clerk of Court for Horry County in July of 2016 and subsequently served on the Board that same month;
- b. In failing in 2016 as well as 2017 to levy an assessment for a sum exceeding Six Million No/100 (\$6,000,000.00) Dollars, as recommended by their consultants and experts, in order to complete all necessary repairs

previously identified by their consultants and experts in 2014 through 2016;

- c. In failing in 2016 as well as 2017 to assess all Co-owners for the common expenses needed to make all necessary repairs as previously identified in the Affidavits of Martinez and Simko, which were recorded in the Office of the Clerk of Court for Horry County in July of 2016 and subsequently served on the Board that same month;
- d. In failing in 2016 as well as 2017 to preform a detailed forensic analysis on Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII from top to bottom by an architectural/engineering firm in order to determine and also document all additional repairs for the previously known defective and deficient General Common Elements and Limited Common Elements;
- e. In failing in 2016 as well as 2017 to correct all known and continuing violations of the City's property maintenance ordinance and 2012 International Residential Building Code, including permit and stop work order violations as reported by the City of North Myrtle Beach's Zoning Department since February of 2016 to the present date;
- f. In failing to seek any recovery from all liability carriers regarding a covered event or loss under the applicable policies for economic loss damages;
- g. In improperly advancing expenses for the defense of the individual Board members Austin, Coe, Madison, White and Windle, upon information and belief, who have not conducted themselves in good faith, have not acted in their official capacity, and have not acted in the best interest of the corporation in violation S.C. Code Ann § 33-8-851 *et seq.* (2006);
- h. In failing to correct all previously known and ongoing water intrusion problems occurring in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII where the damage is increasing at an even greater acceleration rate due to lack of timely maintenance and repairs.

105. Further, the factual and professional opinions set forth in the Affidavit of Mike Parades, PCAM ("Parades"), clearly establish that individual Defendants Austin, Coe, Madison, White and Windle, while acting individually: have committed *ultra vires* acts, have engaged in reckless, wilful, and wanton conduct, and have knowingly violated and continue to violate State law all resulting from their ongoing failure to act in good faith and discharge their affirmative

duties regarding the necessary repair and replacement of Common Elements, including building components as mandated under governing documents. Specifically, the individual Defendants Austin, Coe, Madison, White and Windle's ongoing violations of the City of North Myrtle Beach's property maintenance and repair ordinance as well as other applicable building codes constitutes negligence per se. Their failure to make all necessary repairs as well as to correct previously known violations of the applicable building code including their Stop Work Order violations, constitutes reckless, wilful, and wanton conduct on their part. Their reckless, wilful, and wanton conduct has depreciated the fair market value of the Plaintiffs' individual units as well as the Project evidenced by the Beckham letter dated January 6, 2017. These causative violations of the City of North Myrtle Beach's property maintenance and repair ordinance as well as other applicable building codes, which the current Board members Austin, Coe, Madison, White and Windle, acting individually, participated in, and directed in the management and operation of the Project, constitutes actionable negligence and is evidence of their recklessness, wilfulness and wantonness. A copy of the Affidavit of Parades is attached hereto as (Exhibit "L") and incorporated by reference as part of this Third Amended Complaint.

106. As a direct and proximate result and consequence of gross negligence, and/or willful and wanton conduct of the individual Defendants, Austin, Coe, Madison, White, and Windle, while acting individually, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary investigation, repair, maintenance and reconstruction cost required and to be required over the expected life of the structures, loss of use, diminution in fair market value of their individual units, and for such punitive damages as may be appropriate.

107. As a direct and proximate result and consequence of gross negligence, and/or

willful and wanton conduct of the individual Defendants, Austin, Coe, Madison, White, and Windle, while acting individually, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structures, loss of use, diminution in fair market value of their individual units, and for such punitive damages as may be appropriate.

108. For the foregoing reasons, the Plaintiffs are entitled to a judgment against the individual the Defendants, Austin, Coe, Madison, White, and Windle, acting individually, for all direct, indirect, resulting consequential and punitive damages in an amount to be determined at trial of this case.

FOR A NINTH CAUSE OF ACTION
**(Indemnification from Tilghman Beach and Racquet
Club Condominium Association, Inc.)**

109. The Plaintiffs reiterate each and every relevant allegation set forth above as if fully incorporated herein.

110. Plaintiff, Jill Humphries, was a member of the Board of Directors of the Association from March 2, 2013 to February 6, 2016.

