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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

Deadra L. Jefferson, Circuit Court Judge

Case No. 2005-CP-10-2434

Ashley River Properties II, LLC, as assignee of Lunar
Systems, LTD and Ashley River Properties II, LLC in its own right, ...Respondents

v.

Ashley River Properties One, LLC, successor in the
interest to Ripley Light Yacht Club, LLC and Ripley
Light Development, LLC.....Appellant

Ashley River Properties One, LLC, Third-Party
Plaintiffs.....

v.

Lunar Systems, LTD and Thomas J. Lussier, Third-
Party Defendants.....

RECORD ON APPEAL

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THOMAS J. LUSSIER

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

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v.

**Lunar Systems, LTD and Thomas J. Lussier, Third-
Party Defendants.....Respondents**

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JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

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CLAYTON B. MCCULLOUGH
MCCULLOUGH KHAN, LLC
68 1/2 QUEEN ST
CHARLESTON SC 29401-2220

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order-crt denies ARP II indemnity claims against ARP I etc

CASE NO: 2005CP1002434

Ashley River Properties II Llc Etc , plaintiff, et al VS Ashley River Properties One Llc Etc , d

This judgment was entered on the 26th day of April, 2013, and a copy mailed first class on Monday, April 29, 2013, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

0001

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Lunar Systems, Ltd.,

Plaintiffs,

vs.

Ashley River Properties One, LLC
successor in the interest to Ripley
Light Yacht Club, LLC and Ripley Light
Development, LLC,

Defendants.

Ashley River Properties One, LLC

Third-Party Plaintiff,

vs.

Lunar Systems, LTD and Thomas J.
Lussier,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

ORDER AND JUDGMENT

FILED
2013 APR 26 PM 2:36
JULIE J ARMSTRONG
CLERK OF COURT
BY _____

Presiding Judge:

Date of Trial:

Court Reporter:

Plaintiff's counsel:

Defendant's counsel:

Third-Party Defendant's counsel:

Hon. Deadra L. Jefferson

January 23, 2013

Joyce Rueger

William C. Cleveland, Esq.

Clayton B. McCullough, Esq.

Frank M. Cisa, Esq.

PROCEDURAL BACKGROUND

This case came before the Court for a non-jury trial on January 23, 2013. The Plaintiff Ashley River Properties II, LLC, ("ARP-II") as assignee of Lunar Systems, Ltd. was represented by William C. Cleveland, Esq. The Defendant Ashley River Properties One, LLC ("ARP-I")

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was represented by Clayton B. McCullough, Esq. The third-party Defendant Lunar Systems, Ltd. was represented by Frank M. Cisa, Esq.

On May 19, 2010, the Honorable Thomas L. Hughson, Jr., issued an order, which, among other things, granted ARP-I's Motion to Cancel Lunar's *lis pendens*, granted ARP-I's Motion to Substitute ARP-II as the proper plaintiff, granted ARP-I leave to Amend its answer to add defenses and assert counterclaims against ARP-II and third-party claims against Lunar, and granted ARP-II's Motion to Amend to Add an Independent Claim against ARP-I arising out of the ARP-II Indemnity Agreement.

The claims presently before this Court are as follows: (1) ARP-II's claim against ARP-I as assignee of Lunar and independently for indemnification and (2) ARP-I's claims against ARP-II, Lunar, and Thomas J. Lussier ("Lussier") for abuse of process. ARP-I, ARP-II, and Lunar/Lussier have each asserted various affirmative defenses to these claims.

Having heard the testimony of the witnesses and having duly considered the admitted evidence, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On June 7, 2005, Plaintiff filed a Complaint seeking the following relief: 1) for the Court to "determine the amount owed to the Plaintiff and declare that the Plaintiff has an ownership interest in the condominium property in an amount in proportion to the total purchase price of the condominium property . . . , and decree that the Plaintiff is entitled to an order partitioning the property to sever Plaintiff's interest as a tenant in common"; 2) In the alternative, for the Court to declare the Plaintiff is owed \$325,000 from the Defendants, with interest, "which debt is secured by the condominium property"; 3) that

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the Plaintiff is "entitled to security interest and/or equitable mortgage relative to the condominium property"; 4) that the Court declare the respective rights, obligations, and duties of the parties; 5) for attorneys fees; and 6) for other relief as the Court deems proper.

