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IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Larry B. Hyman, Jr.  
Circuit Court Judge

**RECEIVED**

JUL 25 2018

SC Court of Appeals

Case No.: 2017-002196

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

v.

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

AND

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

v.

South State Bank. ....Respondent

APPELLANT MYRTLE BEACH GOLF & YACHT CLUB ASSOCIATION, INC.'S MOTION  
TO DETERMINE SCOPE OF STAY OF PROCEEDINGS

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ASSOCIATION, INC.

Appellant Myrtle Beach Golf & Yacht Club Association, Inc. (“Appellant”), by and through its undersigned attorneys, hereby moves this Court for an order determining the scope of the stay of the proceedings that exist consistent with Rule 241(a), *SCAPR*. Specifically, Appellant seeks an Order that the lower court may not proceed with the claims in this case that are not currently on appeal because the claims are matters affected by the appeal.

### INTRODUCTION

Plaintiff Condo-World Development, LLC (“Condo-World”) and Heron Point Golf Club Limited Partnership (“Heron Point,” with Condo-World, “Plaintiffs”). Plaintiff Heron Point owns the Golf Course on which Condo World holds a mortgage lien. In 2015, Plaintiffs filed a declaratory judgment action against Appellant seeking a determination that the Golf Course is not restricted in its use. [R at 29-38]. Appellant asserted counterclaims seeking a determination that the Golf Course property is restricted in its use. [R. at 81 – 119].

Thereafter, Appellant amended its Answer and Counterclaim and filed a Third-Party action against Respondent South State Bank (“Respondent”) for breach of contract, contractual indemnity, equitable indemnity and a permanent injunction. [R. at 414-432]. Respondent moved to dismiss the claims against it and the lower court dismissed Appellant’s claims for breach of contract, contractual indemnity and equitable indemnity. [R. at 8-22]. The Order dismissing those claims is the subject of the appeal in this matter.

The Plaintiffs’ declaratory judgment action and Appellants defenses, counterclaims and Third-Party Claims against Respondent stem from the same set of facts and documents. The claims are inextricably linked as they rely on the same nexus of facts, circumstances and documents – the same nexus that is the subject of the pending appeal. Because the facts, circumstances and documents that form the basis of Plaintiff’s action, Appellant’s action and the respective defenses

thereto are matters under appeal in the present case, the Court should issue a stay of this case *in toto* the lower court while the appeal is pending.

### **Background**

#### **I. The Pleadings**

Generally, this case concerns whether the “Golf Course Property” is restricted in its use. The salient facts in this case span 34 years. Of most relevance to this motion, the pleadings in this case all reference and request relief based on the court’s consideration of three documents<sup>1</sup>, two of which are referenced in the pleadings of Plaintiff and Appellant. To wit:

- (i) The 1992 Indenture Deed that transfers the Golf Course property from Peoples Federal Savings and Loan Association (predecessor to Respondent) to Heron Point and contains use restrictions;
- (ii) The 2005 Waiver of Restrictions executed by First Federal Savings and Loan Association of Charleston (the predecessor to Respondent) in favor of Heron Point, which purported to release the use restrictions contained in the 1992 Indenture Deed.

The final document that is of utmost importance and referenced by Appellant (and by Plaintiffs in their Motion to Amend their Answer and Defenses to Appellant’s Counterclaims) is:

- (iii) the 1988 Settlement Agreement entered into by Appellant, Peoples Federal Savings and Loan Association Respondent’s predecessor in interest), Property Consultants, and Myrtle Beach Golf and Yacht Club. The 1988 Settlement Agreement requires the use restrictions contained in the 1992 Indenture Deed<sup>2</sup> that were subsequently allegedly waived, whether in whole or in part, by the 2005 Waiver of Restrictions.

Most significantly, these three documents (the 1988 Settlement Agreement, 1992 Indenture Deed and 2005 Waiver of Restrictions) – and their interpretation - are of utmost importance in the pending appeal and, thus, are matters affected by the appeal under Rules 205 and 241(a), *SCACR*.

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<sup>1</sup> By so stating, Appellant does not waive any arguments and specifically reserves its right to make any and all arguments. Appellant has attempted to distill the case to its essential elements so that the instant motion may be resolved.

<sup>2</sup> The 1992 Indenture Deed has additional sources for its use restrictions.

Moreover, each of these documents concern the same subject matter – (i) the use restrictions on the Golf Course Property. Accordingly, the use restrictions, their interpretation and who is bound by the use restrictions are also matters under appeal.

**A. Plaintiffs Filed A Complaint Against Appellant Regarding the Use Restrictions Contained in The Heron Point Deed and the Alleged Waiver of those Restrictions by South State Bank**

In April 2015, Plaintiffs filed a Complaint against Appellant seeking a determination that the Golf Course property was unrestricted in its use and, *inter alia*:

(c) That the alleged use restrictions referenced in the “**Heron Point Deed**” ... were personal to First Federal Savings and Loan Association of Charleston [**predecessor in interest to Respondent**], the successor by merger to **Peoples Federal Savings and Loan Association** as the grantor/covenantor, and do not run with the golf course property, formally known as the Myrtle Beach & Yacht Club Golf Course;

(d) That **First Federal Saving and Loan Association of Charleston** [**predecessor in interest to Respondent**] as the Grantor/Covenantor had previously waived, relinquished and released the following restrictions as the same may have applied, if at all, to the Enterprise Tracts including the golf course property, by Deed known as “**Waiver of Restrictions** [Deed]” recorded May 5, 2005,

(e) That the Defendant Association lacks standing to enforce the alleged restrictions referenced in the “**Heron Point Deed**” [**the 1992 Indenture Deed**] recorded on April 15, 1992, because they are personal to **Peoples** (“Grantor”), its heirs, successors, and assigns, and do not run with the golf course property...

[R. at 34-35] (emphasis added). By its own pleadings, Plaintiffs have put: (i) the 1992 Indenture Deed and (ii) the 2005 Waiver of Restrictions at issue in this case. Similarly, they have put the use restrictions at issue in this case. Indeed, the enforceability of the use restrictions is the crux of this case.

**B. Appellant’s Counterclaimed Against Plaintiffs Regarding the Use Restrictions in the 1992 Indenture Deed and 2005 Waiver of Restrictions**

Appellant answered Plaintiff's Complaint, asserted defenses and counterclaimed for declaratory relief seeking a determination that the golf course is restricted. [R. 81 – 119] More specifically, Appellant sought a judgment, *inter alia*:

(d) That the above referenced express deed restrictions contained in the "1992 Indenture [Deed]" for Tracts I and II are valid and run with the title of those properties to include ... the Golf Course Property ... and are otherwise not personal to the original Grantor and/or its successors in interest;

(e) That any prior waiver, relinquishment, or release of the above described restrictions by the original Grantor and/or its successors in interest in relation to the 1992 Indenture Deed were invalid and/or are of no legal effect as to the rights of ... [Appellant]...

[R. at 91-93]. Thus, Appellant's counterclaims also specifically referenced the 1992 Indenture Deed and 2005 Waiver of Restrictions.

**C. Appellant Asserted Third Party Claims Against Respondent Based On Respondent's Issuance of the 2005 Waiver of Restrictions and Breach of the 1992 Indenture Deed**

In February of 2017 filed an Amended Answer, Counterclaim and Third-Party Complaint. In March of 2017, Appellant filed a Corrected Amended Answer Counterclaims, Third-Party Complaint ("Third-Party Complaint") against Respondent [R. at 414-432]. In its Third-Party Complaint, Appellant asserted claims for (i) breach of contract, (ii) contractual indemnity, (iii) equitable indemnity, and (iv) a permanent injunction.

Each of Appellant's claims are based, in relevant part, on (i) the 1988 Settlement Agreement, (ii) the 1992 Indenture Agreement, and (iii) the 2005 Waiver of Restrictions. Each of these claims concern, in part, the enforceability of the use restrictions concerned in either the 1988 Settlement Agreement, 1992 Indenture Deed or another legal document.

In its Third-Party Complaint, Appellant alleged that in 1988, Myrtle Beach Golf & Yacht Club, Peoples Federal Savings and Loans Association [predecessors in interest to Respondent], Property Consultants, Inc., and [Appellant] entered an agreement to cause the following deed restriction on the [Golf Course Property]: “The only permitted use of this property is a golf course, country club or other ancillary use relating to golf course or country club use.” [R. at 422 ¶46, 562-578, 565 ¶3].

Appellant further alleged that: “On September 12, 1990, an Easement Maintenance Agreement (“Easement Agreement”) was entered into between Peoples and [Appellant] to memorialize the terms of a negotiated agreement made between them and a third party, Property Consultants, Inc., on or about July 25, 1985 (sic).” [R. at 422 ¶48, 666-674]. The Easement Agreement is recorded in the Horry County Register of Deeds and states:

This Agreement is executed to amend and restate the Order of the Bankruptcy Court and the Agreement entered into between Peoples Federal Savings and Loan Association and [Appellant], dated July 25, 1985 (sic) and in the event that any of the provisions hereof conflict with the provisions of the Order and Agreement referred to therein, this Agreement shall control.

[R. at 672 ¶6.7].

Thereafter, Peoples sold the Golf Course Property to Heron Point Golf Club as evidenced by the Indenture Deed, dated April 15, 1992 (“1992 Indenture Deed”). [R. at 676-682]. The 1992 Indenture Deed contains express limitations on the future use of the Golf Course property and states that:

The property conveyed shall be subject to the following covenants:

The property conveyed herein shall be subject to the following covenants: (a) The only permitted use of this property is as a golf course, country club, or other ancillary use relating to golf course or country club use....

[R. at 423 ¶50-51, 676-682].

On March 22, 2005, Heron Point obtained the 2005 Waiver of Restrictions from First Federal Savings and Loan Association of Charleston (the predecessor in interest to Respondent) regarding the Enterprise Tracts specifically waiving the following restriction:

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

[R. at 424 ¶54, 694-695, 428 ¶70-72].

## **II. Proceedings Arising from The Third-Party Complaint**

### **A. Respondent's Motion to Dismiss**

Respondent filed a motion to dismiss the Third-Party Complaint against it. [R. at 763-771, 773-784]. The lower court granted that motion, in part, and dismissed the claims for breach of contract, contractual indemnity and equitable indemnity. [R. at 8-22]. A subsequent motion to reconsider was also denied (in chambers without oral argument). [R. at 4-6]. On October 18, 2017, Appellant filed a Notice of Appeal of the Orders granting Respondent's motion to dismiss in part and denying Respondent's motion to dismiss in part. [R. at 796-821]. Final Briefs have been filed in the case by both parties.

### **B. The Instant Appeal**

The breach of contract cause of action was based, in relevant part, on:

- The 1988 Settlement Agreement's requirement that Respondent's predecessor-in-interest only convey the deed(s) to the Golf Course Property that contain the use restrictions of the Golf Course Property;
- The 1992 Indenture Deed, which contained the required use restriction required by the 1988 Settlement Agreement;
- The 2005 Waiver of Restrictions by Respondent's predecessor-in-interest that waived the required use restrictions, thereby breaching the 1988 Settlement Agreement and 1992 Indenture Deed.

[R. 412-701]. Accordingly, the 1998 Settlement Agreement, the 1992 Indenture Deed and 2005 Waiver of Restrictions are their interpretation are matters affected by the appeal. The court below dismissed the breach of contract action because it found that Appellant had notice of the Waiver of Restrictions on the date it was recorded – May 5, 2005 – and applied the three-year discovery rule generally applicable to contract actions. [R. at 5-9]

In its appeal, Appellant has asserted multiple theories upon which the breach of contract action may survive a motion to dismiss. Each of these theories generally concern the applicability of the discovery rule. [See Appellant's Final Brief, p. 15-27].

The lower court also dismissed the cause of action for contractual indemnification against Respondent. The cause of action for contractual indemnity is based on a provision contained in the 1988 Settlement Agreement. The 1998 Settlement Agreement was breached when the 2005 Waiver of Restrictions was issued by Respondent. [R. at 9-11]. The lower court held that the contractual indemnification provision did not cover the instant action. Specifically, it held that Plaintiffs were not parties to the 1988 Settlement Agreement.

In its appeal, Appellant asserted several theories of recovery – including the theory that Plaintiff Heron Point is a successor to Respondent's predecessor-in-interest by virtue of the execution of the 1992 Indenture Deed and, thus, is bound by the 1988 Settlement Agreement. [See Appellant's Final Brief 27-33].

Finally, the lower court dismissed Appellant's cause of action for equitable indemnification because it found that damages were not sufficiently alleged. Appellant's cause of action for equitable indemnification was based, in relevant part, on the special relationship created between Respondent's predecessor in interest and Appellant by the 1998 Settlement Agreement. [See Appellant's Final Brief, p.35-38; Appellant's Final Reply Brief, p7-9.] In its appeal, Appellant has

alleged damages that flow, in part, from the issuance of the 2005 Waiver of Restrictions. To the extent the 2005 Waiver of Restrictions acts to waive the use restrictions on the property, then Appellant's property will diminish in value.

Notably, the lower court did not dismiss the claim for a permanent injunction. In so holding, the lower court stated that a future waiver as to property not referenced in the 2005 Waiver of Restrictions is possible" and therefore denied Respondent's Motion to Dismiss the Cause of Action for a permanent injunction. Appellant's cause of action for a permanent injunction stated that "Third Party Defendant South State Bank has legal interest in the 1988 Bankruptcy Agreement, 1992 Sale of subject property to Heron Point and related transactions thereafter, including waiver of certain deed restriction on the various tracts of land." Inherent in the lower court's ruling is that Appellant's have stated a claim, sufficient to survive a motion to dismiss, that the issuance of any waiver of restrictions breaches the 1988 Settlement Agreement. This ruling would appear facially inconsistent with the ruling on the breach of contract issue.

### **III. Other Proceedings**

On October 9, 2017, an Amended Consent Scheduling Order was entered into which stated that:

Judge Hyman shall first determine the ultimate issue in the case of whether the deed restrictions in the alleged Indenture Deed between Peoples Federal Savings and Loan Associations ("Peoples Federal") [predecessor in interest to Respondent and Heron Point Golf Club Limited Partnership ("Heron Point") recorded on April 15, 1992 are personal or rather run with title to the golf course property. Judge Hyman decided in chambers to bifurcate the personal verses real covenant issue from the remainder of the case with the consent of the parties' counsel.

*See Ex. A, Amended Consent Scheduling Order, filed October 9, 2017.* Plaintiffs have used this Scheduling Order to argue that there can be no stay and attempted to conflagrate this Order with

the Order Granting Plaintiffs Motion to Reconsider, Alter or Amend Form 4 Order/Judgment November 7, 2017, filed Nov. 30, 2017. However, the October 9, 2017 Scheduling Order was clearly entered into prior to the Notice of Appeal being filed on October 18, 2017. The October 9, 2017 Order is a red herring that Plaintiffs have used to argue that Appellant cannot argue whether a stay exists.

On October 18, 2017, Appellant filed a Notice of Appeal of the Order Granting in Part and Denying in part the Motion to Dismiss Third Party Complaint of [Appellant] filed on behalf of [Respondent]. [R at 4-22.] In early November 2017, Appellant's Motion for Summary Judgment, filed August 17, 2017, was to be heard. (See attached Exhibit B, Appellant's Motion for Summary Judgment, without exhibits). Appellant's Motion for Summary Judgment was filed prior to the Notice of Appeal. Almost a year later, Plaintiffs filed a responsive memorandum of law on July 13, 2018. (See attached Exhibit C, Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment).

**As early as November 2017, the stay of this case was an issue.** At the November 2017 hearing, Judge Hyman determined that due to a pending appeal Appellant's Motion for Summary Judgment, *inter alia*, could "not appropriately be heard." (See Ex. D, Form 4 Order, filed November 7, 2017). Judge Hyman then "flip-flopped", and decided that the Motion for Summary Judgment could be heard, that the Form 4 Order was "inadvertently entered" and bifurcated all claims that were not subject to appeal. See Exhibit E, Order Granting Plaintiffs' Motion to Reconsider, Alter or Amend Form 4 Order/ Judgment November 7, 2017, filed Nov. 30, 2017. Notably, at the November 15, 2017 hearing, Rule 241(a), SCACR was brought to the court's attention as Appellant's filed a motion for stay on November 15, 2017 in the lower court due to

the pending appeal and mentioned it during oral arguments. The Court did not address the issue of the stay in its November 30, 2017 Order. See Ex E.

Appellant appealed the Order that bifurcated all claims on appeal from the remaining case. (Appellate Case No. 2017-002642). Plaintiffs, herein, filed a motion to dismiss the appeal in Appellate Case No. 2017-002642. While the motion to dismiss was pending, the lower court issued an order stating “Plaintiff would file with the Court of Appeals to lift any stay created by the pending *appeals*.” See. Ex. F Order to Appeal Stay, filed Feb 14, 2018 (emphasis added). Thereafter, Plaintiffs moved in this case for a Motion to Determine the Scope of Claimed Stay, on March 19, 2018.

Ultimately, the Court of Appeals dismissed the interlocutory appeal in Appellate Case No. 2017-002642 as not immediately appealable. See Ex. G, Order of Dismissal. On April 11, 2018, Plaintiffs withdrew their Motion to Determine the Scope of Claimed Stay in this matter stating that they believed the Order on the motion to dismiss was dispositive of the issues raised in the Motion to Determine the Scope of Claimed Stay. See, Ex H, Letter of Withdrawal of Motion to Determine Scope of Claimed Stay, dated April 11, 2018.

However, Plaintiffs have conflated the law regarding whether a matter is subject to an interlocutory appeal with that of the law to determine the scope of stay. At no point, has this Court had the opportunity to review and determine a motion to determine the scope of the stay pursuant to the applicable appellate rules. Accordingly, the present motion is still ripe for review.

At this time, there are several motions scheduled to be heard. Specifically, Plaintiffs have moved to amend their Answer to Respondent’s Third-Party Complaint to state a defense that “Heron Point is a bona fide purchaser for value, without notice, actual or constructive, with respect to the unrecorded 1988 Settlement Agreement to [the] extent the unrecorded agreement constitutes

a defect, lien or interest in its title to the Golf Course Property.” See Ex. I, Plaintiffs Motion to Amend Answer to Third Party Complaint, filed December 17, 2017. Plaintiffs also added a defense that:

The unrecorded 1988 Settlement Agreement executed on July 25, 1988 is legally incompetent and violated the parol evidence rule ... This is because Heron Point is a bona fide purchaser for value, without notice, actual or constructive, of the unrecorded 1998 Settlement prior to purchasing the Golf Course Property on April 15, 1992...Accordingly, the unrecorded 1988 Settlement Agreement is barred from admission into evidence by the [p]arol evidence rule.

*Id.* Thus, Plaintiff is now seeking to amend its pleadings to determine the effect of the 1988 Settlement Agreement and its impact on this litigation.

Plaintiffs’ filed a motion for summary judgement on December 13, 2017, which discusses the facts referenced above *ad nauseum*. See Ex. J, Plaintiff’s Motion for Summary Judgment, filed December 13, 2017 (without exhibits). Appellant, while invoking its opinion that the matter was stayed, filed a prophylactic memorandum in opposition to Plaintiff’s motion for summary judgment. Appellant’s memorandum of law also dissects the facts referenced above (and the matters on appeal) in exquisite detail. See Appellant’s Memorandum of Law in Opposition to Plaintiffs Motion for Summary Judgment and the Amended Memorandum of Law in Opposition to Plaintiffs Motion for Summary Judgment and the Rule 56(F), SCRCF Affidavit of Christopher Pearce. Ex K, L (without exhibits)<sup>3</sup>.

This case was scheduled for oral argument on July 16, 2018 after a conference with Judge Hyman in chambers. Outstanding motions to be heard by Judge Hyman included Appellant’s motion for an *in camera* review of certain documents; Appellant’s motion to exclude the testimony

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<sup>3</sup> Appellant filed an earlier Memorandum of Law in Oppositions to Plaintiffs’ Motion for Summary Judgment, on January 15, 2018.

of a certain fact/expert witness or motion *in limine*, Appellant's motion for Summary Judgment, Plaintiff's Motion for Summary Judgment and Appellant and Plaintiffs' Motions to Amend their pleadings.

At oral argument on July 16, 2018, Judge Hyman, once again, asked that the issue of the stay be briefed to the Court of Appeals. Appellant agreed to brief the issue to this Court. Despite requesting and acknowledging that Appellant will file a motion to determine the scope of stay, Judge Hyman proceeded to hear Plaintiffs' Motion for Summary Judgment and refused to hear the other motions that were calendared well in advance of Plaintiffs' Motion for Summary Judgment. Judge Hyman has also requested additional briefing. Appellant has requested a copy of that transcript but has not received a complete copy of the same yet.

### **ARGUMENT**

#### **I. THIS COURT'S EXCLUSIVE JURISDICTION OVER THE APPEAL AND THE AUTOMATIC STAY IN RULE 241, SCACR, STAYS ALL DISCOVERY AND MOTIONS THAT RELATE TO, CONCERN OR INTERPRET THE 1988 SETTLEMENT AGREEMENT, 1992 INDENTURE DEED and 2005 WAIVER OF RESTRICTIONS.**

Upon service of a notice of appeal, the appellate court obtains exclusive jurisdiction over the appeal. Rule 205, SCACR. The lower court retains jurisdiction to proceed on "matters not affected by the appeal." *Id.* Rule 241, SCACR imposes an automatic stay upon "matters decided in the order, judgment, decree or decision on appeal," subject to certain exceptions that are inapplicable here. The question presented by this motion is whether Appellant's appeal of the lower court's order dismissing Appellant's claims for breach of contract, contractual indemnity and equitable indemnification, on a Rule 12(b)(6) SCRCR motion, which claims deal with the interpretations of the same documents and issues in the underlying action and remaining cause of action in the third-party complaint, stays all discovery, motion practice and rulings on outstanding

motions in the underlying action, third-party action, or both. For the following reasons, Appellant submits that all discovery and motion practice, that relates to, concerns or interprets the 1988 Settlement Agreement, 1992 Indenture Deed and 2005 Waiver of Restrictions and the covenants/use restrictions contained therein should be stayed by this pending appeal.

Rule 241, SCACR, does not provide a procedure for settling disputes over the applicability or scope of the automatic stay. When no procedure is specified, authority to resolve such a dispute vests in the appellate court in which the appeal is pending, not the circuit court. Jean Hoefer Toal, *Appellate Practice in South Carolina* at p. 344 (3d ed. 2016) (citing *Kearny v. Allen*, 287 S.C. 324, 338 S.E.2d 335 (1985) (interpreting former Supreme Court Rule 41 and holding when no procedure is specified, authority to resolve disputes over whether an exception to the automatic stay is vested in the Supreme Court, not the circuit court); *see also State v. Cooper*, 342 S.C. 389, 536 S.E.2d 870 (2000) (modifying *Kearney* to hold Court of Appeals has the power and the authority to rule upon issues arising under the SCACR, including those arising under the predecessor to Rule 241)).

In *Tillman v. Oakes*, 398 S.C. 248, 728 S.E.2d 45 (Ct. App. 2012), this Court held “the lower court’s power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a ‘matter [] affected by the appeal’ under Rules 205 and 241(a).” *Id.* At 225, 728 S.E.2d at 51 (citation omitted). In *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016), the Supreme Court expressly states: “Rule 205 divests the lower court . . . over ‘matters affected by the appeal,’ which necessarily would include a legal . . . action that is based on the outcome of the appealed verdict, judgment, or ruling.” ... *See* ... “*Black’s Law Dictionary* 68 (10th ed. 2014) (defining “affect” as “to produce an effect on; to influence in some way”).”

In the case at bar, the “issue[s] sought to be litigated in the lower court” and “matters affected by the appeal” include Appellant’s permanent injunction cause of action against South State Bank in the Third-Party Action. The permanent injunction cause of action against South State Bank stems from South State Bank’s predecessor in interest’s breach of the 1988 Settlement Agreement and issuance of the 2005 Waiver of Restriction. The resolutions of this issue will necessarily involve the following issues:

- a. interpretation of the 1988 Settlement Agreement, including,
  - i. its operative effect;
  - ii. the intention of the language;
  - iii. who are parties to this 1988 Settlement Agreement – by successor rights, or by privity of contract, *etcetera*.
- b. interpretation of the 1992 Indenture Deed; including,
  - i. whether it is ambiguous;
  - ii. the effect of the language; and
  - iii. including who may be considered parties to it.
- c. interpretation of the 2005 Waiver of Restrictions.

Accordingly, the Third-Party Action is stayed as the issues sought to be litigated by the lower court are matters under appeal.

Similarly, in the case at bar, the “issue[s] sought to be litigated in the lower court” and “matters affected by the appeal” include the declaratory relief causes of action asserted by Plaintiffs against Appellant. In its Complaint, Plaintiffs allege:

- (i) “[T]he alleged use restrictions referenced in the “Heron Point Deed” ... were personal to First Federal Savings and Loan Association of Charleston, the successor

by merger to Peoples Federal Savings and Loan Association [predecessor in interest to Respondent] as the grantor/covenantor, and do not run with the golf course property, formally known as the Myrtle Beach Golf & Yacht Club Golf Course;” Complaint ¶18(c) [R. at 34-35]

- (ii) “That First Federal Savings and Loan Association of Charleston [predecessor in interest to Respondent] as the Grantor/Covenantor had previously waived, relinquished and released the ... [1992 Heron Point Deed] restrictions as the same may have applied, if at all, to the Enterprise Tracts, including the golf course property, by Deed known as “Waiver of Restrictions [Deed] recorded May 5, 2005...” Complaint ¶18(d) [R. at 34-35];
- (iii) “That the Defendant Association lacks standing to enforce the alleged restriction referenced in the Heron Point Deed recorded on April 15 1992 ... because they are personal to Peoples (“Grantor”) its heirs, successors, and assigns, and do not run with the golf course property....” Complaint ¶18(e) [R. at 34-35];

The resolution of this Plaintiffs’ Complaint, by its own terms, will necessarily include interpretation of the 1992 Indenture Deed and 2005 Waiver of Restrictions, which are matters affected by the appeal. See Ex. J, K, L. Plaintiff’s memorandum of law in support of its motion for Summary Judgment and the Appellant’s opposition thereto is just one illustration of how the matters under appeal are sought to be litigated in the lower court. To wit: the memorandums of law are replete with references to the 1992 Indenture Deed and 2005 Waiver of Restrictions. Moreover, Appellant has argued in opposition to Plaintiff’s Motion for Summary Judgment that the 1992 Indenture Deed restrictions stem from the 1988 Settlement Agreement. Plaintiffs in turn have argued that the 1988 Settlement Agreement is inadmissible *parol* evidence and legally

incompetent – both in their Memorandum of Law and in their Motion to Amend their pleadings. Moreover, the issue of whether the 1992 Indenture Deed is ambiguous has been raised by the parties and the issuance of the 2005 Waiver of Restrictions has been raised as an issue of fact precluding summary judgment.

In other words, Plaintiffs' summary judgment memorandum of law and Appellant's opposition thereto demonstrate that the issues sought to be litigated by the lower court are matter affected by the appeal, as the appeal concerns the 1988 Settlement Agreement, 1992 Indenture Deed and 2005 Waiver of Restrictions and the interpretation of the same. In sum, the 1992 Indenture Deed and 2005 Waiver of Restrictions are matters affected by the appeal and are "issue[s] sought to be litigated in the lower court".

Plaintiffs' Complaint seeks a declaratory judgment with respect to standing of Appellant based on the interpretation of the 1992 Indenture Deed and 2005 Waiver of Restrictions. [R. at 24-80]. Appellant's Counterclaims seek a declaratory judgment concerning the 1992 Indenture Deed and the 2005 Waiver of Restrictions. [R. at 412-701]. Both Plaintiffs and Appellant's pleadings raise the issue of the 1992 Indenture Deed and 2005 Waiver of Restrictions and their interpretation and operative effect. Those matters are affected by the appeal and issues sought to be litigated by the lower court.

It would be a waste of judicial resources, time and money for the parties to continue to litigate these issues raised by the interpretation of the 1988 Settlement Agreement, 1992 Indenture Deed, 2005 Waiver of Restrictions while those matters are affected by the appeal. The matters affected by the appeal are inextricably intertwined with the issues sought to be litigated by the lower court. Moreover, all parties' respective prosecution and defense of their claims, to wit: (i) Appellant's prosecution of its Counterclaims and Third-Party Complaint and defense of the

Complaint, (ii) Plaintiffs' prosecution of its Complaint and defense of the Counterclaims, and (iii) Respondents defense of the allegations in the third-party action, will likely be affected by the "outcome of the appealed verdict, judgment, or ruling" and therefore constitutes "matters affected by the appeal." *See Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. at 534, 787 S.E.2d at 494.

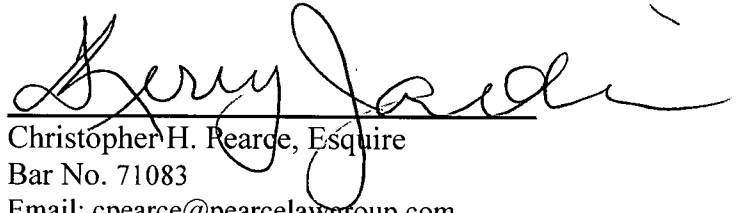
In this case, the overriding question is what causes of action may be heard in light of the pending appeal. The causes of action in the underlying action and the remaining cause of action in the third-party action stem from the same nexus of facts and documents and the interpretation thereof as the causes of action that are on appeal. Accordingly, the underlying case and remaining third-party cause of action should be stayed until the appeal is resolved.

### **CONCLUSION**

For the reasons stated above, Appellant seeks an order from this Honorable Court protecting Appellant from further discovery, further motion practice and any judgments on pending motions in both the underlying case and third-party action and pursuant to Rule 241, SCACR.

***[SIGNATURE PAGE TO FOLLOW]***

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*Attorneys for Respondent  
Heron Point Golf Club Limited Partnership*

# EXHIBIT "A"

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-03173

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

Plaintiffs,

vs.

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Defendant/Third Party  
Plaintiff,

vs.

South State Bank,

Third Party Defendant.

**AMENDED CONSENT SCHEDULING  
ORDER**

Pursuant to Rules 16, 26, and 39 SCRCP, the parties have stipulated that this is a non-jury matter and that the matter should be transferred to non-jury roster. Based on the above and with consent of counsel for the parties, the following schedule is hereby Ordered in this matter:

1. This matter shall be subject to a second court ordered mediation which shall be completed no later than December 31, 2017;
2. Discovery in this matter shall be completed on or before December 15, 2016; and
3. The non-jury trial of this matter shall be heard by Judge Hyman on or before January 26, 2018, or as soon as Court Administration can schedule a date certain non-jury trial date. In accordance with the above, Judge Hyman shall first determine the ultimate issue in the case of whether the deed restrictions in the alleged Indenture deed between Peoples Federal Savings and Loan Association ("Peoples Federal") and

Heron Point Golf Club Limited Partnership ("Heron Point") recorded on April 15, 1992 are personal or rather run with title to the golf course property. Judge Hyman decided in chambers to bifurcate the personal verses real covenant issue from the remainder of the case with the consent of the parties' counsel.

4. Judge Hyman shall hear Myrtle Beach Golf & Yacht Club's outstanding Motions previously scheduled for hearing on September 11, 2017 and September 25, 2017, to include a Motion for Summary Judgment and Motion to Strike/Motion in Limine, on or before the October 30, 2017 non-jury term of court, or as soon as said Motions can be scheduled.
5. Judge Hyman shall conclude his in-camera review of the outstanding Hines document production Motions as soon as can be scheduled prior to any non-jury trial of this matter.
6. All other outstanding Motions shall be decided by Judge Hyman on or before the scheduled non-jury trial date which the Court determines are necessary to help resolve the personal verses real covenant issue with respect to the golf course property.

IT IS SO ORDERED.

Conway, South Carolina

\_\_\_\_\_, 2017

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Judge Larry B. Hyman, Jr.  
Fifteenth Judicial Circuit

I CONSENT:

s/ Howell V. Bellamy, Jr.  
Howell V. Bellamy, Jr., Esquire  
Howell V. Bellamy, III, Esquire  
The Bellamy Law Firm  
P.O. Box 357  
Myrtle Beach, SC 29578

Attorneys for Plaintiffs / Counter-Defendants

I CONSENT:

s/ Christopher H. Pearce  
Christopher H. Pearce  
The Pearce Law Group, P.C  
1314 Professional Drive  
Myrtle Beach, SC 29577

Attorneys for Defendant / Counter-Plaintiff / Third Party Plaintiff

I CONSENT:

s/ Audra M. Byrd  
Audra M. Byrd  
Turner Padgett Graham & Laney, PA  
P. O. Box 2116  
Myrtle Beach, SC 29578

Attorneys for Third Party Defendant  
South State Bank



Horry Common Pleas

**Case Caption:** Condo World Development LLC , plaintiff, et al VS Myrtle Beach  
Golf & Yacht Club Association Inc  
**Case Number:** 2015CP2603173  
**Type:** Order/Amend

So Ordered

s/ Larry B. Hyman 2152

# EXHIBIT "B"

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-03173

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

Plaintiffs,

vs.

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Defendant/Third Party  
Plaintiff

vs.

South State Bank,

Third Party Defendant.

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

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

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

### STATEMENT OF CASE

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

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

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

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

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

### **FACTUAL BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) The Bankruptcy and the 1988 Settlement Agreement

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

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

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

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

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

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

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

(ii) Peoples Files for Foreclosure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## H. Closing of the Golf Course

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

## PROCEDURAL BACKGROUND

### A. The Pleadings

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

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

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

## B. Discovery

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

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

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

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

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

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

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

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

A: That's correct.

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

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

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

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

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

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

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

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

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

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

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

|                    |                 |
|--------------------|-----------------|
| Canal Holdings LLC | Never Responded |
|--------------------|-----------------|

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

### **STANDARD OF REVIEW**

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

### **ARGUMENT**

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

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

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

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

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

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

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

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

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

**1. Plaintiffs Delay in Bringing this Suit was Unreasonable**

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

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

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

2. Plaintiffs Unreasonable Delay Prejudiced MBG&YC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### CONCLUSION

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

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BEACH GOLF & YACHT CLUB  
ASSOCIATION, INC.

August 17, 2017

# EXHIBIT "C"

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

Case No. 2015-CP-26-3173

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

Plaintiffs,

vs.

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Defendant.