111. Plaintiff, Dennis Johnson, Jr., was a member of the Board of Directors of the Association from March 7, 2015 to February 6, 2016.

112. The Answer and Counterclaims of the Defendant Association allege in Paragraphs 133 through 138 that Plaintiffs, Jill Humphries and Dennis Johnson, Jr., personally committed *ultra vires* acts by approving of "*alterations, modifications, and improvements*" to Building III without first obtaining the approval of fifty-one (51%) percent of the Co-owners of Association as required by Article XIX of the Master Deed and in breach of the Master Deed which is expressly denied by them.

113. Plaintiffs Jill Humphries and Dennis Johnson, Jr. assert, at all times relevant, that

they have conducted themselves in good faith and acted in their official capacity in the best interest of the corporation.

114. S.C. Code Ann § 33-8-851 (2006) concerns a corporation's authority to indemnify a former director made a party to a proceeding. This section provides in pertinent part as follows:

(a) Except as provided in subsection (d), a corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if:

- (1) he conducted himself in good faith; and*
- (2) he reasonably believed:*
 - (i) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interest; and*
 - (ii) in all other cases, that his conduct was at least not opposed to its best interest; and*
- (3) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.*

115. Additionally, S.C. Code Ann. §33-31-852 (2006) concerns the mandatory indemnification of a director who is wholly successful in the defense of a proceeding to which he was a party. This section provides in pertinent part:

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of a proceeding to which the director was a party because he is or was a director of the corporation against reasonable expenses actually incurred by the director in connection with the proceeding.

116. The Plaintiffs Jill Humphries and Dennis Johnson, Jr., fall within the scope and protection of S.C. Code Ann. §§ 33-8-851 and 33-31-852 (2006). Furthermore, the Defendant's counterclaims asserted against them are without evidentiary support, baseless, and frivolous.

117. Upon information and belief, Plaintiffs Jill Humphries and Dennis Johnson, Jr. have complied with all the requirements of S.C. Code Ann. §§ 33-8-851 and 33-31-852 (2006) as discussed above and are entitled to indemnification from the Defendant Association under the above provisions of the South Carolina Nonprofit Corporation Act (“Act”) for their reasonable expenses including attorney fees in defending themselves against these baseless, meritless, and frivolous counterclaims filed by the current Board members in bad faith.

FOR A TENTH CAUSE OF ACTION

(Appointment of a Receiver as to Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III)

118. The Plaintiffs reiterate each and every relevant allegation set forth above as if fully incorporated herein.

119. Article I, Paragraph 4(j) (ii) of the By-Laws makes the current Board responsible for the *“maintenance, repair, and replacement . . . of the general and limited elements”* of TB&RC.

120. The Project and/or the regime property for the reasons described above is also in immediate need of substantial repair, in that Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII are infested with dry rot and termites requiring immediate correction to avoid extensive and permanent structural damage to these building. The roofs of Buildings I, II, IV, and V leak, which condition, if not immediately repaired, will allow water to enter these buildings when it rains. The extreme urgent need for substantial repair of these and other items is listed in the Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs Expert John Simko, P.E., who are duly licensed structural Engineers. Their Amended Affidavits are attached hereto as (Exhibits “E” and “F”), and incorporated by reference as part of this Third Amended Complaint.

121. Plaintiffs have an interest as unit owners, including their undivided interest in the Common elements, in the safe and economical management of the condo Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII.

122. On numerous occasions, the Plaintiffs have requested that the individual Defendants Austin, Coe, Madison, White and Windle special assess the Co-owners for the necessary repairs of the described conditions in the Amended Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs Expert John Simko, P.E., but the current Board members have failed and refused, and continue to fail and refuse to levy the required assessment to make the necessary repairs as recommended by their consultants and other experts in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII or to take any other steps to substantially repair or maintain these buildings in good repair.

123. S.C. Code Ann. §15-65-10 (2005) provides a receiver may be appointed by a judge of the circuit court, either in or out of court:

(1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired, except in cases when judgment upon failure to answer may be had without application to the court;

(4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations; and

(5) In such other cases as are provided by law or may be in accordance with the existing practice, except as otherwise provided in this Code.

124. The Plaintiffs contend they fall within the scope and protection of S.C. Code Ann §15-65-10 (2005) regarding the appointment of a receiver by the circuit court.