2. On July 7, 2005, Defendant Robert C. Cunningham filed an Answer in the form of a general denial. On November 1, 2005, an Amended Answer was filed by Defendant ARP-II, in the form of a general denial, and alleged the following affirmative defenses: 1) failure to state a claim upon which relief may be granted; 2) doctrine of laches; 3) doctrine of estoppel; and 4) doctrine of waiver.
3. On May 23, 2008, an Order of Entry of Default was entered against Defendant ARP-I, and on December 18, 2008, an Order Setting Aside Default Judgment was entered by this Court. On January 14, 2009, Defendant ARP-I filed an Answer in the form of a general denial, while alleging the following affirmative defenses: 1) failure to state a claim; 2) waiver; 3) laches; 4) estoppel; 5) release and satisfaction and discharge; 6) lack of subject matter jurisdiction; 7) lack of privity or timely notice; 8) accord and satisfaction; 9) *res judicata* and/or collateral estoppel; 10) extinguishment of debt; 11) unclean hands; 12) payment, set-off, and/or offset; 13) assignment void and invalid; 14) insufficient process; 15) failure to mitigate damages; 16) absence of damages; and 17) reservation of additional and further defenses.
4. In December 2003, Kriti Ripley, LLC ("Kriti") and Emerald Investments, LLC ("Emerald") formed ARP-II to continue the development of a marina on the Ashley River. Emerald is wholly-owned by Stuart Longman, as is the Defendant ARP-I.

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5. The ARP-II operating agreement contains a broad agreement to arbitrate any dispute or controversy.
6. On December 30, 2003, at the time of executing the ARP-II operating agreement, Emerald, Longman and three other of Mr. Longman's companies, ARP-I, Sapphire Development, LLC ("Sapphire"), and Ripley Light Development, LLC executed an indemnity agreement ("Indemnity Agreement") promising to indemnify ARP-II and Kriti for any claims arising out of Mr. Longman's development activities that were not expressly disclosed in attachments to the indemnity agreement.
7. On March 8, 2001, Lunar Systems Ltd. ("Lunar") entered into a real estate purchase agreement with Emerald to purchase a condominium that was proposed to be built on property partially owned by ARP-I and partially owned by ARP-II. Lunar paid \$325,000 as an earnest money deposit.
8. The condominium that Lunar contracted to purchase was never built.
9. Lunar's purchase contract provided that property owned by ARP-I and ARP-II serves as collateral to secure the repayment of Lunar's deposit in the event the condominiums were not built. Lunar's claim for the return of its deposit was not disclosed by the attachments to the Indemnity Agreement.
10. On June 7, 2005, Lunar Systems brought this lawsuit against ARP-II and ARP-I seeking to recover its deposit plus accrued interest. At that time, Lunar filed a lis pendens against the ARP-I and ARP-II property identified in the Lunar real estate purchase contract as collateral for the repayment of Lunar's deposit.
11. On October 30, 2005, a New York arbitration proceeding that involved ARP-II, Longman, Kriti and Emerald issued its award ("The 2005 Award"). The award found

"that Kriti and ARP II are entitled to indemnification from Emerald and Longman in the amount of \$400,000 for all claims to date of third party vendors against ARP II." When this amount was added to other damages found against Emerald and Longman, the total awarded in favor of Kriti and ARP II against Emerald and Longman was \$1,184,581.72.

12. The 2005 Award stated, "we are persuaded that Emerald or Longman or another entity controlled by Longman (a) received and kept the deposits, (b) did not use these funds for the benefit of ARP II, and (c) ARP II must now resolve all these third party claims." The 2005 Award stated, "the resolution of all such claims to be at the expense of ARP II."
13. On November 15, 2005, Kriti and ARP-II petitioned the arbitrators to modify the award of indemnification for preconstruction investor claims from \$400,000 to \$1,031,060.74. Kriti and ARP-II also requested clarification as to the "identity of the third party vendees who have 'claims to date'."
14. On December 9, 2005, the arbitrators responded to Kriti and ARP-II's application, denied their request to modify the award, and instead made only two minor grammatical corrections.¹
15. On February 15, 2008, the Honorable Ira Gammernan, Judicial Hearing Officer, confirmed the First Award and Second Award, which dealt with accounting issues and monetary claims.
16. Although ARP-II and Kriti have attempted to execute on their judgment, Emerald and Longman have paid no monies toward satisfaction of the judgment and it remains unsatisfied, except for the award of some administrative fees for which Emerald and Longman received credit and which are not relevant to this dispute.

¹ Such corrections include the substitution of "vendors" for "vendees" from paragraph 7, page 4 of the award, along with the omission of "to" from line 2 of the same paragraph.

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17. On May 12, 2006, Lunar caused to be filed a Partial Release of *lis pendens* with respect to ARP-II's property only.
18. On December 20, 2007, ARP-II paid Lunar \$325,000 and gave it a note in the amount of \$175,000 in exchange for an assignment of Lunar's claim against ARP-I and a covenant not to sue.
19. After the Assignment and Release was executed, ARP-II brought the present action against ARP-I.
20. On February 15, 2008, the First Award and a subsequent arbitration award dealing with accounting matters were confirmed by the Honorable Ira Gammerman, Judicial Hearing Officer and reduced to judgment on March 27, 2008 in the amount of \$1,184,581.72 against Emerald and Longman.
21. On April 29, 2008, this New York Judgment was enrolled in Charleston County.
22. ARP-II ultimately filed a document on June 11, 2010, which released the *lis pendens* on ARP-I's property, over two years after the New York courts had confirmed the First Award.
23. Following receipt of the assignment of Lunar's claim, ARP-II determined that ARP-I had not appeared in this lawsuit and proceeded to enter ARP-I's default.
24. ARP-I claims that it did not receive notice of entry of the default or ARP-II's application to the Court for an order of damages.
25. At some point, ARP-I did discover the entry of this default because it moved before the Court for an order setting aside the default on August 12, 2008, which was granted on December 18, 2008.