**PLAINTIFFS' MEMORANDUM OF LAW IN  
OPPOSITION TO DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT**

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Third-Party Plaintiff,

vs.

South State Bank,

Third-Party Defendant.

Plaintiffs Condo-World Development, LLC and Heron Point Golf Club Limited Partnership hereby submit their memorandum of law in opposition to the motion for summary judgment filed by Defendant Myrtle Beach Golf & Yacht Club Association, Inc. ("the Association").

**INTRODUCTION**

The Association's motion for summary judgment is based solely on the doctrine of laches. Despite the Association filing a 60-page memorandum of law in opposition to Plaintiffs' motion for summary judgment and submitting approximately 20 separate electronic filings of materials in conjunction therewith, the Association claims Plaintiffs waited too long to assert

their claims and, as a result, there is no evidence available to defend against Plaintiffs' claims.

The Association, however, fails to cite applicable case law which provides that the failure to assert a right does not come into existence until there is a reason or situation that demands assertion of the right. In addition, the Association cannot seek affirmative relief against Plaintiffs regarding the same transaction and issue and at the same time assert Plaintiffs are guilty of laches.

The Association cannot meet the elements of laches. The Court should therefore deny the Association's motion for summary judgment.

### ARGUMENT

#### 1. Laches in general

The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1998). The party seeking to establish laches must show (1) delay, (2) that was unreasonable under the circumstances, and (3) prejudice. *Kelley v. Kelley*, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct. App. 2006).

To establish laches as a defense, the defendant must show the complaining party unreasonably delayed its assertion of a right, thereby prejudicing the defendant. *Id.* For the defense of laches to be sustained, "the circumstances must have been such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts." *Id.* at 607, 629 S.E.2d at 391 (quoting *Byars v. Cherokee County*, 237 S.C. 548, 560, 118 S.E.2d 324, 330 (1961)).

The burden of proof is on the party asserting laches. *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct. App. 1999). “[W]hether laches applies in a particular situation is highly fact-specific, so each case must be judged on its own merits.” *Id.* “[T]he determination of whether laches has been established is largely within the discretion of the trial court.” *Kelley*, 368 S.C. at 607, 629 S.E.2d at 391.

The Association cannot meet any of the elements of laches.

2. **There was no delay and no delay that was unreasonable under the circumstances.**

Our courts have repeatedly stated that the failure to assert a right “does not come into existence until there is a reason or situation that demands assertion.” *Mid-State Trust, II v. Wright*, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (1996); *Ex parte Stokes*, 256 S.C. 260, 267, 182 S.E.2d 306, 309 (1971); *Muir*, 336 S.C. at 297, 519 S.E.2d 599.

“[L]aches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right.” *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994). “The lached party must have had actual knowledge or inquiry notice of the facts forming the basis of its claim, and its failure to assert its right is irrelevant until there is a reason or situation that demands assertion.” *Id.*

“No unreasonable delay can be charged against plaintiff until his or her cause of action has matured or his or her right has been repudiated.” 30A C.J.S. *Equity* § 143.

Here, the golf course had been in existence and operating from its development until the golf course closed in late 2014. Plaintiffs decided to close the golf course because it was no longer economically viable to do so. Plaintiffs then communicated with the Association’s attorney about selling the golf course. The Association’s attorney responded and claimed the

golf course was limited to use as a golf course. Attempts to resolve this issue failed and Plaintiffs filed this action in 2015.

There was no delay that was unreasonable because there was no reason at all to file this action until late 2014. There was no reason or situation that demanded Plaintiffs assert their rights or to file this action until late 2014.

Had Plaintiffs filed this action prior to the golf course closing, the case would not have been ripe and there would have been no case or controversy. *See Pee Dee Electric v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) (finding that before a court may render a declaratory judgment, an actual, justiciable controversy must exist and that a justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute); *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995); (“A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.”).

The Association cannot show a delay and a delay that was unreasonable under the circumstances. The Court should therefore deny the Association’s motion for summary judgment.

3. **The Association cannot show it has been prejudiced.**

The Association cannot show it has been prejudiced by any alleged delay. The Association’s motion is based on the wrong assumption that it needs to provide evidence outside the four corners of the subject documents.

The parties agree the intention of the parties to a restrictive covenant is determined at the time the covenants are created. *Charping v. J. P. Scurry & Co.*, 296 S. C. 312, 372 S. E. 2d 120

(Ct. App. 1988). However, that intention must be determined from the deed itself, unless the deed is ambiguous. Only if the deed is ambiguous may the court consider circumstances surrounding the transaction.

As the Supreme Court has stated,

one of the most valuable safeguards thrown around a deed is that parol evidence is not admissible to vary or contradict the terms of a written contract, and this applies in all its strictness to actions involving deeds. Parol reservations or exceptions made either at or before the making of a deed are merged therein and cannot be allowed to alter or modify its legal effect.

*Scott v. Scott*, 216 S.C. 280, 293, 57 S.E.2d 470, 476 (1950).

“[T]he determination of whether language in a deed is ambiguous is a question of law. The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation.” *Proctor v. Steedley*, 398 S.C. 561, 573 n. 8, 730 S.E.2d 357, 363 n. 8 (Ct. App. 2012). The construction of a clear and unambiguous deed is a question of law for the court. *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987).

It is this Court’s duty to determine whether the 1992 Deed from Peoples Federal to Heron Point is clear or ambiguous. Nonetheless, Charles Hedgepath, the Association’s own expert, has opined the 1992 Deed is unambiguous. *Hedgepath Dep.* pp. 87, 99-100 (Exhibit A).<sup>1</sup> This Court can and should reach the same conclusion. Of course, if the 1992 Deed is unambiguous, this Court should not consider extrinsic evidence in interpreting the 1992 Deed.

Accordingly, the Association’s argument that Plaintiffs’ claims are barred because the Association is having difficulty finding evidence to determine the intent of the 1992 Deed is

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<sup>1</sup> Plaintiffs contend Hedgepath’s testimony is inadmissible because expert testimony on issues of law is inadmissible. However, to the extent the Court disagrees, Plaintiffs cite to the Hedgepath’s deposition testimony for the purposes of this motion.

fundamentally without merit.<sup>2</sup>

In addition, even if extrinsic evidence is required, there is a plethora of evidence, recorded documents, affidavits, and deposition testimony, all of which are attached to or filed in conjunction with Plaintiffs' motion for summary judgment and the Association's response thereto.

4. **The Association's laches defense is barred because it is making the same claims regarding the same transaction and occurrence as Plaintiffs and because Plaintiffs are in peaceful possession of the golf course.**

In *Charleston Library Soc. v. Citizens & Southern Nat. Bank*, 201 S.C. 447, 23 S.E.2d 362, 364-65 (1942), the Supreme Court held:

Where both parties were equally at fault, neither can assert laches against the other; and where each of the parties seeks affirmative relief against the other in reference to the same transaction, neither may assert that the other was guilty of laches.

*Id.*; see also 30A C.J.S. *Equity* § 140 ("Likewise, where each of the parties seeks affirmative relief against the other in reference to the same transaction neither may assert that the other was guilty of laches."); *Davis v. Newton*, 121, S.E.2d 153, 156 (Ga. 1961) ("The rule as to the laches should work both ways. If both parties are equally to blame for the delay, neither should be allowed to invoke the rule in order to gain an advantage over his adversary."); *Lemmer v. Batzli Elec Co.*, 125 N.W.2d 434, 439 (Minn. 1963) ("where each party seeks affirmative relief against the other in reference to the same transaction, neither may assert that the other was guilty of laches.").

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<sup>2</sup> As to the Association's similar argument regarding the unrecorded 1988 Settlement Agreement, that agreement is not recorded, Plaintiffs are not parties to that unrecorded agreement, and Plaintiffs had no notice of that unrecorded agreement. Accordingly, Plaintiffs are not bound by the unrecorded 1988 Settlement Agreement and, thus, any evidence to determine the intent of that unrecorded agreement is not relevant.

Here, the Association and the Plaintiffs are asserting claims against each other asking the Court to reach different conclusions about the same documents and transactions.

In addition, in *Charleston Library Soc.*, the Supreme Court stated:

as the doctrine of laches ordinarily can be invoked only by one in possession against one out of possession, it cannot be interposed as a defense by one whose claim to the property has not been united with the possession; nor can the defense of laches be interposed against one who during the period of delay was under no duty or obligation to act.

*Charleston Library Soc.*, 201 S.C. 447, 23 S.E.2d 362 at 364; *see also* 30A C.J.S. *Equity* § 145 (“The doctrine of laches can ordinarily be invoked only by one in possession against one out of possession, and does not operate in favor of one who has never contacted the title or possession of property. One in peaceable possession of property under claim of right may rest in security until his or her title or possession is attacked, and the failure to appeal to equity during that period is no defense to a suit subsequently brought to establish, enforce, or protect his or her right. This rule applies not only in favor of those occupying land, but also in favor of one in peaceable possession of personal property.”); *Unified Gov’t of Athens-Clarke Co. v. Stiles Apartments Inc.*, 764 S.E.2d 403, 408 (Ga. 2014) (“Anyone who is in peaceable possession of property is not barred by laches or the statute of limitations when bringing an action in equity to establish his rights in such property.”).

Plaintiffs are and have been in peaceable possession of the golf course. The Association has not been in possession of the golf course.

Accordingly, laches is not available as a defense to the Association.

### CONCLUSION

For the above-referenced reasons, this Court should deny the Association’s motion for summary judgment.

Respectfully submitted,

s/ Demetri K. Koutrakos

Demetri K. Koutrakos, SC Bar No. 11318  
**CALLISON TIGHE & ROBINSON, LLC**

P. O. Box 1390

Columbia, SC 29202-1390

Telephone: 803-404-6900

Email: [jimkoutrakos@callisontighe.com](mailto:jimkoutrakos@callisontighe.com)

**ATTORNEYS FOR PLAINTIFF  
HERON POINT GOLF CLUB LIMITED  
PARTNERSHIP**

Bellamy, Rutenberg, Copeland

Epps, Gravely & Bowers, P.A.

s/Howell V. Bellamy, III

Howell V. Bellamy, III (S.C. Bar #66575)

[hbellamyiii@bellamylaw.com](mailto:hbellamyiii@bellamylaw.com)

Howell V. Bellamy, Jr. (S.C. Bar #68543)

[nrichardson@bellamylaw.com](mailto:nrichardson@bellamylaw.com)

1000 29<sup>th</sup> Ave., N.

Myrtle Beach, S.C. 29577

Telephone: (843)-448-2400

**Attorneys For Plaintiffs**

July 13, 2018

ELECTRONICALLY FILED - 2018 Jul 13 1:50 PM - Horry - COMMON PLEAS - CASE#2015CP2603173

# Exhibit A

1 STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 2 COUNTY OF HORRY )

4 CASE NO. 2015-CP-26-3173

6 CONDO-WORLD DEVELOPMENT, )  
 LLC, and HERON POINT GOLF CLUB)  
 7 LIMITED PARTNERSHIP, )

8 Plaintiffs, )

9 -vs-

) DEPOSITION OF:  
 ) CHARLES HEDGEPATH

10 MYRTLE BEACH GOLF & YACHT )  
 CLUB ASSOCIATION, INC., )  
 11 )  
 Defendant. )

12 \_\_\_\_\_ )  
 13  
 14  
 15 Given before Trisha G. Rarick, Court Reporter and Notary  
 16 Public, at CALLISON/TIGHE, 1812 Lincoln Street, First Floor,  
 17 Columbia, South Carolina, on Monday, January 8, 2018, at  
 18 1:08 p.m.

25 Job No. GS2786395

A P P E A R A N C E S

ON BEHALF OF THE CONDO-WORLD DEVELOPMENT, HERON POINT:

BELLAMY LAW FIRM

BY: HOWELL V. BELLAMY, JR.

1000 29th Avenue North

Myrtle Beach, SC 29577

843.448.2400

HBellamyiii@Bellamylaw.com

ON BEHALF OF HERON POINT GOLF CLUB LIMITED PARTNERSHIP:

CALLISON, TIGHE & ROBINSON, LLC

BY: DEMETRI K. KOUTRAKOS

1812 Lincoln Street, Suite 200

Columbia, SC 29201

803.404.6900

JimKoutrakos@callisontighe.com

ON BEHALF OF THE SOUTH STATE BANK:

TURNER, PADGET, GRAHAM & LANEY

BY: AUDRA M. BYRD (By Telephone)

2411 North Oak Street, Suite 301

Myrtle Beach, SC 29577

843.213.5500

abyrd@turnerpadget.com

ON BEHALF OF MYRTLE BEACH GOLF & YACHT CLUB ASSOC:

PEARCE LAW GROUP, P.C.

BY: CHRISTOPHER H. PEARCE

1314 Professional Drive

Myrtle Beach, SC 29577

843.839.3210

ALSO PRESENT:

DOUGLAS BROWN, ESQUIRE

I N D E X

EXAMINATION

Page

By MR. KOUTRAKOS

4

By MR. BELLAMY

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Certificate of Reporter

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E X H I B I T S

Page

PLAINTIFFS' EXHIBITS

1 SUPPLEMENTAL RESPONSE

37

2 JANUARY 5, 2018, DOCUMENT

38

3 DEED TO TRACT 1

53

4 DEED TO TRACT 2

53

5 AMENDED AND RESTATED DECLARATION

66

6 1992 DEED

82

7 NOTICE IN MOTION OF MEMORANDUM

104

8-9 QUITCLAIM DEEDS

117

10 DEED

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11 CHARPING CASE

126

1 contain expressed language that it runs with the  
2 titles to the lots in the Myrtle Beach Golf & Yacht  
3 Club subdivision?

4 A You meant the lot owners -- property  
5 owners?

6 Q Okay. I'm not sure what I meant.

7 MR. BELLAMY: Runs with the title to the  
8 dwellings.

9 BY MR. KOUTRAKOS:

10 Q Would you agree with me that there's no  
11 language in Exhibit Number 6, the 1992 deed, that  
12 says that any restrictions runs with the title to  
13 the lots within the Myrtle Beach & Golf Club  
14 subdivision?

15 A I agree.

16 Q Okay. Are you familiar with the 1988  
17 settlement agreement -- bankruptcy court settlement  
18 agreement?

19 A I am aware of it.

20 Q Okay. It is a --

21 A Bankruptcy.

22 Q -- bankruptcy court opinion that's not  
23 recorded in the public record of Horry County. Is  
24 that your understanding?

25 A That's my understanding.

1 you're putting the burden on the person searching  
2 title to find something as opposed to the parties to  
3 the 1988 settlement agreement actually recording it?  
4 That's what you're doing, correct?

5 A I'm -- I think I am saying that, you know,  
6 from what I have been furnished, this restriction  
7 was in the contract of sale.

8 Q Pardon?

9 A This restriction requirement in the deed  
10 was in the contract of sale between Peoples and  
11 Heron Point.

12 Q Uh-huh.

13 A The deed reflects what the contract said.

14 Q Would you agree with me that the contract  
15 merges into the deed, and, therefore, the contract  
16 is irrelevant?

17 A I would agree with you that there is case  
18 law out there that says the contract, you know,  
19 merges.

20 Q Right. Okay.

21 A Okay.

22 Q Tell me how that goes to the 1988 -- how  
23 does that get -- I'm not sure I got your opinion on  
24 this. Do you or do you not believe that the 1992  
25 deed, Exhibit Number 6, is ambiguous?

1           A     I don't think it's ambiguous with respect  
2     to the restriction.

3           Q     Is it ambiguous in other aspects?

4           A     It does not contain the language that you  
5     and I have discussed earlier. Whether that makes it  
6     ambiguous or not, I'm not sure.

7           Q     So your answer is -- your legal opinion is  
8     you're not sure whether the 1992 is ambiguous?

9           MR. BELLAMY: I think he said it was  
10    unambiguous.

11   BY MR. KOUTRAKOS:

12          Q     It's unambiguous as the restriction as to  
13    what the covenant says, restrictive covenant, but  
14    you're unsure as to whether it's ambiguous as to any  
15    other part of the deed?

16          A     I'm saying -- you know, I will agree with  
17    you that it does not contain the language that you  
18    and I have discussed earlier as to certain aspects  
19    with respect to touch -- you know, binding on the  
20    heirs, successors and assigns.

21          MR. KOUTRAKOS: Let's take a break.

22                   (Off-the-record discussion.)

23   BY MR. KOUTRAKOS:

24          Q     I asked you questions about everything you  
25    have over here in your little folder, but I did see

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

INDEBTURE DEED

FILED  
HORRY COUNTY  
APR 15 PM 3:30

KNOW ALL MEN BY THESE PRESENTS, that Peoples Federal Savings and Loan Association, hereinafter referred to as Grantor, in the State aforesaid for and in consideration of the sum of ten and no/100 (\$10.00) Dollars and other valuable consideration to it paid by Heron Point Golf Club Limited Partnership, hereinafter referred to as Grantee (Receipt whereof is hereby acknowledged) has granted, bargained, sold and released; and by these presents, does grant, bargain, sell and release unto the said Grantee, its Successors and Assigns the following described property:

SEE ATTACHED SCHEDULE "A" FOR DESCRIPTION

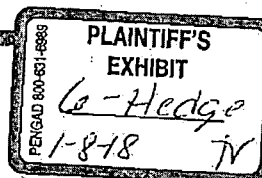
GRANTEE'S ADDRESS: Heron Point Golf Club Limited Partnership  
Post Office Box 26988  
Greenville, S. C. 29616

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

- (a) The only permitted use of this property is as a golf course, country club, or other ancillary use relating to golf course or country club use;
- (b) Grantee, its Successors and Assigns agree to offer memberships to members of Myrtle Beach Golf and Yacht Club Association, Inc., its Successor or Assigns on the same basis that it offers memberships to the public at large, provided, however, that there shall be no requirement to offer memberships.

IT IS FURTHER PROVIDED that these covenants shall not apply to Parcel A-C comprised of 4.636 acres as shown on a plat of Heron Point Golf Club, formerly Myrtle Beach Golf & Yacht Club Golf Course, prepared by Frederick L. Harris, R.L.S. dated April 6, 1992

BOOK 1540 PAGE 482



and filed for record in the Office of the R.M.C. for Horry County  
in Real Estate Plat Book 119 at pages 282.

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

- (a) Right-of-way easement given by Myrtle Beach Golf & Yacht Club, a General Partnership to Horry Telephone Cooperative, Inc. dated April 16, 1985, recorded in said Register's office on June 21, 1985 in Deed book 867 at page 259.
- (b) Memorandum of Exclusive Right and License given by Myrtle Beach Golf & Yacht Club, a General Partnership to Satellite Industries, Inc., a North Carolina corporation doing business in the State of South Carolina in the name of Cablevision Industries, dated December 31, 1984, recorded in said Register's office on July 3, 1985 in Deed book 979 at page 232.
- (c) Declaration for water distribution and sewage collection systems given by Myrtle Beach Golf & Yacht Club, a General Partnership to Grand Strand Water and Sewer Authority, dated January 6, 1988, recorded in said Register's office on February 13, 1988 in Deed book 1026 at page 471.
- (d) Deed and Easement given by Myrtle Beach Golf & Yacht Club, a General Partnership to Grand Strand Water and Sewer Authority, dated August 10, 1988, recorded in said Register's office on September 8, 1988 in Deed Book 1318 at page 388.
- (e) Easement Maintenance Agreement given by Peoples Federal Savings and Loan Association given to Myrtle Beach Golf & Yacht Club Association, Inc., dated September 9, 1990, recorded in said Register's office on November 7, 1990 in Deed Book 1433 at page 361.
- (f) Restrictions, covenants and conditions contained in Deed from James H. Dusenbury, as Nominee, to Myrtle Beach Golf & Yacht Club, a General Partnership, dated February 29, 1984, recorded in said Register's office on March 13, 1984, in Deed Book 855 at page 769.
- (g) Restrictions, covenants and conditions contained in Deed from James H. Dusenbury, as Nominee, to Heron Point Golf Club, Inc., dated April 25, 1989 recorded in said Register's office on May 2, 1989, in Deed Book 1306 at page 642.

TOGETHER with all and singular, the Rights, Members,

500A 1540 PAGE 483

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Hereditaments and Appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee, its Successors and Assigns forever.

AND the Grantor herein hereby binds itself and its Successors and Assigns to warrant and forever defend all and singular the said premises unto the said Grantee, and its Successors and Assigns against itself and its Successors and Assigns and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS the execution hereof by Grantor this 15<sup>th</sup> day of April, in the year of our Lord one thousand nine hundred and ninety-two and in the two hundred sixteenth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered  
in the Presence of:

PEOPLES FEDERAL SAVINGS AND  
LOAN ASSOCIATION

BY: [Signature]

ITS: \_\_\_\_\_

BY: [Signature]

ITS: Vice President

[Signature]  
[Signature]

|                       |        |
|-----------------------|--------|
| DOCUMENTARY STAMP TAX | 900.00 |
| DOCUMENTARY STAMP TAX | 900.00 |
| DOCUMENTARY STAMP TAX | 900.00 |
| DOCUMENTARY STAMP TAX | 900.00 |

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| DOCUMENTARY STAMP TAX | 900.00 |

484

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STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

PROBATE

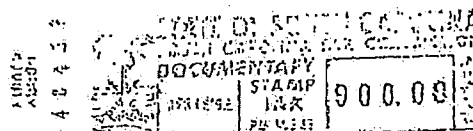
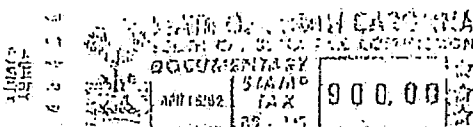
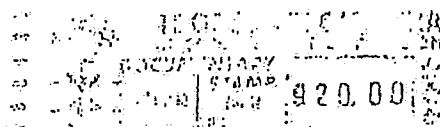
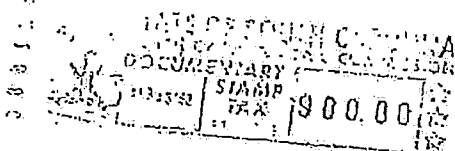
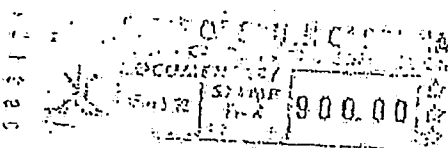
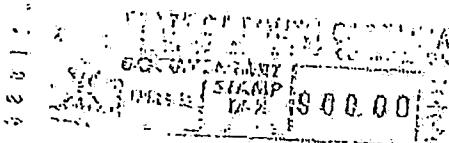
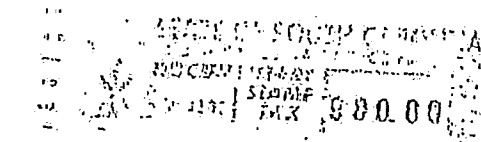
PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantor sign, seal and as its corporate act and deed, deliver the within Deed of Real Estate; that deponent with the other witnesses whose name is subscribed above witnessed the execution thereof

*[Signature]*

SWORN to before me this  
15<sup>th</sup> day of April, 1992.

*[Signature]* (L.S.)  
Notary Public for South Carolina

My Commission Expires: 3/15/97



500X 1540 PAGE 485

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EXHIBIT "A"

Parcel One

All those certain pieces, parcels or tracts of land, together with the improvements thereon, situate, lying and being in Socastee Township in the County of Horry, State of South Carolina, containing in the aggregate 164 . . . , more or less, being shown and described as follows:

Parcel C, containing 0.077 acres, more or less;  
 Parcel L, containing 13.345 acres, more or less;  
 Parcel H, containing 14.522 acres, more or less;  
 Parcel R, containing 3.527 acres, more or less;  
 Parcel H-1, containing 7.587 acres, more or less;  
 Parcel O, containing 5.614 acres, more or less;  
 Parcel Q, containing 27.088 acres, more or less;  
 Parcel T, containing 34.843 acres, more or less;  
 Parcel U, containing 4.219 acres, more or less;  
 Parcel V, containing 9.866 acres, more or less;  
 Parcel Z, containing 1.019 acres, more or less;  
 Parcel AA, containing 10.535 acres, more or less;  
 Parcel AB, containing 11.924 acres, more or less; and  
 Osprey Lake, containing 19.637 acres, more or less;

on survey of Heron Point Golf Club, formerly Myrtle Beach Golf and Yacht Club Golf Course, prepared by Engineering and Technical Services, Inc. by Frederick D. Harris, R.L.S., dated April 6, 1992, and recorded in Real Estate Plat Book 114 at pages 180 . . . ;

TOGETHER WITH a non-exclusive easement for access to and egress from the property described above across Tract I and the remaining portion of "Enterprise Tract" as shown on "Boundary Survey of Enterprise Tract" prepared for Justice Builders by Sur-Tech, Incorporated, dated November, 1983, recorded in said Register's office in Plat Book 79 at page 166.

1540-1540-023-024-025-026 (Parcel 1)  
 4-16-92

STATE OF SOUTH CAROLINA  
 Horry County  
 DOCUMENTARY  
 STAMP TAX  
 900.00

STATE OF SOUTH CAROLINA  
 Horry County  
 DOCUMENTARY  
 STAMP TAX  
 900.00

STATE OF SOUTH CAROLINA  
 Horry County  
 DOCUMENTARY  
 STAMP TAX  
 910.00

486

ALSO,

Parcel Two

All and singular, those certain parcels of land, situate, lying and being in Socastee Township, Horry County, South Carolina, containing a total of 5.349 acres, as shown on that Survey of Heron Point Golf Club, formerly Myrtle Beach Golf and Yacht Club Golf Course, prepared by Engineering and Technical Services, Inc. by Frederick L. Harris, R.L.S., dated April 6, 1992, and recorded in Plat Book 119 at pages 100, and being more particularly shown and designated as:

Parcel S, containing 0.039 acre, more or less;  
Parcel OA, containing 0.029 acre, more or less;  
Parcel P, containing 0.154 acre, more or less;  
Parcel X, containing 0.091 acre, more or less;  
Parcel AB, containing 0.140 acre, more or less;  
Parcel AF, containing 0.070 acre, more or less;  
Parcel AC, containing 0.626 acres, more or less; and  
Parcel AD, containing 0.220 acre, more or less.

ALSO,

Parcel Three

All those certain pieces, parcels or tracts of land, together with the improvements thereon, situate, lying and being in Socastee Township, County of Horry, State of South Carolina, and being shown as Tract II-C (0.453 acre, more or less) and Tract II-D (0.454 acre, more or less) on Survey of Heron Point Golf Club, formerly Myrtle Beach Golf and Yacht Club Golf Course, prepared by Engineering and Technical Services, Inc. by Frederick L. Harris, R.L.S., dated April 6, 1992, and recorded in Real Estate Plat Book 119 at pages 100, which plat is incorporated herein and made a part hereof by reference.

HORRY COUNTY ASSESSOR

184-17-03-055 & 184-17-01-042

Map of Dik - Parcel

4-16-92

BOOK 1540 PAGE 487

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184-17-03-055 & 184-17-01-042  
Map of Dik - Parcel

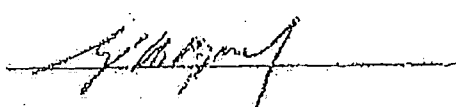
STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

AFFIDAVIT OF  
TRUE CONSIDERATION

GRANTOR: Peoples Federal Savings & Loan Association  
GRANTEE: Heron Point Golf Club Limited Partnership  
TRUE CONSIDERATION: \$4,100,000.00  
DATE: April 15, 1992

PERSONALLY appeared before me the George D. McGrath, Jr.  
who, being duly sworn, says:

That (s)he is familiar with the above-captioned deed in which  
there is recited a nominal consideration and that the true  
consideration is as shown above.



Sworn to and subscribed before me  
this 15th day of April, 1992.

Michael D. Battle  
Notary Public For South Carolina  
My Commission Expires: 3/13/97

488

# EXHIBIT "D"

**FORM 4**

**STATE OF SOUTH CAROLINA  
COUNTY OF HORRY  
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2015CP2603173**

|                                    |                                                  |                                                           |                         |
|------------------------------------|--------------------------------------------------|-----------------------------------------------------------|-------------------------|
| <b>Condo World Development LLC</b> | <b>Heron Point Golf Club Limited Partnership</b> | <b>Myrtle Beach Golf &amp; Yacht Club Association Inc</b> | <b>South State Bank</b> |
|------------------------------------|--------------------------------------------------|-----------------------------------------------------------|-------------------------|

|                                     |                                                                                                                                                  |
|-------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>PLAINTIFF(S)</b>                 | <b>DEFENDANT(S)</b>                                                                                                                              |
| <b>Submitted by: Clerk of Court</b> | <b>Attorney for:</b> <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant<br><input type="checkbox"/> Self-Represented Litigant |

**DISPOSITION TYPE (CHECK ONE)**

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);  
☐ Rule 43(k), SCRCP (Settled); ☐ Other: \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: \_\_\_\_\_
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

**Defendants Myrtle Beach Golf & Yacht Club Association Inc.'s Motion for Summary Judgment and Motion to Reconsider cannot appropriately be heard**  
**Plaintiff Condo World Development LLC's Motion to Reconsider Alter or Amend cannot appropriately be heard at this time due to a pending appeal on this issue.**  
**Defendant's Motion to Strike Affidavit is continued to allow supplement of the motion.**

**This order** ☐ ends ☒ does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| <b>Judgment in Favor of<br/>(List name(s) below)</b> | <b>Judgment Against<br/>(List name(s) below)</b> | <b>Judgment Amount To be Enrolled<br/>(List amount(s) below)</b> |
|------------------------------------------------------|--------------------------------------------------|------------------------------------------------------------------|
| N/A                                                  | N/A                                              | N/A                                                              |
|                                                      |                                                  |                                                                  |
|                                                      |                                                  |                                                                  |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

**E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

2152

Circuit Court Judge

Judge Code

Date

**For Clerk of Court Office Use Only**

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

**Howell Vaught Bellamy III** PO Box 357 Myrtle Beach, SC  
29578

**Christopher H. Pearce** 1314 Professional Drive Myrtle  
Beach, SC 29577

**Laurence Raymond Wells IV** 1314 Professional Drive  
Myrtle Beach, SC 29577

**Audra McCall Byrd** PO Box 2116 Myrtle Beach, SC 29578

**Kerry Kathleen Jardine** 1314 Professional Dr Myrtle Beach,  
SC 29577

\_\_\_\_\_  
**ATTORNEY(S) FOR THE PLAINTIFF(S)**\_\_\_\_\_  
**ATTORNEY(S) FOR THE DEFENDANT(S)**\_\_\_\_\_  
**Court Reporter - Sallie Beth Todd**\_\_\_\_\_  
**Renee N. Elvis - Clerk of Court****Court Reporter:**

**E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_



Horry Common Pleas

**Case Caption:** Condo World Development LLC , plaintiff, et al VS Myrtle Beach  
Golf & Yacht Club Association Inc  
**Case Number:** 2015CP2603173  
**Type:** Order/Form 4

So Ordered

s/ Larry B. Hyman 2152

# EXHIBIT "E"

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

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

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

Plaintiffs, )

vs. )

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

Defendant. )

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

Defendant/Third Party )  
Plaintiff, )

vs. )

South State Bank, )

Third Party Defendants. )

**ORDER GRANTING PLAINTIFFS  
MOTION TO RECONSIDER, ALTER, OR  
AMEND FORM 4 ORDER/JUDGMENT  
NOVEMBER 7, 2017.**

A hearing was held on November 15, 2017. The hearing was scheduled for the purpose of an *in camera* review of the documents involved in the Hinds subpoena / document production and to address other outstanding matters as needed.

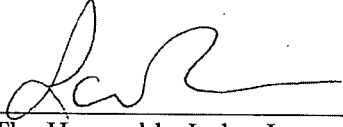
At the November 15, 2017 hearing, the Court reconsidered its November 7, 2017 Form 4 Order on four motions, to wit: Defendant Myrtle Beach Golf & Yacht Club Association Inc.'s Motion to Reconsider, Alter or Amend the Courts' ruling Granting South State Bank's Motion to

Dismiss, Plaintiffs' Condo World Development LLC and Heron Point Golf Club Limited Partnership's Motion to Reconsider, Alter or Amend the Courts ruling Granting South State Bank's Motion to Dismiss, Defendant's Motion for Summary Judgment, and Defendant's Motion to Strike Affidavit. A Form 4 Order was inadvertently entered, stating that Defendant's motions for Summary Judgement and to Reconsider, Alter or Amend and Plaintiffs Motion to Reconsider, Alter or Amend could not appropriately be heard at this time due to a pending appeal.

After due consideration, I hereby bifurcate those claims against the Defendant South State Bank, which were previously dismissed pursuant to my order dated October 4, 2017. That ruling is presently under appeal to the South Carolina Supreme Court. The remaining issues in the case, including the remaining cause of action against South State Bank and the issue of standing, can, in all fairness, be litigated without the necessity of hearing the matters which have been dismissed and are subject to appeal. I therefore order that those matters be bifurcated from the case. All other motions, including dispositive motions, affecting all other matters not under appeal may appropriately be heard. Thus, the November 7, 2017 Form 4 Order is hereby amended so that Defendant's Motion for Summary Judgment may be heard. Any and all dispositive motions in this action shall be appropriately noticed to this Court and shall be filed within two week of the issuance of this Order.

**IT IS SO ORDERED!**

November 27, 2017  
Conway, South Carolina

  
The Honorable Judge Larry B. Hyman  
Chief Administrative Judge for Common Pleas

# EXHIBIT "F"

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-03173

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

Plaintiffs, )

vs. )

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

Defendant. )

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

Defendant/Third Party )  
Plaintiff, )

vs. )

South State Bank, )

Third Party Defendants. )

**ORDER TO APPEAL STAY**

The question presented by the parties arises from Rules 205 and 241 of the Appellate Court Rules as to the extent of the stay, if any, created by the Defendant's, Heron Point, appeal of my previous order. On November 7, 2017 a Form 4 was submitted bifurcating the current case as to the Defendant and South State Bank. Defendant's appealed the bifurcation and raised the argument that the bifurcation would not affect the stay created by the appeal regarding South

State Bank and the entire action was stayed during the pendency of the appeal under Rule 241. Rule 241 of the Appellate Court Rules states in relevant part, "the notice of appeal in a civil matter acts to automatically stay matters decided in the order... on appeal. ... This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court. ... The lower court... retains jurisdiction over matters not affected by the appeal, including the authority to enforce any matters not stayed by the appeal." *South Carolina Appellate Court Rules*, Rule 241. Rule 205 states, "nothing in these rules shall prohibit the lower court... from proceeding with matters not affected by the appeal" *South Carolina Appellate Court Rules*, Rule 205.