125. Upon information and belief, the Plaintiffs have satisfied all conditions precedent for a receiver to be appointed by the circuit court with respect to this pending lawsuit.

126. Unless a receiver is appointed and instructed to take possession of the Project and to collect assessments, and immediately apply the assessments to the repair of the Project, the Project will be materially injured. In addition, Plaintiffs may be subject to serious personal civil liability to third parties for any injury or damage sustained by them as a result of the described defects and dangerous conditions identified in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII.

127. For the forgoing reasons, the Plaintiffs request that a receiver be appointed by the circuit court to take possession of the Project and/or the regime property, to manage, control, care for, preserve, and maintain it, and incur the expenses necessary for the management, control, care, preservation, and maintenance of the regime property, and to special assess the Co-owners and apply the same to the immediate repair of the described defects and dangerous condition of the regime property as described in the Amended Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs Expert John Simko, P.E., and thereafter to maintain the property in good and habitable condition pending the determination of this lawsuit, to pay any taxes or assessments falling due during the period of receivership, and to otherwise employ labor as may be necessary, purchase supplies, and incur the risks and obligations ordinarily incurred by the Board of Directors, managers, and operators of similar horizontal property regimes.

WHEREFORE, having fully set forth their Third Amended Complaint, the Plaintiffs pray for the following relief:

- a. For an Order of the Court finding the Defendant Association and individual Defendants Austin, Coe, Madison, White, and Windle, while acting outside their official capacity as members of the Board of Directors for the Defendant Association, have breached and violated, including, but not limited to, Sections 4(j)(ii) and (vii), 7(b)(i), and 11(a)(b) and (e) of the By-Laws, and Articles XX,

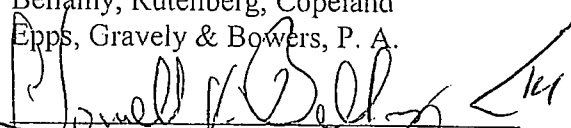
XXI, and XXVII of the Master Deed of Tilghman Beach and Racquet Club Property Regime;

- b. As to the **First Cause of Action**, the Plaintiffs are entitled to an award of actual damages in an amount to be proven at trial; and, also, to an award of punitive damages based upon the Defendant Association's willful violations of the provisions of the TB&RC's Master Deed and By-Laws and State law;
- c. As to the **Second, Sixth, Seventh, and Eighth Causes of Action**, the Plaintiffs are entitled to an award of actual damages in an amount to be proven at trial; and, also, to an award of punitive damages based upon the individual Defendants Austin, Coe, Madison, White, and Windle's *ultra vires* conduct and willful violations of the provisions of the TB&RC's Master Deed and By-Laws and State law;
- d. As to the **Third Cause of Action**, the Plaintiffs are entitled to an award of actual damages in an amount to be proven at trial;
- e. As to the **Fourth Cause of Action**, Plaintiffs are entitled to declaratory relief as demanded in one or more of the following particulars requested under subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), and (j) of Paragraph 71 of the Third Amended Complaint;
- f. As to the **Fifth Cause of Action**, Plaintiffs are entitled to a mandatory injunction compelling one or more of the following particulars requested under subparagraphs (a), (b), (c), (d), and (e) of Paragraph 78 of the Third Amended Complaint;
- g. As part of the **Fifth Cause of Action**, the Plaintiffs request the issuance of a mandatory injunction from the Court requiring the Defendant Association and Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to immediately comply with their affirmative duties and responsibilities under the Master Deed and By-Laws by levying an assessment against all Co-owners to repair and replacement of all defective and deficient conditions of the General Common Elements and the Limited Common Elements located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII as recommended by the Defendants' prior consultants, legal advisers; and, further supported by the findings set forth in the Amended Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and John Simko, P.E., attached hereto as (**Exhibits "E" and "F"**) and incorporated by reference as part of this Third Amended Complaint;
- h. As to the **Ninth Cause of Action**, the Plaintiffs Jill Humphries and Dennis Johnson have complied with all the requirements of S.C. Code Ann. §§ 33-8-851 and 33-31-852 (2006) as discussed above and are entitled to indemnification from the Defendant Association under the applicable provisions of the South Carolina

Nonprofit Corporation Act for their reasonable expenses, including attorney fees, in defending themselves against these baseless, meritless, and frivolous counterclaims as alleged by the current Board members in bad faith;