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26. On May 19, 2010, the Court entered a Consent Order cancelling the Plaintiff's *lis pendens* on ARP I's property. That property has since been deeded to Emerald's bank in lieu of foreclosure.
27. On June 4, 2010, ARP-II amended its complaint so as to assert both the claim it had received by way of assignment from Lunar and its own claim under the Indemnity Agreement for indemnification from ARP-I.
28. In response to ARP-II's amended complaint, ARP-I filed a counterclaim against ARP-II, and a third-party claim against Lunar, claiming ARP-II and Lunar are liable for abuse of process because Lunar assigned its claims against ARP-I to ARP-II and because ARP-II entered ARP-I's default and sought to obtain a default judgment.

CONCLUSIONS OF LAW

I. ARP-II (As Assignee of Lunar) Claim Against ARP-I

1. The Assignment and Release does not permit ARP-II to pursue ARP-I in this action because ARP-II, as assignee, merely stands in Lunar's shoes and receives the same rights that Lunar had at the time of the assignment. See Singletary v. Aetna Cas. & Sur. Co., 316 SC 199, 447 S.E.2d 869 (Ct. App. 1994) ("assignee ... stands in the shoes of its assignor" and "[a]n assignee of a chose in action can claim no higher rights than his assignor had at the time of the assignment"); Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (S.C. Ct. App. 2007) (noting the three elements to an assignment: an assignor, assignee, and transfer of control from the former to latter).

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1. Moreover, the Assignment and Release constituted an accord and satisfaction of Lunar's claim. South Carolina Farm Bureau Mut. Ins. Co. v. Kelly, 345 S.C. 232, 239, 547 S.E.2d 871, 875 (Ct.App.2001) (noting that "[a]n accord and satisfaction occurs when there is (1) an agreement to accept in discharge of an obligation something different from that which the creditor is claiming or is entitled to receive; and (2) payment of the consideration expressed in the new agreement.").
2. Thus, in lieu of Lunar receiving the property it intended to acquire when initially putting down its deposit, Lunar agreed to accept \$325,000 and a promissory note for \$175,000, in exchange for releasing its claim against ARP-I.
3. The First Award required ARP-II to resolve all disputed third-party claims at its own expense, including the Lunar claim.
4. Because the Assignment and Release fully settled Lunar's claim against ARP-II, the party obligated to discharge Lunar's Claim under the First Award, ARP-II merely received an assignment of a satisfied claim.
5. Given the foregoing, ARP-I is entitled to a declaration that ARP-II possesses no claim against ARP-I by virtue of the Assignment and Release.

II. ARP-II's Claim Pursuant to the Indemnity Agreement

6. Allowing ARP-II to pursue Lunar's purportedly assigned claim against ARP-I would circumvent the First Award and permit the re-litigation of previously decided issues and claims. See Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2003) (*res judicata* applies to prior arbitration awards, including claims that could have been submitted but were not); Ross Marine, LLC v. Query, Sautter, & Gliseman, LLC, 380 S.C. 494, 498, 671 S.E.2d 604, 606 (2009) (noting when an issue is litigated and

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determined by final judgment, such "determination is conclusive in a subsequent action whether on the same or a different claim.")

6. Moreover, such re-litigation would violate this state's strong policy in favor of arbitration. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) ("There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.").
7. ARP-II and Kriti had the opportunity to and actually did fully litigate the issues of third-party claims, including Lunar's, in addition to ARP-I's obligations under the Indemnity Agreement in the First New York Arbitration. As previously discussed, the First Award fully addressed and resolved the preconstruction investor claims and indemnification issues, as evidenced by the panel's denial of ARP-II's petition for an award modification. The New York courts subsequently confirmed the First Award, and a judgment encompassing the \$400,000.00 indemnification award was enrolled in Charleston County.
8. ARP-II is now estopped from re-litigating these issues and pursuing additional indemnification against ARP-I even though ARP-I was not a named party in the First New York Arbitration. In Beall v. Doe, the Court held that a verdict in a prior lawsuit was binding on the defendant, even though the plaintiff was not a party to the prior action. 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984). The Court followed the doctrine of "nonmutual collateral estoppel", which can be asserted defensively and offensively; all that is required is that "the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action." Id. (quoting

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Graham v. State Farm Fire and Casualty Ins. Co., 277 S.C 389, 391, 287 S.E.2d 495, 496 (1982).