A hearing was held Tuesday, January 16, 2018 in which the parties were asked to discuss the jurisdiction of this Court to proceed with the bifurcated case, which is not affected by the first appeal filed by the Defendants. Prior to the hearing, the Court was notified the Defendant, Heroin Point, had filed a second appeal, appealing my Order Granting Plaintiffs Motion to Reconsider, Alter, or Amend Form 4 Order/Judgement filed November 7, 2017, in which both parties asked the court to alter or amend the November 7, 2017 Form 4. The parties were emailed a copy of the order prior to it being filed and both submitted changes, which were taken into account of the new order. After the order was filed, Defendant filed an appeal and asked that the whole action be stayed and for a continuance from the motions for Summary Judgment to determine standing.

At the hearing the Defendant argued that the appeals included the entire suit. The parties subsequently agreed Plaintiff would file with the Court of Appeals to lift any stay created by the pending appeals.

**IT IS SO ORDERED!**

November 28, 2017  
Conway, South Carolina

---

The Honorable Judge Larry B. Hyman  
Chief Administrative Judge for Common Pleas



Horry Common Pleas

**Case Caption:** Condo World Development LLC , plaintiff, et al VS Myrtle Beach  
Golf & Yacht Club Association Inc  
**Case Number:** 2015CP2603173  
**Type:** Order/Other

So Ordered

s/ Larry B. Hyman 2152

# EXHIBIT "G"

# The South Carolina Court of Appeals

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

v.

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

AND

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

v.

South State Bank, Respondent.

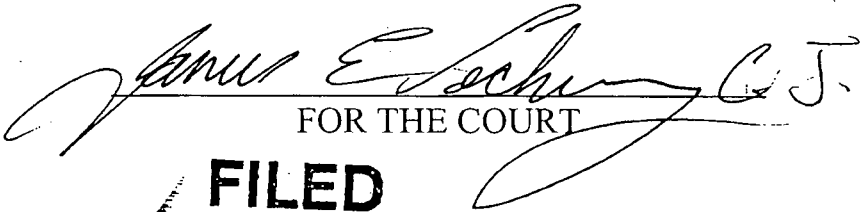
Appellate Case No. 2017-002642

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## ORDER

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Respondents Condo-World Development, LLC and Heron Point Golf Club Limited Partnership have filed a motion to dismiss this appeal, arguing the order on appeal is not immediately appealable. The motion is granted. *See Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72-73, 533 S.E.2d 331, 333-34 (2000) (ruling a bifurcation order is not immediately appealable); *id.* at 73, 533 S.E.2d at 333 ("[T]rial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right.").

  
FOR THE COURT

**FILED**

March 23, 2018

Columbia, South Carolina

cc: Kerry Kathleen Jardine, Esquire  
Audra McCall Byrd, Esquire  
Howell Vaught Bellamy, III, Esquire  
Howell V. Bellamy, Jr., Esquire  
Laurence Raymond Wells, IV, Esquire  
Christopher H. Pearce, Esquire  
Demetri K. Koutrakos, Esquire

# EXHIBIT "H"

**Kathleen S. Romero - Legal Assistant**

803.404.6900

KathyRomero@callisontighe.com

April 11, 2018

**VIA HAND DELIVERY**

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

RE: Condo-World Development, LLC and Heron Point Golf Club Limited  
Partnership vs. Myrtle Beach Golf & Yacht Club Association, Inc.  
Case No. 2015-CP-26-3173  
Appellate Case No. 2017-002196

Dear Ms. Kitchings:

Enclosed herewith please find an original and one (1) copy of Respondents Condo-World Development, LLC and Heron Point Golf Club Limited Partnership's Withdrawal of Motion to Determine Scope of Claimed Stay in the above-referenced matter. Kindly file the same and return a clocked-in copy to the courier.

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

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC



Kathleen S. Romero

Legal Assistant to Demetri "Jim" K. Koutrakos

/ksr

Enclosures

cc: Christopher H. Pearce, Esquire  
Kerry K. Jardine, Esquire  
Charles B. Jordan, Jr., Esquire  
Audra M. Byrd, Esquire  
Howell V. Bellamy, III, Esquire  
Howell V. Bellamy, Jr., Esquire

5320.134\\Appeal1\\Clerk.002

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

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

---

Case No. 2015-CP-26-3173  
Appellate Case No. 2017-002196

---

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

vs.

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

AND

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

vs.

South State Bank .....Respondent

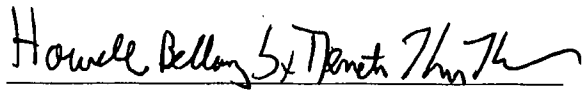
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**RESPONDENTS CONDO-WORLD DEVELOPMENT, LLC AND  
HERON POINT GOLF CLUB LIMITED PARTNERSHIP'S  
WITHDRAWAL OF MOTION TO DETERMINE SCOPE OF CLAIMED STAY**

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Due to this Court's entry of an order dismissing Appellate Case No. 2017-002642, which Respondents Condo-World Development, LLC and Heron Point Golf Club Limited Partnership ("Respondents") believe is dispositive of the issues raised in Respondents' Motion to Determine Scope of Claimed Stay filed March 19, 2018, Respondents hereby withdraw the aforesaid motion.

Respectfully submitted,



Howell V. Bellamy, III

Howell V. Bellamy, Jr.

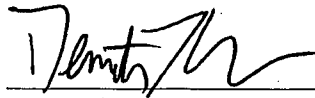
Bellamy, Rutenberg, Copeland, Epps, Gravely &  
Bowers, PA

1000 – 29<sup>th</sup> Ave. N.

Myrtle Beach, SC 29577

Telephone: 843-448-2400

*Attorneys for Respondents Condo-World  
Development, LLC and Heron Point Golf  
Club Limited Partnership*



Demetri K. Koutrakos

Callison Tighe & Robinson, LLC

1812 Lincoln Street, Suite #200

P. O. Box 1390

Columbia, SC 29202-1390

Telephone: 803-404-6900

*Attorneys for Respondent Heron Point Golf  
Club Limited Partnership*

April 11, 2018

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

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

Case No. 2015-CP-26-3173  
Appellate Case No. 2017-002196

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

vs.

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

AND

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

vs.

South State Bank ..... Respondent

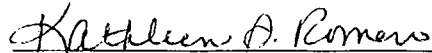
CERTIFICATE OF SERVICE

I, Kathleen S. Romero, an employee of Callison Tighe & Robinson, LLC, do hereby certify that, on this date, I served the foregoing **Respondents Condo-World Development, LLC and Heron Point Golf Club Limited Partnership's Withdrawal of Motion to Determine Scope of Claimed Stay** upon counsel of record, by depositing a copy of the same in the United States mail with proper first-class postage affixed thereon, addressed as follows, and via email:

Christopher H. Pearce, Esquire  
Kerry K. Jardine, Esquire  
Charles B. Jordan, Jr., Esquire  
The Pearce Law Group, PC  
1314 Professional Drive  
Myrtle Beach, SC 29577  
Email: [cpearce@pearcelawgroup.com](mailto:cpearce@pearcelawgroup.com)  
Email: [kjardine@pearcelawgroup.com](mailto:kjardine@pearcelawgroup.com)  
Email: [cjordan@pearcelawgroup.com](mailto:cjordan@pearcelawgroup.com)  
(Attorneys for Appellant Myrtle Beach Golf & Yacht  
Club Association, Inc.)

Audra M. Byrd, Esquire  
Turner Padget Graham & Laney, PA  
2411 N. Oak Street  
P. O. Box 2116  
Myrtle Beach, SC 29578  
Email: [abyrd@turnerpadget.com](mailto:abyrd@turnerpadget.com)  
(Attorneys for Respondent South State Bank)

April 11, 2018

  
Kathleen S. Romero

# EXHIBIT "I"

STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-03173

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

Plaintiffs,

vs.

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Defendant,

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Defendant/Third Party  
Plaintiff,

vs.

South State Bank,

Third-Party Defendant.

**PLAINTIFFS CONDO-WORLD  
DEVELOPMENT, LLC'S AND HERON  
POINT GOLF CLUB LIMITED  
PARTNERSHIP'S NOTICE OF MOTION  
AND MOTION TO AMEND  
ANSWER TO THE DEFENDANT MYRTLE  
BEACH GOLF & YACHT CLUB  
ASSOCIATION, INC.'S CORRECTED  
SECOND AMENDED ANSWER AND  
COUNTERCLAIMS**

**TO: CHRIS PEARCE, ATTORNEY FOR MYRTLE BEACH GOLF & YACHT CLUB  
ASSOCIATION, INC. THE DEFENDANT AND THIRD-PARTY PLAINTIFF  
AND AUDRA BYRD, ATTORNEY FOR SOUTH STATE BANK, THIRD-PARTY  
DEFENDANT.**

**YOU WILL PLEASE TAKE NOTICE** that Plaintiffs Condo-world Development, LLC  
and Heron Point Golf Club Limited Partnership, pursuant to Rule 15, SCRCP, hereby move  
the Court to permit the filing and serving of a Third Amended Complaint in response to the  
Defendant Myrtle Beach Golf & Yacht Club Association, Inc.'s Corrected Second Amended  
Answer And Counterclaims. A copy of the Plaintiff's Proposed Third Amended Answer is  
attached hereto as Exhibit "A".

Plaintiffs' good faith basis for requesting to amend its Answer is based upon the Affidavit of Douglas G. Brown previously filed on September 25, 2017, which is attached hereto as Exhibit "B".

The Supreme Court of South Carolina does not require a supporting memorandum of law to be submitted herewith, as a full explanation of this motion is contained within the motion and attached proposed pleading. This Motion is made upon the grounds of furtherance of justice. Pursuant to Rule 11(a), SCRCP, the undersigned states that consultation with opposing counsel would serve no useful purpose.

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND,  
EPPS, GRAVELY & BOWERS, P.A.

s/Howell V. Bellamy, III  
Howell V. Bellamy, III (SC Bar # 66575)  
[hbellamyiii@bellamylaw.com](mailto:hbellamyiii@bellamylaw.com)  
Howell V. Bellamy, Jr. (SC Bar # 68543)  
[nrichardson@bellamylaw.com](mailto:nrichardson@bellamylaw.com)  
1000 29<sup>th</sup> Ave. N.  
Myrtle Beach, SC 29577  
843-448-2400 Phone  
843-448-3022 Facsimile  
ATTORNEYS FOR PLAINTIFFS

Myrtle Beach, SC 29577

December 13, 2017

# EXHIBIT "A"

|                                             |   |                                          |
|---------------------------------------------|---|------------------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS             |
| COUNTY OF HORRY                             | ) | CIVIL ACTION NO. 2015-CP-26-03173        |
| Condo-World Development, LLC and)           |   |                                          |
| Heron Point Golf Club Limited Partnership ) |   |                                          |
|                                             | ) |                                          |
| Plaintiffs,                                 | ) |                                          |
|                                             | ) |                                          |
| vs.                                         | ) |                                          |
|                                             | ) | <b>PLAINTIFFS CONDO-WORLD</b>            |
| Myrtle Beach Golf & Yacht Club)             |   | <b>DEVELOPMENT, LLC'S AND HERON</b>      |
| Association, Inc.,                          | ) | <b>POINT GOLF CLUB LIMITED</b>           |
|                                             | ) | <b>PARTNERSHIP'S THIRD AMENDED</b>       |
|                                             | ) | <b>ANSWER TO CORRECTED SECOND</b>        |
| Defendant/Third-Party )                     |   | <b>AMENDED ANSWER, COUNTERCLAIMS,</b>    |
| Plaintiff,                                  | ) | <b>AND THIRD-PARTY COMPLAINT OF THE</b>  |
|                                             | ) | <b>DEFENDANT MYRTLE BEACH GOLF &amp;</b> |
| vs.                                         | ) | <b>YACHT CLUB ASSOCIATION, INC.</b>      |
|                                             | ) |                                          |
| South State Bank,                           | ) |                                          |
|                                             | ) |                                          |
| Third-Party Defendant.                      | ) |                                          |
|                                             | ) |                                          |

TO: CHRISTOPHER H. PEARCE, ESQUIRE, ATTORNEY FOR THE DEFENDANT AND THIRD PARTY PLAINTIFF MYRTLE BEACH GOLF & YACHT CLUB ASSOCIATION, INC.

NOW COMES the Plaintiffs Condo-World Development, LLC and Heron Point Golf Club Limited Partnership (hereinafter, "Condo-World" and "Heron Point") answering the Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint of the Defendant Myrtle Beach Golf & Yacht Club Association, Inc. (hereinafter, "MBG&YCA") herein, and would respectfully allege and show unto this Honorable Court as follows:

**FOR A FIRST DEFENSE**  
**(General Objections Applicable to All Allegations)**

1. Each and every allegation that is not hereafter specifically admitted, modified or explained is denied and strict proof is demanded thereof.

2. These answering Plaintiffs Condo-World and Heron Point hereby object to any allegations which in any way attempt to characterize, interpret, describe, or explain the legal effect of any written document, or provision thereof, which is referred to, referenced, or incorporated with Defendant MBG&YCA's Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint ("Second Amended Answer, Counterclaims, and Third-Party Complaint"), and to which document or provision these answering Plaintiffs specifically crave reference, and specifically demand strict proof thereof via reference to a proper legal definition, interpretation, and/or reference obtained from the entire document or other document of record.

3. These answering Plaintiffs Condo-World and Heron Point deny the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the Defendant MBG&YCA's Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint that are inconsistent and contrary to the allegations contained in its Plaintiffs' Complaint and strict proof is demanded thereof.

4. These answering Plaintiffs Condo-World and Heron Point Golf Club deny the allegations contained in Paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of the Defendant MBG&YCA's Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint, regarding Affirmative Defenses Two through Seven, and demand strict proof thereof.

5. The allegations contained in Paragraphs 25 and 26 of the Defendant MBG&YCA's Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint require no response by these answering Plaintiffs Condo-World and Heron Point. To the extent a response is required, the allegations contained in Paragraphs 25 and 26 are denied and strict proof is demanded thereof.

6. The allegations contained in Paragraphs 27, 28 and 29 of the Defendant MBG&YCA's Second Amended Answer, Counterclaims, and Third-Party Complaint are admitted.

7. Responding to the allegations of Paragraph 30 of the Defendant MBG&YCA's Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint, these answering Plaintiffs are without sufficient knowledge and/or information so as to allow it to form a belief as to the Defendant's allegations therein, therefore, denied and strict proof is demanded thereof.

8. The allegations contained in Paragraph 31 of the Defendant MBG&YCA's Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint is denied and strict proof is demanded thereof.

9. The allegations contained in Paragraph 32 of the Defendant MBG&YCA's Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint does not require a response by these answering Plaintiffs Condo-World and Heron Point. To the extent a response is required, the Plaintiffs deny the allegations contained in Paragraph 32 and strict proof is demanded thereof.

10. Responding to the allegations contained in Paragraphs 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of the Defendant MBG&YCA's Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint, these answering Plaintiffs Condo-World and Heron Point would crave reference to the public records of Horry County for the accuracy of the Defendant's allegations. The Plaintiffs deny all allegations contained in these Paragraphs 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 that are inconsistent with the information contained in the

public records on file with the Office of the Horry County Clerk and/or the Office of the Registered Deeds. To the extent a response is required, the Plaintiffs deny the allegations contained in Paragraphs 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 and strict proof is demanded thereof.

11. The allegations contained in Paragraphs 57, 58, and 59 of the Defendant MBG&YCA's Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint require no response by these answering Plaintiffs Condo-World and Heron Point. To the extent a response is required, the Plaintiffs deny the allegations contained in Paragraphs 57, 58, and 59, and strict proof is demanded thereof.

12. The allegations in Paragraph 60 of the Defendant MBG&YCA's Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint, including all sub-parts thereto, are denied by these answering Plaintiffs Condo-World and Heron Point and strict proof is demanded thereof.

13. The allegations of Paragraphs 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, and 96 including prayer for relief and its sub-parts A, B, C, D, E, F, and G are not directed at the Plaintiffs and do not require a response from them. To the extent a response is required, Plaintiffs deny the allegations of these paragraphs and demand strict proof thereof.

#### FOR A SECOND DEFENSE

14. That the foregoing defense is incorporated herein by reference as if fully repeated verbatim herein.

15. These answering Plaintiffs Condo-World and Heron Point assert that pursuant to Rule 12(b)(6), SCRCP, the Defendant MBG&YCA has failed to state facts sufficient to state a Counterclaim against these answering Plaintiffs for Declaratory Judgment.

**FOR A THIRD DEFENSE**

16. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

17. Defendant MBG&YCA's claims may be barred by doctrine of acquiescence, waiver, estoppel, and/or laches.

**FOR A FOURTH DEFENSE**

18. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

19. These answering Plaintiffs Condo-World and Heron Point allege the Defendant MBG&YCA has unclean hands as to its own inequitable conduct and bad faith under the facts and circumstances of this case which give rise to the Defendant's alleged injuries and/or damages.

20. Such inequitable conduct constitutes a complete bar and/or defense to any counterclaim for equitable relief sought hereunder by the Defendant.

**FOR A FIFTH DEFENSE**

21. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

22. The Heron Point Golf Course, formally known as the Myrtle Beach Golf & Yacht Club Golf Course, was not incorporated into the MBG&YC Subdivision as a dedicated Common

Area; and, consequentially, it is not subject to the Recorded Declaration's covenants and restrictions.

**FOR A SIXTH DEFENSE**

23. That the foregoing defenses are incorporated hereby referenced as if fully repeated verbatim herein.

24. That the MBG&YC Subdivision's Amended and Restated Declaration of Covenants and Restrictions<sup>1</sup> ("Recorded Declaration") do not run with the title of the Golf Course Property, formally known as the Myrtle Beach Golf & Yacht Club Golf Course.

**FOR A SEVENTH DEFENSE**

25. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

26. The deed restrictions referenced in the "1992 Deed Poll" between Peoples and Heron Point recorded in Deed Book 1540, at Page 482, are personal to the grantor/covenantee and do not run with the title of the dwellings of the Association's homeowners/members in the MBG&YC Subdivision and benefit them.

**FOR AN EIGHTH DEFENSE**

27. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

28. Even if the Heron Point Golf Course Property is subject to certain real covenants, which is expressly denied, due to changed economic circumstances the Golf Course Property is no longer unsuitable for only a use as a golf course. The doctrine of changed economic

---

<sup>1</sup> The Amended and Restated Declaration of Covenants and Restrictions for Myrtle Beach Golf & Yacht Club Subdivision, recorded in Deed Book 931 at Page 563.

circumstances is a complete bar to the Defendant MBG&YCA's counterclaims for declaratory judgment relief.

**FOR A NINTH DEFENSE**

29. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

30. These answering Plaintiffs Condo-World and Heron Point assert the Defendant MBG&YCA lacks standing as a complete bar to its counterclaim for declaratory judgment relief and affirmative defense of laches.

**FOR A TENTH DEFENSE**

31. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

32. Upon information and belief, some or all of the Defendant MBG&YCA's counterclaims for declaratory judgment relief are barred by the applicable statute of limitation.

**FOR AN ELEVENTH DEFENSE**

33. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

34. Heron Point is a bona fide purchaser for value, without notice, actual or constructive, with respect to the unrecorded 1988 Settlement Agreement to extent the unrecorded agreement constitutes a defect, lien, or interest in its title to the Golf Course Property. Accordingly, the Defendant MBG&YCA's counterclaim for declaratory judgment relief is barred by this equitable defense.

**FOR A TWELFTH DEFENSE**

35. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

36. The Association and its homeowners/members are prohibited by the plain language of Section 1.8. 2.2, 4.1, 8.5 of the Recorded Declarations for MBG&YC subdivision from obtaining any proprietary right, title, or interest in the Golf Course Property by virtue of a recorded plat, by implication through a general plan of development, or previous use. The Golf Course Property was never submitted as a dedicated Common Area under Article II of the Recorded Declaration. Accordingly, the provisions of the Recorded Declaration expressly negate the establishment of any equitable interest or servitude in the Golf Course Property.

**FOR A THIRTEENTH DEFENSE**

37. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

38. The unrecorded 1988 Settlement Agreement executed on July 25, 1988 is legally incompetent and violates the parol evidence rule. See Penton v. J.F. Cleckley & Co., 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997)( *"Parol evidence rule is a rule not of evidence but of substantive law, and, therefore admission of evidence violating this rule is legally incompetent and should not be considered even if no objection to it was made at trial"*). This is because Heron Point is a bona fide purchaser for value, without notice, actual or constructive, of the unrecorded 1988 Settlement prior to purchasing the Golf Course Property on April 15, 1992. Shipyards Prop. Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App.1992)(When "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning"); Pee Dee Stores, Inc. v.

Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (*"The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract or [deed] was executed."*) Accordingly, the unrecorded 1988 Settlement Agreement is barred from admission into evidence by the Parol evidence rule.

39. That the foregoing defenses are incorporated hereby reference as if fully repeated verbatim herein.

40. The Plaintiffs Condo-World and Heron Point reserve and do not waive any additional or further defenses as may be revealed through discovery in this matter or through investigation.

**WHEREFORE**, having fully responded to the corrected Second Amended Answer, Counterclaims, and Third-Party Complaint of the Defendant, Myrtle Beach Golf & Yacht Club Association, Inc., Plaintiffs Condo-World and Heron Point Golf Club pray for the following relief:

1. That the Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint of the Defendant, Myrtle Beach Golf & Yacht Club Association, Inc., be dismissed with prejudice and the relief requested therein be denied;
2. That they be awarded costs and attorney fees in this matter in accordance with State law; and
3. That this Honorable Court award such other and further relief as it may deem just and proper.

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

s/Howell V. Bellamy, III  
Howell V. Bellamy, III (SC Bar # 66575)  
hbellamyiii@bellamylaw.com  
Howell V. Bellamy, Jr. (SC Bar # 68543)  
nrichardson@bellamylaw.com  
1000 29<sup>th</sup> Ave. N.  
Myrtle Beach, SC 29577  
843-448-2400 Phone  
843-448-3022 Facsimile  
ATTORNEYS FOR PLAINTIFFS

Myrtle Beach, South Carolina

December 13, 2017

# EXHIBIT "J"

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

Case No. 2015-CP-26-3173

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

Plaintiffs,

vs.

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Defendant.

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Third-Party Plaintiff,

vs.

South State Bank,

Third-Party Defendant.

**PLAINTIFFS' NOTICE OF MOTION AND  
MOTION FOR SUMMARY JUDGMENT  
BASED ON DEFENDANT'S LACK OF  
STANDING TO ENFORCE CERTAIN  
CLAIMED COVENANTS AND  
RESTRICTIONS AND ACCOMPANYING  
MEMORANDUM OF LAW IN SUPPORT**

**TO: CHRIS PEARCE, ATTORNEY FOR MYRTLE BEACH GOLF & YACHT CLUB  
ASSOCIATION, INC.:**

Plaintiffs Condo-World Development, LLC ("CWD") and Heron Point Golf Club Limited Partnership ("Heron Point"), by and through their undersigned counsel, Howell V. Bellamy, III, Howell V. Bellamy, Jr., and Demetri K. Koutrakos, hereby move for summary judgment as there are no genuine issues of material fact and Plaintiffs are entitled to judgment in their favor finding: (a) Defendant Myrtle Beach Golf & Yacht Club Association, Inc. ("the Association") lacks standing or privity of contract to enforce the claimed covenants and restrictions against the subject

property; (b) the Association lacks standing to assert its claims for declaratory relief; and (c) the Association's affirmative defenses, including laches, fail as a matter of law.

Plaintiffs' motion is based on the pleadings filed in this case; the documents submitted herewith; the South Carolina Rules of Civil Procedure; oral argument; such other matters as may be properly presented to the Court at the time of the hearing; and the following:

#### **PROCEDURAL HISTORY**

Plaintiffs filed a Complaint against the Association on April 27, 2015, seeking an order declaring certain claimed restrictions on the "Golf Course Property" do not apply or are personal to the grantor, or have been waived, released or terminated, or annulled due to changed economic circumstances, which would allow Plaintiffs to develop the subject property. [Plaintiffs' Verified Complaint for Declaratory Judgment Relief, pp. 6-8, ¶ 18 (a – i)].

On June 11, 2015, the Association filed an Answer, Defenses, and Counterclaims seeking an order declaring certain claimed restrictions apply to the "Golf Course Property," which would prevent residential development of the subject property. In response, Plaintiffs filed an Answer and Defenses on July 14, 2015, seeking to dismiss the Association's declaratory judgment counterclaim(s) due to lack of standing. [Plaintiffs' Answer and Defenses, p. 6, ¶ 30].

The Association filed an Amended Answer, Defenses and Counterclaims on November 4, 2015. On February 14, 2017, the Association filed a Second Amended Answer, which included a Third-Party Complaint against South State Bank alleging breach of contract, contractual indemnity, and equitable indemnity and seeking a permanent injunction.

The Association filed a revised and corrected Second Amended Answer and Third-Party Complaint on March 13, 2017. In response, South State Bank filed a Motion to Dismiss. On August 18, 2017, Plaintiffs filed an Amended Answer and Defenses seeking to dismiss the

Association's declaratory judgment counterclaim(s) due to lack of standing. On August 30, 2017, South State Bank filed an Answer and Defenses seeking to dismiss the Association's Third-Party claim for permanent injunctive relief due to lack of standing.

### STATEMENT OF CASE

Plaintiffs seek an order from the Court declaring:

- (1) that the restrictive covenant contained in a 1992 Deed Poll– “[t]he only permitted use of this property is as a golf course, country club, or other ancillary use relating to golf course or country club use” – is a personal covenant and, thus, Plaintiffs can otherwise redevelop the Golf Course Property subject to the restrictive covenant for residential use.
- (2) that the restrictive covenant contained in a 1992 Deed Poll– “[g]rantee, its Successors and Assigns agree to offer memberships to members of Myrtle Beach Golf and Yacht Club Association, Inc., its successors and assigns on the same basis that it offers memberships to the public at large, provided, however, that there shall be no requirement to offer memberships” – is a personal covenant and, thus, they can otherwise redevelop the Golf Course Property subject to the restrictive covenant for residential use.
- (3) that the restrictive covenant contained in the Tract II Deed– “shall be used for a residential community (composed of single-family and multi-family residences), an associated golf course, open areas, parks, lakes, and various other recreational amenities and retail shops” – is a personal covenant and, thus, Plaintiffs can otherwise redevelop the Golf Course Property subject to the restrictive covenant for residential use.
- (4) that the covenants and restrictions contained in the Amended and Restated Declaration of Covenants and Restrictions filed by Myrtle Beach Golf & Yacht Club, a General Partnership on January 29, 1984, do not run with the Golf Course Property and, thus, Plaintiffs can otherwise redevelop the Golf Course Property subject to the restrictive covenant for residential use.
- (5) that the Golf Course Property is not subject to restrictive covenants due to changed economic circumstances, rendering the Golf Course Property unsuitable for use as a golf course and, thus, Plaintiffs can otherwise redevelop the Golf Course Property subject to the restrictive covenant for residential use.
- (6) that the restrictive covenant contained in the Tract II Deed– “shall be used for a residential community (composed of single-family and multi-family

*residences), an associated golf course, open areas, parks, lakes, and various other recreational amenities and retail shops” – does not unreasonably limit the Golf Course Property’s use to only a golf course and, thus, Plaintiffs can otherwise redevelop the Golf Course Property subject to the restrictive covenant for residential use.*

- (7) that the Association lacks Standing to enforce the aforementioned restrictive covenants and the covenants and restrictions contained in the Amended and Restated Declaration against the Golf Course Property.

This case, when boiled down to its central and/or controlling issue, concerns whether the Association can show it has a legal or equitable interest in the Golf Course Property that gives it the right to limit the use of the property to a golf course. Before the Association, a stranger to the several deed conveyances at issue, may assert rights based upon a covenant or restriction, it must show the intent to establish the restrictions for its and its members’ benefit, of which Plaintiffs must have either actual or constructive notice. See Annotation, *Who May Enforce Restrictive Covenant or Agreement as to Use of Real Property*, 51 A.L.R.3d 556 (1973).

Furthermore, any claimed right of the Association to enforce certain restrictive covenants or agreements to which it is not party depends upon the intention of the grantor and grantee in imposing them. Id. Specifically, such rights depend upon an intent to benefit the land of the Association and its members who are seeking to enforce the restrictions. To confer a right of enforcement upon an entity who is not a party to various agreements, it must appear it was intended to create a servitude or right that would inure to the benefit of land acquired by the Association and its members and should be annexed to their dwellings as an appurtenance. Id.

It is undisputed that the parties, who drafted the restrictions and/or covenants in this case, never intended for the Association and its homeowners/members to possess any legal right or equitable interest in the Golf Course Property for their use and enjoyment.<sup>1</sup> For this reason, the

<sup>1</sup> “Supplemental Affidavit #3 of Otis Allen Jeffcoat, III, is attached hereto as Exhibit “P-1” and is incorporated herein by reference.

Association and its members do not have standing to assert or enforce any restriction or covenant concerning the use of the Golf Course Property. The Court should therefore grant the Motion for Summary Judgment on this issue, including dismissing the Association's counterclaim for declaratory relief and the Association's laches defense.

### FACTUAL HISTORY

On February 29, 1984, an Option Agreement<sup>2</sup> was executed between James H. Dusenbury ("Dusenbury" and/or the Seller") and Justice, Inc. ("Justice" and/or the Buyer"), for and in consideration of the Option Money<sup>3</sup> paid by the Buyer to the Seller, granting the Buyer its successors and assigns the exclusive right and option to purchase the real property known as Enterprise Landing Tract, which is broken down into ten (10) tracts, described as follows:

- a. **Tract I** contains 71.2 acres, more or less, and is shown as Tract I on the land release plan attached to the option agreement at Deed Book 854, Page 337.
- b. **Tract II** contains 156.5 acres, more or less, and is shown as Tract II on the land release plan attached to the option agreement at Deed Book 854, Page 337.
- c. **Tract III** contains 85.4 acres, more or less, and is shown as Tract III on the land release plan attached to the option agreement in Deed Book 854, at Page 337.
- d. **Tract IV** contains 82.6 acres, more or less, and is shown as Tract IV on the attached land release plan and further, contains the island in the Waccamaw

<sup>2</sup> Attorney Otis Allen Jeffcoat, III ("Jeffcoat") drafted the Option Agreement at the request and instruction of the parties to the agreement. "Supplemental Affidavit # 3 of Jeffcoat" is attached hereto as Exhibit "P-1".

<sup>3</sup> The Initial Purchase Price (as defined below) for the Property shall be Six Million Three Hundred Thousand and No/100 (\$6,300,000.00) Dollars payable by the buyer to the Seller as follows:

- (a) Upon the execution of this Agreement, the Buyer shall pay to the Seller as Option Money the sum of One Thousand and No/100 (\$1,000.00) Dollars.
- (b) On or before February 29, 1984, the Buyer shall pay to the Seller as additional Option Money the sum of One Hundred Ninety-Nine Thousand and No/100 (\$199,000.00) Dollars.
- (c) Upon the delivery of the deed as hereinafter provided, the Buyer shall pay to the Seller the sum of Six Million One Hundred Thousand and No/100 (\$6,100,000.00) Dollars by Cash or immediately available funds, subject to increase as indicated below.

River shown as "island tract" on the boundary survey described in Exhibit "A" attached to the option agreement in Deed Book 854, at Page 337.

- e. **Tract V** contains 75.3 acres, more or less, and is shown as Tract V on the land release plan attached to the option agreement in Deed Book 854, at Page 337.
- f. **Tract VI** contains 113.9 acres, more or less, and is shown at Tract VI on the land release plan attached to the option agreement in Deed Book 854, at Page 337.
- g. **Tract VII** contains 62.3 acres, more or less, and is shown as Tract VII on the land release plan attached to the option agreement in Deed Book 854, at Page 337.
- h. **Tract VIII** contains 151.3 acres, more or less, and is shown on Tract VIII on the land release plan attached to the option agreement in Deed Book 854, at Page 337.
- i. **Tract IX** contains 126.8 acres, more or less, and is shown on Tract IX on the land release plan attached to the option agreement in Deed Book 854, at Page 337.
- j. **Tract X** contains 90.4 acres, more or less, and is shown on Tract X on the land release plan attached to the option agreement in Deed Book 854, at Page 337.

The Option Agreement for the purchase of Enterprise Landing Tract was subsequently filed with the Horry County Register of Deeds Office in Deed Book 854 at Page 321, which is attached hereto as **Exhibit "A-1"** and is incorporated herein by reference.

The Initial Purchase Price for the ten (10) Tracts described above in the Option Agreement are as follows:

|            |                   |
|------------|-------------------|
| Tract I    | \$ 498,400.00     |
| Tract II   | 1,095,500.00      |
| Tract III  | 597,800.00        |
| Tract IV   | 583,100.00        |
| Tract V    | 527,100.00        |
| Tract VI   | 790,300.00        |
| Tract VII  | 602,700.00        |
| Tract VIII | 56,700.00         |
| Tract IX   | 838,600.00        |
| Tract X    | <u>709,800.00</u> |
|            | \$6,300,000.00    |

Paragraph eleven (11) of the Option Agreement describes the permitted uses allowed by the Optionor regarding the residential development of the ten (10) Tracts known collectively as Enterprise Landing Tract. This paragraph specifically provides in pertinent part:

*The Buyer intends to develop the Property into a Planned Unit Development consisting of a residential community (composed of Single-family and multifamily residences), and associated golf course, club house, lakes, marina, boat storage areas and various other recreational amenities and associated shops. The seller approves of the general development plan described herein, and will impose, in the deed to each tract from the seller to the buyer, reasonable restrictive covenants upon the property in keeping with the general development plan described above. The restrictive covenants so imposed shall be released by the Seller upon Seller's approval of the final development plan (consisting of subdivision survey and restrictive covenants) for each tract, and the restrictive covenants imposed by the seller in such deed(s) shall so provide.* In the deed of conveyance of such Tracts the Seller shall reserve, across any roads or streets to be constructed on the Tract Conveyed, a non-exclusive easement for access to and egress from Portions of the Property not yet purchased by the Buyer. In no event shall the Seller be deprived of reasonable road access to and from any Tracts not yet purchased by the Buyer pursuant to this Agreement.