- i. As to the **Tenth Cause of Action**, the Plaintiffs request that a receiver be appointed by the Circuit Court to take possession of the regime property, to manage, control, care for, preserve, and maintain the regime property, and incur the expenses necessary for the management, control, care, preservation, and maintenance of the regime property, and to special assess the Co-owners and apply the same to the immediate repair of the described defects and dangerous condition of the regime property, and thereafter to maintain the property in good and habitable condition pending the determination of this lawsuit, to pay any taxes or assessments falling due during the period of receivership, and to otherwise employ labor as may be necessary, purchase supplies, and incur the risks and obligations ordinarily incurred by the Board of Directors, managers, and operators of similar horizontal property regimes;
- j. For attorneys fees, costs and expenses incurred in bringing this action;
- k. For a trial by Jury; and
- l. For such other and further relief as the Court may deem proper.

Bellamy, Rutenberg, Copeland
Epps, Gravely & Bowers, P. A.


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Attorneys for Plaintiffs

Myrtle Beach, South Carolina

March 8, 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
)
)
 Jill Keck Humphries, Dennis L,)
 Johnson, Jr., Delona Penny Rice,)
 Whitmel L. Brown, Jr., Gary Steven)
 Robinson, Elizabeth Erin Humphries,)
 and Nancy H. Johnson,)
)
 Plaintiffs,)
 vs.)
)
 Tilghman Beach and Racquet Club)
 Condominium Association, Inc.,)
 James H. Austin, III, Daniel G. Coe,)
 C. Doug Madison, George P. White)
 and Steele Brice Windle, III,)
 individually and as Members of the)
 Board of Directors of the Tilghman)
 Beach and Racquet Club)
 Condominium Association, Inc.,)
)
 Defendants.)
)
 _____)
)
 Tilghman Beach and Racquet Club)
 Condominium Association, Inc.,)
 James H. Austin, III, Daniel G. Coe,)
 C. Doug Madison, George P. White)
 and Steele Brice Windle, III,)
 individually and as Members of the)
 Board of Directors of the Tilghman)
 Beach and Racquet Club)
 Condominium Association, Inc.,)
)
 Third-Party Plaintiffs,)
 vs.)
)
 Great American Insurance Company,)
)
 Third-Party Defendant.)
 _____)
)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 C.A. No. 2016-CP-26-4464

EX. 2

SUMMONS

TO: GREAT AMERICAN INSURANCE COMPANY:

YOU ARE HEREBY SUMMONED and required to answer the Third-Party Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer

to the said Third-Party Complaint upon his or their subscribers at The Pearce Law Group, P.C., 1309 Professional Drive, Suite 202, Myrtle Beach, South Carolina, 29577, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Third-Party Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

THE PEARCE LAW GROUP, P.C.

By: /s/ Charles B. Jordan, Jr.
Charles B. Jordan, Jr., Esquire
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Attorneys for Defendants / Third-Party Plaintiffs

May 2, 2017
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C.A. No. 2016-CP-26-4464

Jill Keck Humphries, Dennis L,)
Johnson, Jr., Delona Penny Rice,)
Whitmel L. Brown, Jr., Gary Steven)
Robinson, Elizabeth Erin Humphries,)
and Nancy H. Johnson,)

Plaintiffs,)

vs.)

DEFENDANTS'/THIRD-PARTY PLAINTIFFS'
THIRD-PARTY COMPLAINT

Tilghman Beach and Racquet Club)
Condominium Association, Inc.,)
James H. Austin, III, Daniel G. Coe,)
C. Doug Madison, George P. White)
and Steele Brice Windle, III,)
individually and as Members of the)
Board of Directors of the Tilghman)
Beach and Racquet Club)
Condominium Association, Inc.,)

Defendants.)

Tilghman Beach and Racquet Club)
Condominium Association, Inc.,)
James H. Austin, III, Daniel G. Coe,)
C. Doug Madison, George P. White)
and Steele Brice Windle, III,)
individually and as Members of the)
Board of Directors of the Tilghman)
Beach and Racquet Club)
Condominium Association, Inc.,)

Third-Party Plaintiffs,)

vs.)