9. The Indemnity Agreement was entered into the record as an exhibit at the First New York Arbitration and this very issue regarding indemnification was litigated, decided, and subsequently confirmed by the New York courts.
10. Alternatively, putting aside the issue of "nonmutual collateral estoppel," ARP-II's claims and arguments in the First Arbitration did address conduct by ARP-I, not just Emerald and Longman individually, and the First Award reflects this fact. The First Award states that the indemnification award was based on conduct by "Emerald or Longman or another entity controlled by Longman." According to the Indemnity Agreement, this other entity was ARP-I and/or its predecessors², evidencing the fact that the First Arbitration considered ARP-I's involvement as well as the Indemnity Agreement in making its decision. Moreover, Williams and Longman testified at trial that the Indemnity Agreement was part of the First Arbitration.
11. Given the above, the rights and obligations of ARP-I have been fully litigated and decided; and, therefore, under the doctrine of *res judicata*, ARP-II may not pursue additional indemnification against ARP-I.

III. ARP-I's Abuse of Process Claims Against ARP-II, Lunar, and Lussier

12. Abuse of Process is the use of the legal system for a purpose other than that which was intended by the law. Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Cp. App. 1999). The elements of such claim consist

²² The Indemnity Agreement was made and entered into by Ripley Light Development, LLC, Emerald Investments, LLC, Ashley River Properties I, LLC, Sapphire Development, LLC, and Stuart Longman, collectively referred to as the "Indemnitors", with Kriti Ripley, LLC, and Ashley River Properties II, LLC, referred to as the "Indemnified Parties."

of "an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceeding." Furthermore, "[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." Id. (quoting Hainer v. Am. Med. Int'l, 328 S.C. 128, 136-37, 492 S.E.2d 103, 107 (1997)). A "Defendant who has done nothing more than carry out process to its authorized conclusion, even though with bad intentions, cannot be liable for abuse of process." Hainer v. Am. Med. Int'l, 328 S.C. 128, 492 S.E.2d 103 (1997). See also Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 567 S.E.2d 251 (Cp. App. 2002) (noting "bad motive" alone insufficient to support claim).

13. ARP-I argues that ARP-II's entering ARP-I's default constitutes the necessary ulterior purpose necessary to pursue its claim.
14. The Defendant fails to demonstrate how the entry of a default constitutes an ulterior purpose. ARP-II has steadfastly sought indemnification for the amounts that it is obligated to pay Lunar. When a party has not appeared, the seeking of an entry of default is a step normally taken by litigants in an effort to recover on their claims.
15. The Defendant asserts that Lunar's filing of a *lis pendens* and ARP-II's continuation of the *lis pendens* satisfies the elements of an abuse of process claim. Lunar's contract provided that ARP-I's property was collateral for the repayment of Lunar's deposit. Therefore, Lunar was within its rights to file the *lis pendens* initially. Likewise, Lunar and ARP-II were entitled to exchange ARP-II's payment and note for an assignment of Lunar's claims against ARP-I and its property. Therefore, ARP-II's continuation of the *lis pendens* was not for any ulterior purpose, but rather for the

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purpose of being indemnified. See D.R. Horton, Inc. v. Wescott Land Co., Inc., 398 S.C. 528, 550, 730 S.E.2d 340, 351 (Cl. App. 2012) (Finding "[p]urchaser's filing of lis pendens on property subject to contract with real estate developer, even if done with ulterior motive to tie up property and attempt to force developer to accept purchaser's new contract terms, did not on its own constitute abuse of process, as purchaser did not engage in any willful acts not authorized in use of the process").

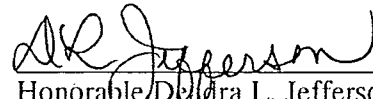
16. The Defendant has testified as to damages he alleges he suffered. However, this testimony is at best speculative as to any alleged losses, and Defendant has not proven any damages on its abuse of process claim. "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Cp. App. 2002). "As a general rule, courts will find that 'all damages must be susceptible of ascertainment with a reasonable degree of certainty.'" 11 S.C. Jur. *Damages* § 5. Furthermore, "When the tortious conduct of a defendant causes a plaintiff to lose prospective profits," the plaintiff may recover such profits after proving "1) it is reasonably certain that such profits would have been realized except for the tort, and (2) such lost profits can be ascertained and measured from the evidence produced with reasonable certainty." Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (2008). Such certainty "means the damages may not be left to mere speculation or conjecture." Id. Because the Defendant did not engage in willful acts not authorized in use of the process, they cannot recover any damages for such claim.

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17. The Defendant has failed to prove the necessary elements to recover on its abuse of process claim. These parties have filed numerous lawsuits and litigation has been ongoing between the parties since 2005, not only regarding the subject property, but also concerning business associations with one another.

BASED ON THE FOREGOING, the Court denies ARP-II's indemnity claims against ARP-I. The Court denies ARP-I's abuse of process counterclaim against ARP-II, and third-party claim for abuse of process against Lunar and Lussier.

IT IS SO ORDERED.