In February 1984, Justice and Peoples Federal Savings and Loan Association ("Peoples") entered a real estate development project (the "Project") to develop the ten (10) Tracts known collectively as Enterprise Landing Tract located in Horry County, South Carolina, otherwise known as the Myrtle Beach Golf & Yacht Club ("MBG&YC").

Peoples funded the Project through various loans and were to receive profits from the development of the Project at which time it incorporated a wholly owned subsidiary known as Peoples Joint Venture Group, Inc. ("Peoples Joint Venture"). At that same time, Justice incorporated Myrtle Beach Golf and Yacht Club, Inc.

On February 29, 1984, Myrtle Beach Golf & Yacht Club, Inc. entered into a General Partnership Agreement ("Agreement") with Peoples Joint Venture for the purpose of developing the Project. This entity was then identified as the "Myrtle Beach Golf & Yacht Club, a General

Partnership.” This Agreement was subsequently filed with the Horry County Register of Deeds Office on March 13, 1984, in Deed Book 855 at Page 758.

This Project was to be developed on a +/- 1,035 acre tract of land otherwise known as the Enterprise Landing Tract as further described by a recorded Plat filed with the Horry County Register of Deeds Office in November 1983 in Plat Book 79 at Page 166. Tract I represented the initial first phase of the construction of the subdivision. Tract II represented additional lands to be developed into residential communities (composed of single-family and multifamily residences), and associated golf course, clubhouse, lakes, marina, boat storage areas and various other Recreational amenities and associated shops.

On February 29, 1984, Dusenbury sold Tract I, a/k/a “Subdivision Property”<sup>4</sup> to Myrtle Beach Golf & Yacht club, a General Partnership. The Tract I Deed was subsequently filed with the Horry County Register of Deeds Office in Deed Book 855 at Page 764 and is attached hereto as Exhibit “B-1” and is incorporated herein by reference.

On February 29, 1984, Dusenbury sold certain parcels of land known as Tract II, a/k/a the “Golf Course Property,”<sup>5</sup> to Myrtle Beach Golf & Yacht Club, a General Partnership which, at that time, included a lake, a tennis court, a swimming and a clubhouse. The Tract II Deed was subsequently filed with the Horry County Register of Deeds Office in Deed Book 855 at Page 769 and is attached hereto as Exhibit “C-1” and is incorporated herein by reference.

The Tract II Deed includes the express restriction:

- (b) “....Property shall be used for a residential community (composed of single family and multi-family residences), an

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<sup>4</sup> Attorney Jeffcoat drafted the Tract I Deed at the request and instruction of the parties to the deed. See “Supplemental Affidavit # 3 of Jeffcoat attached hereto as Exhibit “-1” and incorporated herein by reference.

<sup>5</sup> Attorney Jeffcoat drafted the Tract II Deed at the request and instruction of the parties to the deed. “Supplemental Affidavit # 3 of Jeffcoat” is attached hereto as Exhibit “-1”.

associated golf course, open areas, parks, lakes, and various other recreational amenities and retail shops.

On October 26, 1984, Myrtle Beach Golf & Yacht Club, a General Partnership, filed the Declaration of Covenants and Restrictions ("Original Declaration")<sup>6</sup> for the Project with the Horry County Register of Deeds Office in Deed Book 1351 at Page 858, which is attached hereto as Exhibit "D-1" and is incorporated herein by reference.

On January 29, 1985, the Amended and Restated Declaration of Covenants and Restrictions ("Recorded Declaration" or "Amended and Restated Declaration of Covenants and Restrictions for MBG&YC subdivision")<sup>7</sup> for Myrtle Beach Golf & Yacht Club Subdivision were filed with the Horry County Register of Deeds Office in Deed Book 981 at Page 563 and are attached hereto as Exhibit "E-1" and are incorporated herein by reference.

Section 1.1 of Article I of the Amended and Restated Declaration of Covenants and Restrictions for Myrtle Beach Golf & Yacht Club Subdivision defines various terms used therein as follows:

- a. Section 1.1. Additional Property shall mean and refer to the real property described in Exhibit "B" of this Amended and Restated Declaration and all improvements thereon.
- b. Section 1.4 Association means the Myrtle Beach Golf & Yacht Club Association, Inc., its successors and assigns.
- c. Section 1.8 Common Areas shall mean and refer to all real and personal property now hereafter owned by the Association for the common use and enjoyment of the Owners or designated by the Developer as common areas.

<sup>6</sup> Attorney Jeffcoat drafted the original Declaration for MBG&YC subdivision at the request and instruction of the Developer. "Supplemental Affidavit # 3 of Jeffcoat" is attached hereto as Exhibit "O-1".

<sup>7</sup> Attorney Jeffcoat drafted the Amended and Restated Declaration of covenants and restrictions for MBG&YC subdivision at the request and instruction of the Developer. "Supplemental Affidavit # 3 of Jeffcoat" is attached hereto as Exhibit "O-1".

- d. Section 1.10. Declaration shall mean this Amended and Restated Declaration and all predecessors, supplements and amendment to the Declaration as filed in the Office of the Horry County Clerk of Court.
- e. Section 1.11. Developer means Myrtle Beach Golf & Yacht Club, a General Partnership, its successors and assigns.
- f. Section 1.26. Recreational Amenities shall include such recreational facilities or club and improvements owned by and so designated by Developer and are, from time to time, located within the subdivision or located within or dedicated in the Common Areas, including without limitation, golf courses and related facilities, tennis courts, swimming pools, food and beverage facilities, jogging trails, and bike paths.
- g. Section 1.27. Subdivision shall mean and refer to those tracts or parcels of land described on Exhibit "A," together with all improvements presently thereon and subsequently constructed thereon, and, upon the submission to the provision of this Declaration of the tracts or parcels of land described in Exhibit "B," or any portion thereof.

Article II, Section 2.2 of the Amended and Restated Declaration of Covenant Restrictions, entitled "Plan of Development of Additional Property" describes the amendment process and procedure for adding Additional property also known as Exhibit "B" to the subdivision. This Section provides in pertinent part:

Should the option to add the Additional Property or any portion of it not be exercised within the term specified herein or be terminated by Developer, such option shall in all respects expire and be of no further force and effect. **DEVELOPER SHALL NOT BE OBLIGATED TO IMPOSE ON THE ADDITIONAL PROPERTY OR ANY PORTION OF IT ANY COVENANTS, CONDITIONS, OR RESTRICTIONS THE SAME OR SIMILAR TO THOSE CONTAINED HEREIN, AND THAT PROPERTY NOT SUBMITTED WILL BE FREE OF ANY COVENANT OR CONDITIONS WHATSOEVER UNLESS OTHERWISE AFFIRMATIVELY IMPOSED.** (Emphasis added).

Section 2.2 under Article II of the Recorded Amended and Restated Declaration of Covenants and Restriction further provides in pertinent part:

The option reserved by Developer to cause all or any portion of the Additional Property to become part of the Development shall in no way be construed to impose upon Developer any obligation to add all or any portion of the Additional Property

to the Development or to construct thereon any improvement of any nature whatsoever *or to restrict or limit its use in any manner*. (Emphasis added).

Section 8.5(a) under Article VIII, entitled Amendments by the Developer, describes the amendment process and procedure for adding Additional Property also known as Exhibit "B" to the subdivision. Section 8.5 (a) provides in pertinent part that:

**For a period of fifteen (15) years from the date of recording of this Declaration, Developer may amend this Declaration in any particular by an instrument in writing filed and recorded in the Records of the Office of the Clerk of Court for Horry County, South Carolina, all without the approval of any Owner or Mortgagee; provided, however, that with the exception of the addition of any portion of the Additional Property to the terms of this Declaration: (1) in the event that such amendment materially alters or changes any owner's right to the use and enjoyment of his Dwelling or Multi-Family Area, such amendment shall be valid only upon the written consent thereto by a majority in number of the then existing Owners affected thereby; or (ii) in the event that such amendment would materially and adversely affect the security, title, and interest of any Mortgagee, such amendment shall be valid only upon the written consent thereto of all such Mortgagees so affected.**

Four (4) Amendments were made to the Amended and Restated Declaration of Covenants and Restrictions for Myrtle Beach Golf & Yacht Club Subdivision between 1986 and 1991. However, the Developer, or its successors and assigns, failed to exercise their option to submit Golf Course Property to the Amended and Restated Declaration of Covenants and Restrictions, as set forth under Sections 2.2 and 8.5, within fifteen (15) years from the date of its recordation on January 29, 1985 by the execution of any amendment filed in the Office of the Clerk of Court for Horry County. The Four (4) Amendments to the Amended and Restated Declaration of Covenants and Restrictions for the MBG&YC subdivision are attached hereto as Exhibits "F-1", "G-1", "H-1", and "I-1" and are incorporated herein by reference.

On January 30, 1985, the By-Laws for Myrtle Beach Golf and Yacht Club Association, Inc. ("By-Laws for MBG&YCA")<sup>8</sup> were adopted by Directors R.L. Propps and Samuel D. Burns for the purpose of administering the Myrtle Beach Golf and Yacht Club Subdivision. By-Laws for MBG&YCA are attached hereto as Exhibits "J-1" and are incorporated herein by reference.

The By-Laws for MBG&YCA provide in pertinent part:

The subdivision is identified by the name of Myrtle Beach Golf & Yacht Club and is located upon the real property in Horry County, South Carolina, described on Exhibit "A" to the Amended and Restated Declaration of Covenants and Restrictions for the Subdivision dated as of January 21, 1985, recorded in the Office of the Horry County Clerk of Court on January 29, 1985, in Deed Book 931 at page 563 ("the Declaration"). *Upon submission of the property, or any portion of the property, described in Exhibit "B" to the Declaration, these By-Laws become equally applicable to such additional property.* The Developer of the subdivision is Myrtle Beach Golf & Yacht Club, a General Partnership ("the Developer").

(a) *The provision of these By-Laws are applicable to any and all land subject to the Declaration, and the terms and provisions of these By-Laws are expressly subject to the effect of the terms, provisions, conditions, and authorizations contained in the Declaration.* The terms and provisions of the Declaration shall be controlling wherever and whenever, if ever, they are or may be in conflict with these By-Laws.

(b) *All present or future co-owners, tenants, future tenants, or their employees, invitees, licensees, or any other person that might use the lands of the subdivision, or any of the facilities thereof in any manner, are subject to the regulations set forth in these By-Laws and in the Declaration, as either, or both, may be amended or supplemented from time to time.* (Emphasis added).

On September 12, 1988, Peoples filed for foreclosure on the Golf Course Property against Myrtle Beach Golf & Yacht Club, a General Partnership. Peoples was the successful bidder for the property at the subsequent judicial sale and a Master's Deed was issued by the Court as a result thereof.

<sup>8</sup> Attorney Jeffcoat drafted the By-Laws for MBG&YCA at the request and instruction of the Developer. "Supplemental Affidavit # 3 of Jeffcoat is attached hereto as Exhibit "P-1".

Peoples sold the Tract II Property (*i.e.*—the Golf Course Property) to Heron Point Golf Club Limited Partnership (“Heron Point”) as evidenced by the 1992 Deed Poll recorded April 15, 1992, in the Horry County Register of Deeds in Deed Book 1540 at Page 483, which is attached hereto as Exhibit “K-1” and is incorporated herein by reference.

The 1992 Deed Poll between Peoples and Heron Point contains certain restrictions, which expressly state:

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

- (a) The only permitted use of this property is as a golf course, country club, or other ancillary use relating to golf course or country club use;
- (b) Grantee, its Successors and Assigns agree to offer memberships to members of Myrtle Beach Golf and Yacht Club Association, Inc., its successors and assigns on the same basis that it offers memberships to the public at large, *provided, however, that there shall be no requirement to offer memberships.* (Emphasis added).

In regard to the 1992 Deed Poll, Heron Point entered a First Mortgage and Security Agreement (“Mortgage”) with Peoples wherein the monies loaned for the purchase of the Golf Course Property were further secured. The Mortgage is attached hereto as Exhibit “L-1” and is incorporated herein by reference. The Mortgage provides in pertinent part, *the Mortgagor (i.e., Heron Point Golf Club Limited Partnership) shall not remove, demolish, or materially change the use of the golf course without the prior consent of the mortgagee (i.e., Peoples).* The Mortgage was subsequently amended, assigned and/or transferred multiple times thereafter and finally purchased by CWD.

On June 10, 1992, Peoples quit-claimed its interest to the Association in “all gores or slivers of property” surrounding and/or adjacent to the Golf Course Property by Quit-Claim Deed

recorded in the Horry County Register of Deeds' Office in Deed Book 1554 at Page 782, which is attached as Exhibit "M-1" and is incorporated by reference.

On June 10, 1992, Peoples quit-claimed its interest to the Association in all boulevards, road, streets, courts and common areas in the subdivision. Peoples' Quit-Claim Deed was recorded in the Horry County Register of Deeds' Office in Deed Book 1554 at Page 786, which is attached as Exhibit "N-1" and is incorporated by reference.

On May 5, 2005, First Federal Savings and Loan Association of Charleston ("First Federal") as a successor-in-interest to Peoples agreed to "waive, relinquish and release the following restrictive covenants contained in [1992 Deed Poll (Exhibit "K-1")] as the same may apply, if at all," to a portion of the Golf Course Property sold to Enterprise Road Development, LLC by Heron Point. A copy of the "Waiver of Restrictions" is attached as Exhibit "O-1" and is incorporated reference.

In April 2014, Plaintiffs decided to close the Heron Point Golf Course because it had not been economically viable for four years. The members of the MBG&YC subdivision were not monetarily supporting the golf course by purchasing memberships. Specifically, only 20 members of the Association held memberships to the Heron Point Golf Course out of 1,000 members in the subdivision when the Golf Course ceased operation in 2014.

About a week after closing the golf course, Mr. Clyburn, on behalf of Plaintiffs, met with Board members of the Association and informed them Plaintiffs were going to probably sell the Golf Course Property to a residential developer in the future. Shortly thereafter, Mr. Clyburn received a certified letter from the Association's attorney, Chris Pearce, claiming the Golf Course Property was limited to use as a golf course. In response, Mr. Clyburn told the Association's attorney that Plaintiffs did not agree with the Association's legal position concerning the use of

the Golf Course Property. However, Plaintiffs initially entered into settlement negotiations with the Association, but those negotiations were not successful because of the unrealistic expectations of the Association's board members. At the same time, Plaintiffs were being contacted by several developers who were interested in purchasing the Golf Course Property for residential development purposes; however, they would not be interested in purchasing the Golf Course Property unless and until the use restriction issue had been resolved by either a settlement agreement with the Association or by judicial resolution pursuant to a declaratory judgment action. After several discussions with the Association's board members over the course of several months without any progress, Plaintiffs ultimately decided to file a declaratory action to resolve the restriction issue. Plaintiffs felt they had no other choice but to litigate the matter because Plaintiffs believed the Association's board members were not acting in good faith and they were not interested in resolving the matter in a timely manner unless Plaintiffs conveyed a majority of the Golf Course Property to the Association.

Based upon the foregoing, Plaintiffs filed a Complaint against the Association on April 27, 2015, seeking an order declaring certain claimed restrictions imposed on the Golf Course Property do not apply, or only personal to the grantor, or have been waived, released or terminated, or annulled due to changed economic circumstances, which would allow Plaintiffs to redevelop the Golf Course Property.

#### **STANDARD OF REVIEW FOR SUMMARY JUDGMENT**

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E. 2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E. 2d 868, 874 (2001)). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCF. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Id. at 122, 708 S.E. 2d at 769. “A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” David v. McLeod Reg’l Med. Ctr., 367 S.C. 242, 250, 626 S.E. 2d 1, 5 (2006). “Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” Brockbank v. Best Capital Corp., 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000).

“Under rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party’s case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent’s claim. Id. Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. Id.; Rule 56(e), SCRCF.

**STANDARD OF REVIEW FOR DECLARATORY JUDGMENT RELIEF  
AND RULES GOVERNING THE APPLICATION AND  
CONSTRUCTION OF RESTRICTIVE COVENANTS**

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163 (2015); Felts v. Richland Cnty., 303 S.C. 154, 400 S.E.2d 781 (1991). An action to construe a contract is an action at law. Duncan v. Little, 384 S.C. 420, 424-25, 682 S.E.2d 788, 790 (2009). Covenants will be strictly construed against grantor, and those attempting to enforce them, and in favor of the free use of property. Sprouse v. Winston, 212 S.C. 176, 46 S.E.2d 874 (1948); Edwards v. Surratt, 228 S.C. 512, 90 S.E.2d 906 (1956); Lovering v. Seabrook Island Property Owners' Ass'n, 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986), modified, 291 S.C. 201, 352 S.E.2d 707 (1987); Donald E. Baltz, Inc., v. R. V. Chandler & Co., 248 S.C. 484, 151 S.E.2d 441 (1966); Cathran v. Stroman, 246 S.C. 42, 142 S.E.2d 368 (1965). This policy is based on the idea that society's best interests are advanced by encouraging the free and unrestricted use of land. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 363 S.E.2d 891 (1987); see also Gambrell v. Schriver, 312 S.C. 354, 440 S.E.2d 393 (Ct. App. 1994) (covenants, expressed or implied restricting the free use of land are not favored and must be strictly construed). If language of a restriction is equally capable of two or more different constructions, the construction adopted should be the one that least restricts the use of the property. South Carolina Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299, 302 (2001). Determination of *whether language in a contract or a deed is ambiguous is a question of law*. Id. (Emphasis added).

### ARGUMENT

- I. THE ASSOCIATION LACKS STANDING TO ENFORCE THE COVENANTS AND RESTRICTIONS CONTAINED IN THE RECORDED DECLARATION CONCERNING THE USE OF THE GOLF COURSE PROPERTY BECAUSE THE PROPERTY HAS NEVER BEEN INCORPORATED INTO THE SUBDIVISION AS A DEDICATED COMMON AREA PURSUANT TO A RECORDED AMENDMENT AS REQUIRED BY SECTIONS 1.8, 2.2, 4.1, AND 8.5 OF THE RECORDED DECLARATION.

In paragraph 60(b) of its Second Amended Answer and Counterclaim for declaratory judgment relief, the Association contends that the “*Covenants and Restrictions as filed by Myrtle Beach Golf & Yacht Club, a General Partnership, are valid and run with the title of said lands known as the Amenities Tract (i.e. – the golf Course Property) and otherwise inure to the benefit of the Myrtle Beach Golf and Yacht Club Association, Inc. and its homeowners/members . . . .*”

[Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint of Myrtle Beach Golf & Yacht Club Association, Inc., p. 12, ¶ 60(b)]. Further, in paragraph 60(c) of its Second Amended Answer and Counterclaim, the Association also contends the “*Golf Course Property is a defined Common Element . . . and any land use change is subject to and governed by the controls set forth in the referenced Covenants and Restrictions.*” [p. 12, ¶ 60(c)]. Contrary to its contentions above, the Association lacks standing to enforce the covenants and restrictions contained in the Recorded Declaration against the Golf Course Property.

#### SOUTH CAROLINA LAW WITH RESPECT TO STANDING

To have standing, a party must have an interest in the subject matter of the action. Furman University v. Livingston, 244 S.C. 200, 136 S.E.2d 254 (1964). In South Carolina, a party must also be the “real party in interest.” Duke Power Co. v. South Carolina Public Service Comm’n, 284 S.C. 81, 326 S.E.2d 395 (1985); Dockside Ass’n. Inc. v. Detyens Simmons, 285 S.C. 565, 330 S.E.2d 537 (Ct. App. 1985). “*A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.*” Dockside, *supra*. (citing 67A C.J.S. Parties § 18 at 673–74 (1978); 59 Am. Jur.2d Parties § 40 at 397 (1971)) (Emphasis added). Stated differently, “*Standing refers to a [a] party’s right to make a legal claim or seek judicial enforcement of a duty or right. Standing is ... that concept of justiciability that*

*is concerned with whether a particular person may raise legal arguments or claims. It concerns an individual's sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court.*" (Internal quotation marks and citations omitted) (Emphasis added). Powell ex rel. Kelley v. Bank of Am.,<sup>9</sup> 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008). "As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation." Ex parte Morris, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006).

Similarly, a party seeking to enforce a restrictive covenant must be benefitted from its enforcement. McLeod v. Baptiste, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993). In McLeod, an original grantor of a restrictive covenant sought to enforce it against a grantee where the original grantor no longer owned any real property which would be benefitted by its enforcement. Id. The South Carolina Supreme Court held that a "*grantor lacks standing to enforce a covenant against a grantee when the grantor no longer owns property which would benefit from the enforcement of that restrictive covenant.*" Id. (Emphasis added).

Here, it is undisputed that the Golf Course Property was never incorporated into the MBG&YC subdivision as a dedicated common area by and through a recorded amendment pursuant to the affirmative requirements of sections 1.8, 2.2, 4.1, and 8.5 of the Recorded Declaration. Consequently, the Association and its homeowners/members do not have standing to assert or enforce the Recorded Declaration's covenants and restrictions against any land use

<sup>9</sup> See Powell ex rel. Kelley v. Bank of Am., 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (Standing is comprised of three elements: (1) the plaintiff must have suffered an "injury in fact," an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, i.e., the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision). "The party seeking to establish standing carries the burden of demonstrating each of the three elements." Sea Pines Ass'n for the Protection of Wildlife, Inc. v. South Carolina Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

change because they do not possess any legal right or equitable interest in the Golf Course for the reasons discussed below.

Article II, section 2.2 of the Recorded Declaration, entitled "**Plan of Development of Additional Property**" is the controlling authority for incorporating "Additional Property" such as the Golf Course Property to MBG&YC subdivision as a dedicated Common Area. Golf Course Property is defined as "Additional Property" under § 1.1 of the Recorded Declarations. Article II, section 2.2 provides in pertinent part:

**Should the option to add the Additional Property or any portion of it not be exercised within the term specified herein or be terminated by Developer, such option shall in all respects expire and be of no further force and effect. DEVELOPER SHALL NOT BE OBLIGATED TO IMPOSE ON THE ADDITIONAL PROPERTY OR ANY PORTION OF IT ANY COVENANTS, CONDITIONS, OR RESTRICTIONS THE SAME OR SIMILAR TO THOSE CONTAINED HEREIN, AND THAT PROPERTY NOT SUBMITTED WILL BE FREE OF ANY COVENANT OR CONDITIONS WHATSOEVER UNLESS OTHERWISE AFFIRMATIVELY IMPOSED.**

The option reserved by Developer to cause all of any portion of the Additional Property to become part of the Development **shall in no way be construed to impose upon Developer any obligation to add all or any portion of the Additional Property to the Development or to construct thereon any improvement of any nature whatsoever or to restrict or limit its use in any manner.** (Emphasis added).

Section 2.2 of the Recorded Declaration further provides in pertinent part:

The option reserved under this Section 2.2 may be exercised by the developer **only by the execution of an amendment to this Declaration which shall be filed in the Office of the Clerk of Court for Horry County, South Carolina, together with a revision of or an addition to the Site Plan showing additional property or such portion or portions thereof as being added to the Development by such Amendment, as well as... the Common areas, or other types of property located within the subdivision.** (Emphasis added).

Further, section 8.5(a) of Article VIII entitled "Amendments by the Developer" describes the amendment process and procedure and time limitations for adding the Golf Course Property as additional property to the MBG&YC subdivision. Section 8.5 (a) provides in pertinent part that:

For a period of fifteen (15) years from the date of recording of this Declaration, Developer may amend this Declaration in any particular by an instrument in writing filed and recorded in the Records of the Office of the Clerk of Court for Horry County, South Carolina, all without the approval of any Owner or mortgagee. . . .

In this case, only four (4) Amendments were filed between 1986 and 1992 with the Horry County Clerk of Court's Office. These Amendments did not incorporate the Golf Course Property into the MBG&YC subdivision as a dedicated Common Area. Because Peoples chose not to incorporate the Golf Course Property<sup>10</sup> as a dedicated common area in the MBG&YC subdivision (before selling the property to Heron Point in 1992), it essentially eliminated the only authorized procedure for the Association and its homeowners/members to obtain "*a non-exclusive right and easement*"<sup>11</sup> in and to the Golf Course Property for their use and enjoyment.

For example, section 1.8 of the Recorded Declaration provides in pertinent part: "*nor shall Association or any Owner be entitled to any right, title or interest in such property unless and until such property shall have been formally included as a part of the Subdivision by the Developer pursuant to the terms hereinafter contained.*"<sup>12</sup> (Emphasis added). The plain language in section 4.1 further clarifies that homeowners/members can only have a non-exclusive right and easement of enjoyment in and to dedicated common areas, which means the Golf Course Property

<sup>10</sup> Epting v. Lexington Water Power Co., 177 S.C. 308, 181 S. E. 66, 68 (1935) ("In the performance of covenants, it is a maxim, that he who prevents a thing from being done, shall not avail himself of the nonperformance; and where there are reciprocal duties to be performed by the parties he who alleges a breach ought to show he was always ready and willing to perform what he was obliged to do; otherwise he shall not be permitted to come into court and take advantage of his own laches or neglect.") Here, Association failed to execute and record the necessary amendment in the Horry County Clerks' Office to subject the golf course property to the restrictions running with the land as required by Article II and VIII of the Amended Declaration of the MBG&YC, subdivision.

<sup>11</sup> See § 4.1 of Article IV of the Recorded Declaration.

<sup>12</sup> See §§ 2.2 and 8.5 of the Recorded Declarations for MBG&YC Subdivision.

is not subject to and controlled by the Recorded Declaration's covenants and restrictions as incorrectly argued by the Association in its Second Amended Answer and Counterclaim.

Furthermore, in responding to Plaintiffs' Interrogatory No. 4, the Association's expert witness Charles Hedgepath, Esquire freely admitted and/or opined in Paragraphs XI and XII as follows:

*That the public record(s) fail to reveal the imposition of the Association's Amended and Restated Declaration of Covenants and Restrictions on the . . . golf course [property].* (Emphasis added).

*Golf course. . . [was] not designated as properties and/or common area under the Association's Amended and Restated Declaration of Covenants and Restrictions.*<sup>13</sup> (Emphasis added).

With respect to the foregoing, the Association and its homeowners/members are charged with constructive notice of the affirmative requirements of sections 1.8, 2.2, 4.1 and 8.5 of the Recorded Declaration. See Strother v. Lexington County Recreation Comm'n., 332 S.C. 54, 64, 504 S.E.2d 117, 122 (1998). The South Carolina Supreme Court in Strother explained that, "constructive notice" is a legal inference which substitutes for actual notice. Id. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry, if these facts were pursued with due diligence, they would lead to other undisclosed facts. Id. "A homeowner is charged with constructive notice of any restriction properly recorded within the chain of title." Harbison Comm. Ass'n, Inc., v. Mueller, 319 S.C. 99, 103, 459 S.E. 2d 860, 863 (Ct. App. 1995). Applying these principles, the Association and its homeowners/members are on constructive notice of sections 1.8, 2.2, 4.1 and 8.5 of the Recorded Declaration appearing within their chain of title and they are bound by them.

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<sup>13</sup> A copy of the Association's answer to Plaintiffs' Interrogatory No. 4 is attached hereto as Exhibit "Q-1" and is incorporated herein by reference.

For the foregoing reasons, the Golf Course Property is not subject to and governed by the Recorded Declaration's covenants and restrictions for the MBG&YC subdivision. These covenants and restrictions do not touch and concern, nor do they run with title to the Golf Course Property because the subject property was never formally incorporated into the subdivision as a dedicated common area by a recorded amendment.<sup>14</sup> As such, the Association and its homeowners/members do not possess any legal right or equitable interest in the Golf Course Property and, therefore, they lack standing *"to make a legal claim or seek judicial enforcement of a duty or right"* imposed on the subject property. Accordingly, Plaintiffs' Motion for Summary Judgment should be granted as a matter of law with respect to the Association's lack of standing to assert or enforce the Recorded Declaration's covenants and restrictions against the Golf Course Property.

**II. THE ASSOCIATION LACKS STANDING OR PRIVY OF CONTRACT TO ASSERT OR ENFORCE THE "1992 DEED RESTRICTIONS" CONTAINED IN THE DEED POLL BETWEEN PEOPLES AND HERON POINT RECORDED ON APRIL 15, 1992, CONCERNING THE USE OF THE GOLF COURSE PROPERTY.**

In paragraph 60(e) of its Second Amended Answer and Counterclaim for declaratory judgment relief, the Association contends that the *"express deed restrictions contained in the 1992 Deed [Poll]. . . are valid and run with title to . . . the Golf Course Property and are otherwise not personal in the original Grantor and/or its successors in interest."* [Corrected Second Amended Answer, Counterclaims, and Third-Party Complaint of Myrtle Beach Golf & Yacht Club Association, Inc., p. 12, ¶ 60(e)]. However, the Associations' contentions are without evidentiary support and are contrary to the record for the reasons set forth below.

<sup>14</sup> "Supplemental Affidavit # 3 of Jeffcoat is attached hereto as Exhibit "P-1" and is incorporated by reference.

South Carolina places the burden of showing the restriction in a deed are covenants running with land upon the party claiming the benefit of the restrictions. Charping v. J. P. Scurry & Co., 296 S.C. 312, 372 S.E.2d 120 (Ct. App. 1988). There must be a clear indication that the parties intended to create a covenant that would run with the land. Charping, 296 at 315, 372 S.E.2d at 122 (citing Cheves v. City Council of Charleston, 140 S.C. 423, 138 S. E. 867 (1926)). The intention of the parties in placing the restriction on the property must be determined as of the time the grantor conveyed title to the grantee. Charping, 296 at 315, 372 S.E.2d at 122. Covenants will be strictly construed against the grantor, and those attempting to enforce them, and in favor of the free use of property. Sprouse v. Winston, 212 S.C. 176, 46 S.E.2d 874 (1948); Edwards v. Surratt, 228 S.C. 512, 90 S.E. 2d 906 (1956); Lovering v. Seabrook Island Property Owners Ass'n., 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986), modified, 291 S.C. 201 352 S.E.2d 707 (1987). This policy is based on the idea that society's best interests are advanced by encouraging the free and unrestricted use of land. Sea Pines Plantation Co. v Wells, 294 S.C. 266, 363 S.E.2d 891 (1987). In the absence of express intention, the party claiming the benefit of the restrictive covenant must show by affidavit or otherwise facts regarding the grantor's intention to benefit the land owned by him/her/it when the restricted property was sold. Charping, 296 at 315, 372 S.E.2d at 122.

Accordingly, the burden to prove the restrictions contained in the 1992 Deed Poll run with the title to the dwellings of the homeowners/members of the MBG&YC subdivision and benefit them is admittedly on the Association. [Defendant's Motion for Summary Judgment, p. 21, states that *"the burden to prove the restrictive covenants contained in the 1992 Indenture Deed run with the land is on MBG&YC."* (Emphasis added)].

- A. *The Instrument's language creating the restrictions determines the intent of the covenanting parties when it is clear and unambiguous.*

With respect to the intent of the covenanting parties, insofar as possible, it should be determined from the instrument creating the restriction. Charping, 296 at 315, 372 S.E.2d at 122; Forrest Lake Co., v. Black, 216 S.C. 255, 262, 57 S.E. 2D 420, 424 (1950) (*"The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties as shown by the agreement governs."*) (Emphasis added). Only when the language used is susceptible of more than one reasonable interpretation should the Court consider circumstances surrounding the covenants' title conveyance and execution. See Hoffman v. Cohen, 262 S.C. 71, 202 S.E.2d 363 (1974). Stated differently, extrinsic evidence is not admissible to create ambiguities where ambiguities do not otherwise exist. See Kirven v. Bartell, 266 S.C. 385, 223 S.E. 2d 597 (1976); McDaniel v. Connor, 206 S.C. 96, 33 S.E.2d 75, 77 (1945) (finding where a deed conveying realty was unambiguous, testimony offered to throw light upon grantor's intention as to extent of estate conveyed as inadmissible); Dixon v. Dixon, 362 S.C. 388, 395-96, 608 S.E.2d 849, 852 (2005) (*finding that when a deed or contract are unambiguous, the court will not resort to extrinsic evidence to interpret the document beyond its four corners*). (Emphasis added). When a covenant is unambiguous the restriction should be enforced according to its obvious meaning. See Menne v. Keowee Key Property Owners' Ass'n, Inc., 368 S.C. 557, 629 S.E.2d 690, 695 (Ct. App. 2006).

In the instant case, Peoples conveyed to Heron Point the entire Golf Course Property, consisting of a total of 171.953 acres. The Association was not a party to the 1992 Deed Poll recorded on April 15, 1992, which contains the following deed restrictions in the subparagraphs below:

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

(b) Grantee, its Successors and Assigns agree to offer memberships to members of Myrtle Beach Golf and Yacht Club Association, Inc., its successors and assigns on the same basis that it offers memberships to the public at large, provided, however, that there shall be no requirement to offer memberships.

On its face, the plain language of the subparagraph (a) covenant does not expressly indicate that Peoples and Heron Point intended for the subject covenant to be a real covenant because:

- (1) No express language exists indicating that the subject covenant *runs with the land or more specifically runs with the title of the dwellings of the Association's homeowners/members in the MBG&YC subdivision.* (Emphasis added).
- (2) No express language or words of import exists indicating the subject covenant *shall bind heirs and assigns of the grantee (Heron Point).*<sup>15</sup> (Emphasis added).
- (3) No express language exists *referring to People's remaining lands.*<sup>16</sup> (Emphasis added).
- (4) No express language exists that the subject covenant benefits *Peoples' successor-in-interest and assigns.*<sup>17</sup> (Emphasis added).
- (5) No express language exists that the *Association and its lot owners in the MBG&YC subdivision have the right to assert, or enforce, and/or release the subject covenant.* (Emphasis added).

<sup>15</sup> The Court may look to the language of the covenant to determine whether the language used evidences an intention to attach the attribute of assignability. Cheves, 140 S.C. at 423, 138 S.E. at 869. Under South Carolina law, use of language indicating that covenant shall bind "heirs and assigns" of property owner is evidence that parties intend for covenant to run with land. Id.; see also In re Daufuskie Island Properties, LLC, 431 B.R. 612 (Bankr. D.S.C. 2009). Moreover, the absence of the words "heirs and assigns," or words of import, may be considered in connection with the context of the deed in arriving at the intent of the parties. 21 C.J.S. Covenants § 33 (2017).