Great American Insurance Company,)

Third-Party Defendant.)
)

Defendants / Third-Party Plaintiffs, Tilghman Beach and Racquet Club Condominium Association, Inc. ("Association"), and James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White, and Steele Brice Windle, III (hereinafter collectively referred to as "the Individual Defendants") (the Association and Individual Defendants are collectively referred to herein as "Third-Party Plaintiffs") complaining of Third-Party Defendant, Great American Insurance Company ("Third-Party Defendant"), would respectfully allege as follows:

GENERAL ALLEGATIONS

1. The Association is and was, at all times relevant hereto, an incorporated legal entity organized and existing under the South Carolina Non-Profit Corporation Act ("Act"), S.C. Code Ann., §§ 33-31-10 et seq., 1976, as Amended. The real estate and condominium community related to the Association is physically located in Horry County, South Carolina.

2. The Individual Defendants are now, and have been, since the time the Litigation, as defined in Paragraph 9, was initiated, directors of the Association.

3. Third-Party Defendant is an insurance company, organized and existing under the laws of a State other than South Carolina, doing business in South Carolina as a liability insurer. The Association and the Individual Defendants are informed and believe that Third-Party Defendant regularly issues liability insurance policies either covering risks within the State of South Carolina and/or to insureds located in the State of South Carolina.

4. This Court has both general and specific personal jurisdiction over Third-Party Defendant pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803 and other applicable laws. Third-Party Defendant has maintained continuous and systematic contacts with South Carolina sufficient to grant this Court general jurisdiction over Third-Party Defendant. Moreover, Third-

Party Defendant entered into contracts with South Carolina residents, including the insurance policy at issue here, such that Third-Party Defendant has directed activities to residents of South Carolina and has purposely availed itself of the privilege of conducting business and/or activities in South Carolina. This action arises directly out of the activities that Third-Party Defendant directed to South Carolina, and this Court, therefore, has specific jurisdiction over Third-Party Defendant. The exercise of personal jurisdiction over Third-Party Defendant in this case is consistent with due process under the United States Constitution.

5. This Court has jurisdiction over the subject matter of this action and Horry County, South Carolina, is a proper venue for this case in that the insurance policy in question insures the Association, and the condominium community, which is the subject of the Litigation, as defined in Paragraph 9, is located in Horry County, South Carolina.

6. For good and valuable consideration received from one or more of Third-Party Plaintiffs, Third-Party Defendant issued to the Association an “Exec Pro Community Association Solution Insurance Policy”, # EPP3654704-01, a copy of which is attached hereto as **Exhibit A** (hereinafter “the Great American Policy”).

7. The Association is an “Insured” as defined in the Great American Policy, and both the Association and the Individual Defendants are “Insured Persons” as defined in the Great American Policy. Third-Party Defendant is the “Insurer” as defined in the Great American Policy.

8. Section 1, Insuring Agreements, Subsection A of the Great American Policy provides as follows:

If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against any **Insured Persons** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Insured Persons**, **Loss and Costs of Defense** resulting from such **Claim**, except for any **Loss and Costs of Defense**

which the **Organization** or any **Subsidiary** actually pays as indemnification.

Further, the Section 1, Insuring Agreements, in the Great American Policy provides:

The **Insurer** has the right and duty to defend any **Claim** to which the insurance applies, even if the allegations of such **Claim** are groundless, false or fraudulent.

The Great American Policy further provides:

“**Costs of Defense**” shall mean reasonable and necessary legal fees, costs and expenses incurred in the investigation or defense of any **Claim**, including the costs of any appeal or appeal bond, attachment bond or similar bond (but without any obligation on the part of the **Insurer** to apply for or furnish such bonds); provided, however, **Costs of Defense** shall not include: (1) salaries, wages, overhead or benefit expenses associated with any **Insured Persons**, and (2) any amounts incurred in defense of any **Claim** which any other insurer has a duty to defend, regardless of whether or not such other insurer undertakes such duty.

9. On or about July 7, 2016, Plaintiffs filed a lawsuit in the Court of Common Pleas for Horry County, South Carolina, against Third-Party Plaintiffs. A true and accurate copy of the original Complaint, without exhibits, is attached hereto as **Exhibit B**. On or about October 28, 2016, Plaintiffs filed a Second Amended Complaint in the Court of Common Pleas for Horry County, South Carolina, against Third-Party Plaintiffs. A true and accurate copy of which, without exhibits, is attached to this Third-Party Complaint as **Exhibit C**. On or about March 8, 2017, Plaintiffs filed a Third Party Complaint in the Court of Common Pleas for Horry County, South Carolina, against Third-Party Plaintiffs. A true and accurate copy of which, without exhibits, is attached to this Third-Party Complaint as **Exhibit D**. This lawsuit will be hereinafter referred to as “the Litigation.”