Honorable Delora L. Jefferson
Presiding Judge, Ninth Judicial Circuit

4/26 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

Ashley River Properties II, LLC, as
assignee of Lunar Systems, LTD and
Ashley River Properties II, LLC, in its
own right,

Plaintiffs,

vs.

Ashley River Properties One, LLC
successor in the interest to Ripley
Light Yacht Club, LLC and Ripley Light
Development, LLC,

Defendants.

Ashley River Properties One, LLC

Third-Party Plaintiff,

vs.

Lunar Systems, LTD and Thomas J.
Lussier,

Third-Party Defendants.

**ORDER DENYING DEFENDANT
AND THIRD-PARTY PLAINTIFF
ASHLEY RIVER PROPERTIES ONE,
LLC'S MOTION TO ALTER OR
AMEND**

FILED
2013 JUL 24 PM 4:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Presiding Judge:
Date of Trial:
Court Reporter:
Plaintiff's counsel:
Defendant's counsel:
Third-Party Defendant's counsel:

Hon. Deadra L. Jefferson
January 23, 2013
Joyce Rueger
William C. Cleveland, Esq.
Clayton B. McCullough, Esq.
Frank M. Cisa, Esq.

THIS MATTER is before the Court on Defendant and Third-Party Plaintiff Ashley River
Properties One, LLC's Motion to Alter or Amend pursuant to Rule 59(e), SCRCF. The case

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initially came before the Court on January 23, 2013, for a non-jury trial on ARP-II's claim against ARP-I as assignee of Lunar and independently for indemnification and ARP-I's claims against ARP-II, Lunar, and Thomas J. Lussier for abuse of process. At the conclusion of the trial, the Court took the matter under advisement. On April 26, 2013, this Court issued an Order denying ARP-II's indemnity claims against ARP-I, denying ARP-I's abuse of process counterclaim against ARP-II, and denying ARP-I's third-party claim for abuse of process against Lunar and Lussier. The Defendant and Third-Party Plaintiff, Ashley River Properties One, LLC's Motion to Alter or Amend was filed May 9, 2013, and received by the Court on May 13, 2013. Plaintiff Ashley River Properties II, LLC's Memorandum in Opposition to the Motion to Alter or Amend was filed May 23, 2013 and received by the Court on May 23, 2013, and the Defendants Lunar Systems, LTD and Thomas J. Lussier's Memorandum in Opposition to the Motion to Alter or Amend was filed May 28, 2013 received by the Court on May 24, 2013.

STANDARD OF REVIEW

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment, is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (quoting Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). The Supreme Court has clarified the two situations in which a Rule 59(e) motion is appropriate. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Additionally, "[a] party cannot use a motion to reconsider to present an issue he



could have raised prior to judgment but did not." Anderson Mem'l Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)).

ANALYSIS

Plaintiff contends the Court's Order erred in two ways: a) by finding that "ARP-I did not satisfy the elements of abuse of process, and b) that ARP-I failed to prove damages with specificity regarding the abuse of process claim." The Court will address each argument in the order raised by ARP-I.

First, ARP-I argues the Order erred by finding ARP-I did not prove the elements of abuse of process. ARP-I contends, as it did at trial, that ARP-II's continuation of the *lis pendens* on ARP-I's property constituted an ulterior purpose and "willful act in the use of the process not proper in the regular course of the proceeding." Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999). As case law illustrates, the filing of a *lis pendens* does not alone constitute an abuse of process, even if done with an ulterior motive to tie up the property. D.R. Horton, Inc. v. Westcott Land Co., Inc., 398 S.C. 528, 550, 730 S.E.2d 340, 351 (Ct. App. 2012). The facts are uncontested that ARP-II has not been paid its judgment, and as the Court's Order states, the continuation of the *lis pendens* was done for the purpose of being indemnified. ARP-II's actions do not constitute an abuse of process.

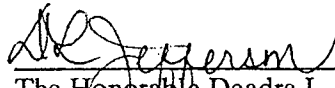
Finally, ARP-I argues the Order erred by finding ARP-I did not prove damages with specificity as to its abuse of process claim. As this Court has already denied ARP-I's abuse of process counterclaim against ARP-II and denied ARP-I's third-party claim for abuse of process against Lunar and Lussier, an extended discussion on damages is not necessary. Even if ARP-I's damages rose beyond mere speculation, because it failed to show that ARP-II, Lunar, and

Lussier engaged in willful acts not authorized in the use of the process, no damages are recoverable.

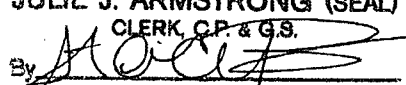
CONCLUSION

Having considered the Third-Party Plaintiff and Defendant's Motion, the Plaintiff's Memorandum in Opposition thereto, the Third-Party Defendants' Memorandum in Opposition thereto, as well as the various interests balanced by the Court at the time of the ruling, the Motion to Alter or Amend is hereby DENIED.¹

IT IS SO ORDERED.