<sup>16</sup> South Carolina Courts *have rejected the presumption that when a grantor sells a portion of his property and imposes restrictions on the portion conveyed, the restrictions are presumed to be for the benefit of the retained land.* See Charging, 296 at 315, 372 S.E.2d at 122. In this case, it is undisputed that South State Bank, who notably was not the original grantor of the 1992 Deed Poll, does not hold any interest or real property that would be benefitted from the enforcement of the subject covenant. As such, South State Bank has no standing to enforce the subparagraph (a) covenant. McLeod v. Baptiste, 315 S.C. 246, 433 S.E.2d 834, 835 (1993). Further, the subparagraph (a) covenant does not touch and concern any benefitted land of Peoples. This because Peoples divested itself of the entire Golf Course Property on April 15, 1992, and, therefore, it has no retained land (*i.e.*, a part or portion of the Golf Course Property) that would be benefitted and/or rendered more valuable by the performance of the subparagraph (a) covenant.

<sup>17</sup> Covenants that do not expressly refer to the estates benefitted by the covenant are generally personal covenants. Charging, 296 at 315, 372 S.E.2d at 122.

- (6) No express language exists that the subject covenant *benefits the lot owners in the MBG&YC subdivision*. (Emphasis added).
- (7) No signatures on 1992 Deed Poll from *the partners of Heron Point*, which is further evidence that the subject covenant was only meant to be a personal covenant, rather than a real covenant.<sup>18</sup> (Emphasis added).
- (8) No express language *exists in the subject covenant or the four corners of the deed about the 1998 Settlement Agreement*. (Emphasis added).

Applying the above principles, the subparagraph (a) covenant on its face contains no express language that the subject covenant runs with the title to the dwellings of the Association's homeowners/members and benefits them with "*a non-exclusive right and easement of enjoyment*"<sup>19</sup> in and to the Golf Course Property, nor does the subject covenant expressly refer to the lands benefitted by it. See Charping, 296 at 315, 372 S.E.2d at 12. (*Covenants that do not expressly refer to the estates benefitted by the covenant are generally personal covenants*). (Emphasis added). Lastly, because the Heron Point Golf Course is no longer economically feasible as a Golf Course and has not operated as a golf course since July 2014, the Association and its homeowners cannot be benefitted by using the property as a golf course. McLeod v. Baptiste, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993) (A party seeking to enforce a restrictive covenant must be benefitted by that act).

Next, a review of the plain language of the subparagraph (b) covenant expressly undercuts the Association's real covenant argument for several reasons. First, there is no requirement to offer memberships to the public at large and the Association's homeowners/members pursuant to the subject covenant's plain language, which expressly provides "*there shall be no requirement to*

<sup>18</sup> At common law, the acceptance of a deed poll, i.e., one signed only by the grantor, would not bind the grantee to covenants in the deed. 17 S.C. Jur. Covenants § 7 (2017). Early South Carolina Cases were in accord. Epting v. Lexington Water Power Co., 177 S.C. 308, 181 S.E. 66, 29 (1935) (Where formal acceptance was necessary to bind grantee on covenants in deed poll grantee's written acceptance which was neither witnessed nor probated held not formal acceptance and insufficient to afford notice).

<sup>19</sup> See § 4.1 of Article IV of the Recorded Declarations.

*offer memberships.*" (Emphasis added). Second, there is no legal requirement to offer golf memberships to the Association's homeowners/members pursuant to the provisions of the Recorded Declaration for the MBG&YC subdivision. Third, the dwelling owners in the MBG&YC subdivision have not obtained "*any right, title or interest*" in and to the Golf Course Property with respect to their use and enjoyment of the property. See Raintree Corp. v. Rowe, 248 S.E.2d 904 (N.C. Ct. App. 1978) (the North Carolina Court of Appeals found that a covenant requiring the owners of lots in a subdivision to be members of a country club located in the subdivision and to pay country club dues was personal).

Based upon the foregoing, the subparagraph (b) covenant is only a personal covenant and does not expressly benefit the Association and its homeowners/members. Consequently, since all memberships have been terminated because the property is no longer being operated as a golf course, the Association and its homeowners cannot be benefitted by the subparagraph (b) covenant. See McLeod v. Baptiste, 315 S.C. at 247, 433 S.E.2d at 835.

***B. Circumstances surrounding the conveyance of title and the creation of the deed restrictions may indicate the intent of the parties if needed.***

The circumstances surrounding the execution and conveyance of the 1992 Deed Poll restrictions on April 15, 1992 do not indicate that Peoples and Heron Point ever intended to directly benefit the Association's homeowners/members with "*a non-exclusive right and easement of enjoyment*"<sup>20</sup> in and to the Golf Course Property appurtenant to and running with the title to their dwellings in the MBG&YC subdivision for the following reasons:

***1. Affidavit of Attorney Douglas G. Brown indicates the 1992 Deed Poll restrictions are personal rather than real covenants.***

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<sup>20</sup> See § 4.1 of Article IV of the Recorded Declarations.

Attorney Douglas G. Brown ("Brown"), who represented Heron Point at the closing regarding the purchase of the Golf Course Property from Peoples, indicates in his affidavit<sup>21</sup> that the 1992 Deed Poll restrictions are just personal covenants, rather than real covenants. The following excerpts from his affidavit establish the underlying and undisputed facts supporting Brown's belief that the 1992 Deed Poll restrictions are only personal covenants:

- Brown points out that *"[t]he Golf Course Property was never made subject to the Declaration of Covenants and Restrictions for MBG&YCA recorded at Book 931, Page 563 applicable to the subdivision, nor the Amended Declaration of Covenants and Restrictions recorded in Book 1027, Page 181 in the Horry County S.C. Clerk's Office, applicable to the MBG&YCA subdivision which would have required the passage of an Amendment to the Declaration and the filing of a site plan with Horry County in order to make the Golf Course Property a common area of the subdivision."* [Affidavit of Brown, P. 3, ¶ 9 (c); (Emphasis added)].
- Brown states that he "[d]id not receive a copy of the 1988 Settlement Agreement prior to the closing nor was he told about the 1988 Settlement Agreement until he was shown a copy of that document in connection with the taking of [his] deposition regarding this matter by Chris Pearce, Counsel for the Association on November 4, 2016." Furthermore, Brown indicates that he *"does not recall discussing the 1988 Settlement Agreement with either Jerry C. Spearman, Sr. or G. Millon Plyler, the General Partners of the Heron Point at the time of the closing on the golf course property on April 25, 1992, nor does he have reason to believe either of them were aware of the 1988 Settlement Agreement, which document, was not recorded in any known public records."* [Affidavit of Brown, P. 2, ¶ 7; (Emphasis added)].
- Brown points out that "[Heron Point] sold a portion of Tract II to Enterprise Road Development, Inc. in May, 2005 in which transaction First Federal Savings & Loan Association ("First Federal"), the successor in interest to Peoples, executed a document waiving the use restriction in question as to the parcel sold to Enterprise Road Development, Inc." He believes *"[t]he fact that the Purchase of the subject Golf Course Property was consummated with First Federal releasing its mortgage lien against the parcel and releasing the use restriction as it did, but without any other adjoining property owners also releasing or waiving the use restriction, is a clear indication that the Heron Point, the purchaser, and First Federal considered the use restriction to be a personal covenant and not a real covenant."* [Affidavit of Brown, P. 3 ¶ 9 (c); (Emphasis added)].

<sup>21</sup> A copy of the Affidavit of Douglas G. Brown ("Brown"), Esquire, is attached hereto as (Exhibit "R-1") and is incorporated by reference.

- Brown states that “[t]he owner’s and the loan title policies issued to the [Heron Point] and Peoples respectively did not contain the use restriction language, or any similar language as contained in the Indenture Deed and the title insurance commitment. He argues *“[t]he omission of the use restrictions in the owner’s and the loan title policies lend support to the Plaintiffs’ contention that the use restriction was not intended to be a real covenant but was intended to be a personal covenant.”* [Affidavit of Brown, P. 4, ¶ 9 (f); (Emphasis Added)].
- Brown states “[I]n connection with the purchase of the Heron Point Golf Course on April 15, 1992, the Heron Point as Mortgagor gave a Promissory Note secured by a First Mortgage and Security Agreement (the “mortgage”) to Peoples as Mortgagee. He points out “[t]he Mortgage contained the following covenant: *‘Mortgagor shall not remove, demolish materially or materially change the use of the golf course without the prior consent of the Mortgagee.’* He asserts that *“[i]t is important to note that the cited provision makes no reference to the requirement for the consent of any other party, including MBG&YCA, or any other party that Mortgagee, in order for Mortgagor (Heron Point) to be allowed ‘to ... remove, demolish materially alter, or materially change the use of the golf course...’”*. He argues that *“[h]ad it been the intention of Peoples to require Mortgagor to obtain the prior consent of MBG&YCA, in addition to the consent of Peoples as Mortgagee, Peoples could have easily provided for the requirement of such additional consent in the applicable Mortgage provision.”* He points out *“[t]he failure of Peoples to do so further strengthens Plaintiffs’ position that Peoples did not intend that the cited Mortgage provision serve to protect property owned by MBG&YCA or the owners of the lots within the subdivision and consequently, that the restrictive covenant contained in the Mortgage was intended to be a personal and not a real covenant.”* [Affidavit of Brown, P. 4, ¶ 9 (g); (Emphasis added)].
- Brown states “[i]n the period of time leading up to the closing of the purchase of the Golf Course Property by [Heron Point] from Peoples on April 15, 1992, and since that time,” he does *“not recall ever having seen any documents(s) that stated that the use restriction contained in the 1992 Indenture Deed was intended to benefit the interest of the lot owners of the subdivision.”* [Affidavit of Brown, P. 4, ¶ 9 (h); (Emphasis added)].
- Brown points out the *“1992 Indenture Deed was signed only by Peoples and was not signed by the [Heron Point], which would customarily be required in the execution and recording of any indenture deed.”* He believes *[i]his fact further illustrates that the likely intention of the Grantor and Grantee was that the use restrictions were meant to be a personal, rather than a real covenant.”* [Affidavit of Brown, P. 4, ¶ 9 (i); (Emphasis added)].
- Brown points out that “Paragraph 1 (Introduction) of the By-Laws of MBG&YCA, states in part: *‘upon submission of the property, or any portion of the property described in Exhibit B to the Declaration, these By-Laws become equally*

*applicable to such additional property.” He contends that “[t]his provision is significant in that it is consistent with the proposition that in order for the Golf Course Property to be subject to the Declaration’s restriction, such property would have to be submitted which would require the execution and filing with the Horry County Register of Deeds of an Amendment to the Declaration, together with a plat showing the Golf Course Property being added as Additional Property to the subdivision.” [Affidavit of Brown, P. 7, ¶ 9, (k); (Emphasis added)].*

2. *Deposition testimony of George N. Magrath, Jr. indicates the 1992 Deed Poll restrictions are personal covenants, rather than real covenants.*

George N. Magrath, Jr. (“Magrath”), who was the Senior Vice President at Peoples at the time the real estate transaction occurred with Heron Point, was responsible for selling the Golf Course to Heron Point on April 15, 1992. Magrath’s deposition testimony tends to indicate that the 1992 Deed Poll restrictions are personal rather than real covenants. The following excerpts<sup>22</sup> from Magrath’s deposition point towards the 1992 Deed Poll restrictions being only personal covenants:

- On Page 130, *Magrath agreed that the Amended Restated Declaration of Covenants and Restriction for MBG&YC Subdivision are the controlling restriction with regard to the development of the ten (10) tracts comprising the Enterprise Tract.* [See Plaintiffs’ Exhibit Number 1 to the deposition of Magrath]. [Dep. Of Magrath, pp. 125-130, lines 1-15; (Emphasis added).] See Hoffman v. Cohen, 262 S.C. 71, 202 S.E.2d 363 (1974) (The construction the parties place on the restrictions is entitled to great, if not controlling, weight).
- On Page 134, *Magrath acknowledged that the Additional Property described on Exhibit “B” to the Amended Restated Declaration of Covenants and Restriction for MBG&YC Subdivision referred to the Golf Course Property. Magrath further confirmed on Page 134 that the Golf Course Property was not described on Exhibit “A” to this Amended Declaration.* [Dep. of Magrath, pp. 130-134, lines 11-15; p. 135 lines 1-3; (Emphasis added)].
- On Pages 136 and 137, *Magrath affirmed that he knew of no amendment to the Amended Declaration* [Plaintiffs’ Exhibit No. 1 to Dep. of Magrath] where the developer made the Golf Course Property a part of the Common Area of

<sup>22</sup> A copy of Magrath’s Deposition Excerpts are attached hereto as (Exhibit “S-1”) and are incorporated by reference.

**MBG&YC Subdivision.** [Dep. of Magrath, p. 136, line 25; p. 137, lines 1-3; (Emphasis added)].

- After reading into the record Section 2.21 Plan of Development of Additional Property of the Amended Declaration [Plaintiffs' Exhibit No. 1 to Dep. of Magrath], including the requirement for the execution of any amendment to the Declaration which amendment would have had to have been filed in the Office of the Clerk of Court for Horry County, South Carolina, together with a revision or addition to the site plan showing the Additional Property being added to the development, *Magrath on Page 143 and 144 stated that at the time that Peoples had foreclosed on the Golf Course Property he was not aware of any amendment having been filed in the Horry County Register of Deeds Office that subjected the Golf Course Property to the restrictions of the Amended Declaration.* [Plaintiffs' Exhibit No. 1 to Dep. of Magrath]. This statement was reaffirmed by Magrath on **Page 145.** [Dep. of Magrath, p. 137, lines 4-25; pp. 138-145; p. 146, lines 1-5; (Emphasis added)].
- Following attorney Howell V. Bellamy, III's reading into the record on **Page 146, Paragraph 2 of the Defense Exhibit 24**, identified as the 1988 Settlement Agreement, including a reference to the parties to that agreement agreeing "to execute the necessary amendment of the Declarations of Restrictive Covenants and/or alienable easements for ingress and egress over the existing roadway," *Magrath agreed that the reference to the Declarations was intended to mean the Amended and Restated Declarations of Restrictions and Covenants, being Plaintiffs' Exhibit Number 1.* [Dep. of Magrath, p. 146, lines 7-25; p. 147, lines 1-16; (Emphasis added)].
- For the record, Magrath read the definition of "Declaration" as stated in Section 1.1 of the Declaration stating: "Declaration shall mean this Amended and Restated Declaration of all predecessors, supplements, and Amendments to the Declaration as filed in the Horry County Clerk of Court." On **Page 149, Magrath affirmed his understanding that the controlling restrictions with respect to the 1988 Settlement Agreement [Defendant's Exhibit 24 to Dep. of Magrath] would be any prior or subsequent restrictions regarding the MBG&YCA's declaration restrictions.** [Plaintiffs' Exhibit No. 1 to Dep. of Magrath]. [Dep. of Magrath, pp. 147-148, lines 1-23; (Emphasis added)]. Stated differently, *Magrath agreed that the parties to Defendant's Exhibit 24, (the 1988 Settlement Agreement) "would be subject to the terms and conditions of any prior or subsequent amendments to [amended] Declaration" previously referred to an Plaintiffs' Exhibit No. 1. . . .* [Dep. of Magrath, P. 149, lines 4-25; p. 150, lines 1-15; (Emphasis added)]. Lastly, *Magrath agreed that "the parties to the [1988 settlement] agreement and their successors-in-interest would have to abide by the Recorded Declaration[s] restrictions and covenants."* [Dep. of Magrath p. 149, lines 16-21; (Emphasis added)].

Considering his deposition excerpts as a whole, Magrath's testimony tends to indicate that 1992 Deed Poll restrictions do not run with the land due to the fact the Golf Course Property was never formally incorporated into the MBG&YC subdivision as a dedicated common area pursuant to the amendment<sup>23</sup> process under Article II. Conversely, by admitting in his deposition that the Golf Course Property is not a dedicated common area in the subdivision, he indicates the 1992 Deed Poll restrictions at best can only be personal covenants.

**3. *The 1992 Deed Poll restrictions do not run with the land and do not benefit the Association or its homeowners/members.***

For the 1992 Deed Poll restrictions to run with the land, the Association must establish two elements: (1) an express intention that Peoples and Heron Point intended for the covenants to run with title to the benefitted land; and (2) the covenants touch and concern the benefitted property. West v. Newberry Elec. Co-op., 357 S.C. 537, 593 S.E.2d 500 (Ct. App. 2004).

Under the first element, as discussed above, the plain and unambiguous language of the 1992 Deed Poll restrictions do not expressly indicate that the covenants run with the title to the dwellings of the Association's homeowners/members in the MBG&YC subdivision and benefit them with "*a non-exclusive right and easement of enjoyment*"<sup>24</sup> in and to the Golf Course Property.

In light of the above, the Association admits<sup>25</sup> in its Motion for Summary Judgment that it cannot meet its burden of proof by affidavit or otherwise facts showing that Peoples and Heron

<sup>23</sup> The Amendment process is the only authorized procedure for incorporating the Golf Course Property in the subdivision as a dedicated Common Area and subjecting the property to the real restrictions of the Recorded Declarations.

<sup>24</sup> See § 4.1 of Article IV of the Recorded Declarations.

<sup>25</sup> See [Defendant's Motion for Summary Judgment, p. 21, ¶ B This section provides that "*MBG&YC cannot determine the intent of the parties to the 1992 Deed [Poll] because the relevant parties are either unavailable or have no recollection of the intent of the parties and there are no documents that illuminate the intent of the parties.*"]. (Emphasis added). Contrary to the Association's contention, the deposition testimony of Magrath, the Affidavit of Brown, and the written documents prove otherwise.

Point intended on April 15, 1992, to directly benefit the dwellings of the Association's homeowners/members with "*a non-exclusive right and easement of enjoyment*" in and to the Golf Course Property appurtenant to and running with the title to their dwellings in the MBG&YC subdivision. (Emphasis Added). Charping, 296 at 316, 372 S.E.2d at 122.

Under second element, the general test to determine whether a covenant touches and concerns land is if, "*the covenantee's legal interest in land is rendered more valuable by the covenant's performance.*" (Emphasis added). See Marathon Finance Co. v. HHC Liquidation Corp., 325 S.C. 589, 483 S.E. 2d 757, 766 (Ct. App. 1997); In re T 2 Green, LLC, 363 B.R. 753, 766 (Bankr. D.S.C. 2006). The 1992 Deed Poll restrictions *do not touch and concern and benefit any land* because Peoples, as the grantor/covenantee when it sold it to Heron Point on April 15, 1992, failed to retain any portion of the Golf Course Property that could have benefitted or rendered more valuable by the operation of the Golf Course. See McLeod v. Baptiste, 315 S.C. at 247, 433 S.E.2d at 835. Likewise, the Association and its homeowners cannot claim their dwellings and/or properties are benefitted by the golf course since it is longer in operation. Id. at 247, 433 S.E.2d at 835 (A party seeking to enforce a restrictive covenant must be benefitted by that act).

**C. *The Association, as a stranger to conveyance between Peoples and Heron Point, lacks standing or privity of contract to enforce the 1992 Deed Poll Restrictions because they are only personal covenants.***

The Association, as a stranger to conveyance between Peoples and Heron Point, seeks an order finding the deed restrictions contained in the 1992 Deed Poll between Peoples and Heron Point "*are valid covenants and run with title to the golf course property*" and benefits its homeowners/members. [Corrective Second Amended Answer, Counterclaim, and Third-Party Compl. at ¶ 60(d)]. Contrary to the Association's assertion above, the undisputed facts in the record and case law show the Association lacks standing.

South Carolina Courts have ruled that “‘Privity’ denotes [a] mutual or successive relationship to the same rights of property.” Thompson v. Hudgens, 161 S.C. 450, 462, 159 S.E. 807, 812 (1931) (citation omitted); see also Black’s Law Dictionary 1394 (10th ed. 2014) (defining “privity” as “[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interests). Furthermore, South Carolina Courts have equated privity with standing. See Maners v. Lexington Cnty. Sav. & Loan Ass’n, 275 S.C. 31, 33–34, 267 S.E.2d 422, 423 (1980) (affirming the trial judge’s determination that “appellant had no standing to allege [her claim] because she was not in privity with respondent). Like privity, standing to sue is a fundamental requirement in instituting an action. Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). To have standing, a party must be the “real party in interest.” Duke Power Co. v. South Carolina Public Service Comm’n, 284 S.C. 81, 326 S.E.2d 395 (1985); Dockside Ass’n. Inc. v. Detyens Simmons, 285 S.C. 565, 330 S.E.2d 537 (Ct. App. 1985). “*A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.*” Dockside, supra. (citing as authority 67A C.J.S. Parties § 18 at 673–74 (1978); 59 Am. Jur.2d Parties § 40 at 397 (1971)) (Emphasis added).

Here, it is undisputed the Association was not a party to the 1992 Deed Poll between Peoples and Heron Point, nor is the Association a successor-in-interest and/or an assignee to Peoples. [Corrective Second Amended Answer, Counterclaim, and Third-Party Compl. at ¶¶ 50, 51, and 52]. Furthermore, the 1992 Deed Poll and its restrictions do not appear in the chain of title of any dwelling owners residing in MBG&YC subdivision. Lastly, but more importantly, the 1992

Deed Poll restrictions are only personal covenants. The Association and its homeowners/members lack standing to assert or enforce the personal covenants because they possess no legal right or equitable interest in the Golf Course Property. See Epting v. Lexington Water Power Co., 177 S.C. 308, 311, 181 S. E. 66 (1935) (A “personal” covenant is a contract between the two immediate parties to a deed, unenforceable by and against later grantees of the real estate conveyed in deed.).

***D. Heron Point is a bona fide purchaser for value without notice, actual or constructive, of the unrecorded 1988 Settlement Agreement on or before the closing for the purchase of the Golf Course Property.***

In this case, Heron Point is a bona fide purchaser for value, without notice, actual or constructive, of the unrecorded 1988 Settlement Agreement to extent the unrecorded agreement constitutes a defect in its title. Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874–75 (2006) (A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he has actually paid in full the purchase money (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) he purchased and acquired the legal title, or the best right to it; and (3) he purchased bona fide, *i.e.*, in good faith and with integrity of dealing, without notice of a lien or defect. The bona fide purchaser must show all three conditions—actual payment, acquiring of legal title, and bona fide purchase—occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property.).

Here, Heron Point purchased the Golf Course Property for value without notice, actual or constructive, of the unrecorded 1988 Settlement Agreement on or before its closing on the Golf Course Property with Peoples on April 15, 1992. Heron Point originally first learned of the existence of the unrecorded 1988 Settlement Agreement in 2016 when it received a copy of the unrecorded agreement from the Association who had received a copy of it pursuant to a subpoena

served on South State Bank. The record in this matter shows Heron Point did not expressly agree for the Association or its homeowners/members to obtain a legal right or equitable interest in the Golf Course Property allowing them to enforce the 1992 Deed Poll restrictions against the Golf Course Property. [Affidavit of Doug Brown, P. 2, ¶ 7; (Exhibit "R-1"); (Emphasis added)].

*E. The Parol evidence rule prohibits the Association from using the unrecorded 1988 Settlement Agreement to contradict, vary, or explain away the clear and plain terms and conditions of the 1992 Deed Poll restrictions.*

To the extent the Association argues the 1992 Deed Poll restrictions arise from the execution of 1988 Settlement Agreement, the parol evidence rule prohibits the Association from using this document to contradict, vary, or explain the terms and conditions of the 1992 Deed Poll restrictions. See Graves v. Serbin Farms, Inc., 306 S.C. 60, 409 S.E.2d 769 (1991) (*Parol evidence rule states that where terms of written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary, or explain its terms*) (Emphasis added); see also Penton v. J.F. Cleckley & Co., 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997) (Where a contract is ambiguous, the South Carolina Supreme Court determined parol evidence is admissible to ascertain the true meaning and intent of the parties).

Here, the Association has failed to plead the terms of 1992 Deed Poll restrictions are ambiguous. [Corrected Second Amended Answer, Counterclaims, and Third-Party Compl. at ¶¶ 50-53]. In Penton, Supreme Court also pointed out that "*Parol evidence rule is a rule not of evidence but of substantive law, and, therefore admission of evidence violating this rule is legally incompetent and should not be considered even if no objection to it was made at trial.*" (Emphasis added).

Based upon the foregoing, the Association's failure to pled ambiguity with respect to the

terms of the 1992 Deed Poll restrictions now acts as a bar from it using the unrecorded 1988 Settlement Agreement to contradict, vary, or explain away deed restrictions' clear terms and plain language. The unrecorded 1988 Settlement Agreement is legally incompetent and violates the parol evidence rule. This is because Heron Point is a bona fide purchaser for value, without notice, actual or constructive, of the unrecorded 1988 Settlement on or before the closing on the Golf Course Property. [Affidavit of Doug Brown, P. 2, ¶ 7; (Exhibit "R-1"); (Emphasis added)]. Shipyard Prop. Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992)(When "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning"); Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (*"The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed."*) (Emphasis added).

**III. THE ASSOCIATION LACKS STANDING OR PRIVITY OF CONTRACT TO ENFORCE THE TRACT II DEED COVENANT BECAUSE THE PLAIN LANGUAGE OF THE COVENANT AND THE CIRCUMSTANCES SURROUNDING ITS CREATION DO NOT INDICATE IT WAS SUPPOSED TO RUN WITH THE TITLE TO THE DWELLINGS OF THE ASSOCIATION'S HOMEOWNERS/MEMBERS AND BENEFIT THEM.**

In paragraph 60(a) of its Amended Answer and Counterclaim for declaratory judgment relief, the Association contends that the "*express deed restriction contained in the Dusenbury Deed for Tract II . . . [is] valid and run[s] with the title . . . of the Golf Course Property.*" (Emphasis added). [Corrected Second Amended Answer, Counterclaims, and Third-Party Compl. of Myrtle Beach Golf & Yacht Club Association, Inc., p. 12, ¶ 60(a)]. Contrary to its contention above, the Association lacks standing to enforce Tract II deed restriction for the reasons discussed below.

On February 29, 1984, Dusenbury sold Tract II (later known as Golf Course Property) to the MBG&YC, General Partnership. Tract II contained 171.952 acres and was carved out of the "Additional Property" described in the Recorded Declaration for the MBG&YC subdivision. Tract II Deed contained a restriction/covenant stating *"shall be used for a residential community (composed of single-family and multi-family residences), an associated golf course, open areas, parks, lakes, and various other recreational amenities and retail shops."* (Emphasis Added). The Association was not a party to 1984 Tract II Deed, but now seeks to enforce the covenant by claiming it is a real covenant and runs with the land.

As previously discussed, for a covenant to run with the land there must be an express intention that the parties intended for the restriction to run with title to the land. See Charping, 296 at 315, 372 S.E.2d at 122. (There must be a clear indication that the parties intended for the covenant to run with the land).

The plain language of the Tract II Deed covenant indicates the covenant is personal to the parties with no express intent to run with the land. The covenant does not expressly refer to the Grantor's remaining property, nor does it expressly indicate that it should benefit Grantor's successors-in-interest and assigns.

The absence of express language in the Tract II Deed showing the covenant is binding upon the grantee's (MBG&YC, General Partnership) *"successors-in-interest and assigns"* is clear evidence that the parties never intended for *the covenant to burden and run with the title to the Golf Course Property*. (Emphasis added). See Cheves, 140 S.C. 423, 138 S.E. at 869. Also, the absence of express language that the Tract II Deed covenant *benefits the Grantor's (Dusenbury)* *"successor-in-interest and assigns"* is clear evidence that the restriction is only a personal covenant. (Emphasis added). See 21 C.J.S. Covenants § 33 (2017). Lastly, the absence of express

language in the Tract II Deed showing the covenant runs with the title to the dwellings of the Association's homeowners/members in the subdivision and benefit them is also clear evidence that the restriction is only a personal covenant. See Charping, 296 at 315, 372 S.E.2d at 122.

"When a motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing there is a genuine issue of material fact for trial." Id. at 315-16, 372 S.E.2d at 122. In the context of this case, the Association must show by affidavit or otherwise facts showing that the parties, Dusenbury and MBG&YC General Partnership, intended for the covenant to run with the title to the dwellings of the Association's homeowners/members in the subdivision and benefit them with "*a non-exclusive right and easement*" in and to the Golf Course Property for their use and enjoyment in order to satisfy its affirmative burden of proof.

Contrary to the above, Attorney Jeffcoat states in his affidavit that "*he prepared this deed, negotiated its terms, and supervised its execution.*" (Emphasis added). He further indicates that "the recited covenant" is only a personal covenant and was not intended "to run with land" and that there was "no intent to benefit anyone other than the parties to the deed." [Affidavit of Jeffcoat, p.6, ¶ 7(Exhibit "O-1")]. For these reasons, the Association's argument must fail as a matter of law.

Based upon the forgoing, the Tract II property also known as Golf Course Property was never submitted pursuant to Article II of the Recorded Declaration, or in any other way. Therefore, neither the Association nor any member of the Association has any standing to assert or enforce the covenant contained in the Tract II Deed. Moreover, the terms of the restrictions contained in the Tract II Deed expressly permit, and do not prevent, the use of the property for residential services. For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted

as a matter of law with respect to the Association's lack of standing to assert or enforce Tract II deed restriction because it is only a personal covenant.

**IV. THE RECORDED DECLARATION EXPRESSLY NEGATES ANY EQUITABLE CLAIMS MADE BY THE ASSOCIATION AND ITS MEMBERS AGAINST THE GOLF COURSE PROPERTY AS AN ADDITIONAL PROPERTY BECAUSE THE GOLF COURSE PROPERTY HAS NOT BEEN FORMALLY INCORPORATED INTO THE MBG&YC SUBDIVISION AS A DEDICATED COMMON AREA BY A RECORDED AMENDMENT.**

In its Second Amended Answer and Counterclaim for declaratory judgment relief, the Association does not assert any equitable right by implication from a general plan of development and/or by recorded plat to limit the use of the Golf Course Property to only a Golf Course use. Even if the Association had made such an equitable claim, it would have failed as a matter of law for the reasons set forth below.

South Carolina law provides that a restriction may arise by implication and by recorded documents such as a plat. See Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E. 2d 378, 380-381 (1980) (refusing to impose a restriction based upon a plat when the plat was ambiguous). However, the plain language of section 1.8 under Article I of the Recorded Declarations clearly indicates that the Association and its homeowners/members cannot acquire any proprietary right, title, or interest in the Golf Course Property by virtue of any general plan or recorded plat of the land. This section provides in pertinent part as follows:

[N]o general plan or plat of the Properties showing area which may later be developed as additional phases of the Development shall be deemed to include such property as Common Areas nor shall the *Association or any Owner be entitled to any right, title or interest in such property unless and until such property shall have been formally included as a part of the subdivision by the Developer pursuant to the terms hereinafter contained.* (Emphasis Added).

Here, the Golf Course Property cannot be implicitly restricted by a *general plan of development or by a recorded plat, or by previous use* to only a golf course use because the clear

language of section 1.8 as described above expressly prohibits *the Association and its homeowners/members from obtaining any proprietary right, title, or interest in the Golf Course Property unless and until such property shall have been formally included as part of subdivision as a dedicated common Area.* (Emphasis added). See Butler v. Sea Pines Plantation Co., 282 S.C. 113, 317 S.E.2d 464, 468-469 (holding unrecorded promotional and sales material did not create an implied easement where buyers were clearly advised that the master plans were not to be construed as permanent designations of property). Further, Attorney Jeffcoat, who prepared the Recorded Declaration for MBG&YC subdivision for the developer, confirms the above interpretation of section 1.8 when he states in his third supplemental affidavit:

The Declaration contains specific provisions negating any “general plan development” or “reciprocal negative easement” claims as to any [Additional] property not actually submitted to the Declaration. See sections 1.8 and 2.2 of the Declaration. Mr. Dusenbury and his clients intended that, if the Project did not go forward for any reason, in whole or in part, that they would be free to otherwise deal with their remaining unpurchased property, without restriction.<sup>26</sup>

Further, the plain language of sections 2.2, 4.1, and 8.5 also indicate the Association and its homeowners/members cannot obtain any proprietary right, title, or interest in the Golf Course Property as additional property by virtue of a recorded plat, or by implication, or their previous use. See In re T 2 Green, LLC, 363 B.R. 753, 768 (Bankr. D.S.C. 2006) (use of the golf course property was not implicitly restricted by a plat or by residents’ prior use of the property, given the clear language in the recorded declarations that prohibited residents from obtaining any proprietary right, title, or interest in the property by virtue of a plat or their previous use).

For the foregoing reasons, the Association and its homeowners/members are prohibited from obtaining any proprietary right, title, or interest in the Golf Course Property by virtue of a recorded plat, by implication through a general plan of development, or previous use. The Golf

<sup>26</sup> [Supplemental Affidavit # 3c of Jeffcoat, p.5, ¶ 6; (Exhibit “O-1”)].

Course Property was never submitted to the Recorded Declaration by amendment as a dedicated Common Area. Accordingly, Plaintiffs' Motion for Summary Judgment should be granted as a matter of law.

**V. THE ASSOCIATION POSSESSES NO LEGAL RIGHT OR EQUITABLE INTEREST IN THE GOLF COURSE PROPERTY IMPOSED BY A REAL COVENANT; AND, THEREFORE, IT LACKS STANDING TO ASSERT THE DEFENSE OF LACHES AND THE ASSOCIATION OTHERWISE HAS FAILED TO PROVIDE EVIDENCE SUPPORTING ITS LACHES DEFENSE.**

In its Motion for Summary Judgment, the Association alleges because of Plaintiffs' inexcusable delay in bringing its declaratory judgment claims it *"cannot determine the intent of the parties with respect to the deed restrictions contained in the 1992 deed poll because the relevant parties are either unavailable or have no recollection of the intent of the parties and there are no documents that illuminate the intent of the parties."* For these reasons, Association argues Plaintiffs' declaratory action is barred by the doctrine of laches. [Defendant's Motion for Summary Judgment, pp. at 19-20]. Contrary to its allegations, the Association lacks standing to assert laches for the reasons set forth below.

"Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Mid-State Trust, II v. Wright, 323 S.C. 303, 474 S.E.2d 421 (1996); Hallums v. Hallums, 296 S.C. 195, 371 S.E.2d 525 (1988); The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice. Hallums at 199, 371 S.E.2d 525, 371 S.E.2d at 528. See Black's Law Dictionary (10th ed. 2014) (defining "prejudice" as "Damage or detriment to one's legal rights or claims").