10. The Complaints, attached to this Third-Party Complaint as Exhibits B, C and D, constitute a “Claim” made within the Policy Period under the Great American Policy because they involve a “civil proceeding . . . made against any ‘Insured’ seeking monetary or non-

monetary (including injunctive) relief commenced by service of the Complaint or similar pleading.”

11. The original Complaint (Exhibit B), Second Amended Complaint (Exhibit C), and Third Amended Complaint (Exhibit D) allege numerous Wrongful Acts by an Insured Person or Persons under the Great American Policy.

12. Despite repeated written demands by Third-Party Plaintiffs on or about July 13, 2016, August 10, 2016¹, August 25, 2016², and November 3, 2016³, Third-Party Defendant has failed and refused and continues to refuse to provide coverage and/or a defense in this matter.

13. Third-Party Defendant has written letters expressly denying any duty to provide coverage or a defense in the Litigation, which constitutes an anticipatory breach of the Great American Policy. Third-Party Defendant’s letters dated August 1, 2016, and October 12, 2016, are attached hereto, respectfully, as **Exhibits H and I**.

14. Third-Party Plaintiffs are informed and believe that the above mentioned Policy provides for a defense and indemnification of the losses, incidents, wrongful acts and occurrences alleged in the original Complaint, the Second Amended Complaint, and the Third Amended Complaint in the Litigation. Accordingly, Third-Party Defendant is or may be liable to the Association and the Individual Defendants for all or part of the claim or claims made against the Association and/or the Individual Defendants contained in the original Complaint, the Second Amended Complaint, and the Third Amended Complaint in the Litigation within the meaning of Rule 14, SCRCP.

¹ August 10, 2016 letter attached hereto as **Exhibit E**.

² August 25, 2016 letter attached hereto as **Exhibit F**.

³ November 3, 2016 letter attached hereto as **Exhibit G**.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

15. All of the allegations contained in Paragraphs 1 through 14 are hereby incorporated herein as if they had been set forth fully hereunder.

16. Third-Party Defendant's conduct, including, but not limited to, Third-Party Defendant's refusal to provide coverage and/or a defense in the Litigation, constitutes a material breach of the Great American Policy.

17. As a direct and proximate result of Third-Party Defendant's breach of the Great American Policy, Third-Party Plaintiffs have incurred actual and consequential damages, including, but not limited to, being forced to retain their own counsel to defend this matter and being required to pay that counsels' fees and expenses and being forced to retain expert witnesses and pay expert witnesses' fees, all of which should have been paid by Third-Party Defendant under the Great American Policy. All of these damages were known or readily ascertainable to Third-Party Defendant both at the time of entering into the insurance policy in question and at the time of Third-Party Defendant's material breach of the Great American Policy.

18. Third-Party Plaintiffs are entitled to recover actual damages and pre-judgment interest accruing from the breach of the insurance policy.

FOR A SECOND CAUSE OF ACTION
(Attorney's Fees Under Section 38-59-40 of the South Carolina Code)

19. All of the allegations contained in Paragraphs 1 through 18 are hereby incorporated herein as if they had been set forth fully hereunder.

20. The allegations in the original Complaint (Exhibit B), the Second Amended Complaint (Exhibit C), and the Third Amended Complaint (Exhibit D) in the Litigation constitute a claim covered by the Great American Policy, and/or Third-Party Plaintiffs have sustained damage at this time which is covered by the Great American Policy.

21. A written demand has been made on Third-Party Defendant to step in and defend the Litigation and/or pay the claim involved in the Litigation. Third-Party Defendant has failed to defend or provide coverage in the Litigation within ninety (90) days from the date of this demand.

22. Third-Party Defendant's refusal to provide a defense and coverage is without reasonable cause and/or in bad faith. In addition to any other sum or amount otherwise recoverable, Third-Party Plaintiffs are entitled to recover from Third-Party Defendant all their reasonable attorney's fees for the prosecution of the Third-Party Complaint under S.C. Code Ann. § 38-59-40.

23. Said reasonable attorney's fees are to be determined by the trial judge and added to the amount of any judgment Third-Party Plaintiffs obtain against Third-Party Defendant on the Third-Party Complaint.