The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

July 24, 2013
Charleston, South Carolina

TEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P. & G.S.
By 
DEPUTY CLERK

¹ This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

4 4024
2/29

The South Carolina Court of Appeals

Ashley River Properties II, LLC, as assignee of Lunar Systems, LTD and Ashley River Properties II, LLC, in its own right, are the Respondents,

v.

Ashley River Properties One, LLC, successor in the interest to Ripley Light Yacht Club, LLC and Ripley Light Development, LLC,

Of Whom, Ashley River Properties One, LLC , is the Appellant.

Ashley River Properties One, LLC, Third-Party Plaintiffs, Appellant,

v.

Lunar Systems, LTD and Thomas J. Lussier, Third-Party Defendants, Respondents.

Appellate Case No. 2013-001984

The Honorable The Honorable Deadra L. Jefferson
Charleston County
Trial Court Case No. 2005CP1002434

ORDER

The time for serving and filing the Appellant's Initial Brief is hereby extended until January 13, 2014.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Clayton B. McCullough, Esquire

William C. Cleveland, Esquire

Frank M. Cisa, Esquire

Ross A. Appel, Esquire

FILED
5 December 2013

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 05-CP-10-2434

LUNAR SYSTEMS, LTD.,)
Plaintiff,)

vs.)

AMENDED LIS PENDENS

ASHLEY RIVER PROPERTIES)
ONE, LLC and ASHLEY RIVER)
PROPERTIES TWO, LLC,)
successors in the interest of RIPLEY)
LIGHT YACHT CLUB, LLC,)
RIPLEY LIGHT YACHT CLUB,)
LLC, RIPLEY LIGHT)
DEVELOPMENT, LLC, and)
ROBERT C. CUNNINGHAM,)

Defendants.)

FILED
2005 JUN -7 PM 2:24
JULIA M. STIRONG
CLERK OF COURT

NOTICE IS HEREBY GIVEN that an action has commenced in the Court of Common
Please for Charleston County, State of South Carolina, upon a Complaint of the above-named
Plaintiff against the above-named Defendants for the purpose of declaring an ownership interest
in the real estate described herein and the right to partition the same, that all of the said premises
which are the subject of this action are at the time of the commencement of this action and at the
time of filing this notice situated in the County of Charleston and are described as follows:

SEE ATTACHED EXHIBIT "A".

CISA & DODDS, LLP



Frank M. Cisa
622 Johnnie Dodds Blvd.
Mt. Pleasant, SC 29464
(843) 881-3700
Attorney for the Plaintiff

June 3, 2005

EXHIBIT A

ALL that certain piece, parcel or lot of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as NEW PARCEL "A", HIGHLAND 274,098.43 S.F., 5.145 AC., on that certain plat entitled "PLAT SHOWING THE COMBINATION OF PARCEL 1, 4, 5, 6B, & PORTION OF COMMON AREA 2 CREATING PARCEL 'A', OWNED BY RIPLEY POINT ASSOCIATES, LLC, ABOUT TO BE CONVEYED TO RIPLEY LIGHT YACHT CLUB, LLC, LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA" made by General Engineering dated March 16, 2001, last revised October 24, 2002, and recorded in the RMC Office for Charleston County on October 28, 2002 in Plat Book EF, Page 972. Said lot having such size, shape, dimensions, buttings and boundings as shown on said plat.

ALSO

All the docks, bulkheads, floating docs and all other properties attached to the rear property described above.

SUBJECT to all restrictions and easements of record.

BEING the same premises conveyed to Ripley Light Development, LLC by Ripley Point Associates, LLC by deed dated November 4, 2002 and recorded in the RMC Office for Charleston County on November 5, 2002 in Book S424, Page 112.

TMS No. 421-11-00-054

Grantees' Address: 424 West Mountain Road
Ridgefield, CT 06877

TOGETHER WITH, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina and known and designated as Parcel 6A on a plat entitled "Plat Showing the Property Line Adjustment and Resubdivision of Parcel 8, Residual Area 5, and Ripley Point Drive into Parcel 1, Common Area 2, Parcel 3, Parcel 4, Parcel 5, Parcel 6A, Parcel 6B, Parcel 7 and Parcel 8, prepared for Ripley Point Associates, L.L.C. Located in the City of Charleston, Charleston County, South Carolina" prepared by Hoffman Lester Associates, Inc. dated August 28, 1997 and recorded in Plat Book EC, at Page 61 in the RMC Office for Charleston County, South Carolina. Said parcel having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

SUBJECT to all restrictions and easements of record.

BEING the same premises conveyed to Ripley Light Development, LLC by Emerald Investment, LLC by deed dated June 21, 2001 and recorded in the RMC Office for Charleston County on June 27, 2001 in Book K-375, Page 898.

TMS No. 421-11-00-085

Grantees' Address: 424 West Mountain Road
Ridgefield, CT 06877

TOGETHER WITH, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 05-CP-10- 2434

LUNAR SYSTEMS, LTD.,)
)
Plaintiff,)

vs.)