Here, it is undisputed the Association does not possess any legal right or equitable interest in and to the Golf Course Property arising under the imposed covenants and restrictions because

they do not run with the title to either the Golf Course Property or the dwellings of the homeowners/members in the MBG&YC subdivision based upon the foregoing. See Powell ex rel. Kelley v. Bank of Am., 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (“*Standing refers to a [a] party’s right to make a legal claim or seek judicial enforcement of a duty or right. Standing is ... that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims. It concerns an individual’s sufficient interest in the outcome of the litigation to warrant consideration of [the person’s] position by a court.*” (Internal quotation marks and citations omitted) (Emphasis added).

In addition, there is no evidence of prejudice. Contrary to the Association’s contention that the relevant parties are either unavailable or have no recollection of the intent of the parties, the deposition testimony of Magrath, the Affidavit of Brown, and the written documents prove otherwise.

Accordingly, Plaintiffs’ Motion for Summary Judgment should be granted as a matter of law with respect to the Association lack of standing to assert the defense of laches as a bar to Plaintiffs’ claim for declaratory judgment relief.

### CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion for Summary Judgment should be granted as a matter of law dismissing the Defendant Association’s counterclaim(s) for declaratory relief in its entirety as well as its laches defense asserted as a bar to Plaintiffs’ declaratory action. The Association and its homeowners/members do not possess any legal right or equitable interest in and to the Golf Course Property; and, therefore, they lack standing to assert or enforce certain restrictions and covenants with respect to the use of the Golf Course Property.

Plaintiffs are therefore entitled to judgment as in their favor finding (a) Defendant Myrtle Beach Golf & Yacht Club Association, Inc. ("the Association") lacks standing or privity of contract to enforce the claimed covenants and restrictions against the subject property; (b) the Association lacks standing to assert its claims for declaratory relief; and (c) the Association's affirmative defenses, including laches, fail as a matter of law

Respectfully submitted,

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**PARTNERSHIP**

December 13, 2017

# EXHIBIT "K"

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY )

Civil Action No. 2015-CP-26-03173

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

Plaintiffs,

vs.

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Defendant/Third Party  
Plaintiff

vs.

South State Bank,

Third Party Defendant.

**CORRECTED AMENDED  
MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

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

The Defendant Myrtle Beach Golf & Yacht Club Association, Inc. (hereinafter, "MBG&YC"), by and through its undersigned counsel, hereby submits this Memorandum in Opposition to Plaintiffs Condo-World Development, LLC ("CWD") and Heron Point Golf Club Limited Partnership ("Heron Point," together with CWD, "Plaintiffs") Motion for Summary Judgment ("Plaintiffs' Motion for Summary Judgment"). For the reasons set forth below, counsel would show that there are genuine disputes of material fact(s) and/or summary judgment should be granted in favor of MBG&YC in that: (i) MBG&YC has standing and privity to enforce certain covenants and restrictions; (ii) MBG&YC has standing to assert its claims for declaratory relief; and (iii) MBG&YC affirmative defense for laches does not fail as a matter of law.

## STATEMENT OF CASE

### A HEARING ON SUMMARY JUDGMENT IS INAPPROPRIATE AT THIS TIME

Summary Judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Baughman v. American Telephone and Telegraph Company, 306 S.C. 101 (1991) citing 10A Wright & Miller, Federal Practice and Procedure § 2741, p. 543 (1983); 6 Moore's Federal Practice ¶ 56.02[6], p. 56-39 (2d ed. 1990); *see, e.g., First Chicago Int'l v. United Exchange Co.*, 836 F.2d 1375 (D.C.Cir.1988); Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F.2d 230 (2d Cir.1985); Tyler v. City of Enterprise, 521 So.2d 951 (Ala.1988); Gangadean v. Leumi Fin. Corp., 13 Ariz. App. 534, 478 P.2d 532 (1970); Commercial Bank of Kendall v. Heiman, 322 So.2d 564 (Fla.Dist.Ct.App.1975); Board of Education v. Van Buren & Firestone, Architects, Inc., 165 W.Va. 140, 267 S.E.2d 440 (1980). See also Rule 56(f), SCRCP, "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." In construing Rule 56(f), SCRCP, the Court has held (i) the word "party" encompasses an "attorney"; (ii) the two-day rule as articulated in Rule 56(c) does NOT apply to a Rule 56(f) affidavit, and (iii) it is an abuse of discretion to fail to consider the affidavit. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003). See Affidavit of Christopher H. Pearce, Esq., dated July 13, 2017 ("Pearce Aff").

A circuit court's failure to exercise discretion is itself an abuse of discretion. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

Because summary judgment is a drastic remedy, it must not be granted until the

opposing party has had a “full and fair opportunity to complete discovery ... Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. ... “When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”

Id. (internal citations omitted) (denying summary judgment where attorney submitted affidavit pursuant to Rule 56(f), SCRCP, finding it was an abuse of discretion to grant summary judgment where opportunity for **full and fair** discovery had been denied and it was clear that the party needed a continuance).

Plaintiffs’ moved to amend their reply to the Counterclaims in December 2017 – raising issues for the first time since this case began. See Pearce Aff. Plaintiffs amended their expert and factual witness discovery in December 2017. Id. The role of Otis Allen Jeffcoat, Esquire, is still unclear as a motion has been pending on that issue since last year. Id. There is still a motion pending with respect to the *in camera* review of the Edwin Hinds, Esquire’s document production, which review and production may make further discovery necessary. Id. Moreover, this is a complex case that requires a careful and thorough review of facts and law. Id. In addition, although not denominated as such, the Affidavit of James McGowan is also being submitted pursuant to Rule 56(f). Id.

Under the circumstances, it would be an abuse of discretion for this Court not to grant a continuance.

Moreover, and perhaps more significantly, this Court has no jurisdiction to hear this matter at this time. MBG&YC has appeal an order of this Court. The matters raised in this motion are subject to the automatic stay, pursuant to Rule 241(a), SCACR. The stay is automatic. Plaintiffs’ remedy lies with the appellate court, not this Court. Plaintiffs filed a motion, *inter alia*, regarding the scope and existence of the stay with the Appellate Court and then withdrew it. Where a dispute exists as to whether the stay exists, or the scope of the stay, the authority to resolve that dispute

rests with the Court of Appeals. See State v. Cooper, 342 S.C. 389, 536 S.E. 2d 870 (2000). It is undisputed that a genuine dispute exists as to whether there is a stay and the scope of the stay. Accordingly, this Court is without jurisdiction to entertain Plaintiffs' motion.

Despite the fact that under the circumstances described above the Court should not move forward with Plaintiffs' motion, MBG&YC is submitting this memorandum in opposition, under protest, reserving all its rights and, in so doing, has filed copies of every deposition transcript in this case to rely upon at the Court of Appeals should that be necessary.

### **- THE CASE BACKGROUND**

MBG&YC has standing to enforce certain restrictive covenants against Plaintiffs' Golf Course Property, and bring counterclaims regarding those restrictive covenants, because those covenants are real covenants that run with the land. Therefore, Plaintiffs' Golf Course Property is restricted in its use.

Plaintiffs seek a declaratory judgment that those certain restrictive covenants, *inter alia*, - "[t]he only permitted use of this property is as a golf course, country club, or other ancillary use relating to golf course or country club use" - are personal covenants and, thus, they can redevelop the property. Plaintiffs would have this Court determine on summary judgment that MBG&YC does not have standing to enforce the real covenants or even bring claims regarding those same covenants. To reach this conclusion, however, Plaintiffs' have invented a smoke screen by:

- (i) citing to factually inapplicable caselaw;
- (ii) citing a veritable treatise of law - regardless of the applicability of the cases cited to the instant motion - such that it is all but impossible to distinguish each of Plaintiffs' arguments;
- (iii) arguing issues that are completely unrelated to the case;
- (iv) defining its own version of the facts as "principles;"
- (v) relying on Otis Allen Jeffcoat, III, Esquire, for a recitation of the facts, despite the fact that, *inter alia*, he should be disqualified from

- (vi) participating in this case as a fact or expert witness<sup>1</sup>;  
providing material to Otis Allen Jeffcoat III, Esquire and, his alternative expert, Douglas Brown, Esquire, that have been intentionally withheld from MBG&YC – specifically the Edwin Hinds, Esquire, documents – and are the subject of motion practice before this Court -- and
- (vii) citing to “facts” otherwise unsupported by testimony, affidavit or citation to a document.

The lack of proper citation to actual witness testimony is glaring because it supports MBG&YC’s motion for summary judgment on the affirmative defense of laches because it demonstrates that Plaintiffs’ could not locate or find and, thus, utilize appropriate factual witnesses to support its claim that MBG&YC lacks standing to enforce the restrictive covenants. Plaintiffs’ claims are barred by laches.<sup>2</sup> If, however, this Court determines that the claims are not barred, there are disputed issues of fact as evidenced by, *inter alia*, the opinions of the experts, the credibility of the witnesses, the legal conclusions that could be reached from the facts, whether MBG&YC has standing to enforce the covenants, the intention of the parties to the restrictive covenants can be determined and, if so, what the intent of the parties was, such that summary judgment should be denied.

Accordingly, Plaintiffs’ motion for summary judgment on the basis that MBG&YC lacks standing to enforce those certain covenants or to assert its claims for declaratory relief enforcing those restrictive covenants should be denied as should Plaintiff’s motion for summary judgment dismissing the affirmative defense of MBG&YC on standing.

<sup>1</sup> MBG&YC’s Motion to Strike the Affidavit of Otis Allen Jeffcoat, III, Esquire, and the Supplemental Affidavit of Otis Allen Jeffcoat and/or Motion in *Limine*, dated June 29, 2017, and any supporting documentation, including MBG&YC’s Supplemental Memorandum, filed January 15, 2018, and Supplemental Affidavit of Christopher H. Pearce, Esquire, filed July 13, 2018, is hereby incorporated by reference and in its entirety.

<sup>2</sup> MBG&YC’s Notice of Motion and Memorandum of Law in Support of Defendant Myrtle Beach Golf & Yacht Club Association, Inc.’s Motion for Summary Judgment and attached exhibits, dated August 17, 2017 (“MBG&YC Motion for Summary Judgment”), is hereby incorporated by reference and in its entirety.

## FACTUAL BACKGROUND

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

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

The Buyer intends to develop the Property into a planned unit development consisting of a **residential community (composed of single-family and multifamily residences, an associated golf course, club house, lakes, marina, boat storage areas and various other recreational amenities and associates shops.** The Seller approves of the general development plan described herein, and will impose, in the deed to each Tract from the Seller to the Buyer, **reasonable restrictive covenants upon the Property in keeping with the general development plan described above.** The restrictive covenants so imposed shall be released by the Seller upon Seller's approval of the final development plan (consisting of subdivision survey and restrictive covenants) for each Tract, and the restrictive covenants imposed by the Seller in such deed(s) shall so provide.

See Exhibit A-1 to Plaintiff's Motion for Summary Judgment.<sup>3</sup> (emphasis added).

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

<sup>3</sup> All citations are to Plaintiffs' Motion for Summary Judgment, the Counterclaims, and MBG&YC's Motion for Summary Judgment unless otherwise expressly stated.

subsidiary known as Peoples Joint Venture Group, Inc. At that same time, Justice incorporated MBG&YC. (*Id.* ¶ 34.)

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

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

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

**(b): The Property shall be used for a residential community (composed single-family and multi-family residences), an**

**associated golf course, open areas, parks, lakes, and various other recreational amenities and retail shops.**

(See Plaintiffs' Motion for Summary Judgment, Ex. B-1, copy of Dusenbury Deed for Tract I (emphasis added); Counterclaims, Ex. 3 (emphasis added)).

The deeds also contain an identical express restriction that "[t]he maximum density of dwelling units on the property shall be in accordance with the Grantee's development plan as approved by the Grantor." (See Plaintiffs' Motion for Summary Judgment, Ex. B-1 and Counterclaims, Ex. 3)

On October 26, 1984, the Declaration of Covenants and Restrictions for Myrtle Beach Golf & Yacht Club Subdivision, with the Partnership as the developer, was filed with the R.O.D. (Counterclaims, Ex. 5). On January 21, 1985, the Amended and Restated Declaration of Covenants and Restrictions for Myrtle Beach Golf & Yacht Club Subdivision, again with the Partnership as developer, was filed with the R.O.D. (Counterclaims, Ex. 6).

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

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

Id. (emphasis added). This is almost identical language to the language used in the deeds for Tract I and II. (See Plaintiffs' Motion for Summary Judgment, Ex. B-1; Counterclaims, Ex. 3). James H. Dusenbury, Esq., however, no longer has any recollection of the negotiations of the deeds or other facts that may be pertinent to this case. (See MBG&YC's Motion for Summary Judgment

Exhibit C, excerpts of the Deposition of James Dusenbury, dated July 15, 2016 ("Dusenbury Dep.") at 17:16-17:7; 18:17-19:7; 19:25-19:12; 20:22-21:12; 25:7-11.)

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

(i) The Bankruptcy and the 1988 Settlement Agreement

On June 3, 1988, American Community Development Corp. put the Partnership into involuntary bankruptcy. (Counterclaims ¶ 45.) As part of the resolution of the involuntary bankruptcy, on or about July 25, 1988, the Partnership, Peoples, Property Consultants, Inc., and MBG&YC entered into an agreement (the "1988 Settlement Agreement") whereby Peoples agreed to cause the following deed restriction on the property, including the Golf Course Property:

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

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

Due to the passage of time, there is *de minimis* evidence available regarding the 1988 Settlement Agreement. See MBG&YC's Motion for Summary Judgment. However, Peoples was aware of bankruptcy, the homeowner's association being involved with those processes, and a subsequent settlement agreement between the parties. (Attached hereto as Exhibit A are excerpts of the deposition of George McGrath, dated August 18, 2016 ("Magrath Dep") 32: 7-18, 35:11-15). Moreover, the bankruptcy agreement, to which Peoples and the Association are both parties to, covered and included property with the Myrtle Beach Golf Club community to include: the guard house, the community pool, the golf course, tennis and shuffleboard courts, the clubhouse, the recreational amenities, and the Tract I and Tract II roads. (See Ex A, attached hereto, McGrath Dep. 33:22 – 34:20, 44:9-22).

## (ii) Peoples Files for Foreclosure

Upon best information and belief, the 1988 Settlement Agreement permitted the release of the Golf Course Property from the automatic stay of Bankruptcy Code § 362. Upon best information and belief, this occurred prior to September 12, 1988 and allowed Peoples to foreclose on the Golf Course Property. On September 12, 1988, Peoples filed for foreclosure on the Golf Course Property against the Partnership. Peoples knew during the foreclosure proceedings that MBG&YC claimed an interest in the Golf Course Property. (See. Ex. A, attached hereto, McGrath Dep 72:22- 73:18). Peoples was the successful bidder for the property at the subsequent judicial sale and a Master's Deed was issued by the Court as a result thereof.<sup>4</sup> (Counterclaims ¶ 48.) However, a review of the Master's Deed, dated January 22, 1991 and as recorded at the R.O.D., indicates that the subject foreclosure action was limited to Tract I and related parcels and did not include Tract II (i.e. the Golf Course Property). No explanation for the discrepancy has been asserted by the Plaintiffs to date. To the extent no explanation has been provided, based on the public records a question of fact exists as to Peoples and Heron Point's fee title ownership of the Golf Course Property. The case was appealed, in part, and ultimately affirmed, on the issues of lender liability and equitable subordination of lender's mortgage. Peoples Fed. Savings & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, et al, 310 S.C. 132, 425 S.E.2d 764 (Ct. App. 1992). For all intents and purposes, Peoples became the developer of the Golf Course Property after the foreclosure process was completed. (See Ex A., attached hereto, McGrath Dep, 52:5-10). Peoples knew that deed restrictions were required to be included with any the sale of the Golf Course Property and McGrath believes those issues were communicated to Heron Point. (Id. McGrath Dep.

<sup>4</sup> Portions of the Court's foreclosure rulings were subject to certain appellate processes between the parties.<sup>4</sup> See (Counterclaims, Exhibits 8, 9 and 10).

62:20 – 64:6). Peoples had “broad fear” that MBG&YC would use its voting power on fees to adversely affect the value of the golf course. This was the perspective from which Peoples negotiated the bankruptcy settlement agreement and the following road maintenance agreement with MBG&YC. (Id. McGrath Dep. 47: 13 – 48:11).

(iii) The 1990 Easement Maintenance Agreement  
References the 1988 Settlement Agreement

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

Whereas, Peoples Federal Savings and Loan Association, Property Consultants, Inc. and Myrtle Beach Golf and Yacht Club Association, Inc. entered an Agreement dated July 25, 1985, which was incorporated into an Order of the United States District Court for South Carolina Bankruptcy Division.

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

Moreover, the Easement Agreement amends and restates the 1988 Settlement Agreement:

6.7 Conflicts. This Agreement is executed to amend and restate the Order of the Bankruptcy Court and the Agreement entered into between Peoples Federal Savings and Loan Association and Myrtle Beach Golf and Yacht Club Association, Inc., dated July 25, 1985 (sic)...

Id. Accordingly, there can be no dispute that Peoples knew of the 1988 Settlement Agreement.

Peoples continued to own and operate the subject Golf Course for a period of years

thereafter in full cooperation with MBG&YC and its members. (Counterclaims ¶ 49.)

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

Thereafter, Peoples sold the Golf Course Property to Heron Point as evidenced by the Indenture Deed ("1992 Indenture Deed") recorded April 15, 1992 in the R.O.D. (Counterclaims, Ex. 12).

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

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

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

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

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

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

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

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

Id. Otis Allen Jeffcoat, Esq. drafted the title policy for this transaction.

Despite extensive and diligent discovery, no reliable evidence from witnesses with

knowledge could be located as to the intent of whether the restrictive covenants contained within the 1992 Indenture Deed were real or personal because the parties with knowledge are deceased or do not recall any relevant information.

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

With respect to the 1992-time period, on behalf of Heron Point, Jerry Spearman, Sr. and Millon Plyler were the individuals with knowledge of the 1992 transaction that resulted in the 1992 Indenture Deed. (Exhibit to MBG&YC's Motion for Summary Judgment, Douglas Brown, Esquire, deposition, dated November 4, 2016, ("Brown Dep.") at 10:14-11:3; 14:7-15). Both are now deceased. Id. at 10:21-11:1. Attorney Douglas Brown, corporate counsel for Heron Point, represented Heron Point with respect to the 1992 transaction and sale of the Heron Point Golf Course from Peoples to Heron Point. Id. at 10:2-13. Mr. Brown, however, does not have a strong recollection of the 1992 transaction nor recollect any discussions or negotiations regarding the 1992 Indenture Deed leading up to closing. Id. at 13:7-12; 36:16-21.

However, Jerry Spearman, Sr. wrote to Charlie Clark in a 2005 memorandum that states "The prospects of this change should be encouraging, would be encouraging **except for the deed**

restriction on the property that requires it remain a golf course.” (Ex. J to MBG&YC’s Motion for Summary Judgment) (emphasis added). Jerry Spearman, Jr. further testified that:

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

(Ex H to MBG&YC’s Motion for Summary Judgment, Spearman Dep. at 48:14-24) (emphasis added). Per Jerry Spearman, Jr.’s own testimony, he, and, thus, Heron Point knew the property was subject to restrictions.

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

On behalf of Peoples, Mr. Magrath was involved with the negotiations leading up to the sale of the golf course to Heron Point. (Ex. D to MBG&YC’s Motion for Summary Judgment, Magrath Dep.). However, Magrath’s recollection of the negotiations are very limited. Id. at 83: 8-25. Magrath did, however, recollect the restrictive covenants from the 1988 Settlement Agreement

being included in the 1992 Indenture Deed. Id. at 86: 14-20. He further testified that “there was never any doubt that language would be in the Deed because that’s what was agreed to earlier.” Id. at 87:5-9.

Notably, because Heron Point purchased the Golf Course Property from Peoples, the 1990 Easement Agreement which references the 1988 Settlement Agreement – is in Heron Point’s chain of title. Accordingly, Heron Point had actual notice of the 1988 Settlement Agreement based on documents contained in its chain of title.

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

In connection with the 1992 Indenture Deed, on April 15, 1992, Heron Point Golf Club L.P. as mortgagor executed a Promissory Note secured by a First Mortgage and Security Agreement with Peoples as mortgagee. (Complaint, Ex. B). In said First Mortgage and Security Agreement, Heron Point covenanted as follows: **“Mortgagor shall not remove, demolish, materially alter, or materially change the use of the golf course without the prior consent of the Mortgagee.”** Id. (emphasis added). The Note and Mortgage were assigned twice, with the last assignment occurring on August 30, 2012 from VFC Partners 15, LLC to Plaintiff Condo World Development, which transaction was recorded May 18, 2012, in Mortgage Book 5402 at Page 2786. (Complaint ¶ 10.)<sup>5</sup> Plaintiff Condo-World performed no due diligence with respect to this transaction. (Ex. G., Clyburn Dep. 38:4 – 16.)

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

At or about the same time that Peoples sold their interest in the Golf Course Property, on June 10, 1992, Peoples executed two quit claim deeds to MBG&YC, quit-claiming their interest

<sup>5</sup> Condo-World is also the controlling general managing general partner in Heron Point Golf Club and has had an interest in the Golf Club since somewhere between 2002-2004. (See Ex. G to MBG&YC’s Motion for Summary Judgment, Clyburn Dep. at 20:3-14; 29:6 -15).

(i) in “all gores or slivers of property” surrounding and/or adjacent to the Golf Course Property and (ii) all boulevards, road, streets, courts and common areas. The quit-claim deeds were recorded in the R.O.D. (Counterclaim, Exs. 13, 14). The property sold to MBG&YC is reasonably significant. Moreover, the property quit-claimed to MBG&YC by Peoples is in the chain of title of the Dusenbury deeds. Otis Allen Jeffcoat, III, Plaintiffs’ alleged expert, never reviewed these deeds according to his own testimony, however, in prior affidavits he states he specifically relied on these deeds. See Affidavit of Otis Allen Jeffcoat, dated July 25, 2016, ¶ 28.

**F. Heron Point Obtains a Waiver of Deed Restriction<sup>6</sup>  
from First Federal Savings & Loan Association of Charleston**

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

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

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

In addition to obtaining this waiver, as of 2005, Heron Point was already considering changing the use of the property from a golf course to a real estate development. (See Ex. I to MBG&YC Motion for Summary Judgment) On November 5, 2005, Jerry Spearman, Sr. wrote to Charlie Clark and stated: “The question must be answered: however, as to whether to attempt to

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<sup>6</sup> Plaintiffs’ attempt to argue that the 2005 Waiver of Restrictions is not relevant to the instant motion. Under that auspice, they have repeatedly refused to produce the documents of Attorney Edwin Hinds. However, Plaintiff’s “expert” Douglas Brown, Esquire, opines on the 2005 Waiver of Restrictions

change the use of the property from a golf course to real estate development. The prospects of this change would be encouraging except for the deed restriction on the property that requires it to remain a golf course.” Id. (emphasis added.)

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

In July of 2014, Heron Point sold MBG&YC portions of the Golf Course Property, in consideration of \$30,680.90. (See Ex. K, to MBG&YC’s Motion for Summary Judgment, copy deed, dated July 16, 2014). The property sold was a portion of the property that Heron Point was granted by the Indenture Deed. Id.

#### **H. Closing of the Golf Course**

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

### **PROCEDURAL BACKGROUND**

#### **A. The Pleadings**

Plaintiffs waited approximately 27 years from date of the 1988 Settlement Agreement which was incorporated into a District of South Carolina Bankruptcy Court Order, 23 years from the date of the 1992 Indenture Deed, 10 years from the date of Jerry Spearman, Sr.’s memorandum to Charlie Clark, and 10 years from the date that Heron Point obtained a “Waiver of Restrictions” to file the instant action, on April 27, 2015, seeking declaratory relief that: MBG&YC does not have standing to contest this action; Plaintiffs are not subject to any restrictive covenants because those covenants have been waived, relinquished and/or released; the covenants are personal; to the

extent that the restrictive covenants apply, the golf course property is not subject to the declaration of covenants due to changed economic circumstances. (Complaint ¶ 18).

MBG&YC timely answered the Complaint and, ultimately, on February 14, 2017, filed the Counterclaims. MBG&YC filed a Third-Party Complaint against South State Bank as successor-in-interest to Peoples Federal and sought, *inter alia*, to permanently enjoin South State Bank from waiving any deed restrictions relating to the Heron Point Golf Course property. Following a motion to dismiss by South State Bank, which was granted and denied in part<sup>7</sup>, the sole claim currently remaining against it is the permanent injunction claim. On August 4, 2017, Plaintiffs filed an Answer to MBG&YC's Counterclaims.

On October 18, 2017, MBG&YC filed an interlocutory Notice of Appeal of the Order granting in part, and denying in part, South State Bank's Motion to Dismiss the Third-Party Complaint. On December 13, 2017, Plaintiffs filed a motion to amend their Reply to MBG&YC's Answer, Counterclaims and Third-Party Complaint. On December 21, 2017, MBG&YC filed a motion for continuance. On January 5, 2018, MBG&YC filed a motion to amend their Answer, Counterclaims and Third-Party Complaint. On January 15, 2018, MBG&YC filed (i) an Amended Motion to Amend its Answer, Counterclaims and Third-Party Complaint and (ii) an Amended and Second Motion for a Continuance. On March 19, 2018, Plaintiffs filed a Motion to Determine the Scope of the Claimed Stay with the Court of Appeals, and, thereafter, withdrew it.

#### **B. Discovery**

Counsel for MBG&YC has engaged in diligent and exhaustive efforts to locate individuals who have knowledge of whether the restrictive covenant contained in the 1988 Settlement Agreement and 1992 Indenture Deed run with the land or are personal covenants.

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<sup>7</sup> That Order is currently the subject of an appeal.

These efforts have been all but futile due to the unreasonable passage of time between the relevant events and the date this lawsuit was brought. Most illustrative of the complete lack of knowledge of the factual circumstances regarding the 1988 Settlement Agreement and 1992 Indenture Deed is the 30(b)(6) SCRCP depositions of Plaintiffs.

*1. The 30(b)(6) Depositions of Plaintiffs  
Provided No Salient Evidence Regarding the Intent of the Parties*

Roy Clyburn, who verified the Plaintiffs' Complaint, testified, as a 30(b)(6) SCRCP witness on behalf of Plaintiff Condo-World Development, LLC, that he was not familiar with "any of the dealings or operation or formation Heron Point Golf Club Limited Partnership" prior to 2003. (Ex. G. to MBG&YC's Motion for Summary Judgment, Clyburn Dep. 32:25- 33:6.) Significantly, Condo-World's counsel stipulated that **"We're not going to offer Mr. Clyburn as a fact witness regarding the intent of the covenant that's set forth in the deed."** Id. at 51:8-56:4. (emphasis added).<sup>8</sup> Condo-World is not only the holder of the note and mortgage on the property, it is also the controlling managing general partner in the Heron Point Golf Club Limited Partnership. Id. at 20:3-14. Clyburn became an investor, individually, with Heron Point Golf Course in 2003 or 2004. Id. at 29:6-15. Neither Clyburn nor anyone on his behalf performed any due diligence on the golf course property in regard to the initial 2003 transaction. Id. at 33:12-34:15. In 2012, Clyburn transitioned from individual to corporate ownerships of Heron Point Golf Course, but again performed no due diligence other than talking to his accountants about tax implications. (Ex G. to MBG&YC's Motion for Summary Judgment, Clyburn Dep. at 35:14-36-

<sup>8</sup> Notably, When asked "What facts or information or documentation do you believe supports that request or request of relief from the court; do you know?" Counsel for Plaintiffs objected on the grounds of work product privilege. Id. Clyburn Dep. at 50:15-52:7. When asked, in his capacity as the party who verified the pleading, whether he would testify today about any facts, documents, or information regarding Condo-World's position as to whether it is Plaintiffs position that they have the legal right to develop the subject property, Clyburn testified "I think it premature. I don't know enough about it to discuss it." Id. at 68:9-23. See Rule 11(c), SCRCP.

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

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

Q: What I'm trying to figure out is in Exhibit 4, which is the Verified Complaint filed by Heron Point Golf Club Limited Partnership as a Co-Plaintiff, there are references to the April 15, 1992 deed, which is where the deed restrictions aspect of this case originate, at least in part, ... But you've earlier stipulated that you don't have any personal knowledge about those documents and such; is that true? . . .

A: That's correct.

*Id.* at 60: 3-18., *see Id.* at 10:10-17:18. Regardless of the fact that Spearman testified he had no knowledge of the documents, he did testify to attending meeting with his father at Peoples and,

later South State with Charlie Clark. (Ex. H, to MBG&YC's Motion for Summary Judgment, Spearman Dep. 67:7 – 73:4.)

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

2. Plaintiffs' Reliance on Otis Allen Jeffcoat, III, Esquire for Factual and/or Expert Opinions Should Be Excluded

Mr. Jeffcoat states:

Concerning legal representation of the Association, my prior law firm assisted the Association in collecting about 5 or 6 delinquent accounts during 1990. Those matters ended in 1990 and were not related to this lawsuit. I also was consulted by member of the Association in 1995 about a few matters, which consultation ended in 1995 and was not related to this lawsuit. I represented the developer of the Myrtle Beach Golf & Yacht Club subdivision in the creation of that subdivision in the 1980s, which representation ended when that developer failed in about 1987. In none of these matters was I privy to or aware of the 1988 agreement between Peoples Federal Savings and Loan Association and Property Consultants, Inc. or the 1992 indenture deed between Peoples Federal Savings and Loan Association and Heron Point Golf Club Limited Partnership.

Affidavit of Otis Allen Jeffcoat, dated September 6, 2017, Paragraph 5. **Unbelievably, Mr. Jeffcoat has forgotten that he performed the title examination and drafted the title opinion for 1992 transaction between Peoples and Heron Point.** See Exhibit B, attached hereto, letter from Otis Allen Jeffcoat, Esquire, to Michael W. Battle, Esquire, dated April 15, 1992. In and of itself this glaring inconsistency in testimony raises so many issues and red flags that (i) his credibility should be called to issue; (ii) his factual opinions should be called into issue – because

if he cannot recall what he did in 1992, how can he recall what he did in the 1980s, and (iii) his expert opinion should be called into question. Moreover, exhaustive and extensive discovery in this matter has produced no copy of Jeffcoat's underlying title opinion letter which would be a critical document in this case.

It is undisputed that Otis Allen Jeffcoat, Esquire, was intricately involved in the creation of the documents at issue in this case. He was for all intents and purposes the transactional attorney for the "Myrtle Beach Golf & Yacht Club project" as he terms it. He originally became involved with the "Myrtle Beach Golf & Yacht Club project" in the early 1980's. (See Exhibit C, attached hereto, Deposition of Allen Jeffcoat, dated December 28, 2017 ("Jeffcoat Dep."), 16:18 - 17:21). His client was Rodney Propps and Justice, Inc. and he was involved, generally, with the "title examination of the Enterprise Tract, which became Myrtle Beach Golf & Yacht Club, assisted the climb (sic) in feasibility discussions, negotiations with the landowner, who was Mr. Dusenbury and his client, and then gradually drafting documents that were necessary for the acquisition, and development and financing of the project." Id. 19: 25 -18:122. However, Mr. Jeffcoat's testimony is "hampered by fading memory because this was ... thirty-something years ago". Id. He drafted the "Option Agreement and related documents that, that really outlines between the two parties what the development deal was going forward." Id. 22:9-13; 25:25 -26:10. Mr. Jeffcoat believes he likely drafted the General Partnership Agreement and/or associated Memorandum of General Partnership. Id. 28:19-.29:8.

**Mr. Jeffcoat "thinks" he was involved with the formation of MBG&YC and prepared the formation documents, including the initial Bylaws and related documents.** Id. 30:4- 12, 59:20 - 60: 3. Mr. Jeffcoat further admits that the corporation bylaws create obligation and duties on the MBG&YC. (See Exhibit C, attached hereto, Jeffcoat Dep. 60:16-19). He was the closing

attorney, on behalf of Myrtle Beach Golf & Yacht Club, a General Partnership, for the first purchase from Dusenbury to Myrtle Beach Golf & Yacht Club, a General Partnership. Id. 30:31 – 32:2. The partners in Myrtle Beach Golf & Yacht Club, a General Partnership were Peoples and Justice Inc. Id. 32:3-12. The Option Agreement controlled the ultimate sale of the parcels as they were taken down and the guiding document that everyone relied on. Id. 39: 13-19.

Mr. Jeffcoat drafted the Declaration of Covenants as part of the “project documents”. Id. 40:16 – 41: 7. He also was involved in drafting some of the later amendments but cannot recall which ones. Id. 41: 8 – 17:19. He was involved in the state foreclosure proceedings on the Golf Course Property but does not recall the extent of his involvement. Id. 43: 24 -44:13. He handled foreclosure actions on behalf of MBG&YC in the early 1990s. Id. 49:14- 50:4. All his files relating to his representation of MBG&YC were destroyed. Id. 50:24-25. He admits he was an officer of MBG&YC – Assistant Secretary – and counsel to the MBG&YC, for limited purposes. Id. 59:3-16. He admits that he did not consult with or receive consent from MBG&YC regarding his involvement in this case. Id. 61: 22 – 62:4. He admits he never received consent from Mr. Propps or Justice, Inc. to become involved in this litigation. Id. 63: 19 – 24.

Mr. Jeffcoat’s involvement with MBG&YC was more involved than he testified to. In June of 1995, he wrote Mr. Spearman on behalf of MBG&C regarding the Easement Maintenance Agreement between Peoples and MBG&YC and stated:

I am also sure you are aware that Heron Point Golf Club Limited Partnership, as successor in interest to Peoples Federal Savings and Loan Association is responsible for the obligations of the Administrator under the Agreement ...

[Heron Point] is not fulfilling its obligations to maintain the road under the terms of the Easement Maintenance Agreement. This obligation runs with the land and binds your company as successor owner of the land...