FOR A THIRD CAUSE OF ACTION
(Bad Faith)

24. All of the allegations contained in Paragraphs 1 through 23 are hereby incorporated hererin as if they had been set forth fully herein.

25. Third-Party Defendant's refusal to pay and/or provide the contracted-for benefits under the Great American Policy is without a reasonable basis and is in bad faith.

26. Third-Party Plaintiffs are entitled to recover actual, consequential, and punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

27. All of the allegations contained in paragraphs 1 through 26 are hereby incorporated herein as if they had been set forth fully hereunder.

28. This cause is brought to resolve a justiciable controversy pursuant to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-10, et seq.

29. Third-Party Plaintiffs herein are persons interested under a written contract within the meaning of Section 15-53-30 of the South Carolina Uniform Declaratory Judgment Act. Third-Party Plaintiffs are entitled to a construction of this written contract of insurance within the meaning of Section 15-53-40 of the South Carolina Uniform Declaratory Judgment Act.

30. Third-Party Plaintiffs are informed and believe that they are entitled to a declaration that Third-Party Defendant owes to them a duty of defense and indemnification in the aforementioned action. This declaration will terminate the uncertainty or controversy between the parties that currently exists under the Great American Policy.

31. Third-Party Plaintiffs are further informed and believe that they are entitled to the additional relief based on the Court's declaratory judgment or decree within the meaning of Section 15-53-120 of the South Carolina Uniform Declaratory Judgment Act including, but not limited to, an order directing that Third-Party Defendant pay any attorneys' fees, expenses and costs that Third-Party Plaintiffs have incurred in defending against the original Complaint or subsequent versions of the original Complaint in the Litigation, for the attorneys' fees and costs incurred by Third-Party Plaintiffs in bringing this Third-Party Complaint and for such other and further relief as the Court deems fair and equitable.

WHEREFORE, Third-Party Plaintiffs demand judgment against Third-Party Defendant

as follows:

- (a) for an award of actual damages, including consequential damages, on Third-Party Plaintiffs' First Cause of Action, in an amount to be determined by a jury;
- (b) for an award of reasonable attorney's fees under S.C. Code Ann. § 38-59-40, in an amount to be determined by the trial judge;
- (c) for an award of actual damages, including consequential damages, and punitive damages in an amount to be determined by a jury on Third-Party Plaintiffs' Third Cause of Action;
- (d) for a declaration under Third-Party Plaintiffs' Fourth Cause of Action that Third-Party Defendant has a duty to defend Third-Party Plaintiffs and to indemnify Third-Party Plaintiffs and provide coverage for the claims alleged in the Litigation;
- (e) for an award of additional relief for its declaratory judgment within the meaning of Section 15-53-120; and
- (f) for such other and further equitable relief as the Court deems fair and proper.

Respectfully submitted,

THE PEARCE LAW GROUP, P.C.

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Attorneys for Defendants / Third-Party Plaintiffs

May 2, 2017
Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2016-CP-26-4464

RECEIVED
JUN 29 2018
SC Court of Appeals

Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson Plaintiffs,

v.

Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc. Respondents,

v.

Great American Insurance Company Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the herein below listed documents was served upon all counsel of record by U.S. Mail, postage prepaid, on this the 29th day of June, 2018.

DOCUMENTS: *Return in Opposition to Appellant's Emergency Motion for a Protective Order*
 Notice of Appearance of Sarah P. Spruill

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June 29, 2018

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
JUN 29 2018
SC Court of Appeals

Re: Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson v. Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc. v. Great American Insurance Company; Case No. 2016-CP-26-04464
Appellate Case No. 2018-001180

Dear Ms. Kitchings:

Enclosed for filing, please find an original and seven (7) copies each of *Respondents' Return in Opposition to Appellant's Emergency Motion for a Protective Order* and the *Notice of Appearance of Sarah P. Spruill* in the above-referenced matter, together with our *Proof of Service* of same.

If you have any questions, please give me a call.

Thank you for your assistance in this matter.

With kind regards,

HAYNSWORTH SINKLER BOYD, P.A.

Drew Raul for Joshua D. Spencer

Joshua D. Spencer

JDS/jmb
Enclosures

cc: Howell V. Bellamy III, Esq.
Howell V. Bellamy Jr., Esq.
Charles B. Jordan, Jr., Esq.
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