SUMMONS

ASHLEY RIVER PROPERTIES)
ONE, LLC and ASHLEY RIVER)
PROPERTIES TWO, LLC,)
successors in the interest of RIPLEY)
LIGHT YACHT CLUB, LLC,)
RIPLEY LIGHT YACHT CLUB,)
LLC, RIPLEY LIGHT)
DEVELOPMENT, LLC, and)
ROBERT C. CUNNINGHAM,)

Defendants.)

FILED
2005 JUN -7 PM 2:25
JULIUS R. IRONIG
CLERK OF COURT
BY

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action,
a copy of which is herewith served upon you, and to serve a copy of your Answer upon the
subscribers at their office located at 622 Johnnie Dodds Boulevard, South Carolina, 29464 within
thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to
answer the Complaint within the time aforesaid, judgment by default will be rendered against
you for the relief demanded in the Complaint.

CISA & DODDS, LLP



Frank M. Cisa
622 Johnnie Dodds Blvd.
Mt. Pleasant, SC 29464
(843) 881-3700
Attorney for the Plaintiff

June 3, 2005

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 05-CP-10- 2434

LUNAR SYSTEMS, LTD.,)
)
Plaintiff,)

vs.)

COMPLAINT
(Non-Jury)
(Declaratory Judgment)

ASHLEY RIVER PROPERTIES)
ONE, LLC and ASHLEY RIVER)
PROPERTIES TWO, LLC,)
successors in the interest of RIPLEY)
LIGHT YACHT CLUB, LLC,)
RIPLEY LIGHT YACHT CLUB,)
LLC, RIPLEY LIGHT)
DEVELOPMENT, LLC, and)
ROBERT C. CUNNINGHAM,)
)
Defendants.)

FILED
2005 JUN -7 PM 2:25
CLERK OF COURT
BY

The Plaintiff, above-named, complaining of the Defendants, above-named, would respectfully show unto this honorable Court as follows:

1. The Plaintiff is a corporation organized and existing under the laws of the State of Ohio, and at all times hereinafter mentioned was and is doing business in the County of Charleston, South Carolina and claims an ownership interest in real estate located in Charleston, South Carolina.
2. The Defendant, Ashley River Properties One, LLC ("Ashley River One"), and Ashley River Properties Two, LLC ("Ashley River Two"), have an ownership interest in the real estate which is the subject of this action and are the successors in interest of the Defendant, Ripley Light Yacht Club, LLC ("Ripley Light").

3. The Defendants, Ripley Light and Ripley Light Development, LLC ("Ripley Development") have an ownership interest in the real estate which is the subject of this action.
4. The Defendant, Robert C. Cunningham, is upon information and belief, a citizen and resident of the County of Charleston, State of South Carolina, and was an early purchaser as defined herein and claims an ownership interest under the terms of a Purchase Agreement similar to that of the Plaintiff and claims an ownership interest in the real estate, which is the subject of this action, under the terms of a Purchase Agreement similar to that of the Plaintiff.
5. This action is brought pursuant to §15-53-10, et seq., South Carolina Code of Laws, 1976, the Uniform Declaratory Judgment Act.
6. That heretofore, on or about March 8, 2001, the Plaintiff entered into a Real Estate Purchase Agreement with Ripley Light to purchase a unit in a proposed condominium project on the real property described on the Exhibit "A", which is attached hereto and incorporated herein by express reference, which property is hereinafter referred to as the "condominium property".
7. That on or about March 8, 2001, an Early Purchase Addendum was also executed relative to the purchase of the condominium unit, wherein the purchase price of the condominium unit was reduced by half to \$325,000.00, which sum was paid to Ripley Light by the Plaintiff.
8. By the terms of the Early Purchase Addendum, the money paid by the Plaintiff was to be placed in escrow. In the event the escrowed funds were used for the purchase of the

underlying real estate described on the Exhibit "A", then the Plaintiff as collateral for repayment of its funds was to be given an interest in the condominium property owned or subsequently acquired by Ripley Light and Ripley Development and their successors in interest, Ashley River Properties One and Ashley River Properties Two.

9. The Early Purchase Addendum further provided that in the event construction did not commence on or before December 31, 2001, that either the condominium property would be sold and the proceeds divided on a prorata basis according to the amount of capital contribution or the Plaintiff would be reimbursed the full purchase price with interest.
10. Another option under the Early Purchase Addendum was to allow seller of the condominium property additional time to commence construction, however, construction is not yet complete and therefore the Plaintiff is entitled to its prorata interest in the condominium property or alternatively the repayment of their earnest money deposit with accrued interest.
11. That thereafter, the condominium property, owned by Ripley Development was conveyed to two newly formed limited liability corporations which were Ashley River One and Ashley River Two. These transfers are subject to Plaintiff's undivided prorata interest in the condominium property.
12. That the Plaintiff is owed the principle sum of \$325,000.00. Although the Plaintiff has demanded the repayment of its \$325,000.00, together with accrued interest, no payment has been forth coming.
13. That a controversy exists between the Plaintiff and the Defendants in that:
 - a. The Plaintiff and Defendant, Robert C. Cunningham, claim ownership interests in

the condominium property held by Ashley River One and Ashley River Two and as tenants in common of an undivided interest and claim the right to have their interest severed from the other owners. In the alternative the Plaintiff claims a security interest and equitable mortgage on the condominium property for the amount of \$325,000.00 with interest at the legal rate, together with cost and reasonable attorney's fees.

b. The corporate Defendants deny that the Plaintiff holds any interest in the subject property.

c. The Plaintiff denies and disputes the contentions of the corporate Defendants and the corporate Defendants deny and dispute the contentions of the Plaintiff.