(See Exhibits to Affidavit of Christopher H. Pearce, dated July 13, 2018, in support of Motion to Disqualify Jeffcoat, Exhibit Letter from Otis Allen Jeffcoat to Jerry Spearman, Sr., dated June 23, 1995.) Moreover, minutes of the Board of Directors, dated September 12, 1995 reflect that Mr. Jeffcoat was being used on "matters dealing with the Covenants." See Exhibits to Affidavit of Christopher H. Pearce, dated July 13, 2018. Mr. Jeffcoat cannot deny his involvement dealt directly with the covenants on behalf of MBG&CY and the Easement Maintenance Agreement. He even opined as to whether matters ran with the land in 1995.

Mr. Jeffcoat should be disqualified from testifying in this case. Mr. Jeffcoat was indisputably the transactional attorney for the development of the "Myrtle Beach Golf & Yacht Club" project. As part of his transactional work, he drafted the documents at issue in this motion – the Option Agreement, the General Partnership Agreement, the Declaration of Covenants and Restrictions, one or more amendment to the Declaration of Covenants and Restrictions, the Dusenbury Deeds, and, finally, the documents that incorporated MBG&YC. These documents are all inextricably related. He now seeks to opine on those very same documents. He should be disqualified from testifying adverse to MBG&YC.

Generally, an attorney cannot, on termination of employment, represent one whose interest in the transaction is adverse to that of his former client. However, an attorney is not prevented from representing a subsequent client against a former client, where the duties required of him do not conflict with those required in the first employment. The test of whether the attorney's employment is inconsistent with his duty to a former client is whether acceptance of the new retainer will require him, in forwarding the interest of the new client, to do anything that will injuriously affect a former client in any matter in which he formerly represented him, and also **whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship.**

Madison v. Graffix Fabrix, Inc., 304 S.C. 321, 325–26, 404 S.E.2d 37, 40 (Ct. App. 1991) (emphasis added). Although this case deals with disqualification of an attorney from representation, its holding applies equally to the case at hand. Here, by testifying against MBG&YC, as a fact witness or as an expert for the opposing parties, Mr. Jeffcoat is undoubtedly using his knowledge and information acquired in his former relationship with MBG&YC against MBG&YC. On that basis alone, he should be disqualified.

Moreover, Rule 1.9(a) of the Rules of Professional Conduct provides: “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” Id. “In determining whether the matter is “substantially related,” one should consider, among other things, whether the affected lawyer “would have or *reasonably could have* learned confidential information in the first representation that would be of significance in the second.” Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996).

In this case, Mr. Jeffcoat’s prior representation of MBG&YC is substantially related to his current “role” as an expert witness and he could have learned of confidential information that is significant in this matter. It is also undisputed that Mr. Jeffcoat has not sought informed consent or a waiver from MBG&YC. Accordingly, Mr. Jeffcoat’s testimony as an expert and/or fact witness should be stricken in its entirety.

Plaintiffs – obviously concerned about Mr. Jeffcoat’s potential conflict of interest – have now identified him and are attempting to utilize him as a fact witness. Rule 1.9(c) of the Rules of Professional Conduct provides that: “A lawyer who has formerly represented a client in a matter ... shall not thereafter: (1) use information relating to the representation to the disadvantage of the

former client ...; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.” Plaintiffs cannot transform Mr. Jeffcoat from an expert witness to a fact witness in an attempt to avoid the restrictions in Rule 1.9, SCRPC because Rule 1.9 (c) expressly prohibits that. Accordingly, Mr. Jeffcoat’s testimony should be stricken in its entirety.

It should be noted that Mr. Jeffcoat also may have violated Rule 1.7, SCRPC, with respect to Mr. Propps and Rule 1.9, SCRPC with respect to Justice, Inc. Although he testified he did not breached any ethics rules, the record is to the contrary. At a bare minimum, Mr. Jeffcoat’s credibility is an issue of fact that must preclude the grant of summary judgment. Magill v. Gulf & Western Industries, Inc., 736F.2d 976 (4th Cir. 1984).

Summary judgment is seldom appropriate in cases in which particular states of mind are decisive elements of claim or defense, because state of mind is so often proved by inferences from circumstantial evidence and by self-serving direct evidence. Charbonnages de France v. Smith, 597 F.2d at 414. Courts have recognized that knowledge is such a state of mind. *E.g.*, Friedman v. Meyers, 482 F.2d 435, 439 (2d Cir.1973). Summary judgment also is inappropriate if an issue depends upon the credibility of witnesses, because such credibility can best be determined after the trier of fact observes the witnesses’ demeanor. Morrison v. Nissan Motor Co., 601 F.2d 139, 141 (4th Cir 1979). Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented.

Magill v. Gulf & Western Industries, Inc., 736F.2d 976 (4th Cir. 1984); *see, also*, Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234 (Ct. App. S.C. 2008)

Finally, Mr. Jeffcoat’s testimony should be disregarded because he is providing legal opinions as opposed to expert opinions. He admits that: (i) he has not discussed the matters at

issue with any of the parties to the transactions at issue or read their respective deposition transcripts in an attempt to refresh his memory as to same; (ii) he has never spoken with representatives of the Grantor or Grantee regarding their intentions as to the covenants/contractual obligations contained in the 1992 Indenture Deed; and (iii) he has not reviewed a number of relevant deeds between Peoples and MBG&YC and MBG&YC and Heron Point as part of his review of the matter. (See Exhibit C, attached hereto, Jeffcoat Dep. 124:24- 126:17; 127:5-10; 156:20-23).<sup>9</sup> Mr. Jeffcoat's affidavits and his deposition testimony are replete with conclusions of law that are within the exclusive province of the court and inappropriately "usurp[s] the trial court's role in determining whether [Plaintiffs] are entitled to summary judgment." See generally, Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) O'Quinn v. Beach Associates, 272 S.C. 95, 249 S.E. 2d 734 (1978) (where expert testimony was offered to establish a conclusion of law, the trial court properly excluded the testimony because it was within the exclusive province of the trial court).

In general, expert testimony on issues of law is inadmissible. See generally Note, Expert Legal Testimony, 97 Harv.L.Rev. 797, 797 (1984); see also Askanase v. Fatjo, 130 F.3d 657, 673 (5th Cir.1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "[s]uch testimony is a legal opinion and inadmissible."); United States v. Sinclair, 74 F.3d 753, 758 n. 1 (7th Cir.1996) (commenting that Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

Dawkins v. Field, 354 S.C. 58, 580 S.E. 2d 433 (2003). See Jeffcoat Dep. and Jeffcoat Affidavits, generally. Mr. Jeffcoat's opinions should be disregarded. Moreover, because Plaintiffs rely on Mr. Jeffcoat for a recitation of the "facts" of this case, as a result of Mr. Jeffcoat's testimony being

<sup>9</sup> Mr. Jeffcoat, however, in an affidavit, dated July 26, 2015, stated that he had reviewed the subject deeds as part of his review of documents that formed the basis of his professional opinions. Mr. Jeffcoat's credibility is clearly an issue of fact because his own testimony contradicts his affidavit.

stricken, the motion must fail because Plaintiffs have failed to submit evidence that would result in the grant of a motion for summary judgment.

3. *Douglas Brown, Esquire's Testimony Should Be Disregarded as Biased*

Sometime in December of 2017, Plaintiffs amended their discovery to assert that Douglas Brown, Esquire is an expert witness. However, Mr. Brown is an interested, biased party whose testimony is inconsistent. Mr. Brown is corporate counsel for Heron Point. He was involved in the closing of the Golf Course Property in 1992. Despite his involvement therein, his closing file does not contain any documents regarding the 1988 Settlement Agreement. Most significantly, his file does not contain any notes regarding whether the covenants are real or personal or whether he discussed that with his clients. This fact is crucial because if Mr. Brown failed to advise his clients that the covenants on the Golf Course Property were real covenants – or may be construed as such in the future – he faces potential liability from the Plaintiff. Thus, it is in his own best interest to testify that the covenants are personal and otherwise in accordance with that position. Mr. Brown's credibility is also an issue of fact that precludes the granting of summary judgment.

Moreover, his opinions should be disregarded as legal opinions under the line of cases cited in the immediately preceding section.

### **STANDARD OF REVIEW**

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. Summary judgment is proper when no genuine issue exists as to any material fact and moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. On summary

judgment, the court's task is not to try issues of fact but to determine if genuine issues of material fact exist. Thomas Sand Co. v. Colonial Pipeline, Co., 249 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct. App. 2002). "Because it is drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Schmidt v. Courtney, 357 S.C. 310, 318, 592 S.E.2d 331 (2002); Corner v. City of Forest Acres, 348 S.C., 560 S.E.2D 606 (2002); Redwend Ltd. P'ship v. Edwards, 354 S.C.459, 581, S.C.2d 496 (Ct. App. 2003); Basil v. Aiken Reg'l Med. Ctrs., 352 S.C. 371, 573, S.E.2d 830 (Ct. App. 2002); Trivelas v. South Carolina Dept't of Transp., 348 S.C. 125, 558, S.E.2d 271 (Ct. App. 2001); Murray v. Holman, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001); McNair v. Rainsford, 300 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). "Additionally, even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted." Hill v. York County Sherriff's Dep't, 313 S.C. 303, 305, 437 S.E.2d 179, 180 (Ct. App. 1993). In determining whether a triable issue of fact exists, the evidence and reasonable inference from it must be viewed in the light most favorable to nonmoving party. Sauner v. Pub Serv. of S.C., 354 S.C. 397, 404, 581, S.E.2d 161, 165 (2003). When evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury. Vaughan v. Town of Lyman, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006). "At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." Hill, 313 S.C. at 308, 437 S.E.2d at 182. This standard was confirmed by the Supreme Court in Hancock v. Mid-South Management Co., 381 S.C. 326, 673 S.E.2d 801 (2009).

Further, "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Summary judgment should not be granted

even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." Mulherin-Howell v. Cobb, 362 SC 588, 608 S.E. 2d 587 (Ct. App 2005) (internal citations omitted).

Despite Plaintiffs' statement to the contrary, Plaintiffs bear the burden of proof to demonstrate that the restrictive covenant no longer apply. See Menne v. Keowee Key Property Owners' Ass'n, Inc., 368 S.C. 557, 629 S.E.2d 690, Martin v. Cantrell, 225 S.C. 140, 81 S.E. 2d 37 (1954). As stated in Martin,

The plaintiff seeks affirmative relief under the declaratory judgment act, and of course the burden of proof rests upon [plaintiff] in this action, as well as in other actions, to prove the material allegations of [plaintiff's] complaint by the greater weight or preponderance of the testimony. Our attention has not been called to any authority where the burden of proof in an action under the declaratory judgment act rests any less heavily upon the shoulders of the plaintiff than in the ordinary civil action. Prudential Ins. Co. v. Cannon, 211 S.C. 134, 44 S.E.2d 25. It must be kept in mind that it is the plaintiff who is seeking to have the *restrictions removed* and not the defendants. ... [H]ere we have the appellant attempting to assert the *invalidity of the restrictions*.

Martin v. Cantrell, 225 S.C 144, 81 S.E.2d 38.

### ARGUMENT

#### **MBG&YC has Standing to Enforce the Various Covenants and Restrictions Against the Golf Course Property and to Assert its Claims for Declaratory Relief**

Plaintiffs' argument that MBG&YC lacks standing to bring its counterclaims is meritless. Plaintiffs' argument that MBG&YC lacks standing to enforce the restrictions and covenants or to assert counterclaims is similarly specious. Indeed, it borders on ludicrous for Plaintiffs to now claim that MBG&YC lacks standing: (i) almost two years after they initiated the action, (ii) a year

and a half after MBG&YC answered and counterclaimed, (iii) after numerous depositions and seemingly endless discovery, and (iv) after multiple court hearings.

With respect to MBG&YC having standing to assert the Counterclaims, Plaintiffs initiated the instant lawsuit against MBG&YC. The counterclaims that MBG&YC brought were compulsory pursuant to Rule 13, SCRCP. MBG&YC counterclaimed pursuant to Rule 57, SCRCP, and the Uniform Declaratory Judgments Act, S.C. Code Ann 15-53-10 *et al.*

To state a sufficient cause of action under the Declaratory Judgment Act a party must demonstrate a justiciable controversy. Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985). A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute which is contingent, hypothetical, or abstract. Guimarin & Doan, Inc. v. Georgetown Textile and Mfg. Co., Inc., 249 S.C. 561, 155 S.E.2d 618 (1967). A justiciable controversy exists where (1) a concrete issue is present, and (2) there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party. Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970). A party has stated a cause of action under the Declaratory Judgment Act if he states the existence of a controversy which should be decided even though he is ultimately on the wrong side of the controversy. Dantzler v. Callison, 227 S.C. 317, 88 S.E.2d 64 (1955).

Firemen's Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co., 302 S.C. 234, 236, 394 S.E.2d 855, 857 (Ct. App. 1990).

MBG&YC's counterclaims request a declaratory judgment and that the Court inquire into the very same documents that Plaintiffs seek a declaratory judgment regarding. Compare Complaint to Counterclaims. Indeed, with a few exceptions, Plaintiffs and MBG&YC are seeking competing declarations on the same issues. It defies logic, hornbook law, and basic rules of civil procedure that Plaintiffs could seek relief on these matters while claiming MBG&YC cannot in the same lawsuit.

With respect to MBG&YC having standing to enforce the covenants and restrictions, the Supreme Court of South Carolina has stated that “[t]o have standing, a party must have an interest in the subject matter of the action. In South Carolina, a party must also be the real party in interest. A real party in interest ... ordinarily is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.” Dockside Ass’n, Inc. v. Detyens, Simmons & Carlisle, 285 S.C. 565, 568–69, 330 S.E.2d 537, 539 (Ct. App.), aff’d as modified, 287 S.C. 287, 337 S.E.2d 887 (1985), and overruled on other grounds by Queen’s Grant Villas Horizontal Prop. Regimes I-V v. Daniel Int’l Corp., 286 S.C. 555, 335 S.E.2d 365 (1985) (internal citations and quotations omitted).

Moreover, the Supreme Court of the United States enunciated the standing test in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct 2130 (1992):

First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical’. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Id. Smiley v. South Carolina Dep’t of Health & Env. Cont’l, 374 S.C. 326, 649 S.E.2d 31 (2007).

With respect to standing, MBG&YC has suffered a concrete and particularized harm in that Plaintiffs admittedly seek to redevelop the Golf Course Property, which redevelopment would affect the property values of the members of MBG&YC, and brought the instant action to redevelop the Golf Course Property. There is a causal connection in that Plaintiffs are seeking to cease enforcement of the restrictions, which will cause the harm to MBG&YC. And, a favorable

decision by the Court will ensure the restrictive covenants remain in place and MBG&YC's nature, quality, value, or mode of enjoyment of the demised premises will continue unimpeded. Therefore, under the standing tests as enunciated by the Supreme Court of the United States and Supreme Court of South Carolina, as explained, *supra* and *infra*, MBG&YC has standing to enforce the covenants and restrictions against the Golf Course Property.

In addition to having standing, the covenants are real covenants. "Pursuant to South Carolina law, a covenant is a real covenant that runs with the land and binds successors to the original covenantor if three elements are found: (i) an indication the covenanting parties intended the covenant to run with the land; (ii) the covenant touches and concerns the real property; and (iii) the party required to observe the covenant has actual or constructive notice of the covenant." In re Daufuskie Island Properties LLC, 431 B.R. 612 (Bankr. D.S.C. 2009) (citations omitted). In determining the first element, the Court must construe the covenant, "so as to carry into effect the intention of the parties, which is to be collected from the whole instrument and **from the circumstances surrounding its execution.** Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E. 867 (1927) (emphasis added). "The general rules of strict construction of restrictions on the use of real estate is not applicable if it will defeat the plain and obvious purpose of the restrictions." Midway Properties, Inc. v Pfister, 292 S.C. 104, 354 S.E.2d 926 (Ct. App. 1987) citing Davey v. Artistic Builders, Inc. 263 S.C. 431, 211 S.E.2d 235 (1975). The Court may construe the language of the covenant to determine whether the language used evidences an intention to attach the attribute of assignability. See Cheves.

With respect to satisfying the second element:

Epting v. Lexington Water Power Co., 177 S.C. 308, 181 S.E. 66 (1935), is instructive. The Epting Court distinguished personal covenants and covenants running with the land, stating "a covenant is personal when it has no relation to the land conveyed... or is not

connected with the title.” 177 S.C. 308, 181 S.E. at 71. In contrast, to run with the land, a covenant “must relate to the realty demised, having for its object something annexed to, or inherent in, or connected with the land; that its performance or nonperformance must affect the nature, quality, value, or mode of enjoyment of the demised premises.” *Id.*

In re Daufaskie Island Properties LLC, 431 B.R. 612 (Bankr. D.S.C. 2009).

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

**I. Although the Golf Course Property was Never Incorporated into the Subdivision; MBG&YC has Standing to Enforce the Covenants and Restrictions Contained in the Option Agreement and Dusenbury Deeds**

Plaintiffs’ first argument is that MBG&YC lacks standing because the Golf Course was never incorporated into the subdivision. MBG&YC concedes that the Golf Course Property was never incorporated into the subdivision as a dedicated common area pursuant to a recorded amendment as required by the recorded declaration. However, because the Golf Course Property

was never incorporated into the subdivision as a dedicated common area, it remains subject to the Option Agreement, and thus, subject to restrictive covenants. See Point III, *infra*.

In support of their argument, Plaintiffs' rely on McLeod v. Baptiste, 315, S.C. 246, 433 S.E.2d 834 (1993). That case is inapplicable to the current case. In McLeod, the Supreme Court held that a "grantor lacks standing to enforce a covenant against a grantee when the grantor no longer owns property which would benefit from the enforcement of that restrictive covenant." Here, MBG&YC is: (i) a remote grantee of land that makes up the Enterprise Tracts; (ii) a direct grantee of Golf Course Property from Plaintiffs; and (iii) a successor-in-interest to Peoples pursuant to the quit-claim deeds. Similarly, Plaintiffs are grantees of the Golf Course Property. Plaintiffs' citation to McLeod is not relevant to the facts of this case as this case does not concern a grantor seeking to enforce a covenant against a grantee. This is just one of many examples of Plaintiffs' improper citation to authority.

## **II. MBG&YC has Standing and Privity of Contract to Enforce the Deed Restrictions Contained in the 1992 Indenture Deed**

Plaintiff's argues MBG&YC lacks standing to enforce the restrictions in the 1992 Indenture Deed. However, the deed restrictions contained in in the 1992 Indenture Deed "are valid and run with title to the Golf Course Property and are not otherwise personal in the Grantor and/or its successors in interest." Counterclaims ¶ 60(e).

### ***A. The 1992 Indenture Deed Express Intention is that the Covenants Run with the Land; Alternatively the 1992 Indenture Deed is Ambiguous***

Plaintiffs argue that the 1992 Indenture Deed does not contain any express intention that the covenants run with the land. Plaintiffs, however, fail to note certain crucial word on the face of the document. Specifically, the 1992 Indenture Deed states: "...that Grantor... does grant, bargain, sell and release unto the *said Grantee, its Successors and Assigns* the following described

property... [said property] shall be subject to the following covenant (a) The only permitted use of this property is as a golf course, country club, or other ancillary use relating to golf course or country club use.” (See Counterclaims, Ex 12, 1992 Indenture Deed.) The language “successors and assigns” demonstrates that the covenant was intended to run with the land. See e.g. Harbison Community Ass’n, Inc. v. Mueller, 319 S.C. 99, 459 S.C. 99 (Ct. App 1995); Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 372 S.E. 2d 120 (Ct. App. 1988).<sup>10</sup> Moreover, restrictions concerning the use of property will ordinarily be construed to touch and concern the land. Id. Under the plain language of the 1992 Indenture Deed, the express intention is that the covenants runs with the land.

However, the 1992 Indenture Deed, standing in isolation is ambiguous; moreover, covenants must be construed so as to carry into effect the intent of the parties, which is collected from the whole instrument and surrounding circumstances. Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E 867 (1927).

***B. In Considering the Whole Instrument, the 1992 Indenture Deed Contains Real Covenants and the Unmistakable Implication is that the Covenants Run with the Lands***

“Covenants are to be construed so as to carry into effect the intention of the parties, which is to be collected from the whole instrument and from the circumstances surrounding its execution.” Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E 867 (1927). See also

<sup>10</sup> Throughout their memorandum of law, Plaintiffs’ cite to Charping for the proposition that covenants that do not expressly refer to the estates benefitted by the covenant are generally personal covenants. Charping merely indicates that language referring to remaining property may indicate an intent for the covenant to run with the land. Plaintiffs are confusing the law regarding reciprocal negative easement and whether a covenant runs with the land.

Arrants v. Rankin, 268 S.C. 567, 235 S.E. 2d 135 (1977). Although restrictive covenants are to construed strictly against the persons seeking to enforce them,

[t]his rule, however, obtains only when the parties have failed to express their meaning with sufficient clarity to enable the court to say that its construction is plain and admits of no doubt, the rule will not be applied to defeat the obvious purpose of the restriction, nor does it require an unnatural and strained construction of the words used; and before giving effect to the rule the court will have recourse to every aid, rule or canon of construction to ascertain the intention of the parties, since it is the duty of the courts to enforce, not to make, contracts.

Sprouse v. Winston, 212 S.C. 176, 46 S.E. 2d 874 (1948) (citations omitted).

The 1992 Indenture Deed, which Plaintiffs have recently attempted to term a “Deed Poll<sup>11</sup>,” specifically states that:

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

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

IT IS FURTHER PROVIDED that these covenants shall not apply to Parcel A-C comprise of 4.636 acres ...

The property conveyed herein shall be subject to the following restrictions: ...

(f) Restrictions covenants and conditions contained in Deed from James H. Dusenbury, as Nominee, to Myrtle Beach Golf & Yacht Club, a General Partnership, dated February 29, 1984, recorded in said Register’s office on March 13, 1984, in Deed Book 855 at page 769.

(g) Restrictions, covenants and conditions contained in Deed from James H. Dusenbury, as Nominee, to Heron Point Golf Club, Inc. dated April 25, 1989 recorded in said Register’s office on May 2, 1989, in Deed Book 1306 at page 642.

(Counterclaims Ex 12) (emphasis added).

<sup>11</sup> Plaintiffs’ moved to amend their pleadings to use the phrase “Deed Poll” to describe the 1992 Indenture Deed and utilized it in their Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment. Both motions were made in December of 2017. Despite the fact that this case was commenced in April of 2015, in December of 2017 – Plaintiffs have first injected this term the case. This is another instance of Plaintiffs’ attempt to misstate the facts – as the 1992 Indenture Deed is termed on its face “Indenture Deed”.

The plain language of the 1992 Indenture Deed when the instrument is read as a whole is that the covenant that "The only permitted use of this property is as a golf course, country club, or other ancillary use relating to golf course or country club use" runs with the land. First, the 1992 Indenture Deed exempts one parcel of the conveyed property from the covenants. Second, the property is subject to the restrictions and covenants in the Dusenbury deeds - which state "This conveyance is made expressly subject to the following restrictions: The property shall be used for a residential community (composed of single-family and multi-family residence, an associates golf course, open areas, parks, lakes and various other recreational amenities and retail shops." The Dusenbury Deeds were issued from the Option Agreement, which states:

The Buyer intends to develop the Property into a planned unit development consisting of a **residential community (composed of single-family and multifamily residences, an associated golf course, club house, lakes, marina, boat storage areas and various other recreational amenities and associates shops.** The Seller approves of the general development plan described herein, and will impose, in the deed to each Tract from the Seller to the Buyer, **reasonable restrictive covenants upon the Property in keeping with the general development plan described above.** The restrictive covenants so imposed shall be released by the Seller upon Seller's approval of the final development plan (consisting of subdivision survey and restrictive covenants) for each Tract, and the restrictive covenants imposed by the Seller in such deed(s) shall so provide.

(Plaintiff's Motion for Summary Judgment, Ex A-1, Option Agreement, p.7).

It is undisputed that the tracts were never released from the Option Agreement. The language in the 1992 Indenture Deed expressly references and all but mirrors the covenants in Dusenbury Deeds. In turn, the Dusenbury Deeds reference the Option Agreement, which is in the chain of title to both MBG&YC and the Golf Course Property. Accordingly, the covenants in the 1992 Indenture Deed should be construed so as to carry into effect the intention of the parties, "which is to be collected from the whole instrument and from the circumstances surrounding

its execution” See, Cheves. The court should not enforce the interpretation that Plaintiffs argue as it will defeat the obvious purpose of the restriction. See Sprouse v. Winston. Regardless of the express language of the 1992 Indenture Deed, the unmistakable implication is that the covenants contained therein run with the land. See Charping v. J.P. Scurry & Co., 926 S.C. 312, 372 S.E. 2d 120 (Ct. App. 1988).

Plaintiffs cite Charping v. J.P. Scurry & Co., Inc. 296 S.C. 312, 372 S.E.2d 12 (Ct. App. 1988) seemingly for the principle that certain “magic words” must be used to ensure that the covenant runs with the land. However, they also improperly cite it for the principle that “covenants that do not expressly refer to the estates benefitted by the covenant are generally personal covenants.” See Plaintiffs’ Memorandum of Law in Support of its Motion for Summary Judgment, p.27. There is no such principle stated in the Charping case.<sup>12</sup> Moreover, as stated above, a covenant that runs with the land can arise by implication and from the intention of the parties as collected by the whole instrument.

Plaintiffs also argue that the since the golf course has not been operated as a golf course because it is no longer economically feasible, MBG&YC and its homeowners cannot be benefitted by the property using the Golf Course. However, Plaintiffs fail to cite a single witness for the alleged “fact” that it is no longer economically feasible to operate the golf course. Moreover, it would defy logic that Plaintiffs could unilaterally cease to operate under a restrictive covenant and thereby terminate it. See Dunlap v. Beaty, 239 S.C. 196, 122 S.E.2d 9 (1961). To follow Plaintiffs’

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<sup>12</sup> Plaintiffs’ also footnote the fact that a deed poll will not bind the grantee to covenants in the deed at common law. Id. First, Plaintiffs’ have until recently utilized the term on the deed – Indenture Deed. They have a pending motion to amend its pleadings to refer to the Indenture Deed as a Deed Poll. Similarly, MBG&YC has a pending motion to amend its pleadings to note that the Indenture Deed is defective or ambiguous. Regardless, courts at common law also looked at the substance of the deeds, regardless of whether the deed was deemed a deed poll or indenture deed. See Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E. 867 (1927).

logic to its conclusion would allow the proverbial "parade of horrors" ... individuals and companies that are subject to a restrictive covenant would simply stop acting in accordance with it and therefore terminate it. Restrictive covenants would cease to exist. Thus, Plaintiffs' deed restrictions are real covenants that run with the land.

1. Douglas Brown's Affidavit Regarding the Intent of the Party Should be Disregarded as Biased, Self-Serving Testimony from an Interested Party that Faces Potential Liability in Connection with his Handling of The Transaction and that Violates the Dead Man's Statute

Douglas Brown has been offered as both a fact and expert witness in this case. However, his opinions regarding the intent of the party are clearly biased: (i) he was the attorney representing the Plaintiffs, and (ii) as a result of this litigation a number of issues (deed restrictions, title policy errors, etc.) have been raised which draw Mr. Brown's role and standard of care into question.

Moreover, Mr. Brown is offering legal opinions, which are impermissible. See Section "Procedural History", B. 2. *supra*.

2. The "Facts" Plaintiffs cite from George N. Magrath, Jr.'s Deposition are a Red Herring and Do Not Support the Conclusion that the 1992 Indenture Deed Restrictions were Personal Covenants as Opposed to Real Covenants

Plaintiffs' memorandum of law bullet points six areas of testimony from George N. McGrath, Jr. in support of its position that the covenants contained in the 1992 Indenture Deed are personal. **Not a single area of testimony referenced addresses or relates to the 1992 Indenture Deed.** Instead, the cited testimony of Mr. Magrath discusses his recollection as to whether the Golf Course Property was formally incorporated into the Amended Restated Declaration of Covenants and Restrictions for MBG&YC subdivision as a common element. As stated, *supra*, MBG&YC concedes that the Golf Course Property was not incorporated into the Amended and Restated Declarations. However, the Golf Course Property is still subject to the Option Agreement and Dusenbury deed restrictions. Plaintiffs' then leap to the conclusion that based on the fact that

the Golf Course Property was not formally incorporated into the Amended and Restated Declarations, the 1992 Indenture Deed restrictions can only be personal covenants. Plaintiffs' premise and argument simply does not support their conclusion. To be blunt, their conclusion is so attenuated from their premise, it does not even require a response other than Plaintiffs' have failed to explain how Mr. Magrath's testimony supports any theory that the 1992 Indenture Deed contains personal covenants.

3. The 1992 Indenture Deed Restrictions Run with the Land and Benefit MBG&YC and its Homeowners

Plaintiffs misstate the holding of West v. Newberry Electric Co-Op, 357 S.C. 537, 593 S.E. 2d 500 (Ct. App 2004), and, indeed, the test for establishing whether a restriction covenant runs with the land. Plaintiffs state that under West, MBG&YC must show an "express intention" that the covenants are to run with the land. That is not the holding of West. For the 1992 Indenture Deed restrictions to run with the land and be enforceable by a successor-in-interest, MBG&YC "must establish that the covenanting parties intended that the covenant run with the land and the covenant touches and concerns the land. "[A] party seeking to enforce a covenant must show the covenant applies to the property either by its express language or **by a plain and unmistakable implication.**" Id. (citations omitted) (emphasis added). See Point I, I.B., *supra*.

Moreover, Plaintiffs misstate the benefit that MBG&YC is entitled to pursuant to the covenants contained in the 1992 Indenture Deed. Plaintiffs use of the language "a non-exclusive right and easement of enjoyment" is misleading because it again refers to the Recorded Declarations – as opposed to the covenant contained in the 1992 Indenture Deed. Once again, Plaintiffs are referencing documents simply not at issue with respect to the 1992 Indenture Deed and then claiming based on those irrelevant documents that the covenants do not run with the land. Plaintiffs are making variations of the same argument regarding one set of covenants and

disguising it as multiple arguments regarding multiple covenants. The Court should see right through this ploy and refuse to countenance it.

As discussed above, the plain and unmistakable implication is that the covenant contained in the 1992 Indenture Deed that "The only permitted use of this property is as a golf course, country club, or other ancillary use relating to golf course or country club use" is that it runs with the land.

MBG&YC maintains in its Motion for Summary Judgment that it cannot determine the intent of the parties to the 1992 Indenture Deed because the relevant parties are either unavailable or have no recollection of the intent of the parties and there are no documents that illuminate the intent of the parties.

In the alternative, MBG&YC maintains that the 1992 Indenture Deed restrictions run with the land. As to the first element, MBG&YC argues that by plain and unmistakable implication the covenant contained in the 1992 Indenture Deed applies to the Golf Course Property. See Point I.B.i.

As to the second element, the covenant touches and concerns the real property in that has as its object "a golf course, country club, or other ancillary use relating to golf course or country club use." The performance of this covenant affects the nature, quality, value and mode of enjoyment of MBG&YC and its homeowners who were induced to buy property based on the inclusion of a golf course in the subdivision. The subdivision was always intended to be a golf course community and property values of owners are substantially increased by based on its inclusion in a golf course community. Epting, 177 S.C. 308, 81 S.E. 3d 71. This intent is expressly laid out in the Option Agreement and all subsequent deeds. In addition, when a covenant affects the use of a property it will be construed to touch and concern the land. See, Charming.

Misciting McLeod, Plaintiffs argue that Peoples, as grantor/covenantor when it sold the Golf Course Property to Heron Point, failed to retain any portion of the Golf Course Property that could have benefitted or rendered more valuable by operation of the Golf Course. Plaintiffs' argument fails. First, Plaintiffs and MBG&YC hold property from a common grantor – Peoples. Peoples quit-claimed its interest in “(i) in “all gores or slivers of property” surrounding and/or adjacent to the Golf Course Property and (ii) all boulevards, road, streets, courts and common areas to MBG&YC. The property Peoples quit-claimed to MBG&YC came from the Master's Deed of Foreclosure, filed with Horry County in 1990. See Counterclaims Exhibit 10. The Golf Course Property that was purchased as a result of the 1992 Indenture Deed was also from the Master's Deed of Foreclosure. Second, Heron Point sold property directly to MBG&YC in July of 2014. (MBG&YC's Motion for Summary Judgment Exhibit K). Third, MBG&YC remains a remote grantee of property from the Option Agreement and deed to Tract I and II from the Partnership. Fourth, there was a common scheme of development with respect to the Golf Course Property. Finally, and as previously noted, Plaintiffs cannot unilaterally close the golf course to remove the benefit that is retained by MBG&YC and then claim the benefit of its own act. One who seeks equity must do equity.

### **C. MBG&YC has Privity Sufficient to Enforce the 1992 Indenture Deed**

Plaintiffs argue that MBG&YC cannot enforce the 1992 Indenture Deed because it is not a party to the deed. Admittedly, MBG&YC was not a party to the 1992 Indenture Deed. However, MBG&YC disputes that MBG&YC is not a successor-in-interest to Peoples. By virtue of the quit-claim deeds, MBG&YC is a successor-in-interest to property that came from the same Master's Deed of Foreclosure as the Golf Course Property. Similarly, by virtue of the sale of a portion of the Golf Course Property from Heron Point to MBG&YC, MBG&YC has a “mutual or successive

relationship to the same rights of property.” Thompson v. Hudgens, 161 S.C. 450, 159 S.E. 807 (1931 (citations omitted)). Therefore, MBG&YC has both privity and standing to enforce the restrictions contained in the 1992 Indenture Deed. As stated, *supra*, the covenants are real covenants.

**D. Plaintiffs’ Fail to Provide Sufficient Factual Citation that it Was a Bona Fide Purchaser For Value without Notice, Actual or Constructive of the Unrecorded 1988 Settlement Agreement on or Before the Closing of the Golf Course Property**

As an initial matter, this defense was not raised in the pleadings, and, instead is the subject of Plaintiffs’ motion to amend their defenses. Regardless...

To qualify as a bona fide purchaser, a party must show “(1) actual payment of the purchase price of the property, (2) acquisition of legal title to the property, or the best right to it, and (3) a bona fide purchase, ‘i.e., in good faith and with integrity of dealing, without notice of a lien or defect.’ ” Robinson v. Estate of Harris, 378 S.C. 140, 146, 662 S.E.2d 420, 423 (Ct. App. 2008) (quoting Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874–75 (2006)). “In addition, ‘[t]he bona fide purchaser must show all three conditions—actual payment, acquiring of legal title, and bona fide purchase—occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property.’ ” Id. (quoting Spence, 368 S.C. at 117, 628 S.E.2d at 875).

Belle Hall Plantation Homeowner’s Association, Inc. v. Murray, 419 S.C. 605, 799 S.E.2d 310 (2017). In that case, the Court held that before the buyers paid the entire purchase price, they received actual notice that there could be a claim or defect that could affect title to the property and, thus, could not claim status as a bona fide purchase for value. “The bona fide purchaser must show all three conditions—actual payment, acquiring of legal title, and bona fide purchase—occurred before he had notice of a title defect or other adverse claim, lien, or interest in the property.” Id. (quotations omitted.)

Heron Point argues that it is a bona fide purchase for value, without notice, actual or constructive, of the unrecorded 1988 Settlement Agreement to the extent the unrecorded agreement

constitutes a defect in its title. Heron Point failed to submit an affidavit from the purchasers, the principals involved in the transaction, to support this argument. Instead, to support this argument, Plaintiffs' rely on Douglas Brown, Esquire's<sup>13</sup> affidavit wherein he states (i) that he had not seen the Settlement Agreement until his deposition in this case in 2016, and (ii) he does not recall discussing it with Jerry C. Spearman or G. Millon Plyler. Douglas Brown's affidavit states that "he did not recall" – not that he did not discuss it with Mr. Spearman or Mr. Plyler. The simple fact is too much time has passed for him to recollect whether he discussed it with them. More significantly, whether Mr. Brown recalls the 1988 Settlement Agreement is immaterial – as he is not the purchaser. He was not privy to the internal thought processes or secret knowledge of the principals of Heron Point. Plaintiffs have failed to establish that they can claim status as a bona fide purchaser for value.

Moreover, Mr. Brown's testimony should be barred by the dead man statute. And, as stated above, Mr. Brown is clearly an interested party with respect to this transaction at this time – even if he was not at the time of the transaction – because of the potential liability he now faces due to his closing of the 1992 transaction for Heron Point. Mr. Brown's credibility is an issue of fact. Magill v. Gulf & Western Industries, Inc., 736F.2d 976 (4th Cir. 1984).

Condo-World also cannot be a bona-fide purchaser for value because Mr. Clyburn testified that no due diligence was performed on the golf course property with respect to his purchases.

Separate and apart from Heron Point, Mr. Magrath who would have been involved in the transaction on behalf of Peoples testified that he does not have much recollection of the negotiations regarding the sale. Magrath did, however, recollect the restrictive covenants from the

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<sup>13</sup> The only contribution Mr. Brown's testimony on this point does is support MBG&YC's motion for summary judgment on the affirmative defense of laches and supports the denial of Plaintiffs' motion for summary judgment to dismiss the affirmative defense of laches.

1988 Settlement Agreement being included in the 1992 Indenture Deed. (Ex. D, Magrath Dep. 86:14-20). He further testified that “there was never any doubt that language would be in the Deed because that’s what was agreed to earlier.” Id. at 87:5-9. Thus, the testimony by the witness that Plaintiffs have proffered as having knowledge of the intent of the 1992 Indenture Deed has testified that the 1988 Settlement Agreement were included in the 1992 Indenture Deed. This testimony again raises an issue of fact with respect to how Plaintiffs could qualify as bona fide purchasers for value.

Finally, Plaintiffs had record notice of the 1988 Settlement Agreement as it was explicitly referenced and incorporated into the Easement Agreement, which is a recorded document in Plaintiffs’ chain of title. Plaintiffs do not qualify as bona fide purchasers for value

Accordingly, Plaintiffs’ motion for summary judgment on this ground should be barred.

**E. The 1988 Settlement Agreement Stands on Its Own, is Not Barred by the Parol Evidence Rule and Supports the Overall Conclusion that the 1992 Indenture Deed Covenants Run with the Land**

Plaintiffs’ argue that any use by the Court of the 1988 Settlement Agreement is precluded by the parol evidence rule. In the 1988 Settlement Agreement, Peoples agreed to cause the following deed restriction on the Golf Course Property:

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

(Counterclaims, Ex. 7). Plaintiffs’ have resorted to the parol evidence rule an attempt to exclude its devastating effect on their case. However, the 1988 Settlement Agreement was incorporated into the Easement Agreement in 1990 – a mere two years after the 1988 Settlement Agreement. Two years later, Heron Point purchased the Golf Course Property by virtue of the 1992 Indenture Deed. By purchasing the Golf Course Property, Heron Point had record notice of the 1990

Easement Agreement and, thereby, record notice of the 1988 Settlement Agreement within four years of its execution. Clearly, the 1988 Settlement Agreement is within Plaintiffs' chain of title.

However, the 1988 Settlement Agreement stands on its own as an independent document wherein Peoples agreed to include a deed restriction on the Golf Course Property and further supports the argument that the deed restriction in the 1992 Indenture Deed was intended to be a real covenant. The 1988 Settlement Agreement may be unrecorded, however, the evidence tends to support the fact that it is an Order of the United States Bankruptcy Court. See MBG&YC Motion for Summary Judgment. Moreover, the lack of evidence surrounding it is one of the primary reasons that MBG&YC's motion for summary judgment on the basis of laches.

The parol evidence rule does not apply in this instance because the issue here is not whether the deed should be explained by the 1988 Settlement Agreement, but whether the 1988 Settlement Agreement is valid. See New Prospect Area Fire Dist v. New Prospect Ruritan Club, 311 S.C. 402, 429 S.E.2d 791 (1993). Plaintiffs do not argue that the 1988 Settlement Agreement is invalid.

To the extent the parol evidence rules applies, MBG&YC has moved to amend its pleading to state that the 1992 Indenture Deed is ambiguous.<sup>14</sup> Accordingly, evidence should be admitted to explain the 1992 Indenture Deed. Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995).

To the extent the parol evidence rule applies, the 1988 Settlement Agreement falls within an exception to the parol evidence rule. "Where an agreement is silent as to a particular matter and because of the nature and character of the transaction an ambiguity arises, parol evidence may be admitted in order to supply a deficiency in the language of the contract. In such instance, parol evidence is admissible not to contradict the terms of the written agreement, but to determine the

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<sup>14</sup> See MBG&YC's Motion to Amend, which is incorporated by reference and in full.

intent of the parties as to that particular matter.” Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995). In this case, the 1992 Indenture Deed is silent as to the reason for the restriction and due to the nature and character of the 1992 Indenture Deed, an ambiguity has arisen. Plaintiffs’ cannot argue otherwise – it is because of the very nature of the 1992 Indenture Deed they are seeking a declaration that the covenants do not run with the land – thus Plaintiffs themselves have raised the issue of an ambiguity in the agreement. Moreover, the parol evidence sought to be introduced is not inconsistent with and contradictory to the writing. See U.S. Leasing Corp. v. Janicare, Inc., 294 S.C. 312, 364 S.E. 2d 202 (Ct. App. 1988).

Moreover, where there is a controversy between a third party and one of the parties to the instrument in question, parol evidence is admissible. See Baptist Foundation for Christian Educ. v. Baptist College at Charleston, 282 S.C. 53, 317 S.E.2d 453 (Ct. App. 1984).

Further, “when there is no defect on the face of a document but an uncertainty appears upon attempting to effectuate the document, then the document contains a latent ambiguity and parol evidence is admissible...” See Bowles v. Bradley, 319 S.C. 377, 461 S.E. 2d 811 (1995). Here, upon attempting to effectuate the document – and determining whether the covenant runs with the land – the document contains a latent ambiguity and parol evidence, specifically the 1988 Settlement Agreement is admissible.

Moreover, “parol evidence is ordinarily admissible to show the true consideration for a deed even though the actual consideration may be other than or different from that recited in the deed.” Smith v. McClam, 289 S.C. 452, 457, 346 S.E.2d 720, 724 (1986). Here, the 1992 Indenture Deed recites only \$10.00 as consideration. Clearly, this was not the true consideration for the deed, thus, parol evidence is admissible to show the true consideration for the deed.

Finally, “where a deed constitutes only part performance of a preceding contract, other distinct and unperformed provisions of the contract are not merged in the deed.” New Prospect Area Fire Dist. V. New Prospect Ruritan Club, 311 S.C. 402, 429 S.E.2d 791 (1993). Here, arguably, there were provisions of the 1988 Settlement Agreement, which is a type of contract, that arguably still needed to be performed.

Under the circumstances, the 1988 Settlement Agreement permissibly explains that the deed restrictions in the 1992 Indenture Deed were a result of the 1988 Settlement Agreement.

### **III. THE ASSOCIATION HAS STANDING AND PRIVITY OF CONTRACT TO ENFORCE THE TRACT II DEED COVENANTS, WHICH COVENANTS RUN WITH THE LAND**

The “express deed restriction contained in the Dusenbury Deed for Tract II ... [is] valid and runs with the title of the ... Golf Course Property.” Counterclaims ¶ 60(a). “Covenants are to be construed so as to carry into effect the intention of the parties; which is to be collected from the whole instrument and from the circumstances surrounding its execution. Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E. 867 (1927).” See also Arrants v. Rankin, 268 S.C. 567, 235 S.E. 2d 135 (1977). Although restrictive covenants are to be construed strictly against the persons seeking to enforce them,

[t]his rule, however, obtains only when the parties have failed to express their meaning with sufficient clarity to enable the court to say that its construction is plain and admits of no doubt, the rule will not be applied to defeat the obvious purpose of the restriction, nor does it require an unnatural and strained construction of the words used; and before giving effect to the rule the court will have recourse to every aid, rule or canon of construction to ascertain the intention of the parties, since it is the duty of the courts to enforce, not to make, contracts.

Sprouse v. Winston, 212 S.C. 176, 46 S.E. 2d 874 (1948) (citations omitted). In the absence of express intention, the party claiming the benefit of the restrictive covenant must show by affidavit

or otherwise facts regarding the grantor's intention to benefit the land now owned by him/ it when the restricted property was sold. Id., 926 S.C. 312, 372 S.E. 2d 120 (Ct App. 1988). "Courts tend to strictly interpret restrictive covenants and a party seeking to enforce a covenant must show the covenant applies to the property either by its express language or by plain and unmistakable implication." Id. (citations omitted). See also Argument and Point II.B.

Pursuant to the Option Agreement:

The Buyer intends to develop the Property into a planned unit development consisting of a **residential community (composed of single-family and multifamily residences), an associates golf course, club house, lakes, marina, boat storage areas and various other recreational amenities and associated shops.** The Seller approved of the general development plan described herein, and will impose, in the deed to each Tract from the Seller to the Buyer, reasonable restrictive covenants upon the Property in keeping with the general development plan described above. The restrictive covenants so imposed shall be released by the Seller upon Seller's approval of the final development plan (consisting of subdivision survey and restrictive covenants for each Tract, and the restrictive covenants imposed by the Seller in such deed(s) shall so provide.

Id., ¶ 11 (emphasis added). Indeed, it is undisputed that regardless of how the property is referenced - Tract II, the Dusenbury Deed, and/or the Golf Course Property - it was never released from the Option Agreement. Moreover, there is no evidence to suggest that the Option Agreement was changed, amended, cancelled, or modified by the buyer, Justice, Inc. or any successor.

The Option Agreement was to "bind and inure to the benefit of the respective parties hereto, their heirs, successors, executors, administrators and assigns." Id. ¶ 17. The Partnership purchased Tract I of the Enterprise Landing Tract pursuant to the Option Agreement, which became the Subdivision property. See Plaintiff's Exhibit 2. The Partnership subsequently purchased Tract II of the Enterprise Landing Tract, pursuant to the Option Agreement, which property became known as the Golf Course Property. See Plaintiffs' Motion for Summary Judgment, Exhibit 3. Both the

deed to Tract I and Tract II (a/k/a the "Dusenbury Deeds") contained restrictive covenants that apply, respectively, to Tract I and Tract II of the Enterprise Tract and are therefore in the chain of title of the land that is subject to this litigation. The identical restrictive covenants state that "This conveyance is made expressly subject to the following restrictions: (b) The property shall be used for a residential community (composed of single-family and multi-family residences) an associated golf course, open areas, parks, lakes and various other recreational activities and retail shops." See Plaintiffs' Motion for Summary Judgment, Exhibits 2, 3.

Plaintiffs' claim that the Tract II Deed expressly permits and does not prevent the use of the property for residential use. However, Plaintiffs fail to acknowledge that that the Tract II Deed require that there be "an associated golf course, open areas, parks, lakes, and various other recreational amenities and retail shops." Plaintiffs intent – according to the memorandum of law they submitted – is to sell the property for redevelopment. Plaintiffs have no intent of complying with the deed restriction.

In sum, MBG&YC has standing in this litigation because the restrictive covenants contained in the Option Agreement and Dusenbury Deeds are real covenants contained in Plaintiffs, and its own, chain of title. Moreover, the covenants are real covenants – not personal. First, the Option Agreement clearly indicates, by its terms, that the covenanting parties intended the covenant to run with the land as the Option Agreement states that "This agreement shall bind and inure to the benefit of the respective parties hereto, their heirs, successors, executors, administrators and assigns." Plaintiffs' Motion for Summary Judgment Ex. 1, ¶ 17. It is undisputed that the property in the Dusenbury Deeds, Tract I and II, was never released from the Option Agreement. It is further undisputed that the Option Agreement has not been modified, altered, amended or terminated. Thus, when read in conjunction with the Option Agreement, the

Dusenbury Deed, does contain a real, restrictive covenant. The covenant touches and concerns real property because the performance or nonperformance of the covenant would affect the nature, quality, value, or mode of enjoyment of the demised premises. Moreover, Plaintiffs clearly had notice of the covenant as it is in their chain of title. By the express language or unmistakable implication, the restrictive covenants in the Option Agreement and Dusenbury Deeds are real covenants.

Moreover, MBG&YC has standing to assert the covenant and enforce it because it is: (i) a remote grantee of land that makes up the Enterprise Tracts; (ii) a direct grantee of Golf Course Property from Plaintiffs; and (iii) a successor-in-interest to Peoples pursuant to the quit-claim deeds.

**A. Attorney Jeffcoat's Opinions Should Be Disregarded.**

As stated *supra*, Attorney Jeffcoat's Opinions should be disregarded because he is disqualified from testifying as an expert witness or factual witness because he is breaching his attorney-client privilege to MBG&YC by doing so. Attorney Jeffcoat cannot call himself a mere "fact witness" because he is not – he was the attorney responsible for drafting the documents at issue and advised MBG&YC regarding the same. His role in drafting the documents cannot be ignored. Any reliance that Plaintiff's place on Attorney Jeffcoat is improper. As previously stated his affidavit should be struck.

Accordingly, Plaintiffs' motion for summary judgment based on MBG&YC's lack of standing should be denied.

**IV. THERE IS A RESTRICTION ON THE USE OF THE PROPERTY BASED ON COMMON SCHEME OF DEVELOPMENT AND/OR RECORDED PLAT**

"Restrictive covenants on the use of property may be created in express terms or by implication." Bomar v. Echols, 270 S.C. 676 (1978) citing Edwards v. Surratt, 228 S.C. 512, 90

S.E.2d 906 (1956).

Where they arise by implication, the restrictions are said to create a reciprocal negative easement. 20 Am.Jur.2d Covenants, Conditions and Restrictions 173 (1965). Although a variety of terms have been used to refer to restrictive covenants by implication, "(i)t is well settled in this state that where the owner of a tract of land subdivides it and sells the distinct parcels thereto to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee. . . ." McDonald v. Welborn, 220 S.C. 10, 66 S.E.2d 327 (1951).

Ordinarily, four elements must be established to show a reciprocal negative easement:

- (1) There must be a common grantor. Edwards v. Surratt, supra;
- (2) There must be a designation of the land or tract subject to restrictions. Id.;
- (3) There must be a general plan or scheme of restriction in existence for the designated land or tract. Id.; and
- (4) The restrictive covenants must run with the land. 20 Am.Jur.2d, supra.

Bomar v. Echols, 270 S.C. 676 (1978). In this instance, there is evidence supporting each of these elements.

First, there is a common grantor of the parties. Myrtle Beach Gold & Yacht Club, a General Partnership composed of Justice and Peoples, acquired both Tract I, which became the single family residential development known as Myrtle Beach Golf and Yacht Club, and Tract II, the Golf Course Property, from James H. Dusenbury, as Nominee, at the same time. MBG&YC and its members obtained title to their property from the General Partnership. Heron Point obtained title to the Golf Course Property from Peoples who obtained title via foreclosure from the General Partnership.

Second, there is a designation of land or tract subject to the restrictions. The Option Agreement whereby Dusenbury obtained a right to Tract I and Tract II, and the deeds from Dusenbury to the General Partnership clearly identify the property subject to the restrictions.

Third, there is a general plan or scheme of restriction in existence for the designated property. The Option Agreement, under which Dusenbury obtained title to the property, sets forth a preliminary “common scheme consisting of a residential community (composed of single- family and multifamily residences), an associated golf course . . .” for the Enterprise Tract of which the property at issue is a portion. (Option Agreement, ¶ 11). The Myrtle Beach Golf and Yacht Club General Partnership was formed for the purpose of buying Tract I (Residential Tract) and Tract II (Golf Course Tract) in order to execute this scheme. The deeds from Dusenbury to the General Partnership contain the identical restriction: “The property shall be used for a residential community (composed of single-family and multi-family residences, an associated golf course . . .” This restriction is substantially similar to the preliminary scheme contained in the Option Agreement. The existence of identical restrictions in lots conveyed at or near the same time is evidence of a general plan or scheme. Stanton v. Gulf Oil Corporation, 232 S.C. 148, 152, 101 S.E.2d 250, 251 (1957), Hill v. Marsh, 2005 WL 7082785, p2 (S.C.Ct.App. 2005). Further, the restriction in the 1992 Indenture Deed of Tract II from Peoples to Heron Point restricting Tract II to a “golf course, country club or other ancillary use” is further evidence of this overall scheme that Tract I was to be the residential portion of the scheme and Tract II was to be the golf course portion of the scheme.

Finally, as more fully discussed herein, these restrictive covenants run with the land.

Plaintiffs argue that because the Golf Course was never formally incorporated in the Recorded Declarations for MBG&YC that the golf course is not subject to any restrictions. MBG&YC does not argue that the Golf Course is in any way subject to any restrictions contained in the Recorded Declarations. Rather, MBG&YC’s equitable negative reciprocal easement arises out of the common scheme of development of Tract I and Tract II as set forth in the Option

Agreement to Dusenbury and the deeds to the respective Tracts from Dusenbury to the Myrtle Beach Golf & Yacht Club General Partnership. Any language in the Recorded Declarations denying MBG&YC any interest in any other property is simply emphasizes the legal requirement that unless property is specifically made subject to the Recorded Declarations, the property is not subject to the Recorded Declarations. Accordingly, Plaintiffs' motion for summary judgment must be denied.

**V. MBG&YC HAS STANDING TO ASSERT AND HAS PROVED ITS AFFIRMATIVE DEFENSE OF LACHES**

As an initial matter, MBG&YC incorporates by reference and in its entirety its motion, and accompanying exhibits, in support of summary judgment to dismiss the Complaint on the affirmative defense of laches in response to Plaintiffs' motion to dismiss MBG&YC's affirmative defense of laches.

Second, under no construction of the Rules of Civil Procedure can a party argue against a motion for summary judgment by submitting a wholly separate dispositive motion on that same topic - four months later - after that party failed to submit sufficient evidence to dispute the initial motion for summary judgment.

MBG&YC submitted its motion in support of summary judgment on the affirmative defense of laches in August of 2017. In September of 2017, Plaintiffs submitted the affidavits of Robert F. Salvino, Ph.D. and Douglas Brown, Esquire in opposition to the motion. Those affidavits were non-responsive and failed to raise an issue of fact that would preclude granting of summary judgment. Now, Plaintiffs are attempting a second bite at the proverbial apple by moving to dismiss the affirmative defense of laches, and in so doing, are submitting arguments against MBG&YC's motion for summary judgment on the affirmative defense of laches. The Court should not countenance Plaintiff's motion under such circumstances.

Third, the evidence gathered since MBG&YC submitted its motion only further supports its motion. For instance, Douglas Brown, Esquire – who submitted an affidavit in opposition to MBG&YC’s motion for summary judgment and which affidavit was purportedly responsive to the issue of laches – conceded at his deposition that he basically has no opinions or factual basis to support the denial of MBG&YC’s motion.

At his deposition, Douglas Brown, Esquire testifies as follows:

Q: You have been asked to file, and you did file an amended affidavit in opposition to the Myrtle Beach Golf & Yacht Club Association’s motion for summary judgment, and we have gone through that affidavit – amended affidavit ... my question is, is there anything specific factually, opinion-wise or a mixture of the two that you would say you believe is in opposition or in disagreement to Myrtle Beach Golf & Yacht Club’s position that laches is a bar to this matter being adjudicated.

Mr. Koutrakos: Object to the form.

A: Well, I’d say this: I mean, it seemed like a big lynchpin on which the association’s case hinges is the noncompliance shall we say or ignoring the 1988 settlement agreement. And that certainly comes into laches issues, becomes relevant there because nobody on the purchaser’s side knew about that document, to my knowledge, until very recently. I certainly didn’t, and to my knowledge, Millon Plyler and Jerry Spearman didn’t know about it. ... Didn’t have a copy in my file... and so that certainly is the case.

Q: Anything other than the settlement agreement and the – I guess the compliance of enforceability of it? Anything else that you believe is in opposition or would be in opposition to the motion for summary judgment?

Mr. Koutrakos: Object to form.

Mr. Bellamy: Object to form.

A. No. There may be, but I don’t know.

(Exhibit E, attached hereto, Deposition of Douglas Brown, dated January 8, 2018, 100:9 – 101:16).

In short, Mr. Brown admitted that laches is a possible defense and he doesn’t know of any facts or

have any expert opinions that would preclude the granting of summary judgment in favor of MBG&YC on its affirmative defense of laches.

Similarly, Mr. Jeffcoat readily admitted that he:

1. Has no access to his original files, including any work-product, attorney notes, correspondence, meeting minutes, etc. in relation to his work on MBG&YC, whether as counsel for the developer or MBG&YC;
2. That these relevant materials are not available to him due to the passage of time (i.e. - 27+ years) and his prior firm's policies on document retention / destruction; and
3. Has not been able to locate or obtain any original file materials in relation to his work on MBG&YC from other attorneys whom may have been involved the original transaction(s) at issue in this case.

(Exhibit C, attached hereto, Jeffcoat Dep. at 27:3-18; 27 at 19:19 - 28:18; 36:3 - 37:10; 51:20 - 52:6; 115:4 - 21). Mr. Jeffcoat further admits that his testimony in this matter is hampered due to the fact that it is based on his memory of events that occurred 30+ years ago. (Ex. C, Jeffcoat Dep. Attached hereto, 18:7-13; 134:5-21). Fourth, in direct response to Plaintiffs' motion, Plaintiffs' based their motion to dismiss the affirmative defense on standing. Standing has been discussed *ad nauseum* in this memorandum. MBG&YC has standing to assert the defense of laches as a bar to Plaintiffs' claim for declaratory judgment.

Fifth, even if this Court denies MBG&YC's motion for summary judgment and grants Plaintiffs' motion to dismiss the affirmative defense of laches, Plaintiffs' have failed to dismiss MBG&YC's other affirmative defenses - including equitable estoppel:

The essence of equitable estoppel is that the party entitled to invoke the principle was misled to his injury. The essential elements are: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (ii) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change his position prejudicially.

South Carolina Public Service Authority v. Ocean Forest, Inc. 275 S.C. 552, 273 S.E.2d 773 (1981) quoting South Carolina State Highway Dep't v. Metts, 270 S.C. 73, 240 S.E.2d 816 (1978).

Accordingly, Plaintiffs have failed to make a motion that is dispositive of the entire case. Plaintiffs' motion for summary judgment dismissing the affirmative defense of laches should be denied.

**VI. THE ONLY DOCUMENT EVIDENCING THE INTENT OF PLAINTIFFS IS THAT THE COVENANTS RUN WITH THE LAND AND THE WAIVER OF RESTRICTIONS OBTAINED IN 2005 RAISES AN ISSUE OF FACT**

Plaintiffs argue that the covenants are personal covenants. However, this argument is belied by the fact that every single deed issued after the Option Agreement contains a covenant restricting the usage of the Golf Course Property. Moreover, the only document that memorializes the intent or understanding of the principals of Plaintiffs' is the 2005 memorandum from Jerry Spearman, Sr. to Charlie Clark wherein he states "The prospects of this change should be encouraging, would be encouraging **except for the deed restriction on the property that requires it remain a golf course.**" (MBG&YC's Motion for Summary Judgment, Ex J.) Thus, the only evidence from Plaintiffs of the principals' intent is that the property is required to be a golf course or otherwise restricted in its use. Finally, if the deed restriction was truly personal – there would be no need for the limited "Waiver of Restrictions" that Plaintiffs sought and obtained in 2005. The act of their seeking the waiver is evidence of their knowledge that the restriction ran with the land. Accordingly, the issuance of the 2005 Waiver of Restrictions raises an issue of fact precluding summary judgment.

**VII. SUMMARY JUDGMENT IS PRECLUDED BECAUSE PLAINTIFFS EXPERT AND MBG&YC'S EXPERT DISAGREE ON VIRTUALLY EVERY OPINION**

When parties proffer competing experts on the salient facts, summary judgment is inappropriate. See Intellectual Ventures I LLC v. Capital One Financial Corp. 2017 WL 5970720 (U.S.D.C. S.D. Maryland, December 1, 2017); accord Spirit Airlines, Inc. v. Nw. Airlines Inc., 431 F.3d 917 (6th Cir. 2005). "When each side offers expert testimony, and that testimony conflicts on

a material fact, such as causation, summary judgment will be inappropriate.” Summary Judgment: Federal Law and Practice 8:9. It is virtually the rule of the land that summary judgment is inappropriate when there is a so-called “battle of the experts.” The rule is pervasive throughout American jurisprudence on both the state and federal level, and so elementary, that a complete recitation of every jurisdiction that has adopted the rule would be repetitive to the point of tedium.

In this case, Plaintiffs alleged experts Douglas Brown, Esquire, and Otis Allen Jeffcoat, III, Esquire’s, opinions conflict with that of MBG&YC’s expert Charles Hedgepath, Esquire. Compare Jeffcoat Dep. <sup>15</sup>and both Brown Dep, Jeffcoat Affidavits and Brown Affidavit with Deposition of Charles Hedgepath, Esquire, dated January 8, 2018 (“Hedgepath Dep.”) Attached hereto as Exhibit D is the Hedgepath Dep.

Hedgepath<sup>16</sup> opined:

- That it is not necessarily required that an attorney drafting restrictive covenants that run with the land include the property benefitted. 46:18-47:2.
- That the covenants and restrictions contained in the Dusenbury Deed for Tract II run with the land because of the consummation of the Option Agreement and intent between Dusenbury and Justice to create a golf course community. 59:11: 60:3.
- That the courts can look outside the Dusenbury Deed if its ambiguous. 60:10-19.
- That the Dusenbury Deed restriction is in the chain of title to the Golf Course, MBG&YC and the homeowners of MBG&YC. 60:20-62:9.

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<sup>15</sup> This deposition has been previously filed with the Court.

<sup>16</sup> All citations in this section are to the Charles Hedgepath Deposition.

- That there does not need to be an express intent that the restrictions run with the land. 62:12-19
- That the Amended Declaration and Restrictions do create an implied negative reciprocal easement based on Section 7.34. 75:19 – 77:25
- That the 1992 Indenture Deed restrict the property to use as a golf course and contains a real covenant that runs with the land, it touches and concerns the land 82:14-84:7
- That the maintenance agreement between People and the Association put Heron Point on notice of the 1988 Settlement Agreement. 88:1-4
- That MBG&YC has a right to enforce a restriction against Plaintiffs based on the restriction in the 1992 Indenture Deed. 89: 1,22 - 90:4.
- That MBG&YC can enforce restrictions against the Golf Course Property based on the deeds conveyed the roadways, the 1992 Indenture Deed, the Bankruptcy Agreement and because Heron Point knew it was buying a golf course that was part of the consideration. 91:13-92:10
- That the court can rely on “things” outside the four corners of the deed, which occurred prior to 1992. 95:22 – 96.
- That the 1992 Indenture Deed is ambiguous 99:22—100:6
- That MBG&YC is a successor to Peoples because of the deeds conveying the gores and slivers and road network. 120:15-25
- That the Dusenbury Deed for Tract II is in the chain of title to MBG&YC by reason of the fact that Heron Point deeded land to MBG&YC. 130:18-131:4

Each of the facts stated above support MBG&YC's position, are contrary to the opinions offered by Plaintiffs' experts and create material issues of fact. Accordingly, Plaintiffs' motion for summary judgment should be denied.

### CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be denied in its entirety.

THE PEARCE LAW GROUP, P.C.

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ATTORNEYS FOR DEFENDANT / THIRD  
PARTY PLAINTIFF MYRTLE BEACH GOLF &  
YACHT CLUB ASSOCIATION, INC.

July 16, 2018

# EXHIBIT "L"

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY )

Civil Action No. 2015-CP-26-03173

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

Plaintiffs,

vs.

Myrtle Beach Golf & Yacht Club  
Association, Inc.,

Defendant/Third Party  
Plaintiff

vs.

South State Bank,

Third-Party Defendant.

**AFFIDAVIT OF CHRISTOPHER H. PEARCE  
IN SUPPORT OF  
DEFENDANT MYRTLE BEACH GOLF &  
YACHT CLUB ASSOCIATION, INC.'S  
MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT**

PERSONALLY APPEARED before me, Christopher H. Pearce, Esq. who being duly sworn, says that:

1. I am over the age of eighteen (18) years old, I am competent to attest to the matters contained herein and have personal knowledge and/or personal understanding of the same, except as stated as to my best information and belief.

2. I am submitting this affidavit in support of Defendant Myrtle Beach Golf & Yacht Club Association, Inc. ("MBG&YC")'s Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and pursuant to Rule 56(f), SCRCP.

3. MBG&YC's original Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment was filed on or about January 15, 2018; MBG&YC's Amended

Memorandum in Opposition to Plaintiff's Motion for Summary Judgment was filed on July 13, 2018. Both memorandums are incorporated by reference

4. While additional time has passed since this motion was scheduled to be heard, Defendants have still been deprived of a complete and fair opportunity to conduct discovery. At present, there is still an outstanding motion relating to the production of the documents from Attorney Edwin Hinds. We received only this week documents that Attorney Jeffcoat reviewed as a designated expert in this matter. Plaintiffs filed a motion for summary judgment on the issue that Heron Point Golf Club LLC was a bona fide purchaser for value – an issue not previously raised in their pleadings. Plaintiffs have attempted to cure this deficiency by amending their Answer so as to set forth that defense.

5. Quite literally, MBG&YC does not know what role Attorney Jeffcoat is playing in this lawsuit – whether he is a fact witness, expert witness, or neither. It is patently unfair for MBG&YC to defend a motion for summary judgment based in part on the representations and opinions of Attorney Jeffcoat when Attorney Jeffcoat represented MBG&YC on issues related to the present litigation. Attorney Jeffcoat should be disqualified from testifying and Plaintiffs required to move for summary judgment without the benefit of his testimony. The motion to disqualify Attorney Jeffcoat should not be heard at the same time as Defendant's Motion for Summary Judgment as Attorney Jeffcoat is breaching his duty to his former client by testifying and MBG&YC should not have to defend itself based upon its own attorney's failure to comply with the relevant rules of professional conduct.

6. Finally, there is still a dispute as to jurisdiction. MBG&YC strongly opines that this case is stayed and that the Court of Appeals has sole jurisdiction over the matter at this instant time.

FURTHER AFFIANT SAYETH NAUGHT.

CH. H. P.  
CHRISTOPHER H. PEARCE, ESQUIRE

SWORN TO AND SUBSCRIBED  
BEFORE ME

this 13 day of July, 2018.

Barbara J Miller  
Notary Public for South Carolina  
My Commission Expires: 9-17-25

IN THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

JUL 25 2018

**SC Court of Appeals**

APPEAL FROM HORRY COUNTY – 15<sup>th</sup> CIRCUIT  
Court of Common Pleas

Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2017-002196

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

vs.

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

AND

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

vs.

South State Bank.....Respondent

CERTIFICATE OF SERVICE

I certify that I have served the foregoing Motion to Determine Scope of Stay by depositing a copy of it in the United States mail, postage prepaid on July 24, 2018, addressed to the following attorneys of record:

Howell V. Bellamy, III, Esquire  
Howell V. Bellamy, Jr., Esquire  
The Bellamy Law Firm  
P.O. Box 357  
Myrtle Beach, SC 29578.  
***Attorneys for Plaintiffs***

Audra M. Byrd, Esquire  
Turner Padgett Graham & Laney, PA  
P.O. Box 2116  
Myrtle Beach, SC 29578  
***Attorneys for South State Bank***

Demetri K. Koutrakos, Esquire  
Callison Tighe & Robinson, LLC  
P. O. Box 1390  
Columbia, SC 29202-1390  
***Attorney for Plaintiff Heron Point  
Golf Club Limited Partnership***

July 24, 2018

A handwritten signature in black ink, appearing to read 'AHR', is enclosed within a large, loopy oval shape.

---

Allison Harding Rizzo, Paralegal  
The Pearce Law Group, P.C.  
1314 Professional Drive  
Myrtle Beach, South Carolina 29577  
Tel: (843) 839-3210  
Fax: (843) 839-3214

July 24, 2018

*Via UPS Overnight Mail*

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: Myrtle Beach Golf & Yacht Club Association, Inc, Appellant. v. South State Bank,  
Respondent  
Court of Appeals Case No.: 2017-2196

Dear Madam Kitchings:

Enclosed please find an original and two (2) copies of Appellant's Emergency Motion for Protective Order and Motion to Determine Scope of Stay and Certificate of Service for filing in the above-referenced matter together with our firm's check in the amount of \$25.00 to cover filing fees.

Thank you for your assistance, and if you require anything further, please contact.

Very truly yours,

THE PEARCE LAW GROUP, P.C.



Kerry K. Jardine, Esquire

KKJ/ahr

Encls.

cc: Howell V. Bellamy, Jr., Esquire w/enclosure  
Howell V. Bellamy, III, Esquire w/enclosure  
Audra K. Byrd, Esquire w/enclosure  
Demetri K. Koutrakos, Esquire, w/ enclosure