14. The corporation Defendants have breached the agreement with the Plaintiff.

15. That the parties are all persons who may have an interest, which may be effected by the Courts declaration and pursuant to §15-53-80, Code of Laws of South Carolina are proper parties to this action. That by reason of the foregoing a declaratory judgment is both necessary and proper in order to determine the rights, obligations and liabilities, if any, which exists among the parties.

WHEREFORE, the Plaintiff prays as follows:

- enc 8-6-15*
1. That the Court determine the amount owed to the Plaintiff and declare that the Plaintiff has an ownership interest in the condominium property in an amount in proportion to the total purchase price of the condominium property paid by one or more of the corporate Defendants, and decree that the Plaintiff is entitled to an order partitioning the property to sever Plaintiff's interest as a tenant in common.

2. That, in the alternative, the Court declare that the Plaintiff is owed the sum of \$325,000.00 from the corporate Defendants, together with interest at the lawful rate, which debt is secured by the condominium property.
3. That the Court declare that the Plaintiff is entitled to a security interest and/or equitable mortgage relative to the condominium property.
4. That the Court declare the respective rights, duties and obligations between the parties.
5. For attorneys fees against the corporate Defendants, pursuant to the terms of the Agreement.
6. For cost and such other further relief that this Court deems just and proper.

CISA & DODDS, LLP



Frank M. Cisa
622 Johnnie Dodds Blvd.
Mt. Pleasant, SC 29464
(843) 881-3700
Attorney for the Plaintiff

June 3, 2005

one
5-6-5

EXHIBIT A

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ALSO

All the docks, bulkheads, floating docks and all other properties attached to the rear property described above.

SUBJECT to all restrictions and easements of record.

BEING the same premises conveyed to Ripley Light Development, LLC by Ripley Point Associates, LLC by deed dated November 4, 2002 and recorded in the RMC Office for Charleston County on November 5, 2002 in Book S-424, Page 112.

TMS No. 421-11-00-054

Grantees' Address: 424 West Mountain Road
Ridgefield, CT 06877

TOGETHER WITH, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

ALSO

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina and known and designated as Parcel 6A on a plat entitled "Plat Showing the Property Line Adjustment and Resubdivision of Parcel 8, Residual Area 5, and Ripley Point Drive into Parcel 1, Common Area 2, Parcel 3, Parcel 4, Parcel 5, Parcel 6A, Parcel 6B, Parcel 7 and Parcel 8, prepared for Ripley Point Associates, L.L.C. Located in the City of Charleston, Charleston County, South Carolina" prepared by Hoffman Lester Associates, Inc. dated August 28, 1997 and recorded in Plat Book EC, at Page 61 in the RMC Office for Charleston County, South Carolina. Said parcel having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

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TMS No. 421-11-00-085

Grantees' Address: 424 West Mountain Road
Ridgefield, CT 06877

TOGETHER WITH, all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LUNAR SYSTEMS, LTD

Plaintiff(s)

vs.

ASHLEY RIVER PROPERTIES ONE, LLC,
ET AL.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

05 - CP - 10 - 2434

(Please Print)

Submitted By: Frank M. Cisa

Address: 622 Johnnie Dodds Blvd.

Mt. Pleasant, SC 29464

SC Bar #:

1237

Telephone #:

(843) 881-3700

Fax #:

(843) 881-2511

Other:

E-mail:

frank@cisadodds.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299)

Torts - Personal Injury

- ☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Other (399)

Real Property

- ☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☒ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions

- ☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

Appeals

- ☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☒ Other (699)

Declaratory Judgment

Submitting Party Signature: _____

Date: _____

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 05-CP-10-2434

ASHLEY RIVER PROPERTIES,)
II, LLC, as assignee of LUNAR)
SYSTEMS, LTD and ASHLEY)
RIVER PROPERTIES, II, LLC,)
in its own right,)

Plaintiffs,)

-vs-)

THIRD-PARTY SUMMONS

ASHLEY RIVER PROPERTIES)
ONE, LLC successor in interest to)
RIPLEY LIGHT YACHT CLUB,)
LLC and RIPLEY LIGHT)
DEVELOPMENT, LLC,)

Defendant.)

ASHLEY RIVER PROPERTIES)
ONE, LLC.)

Third-Party Plaintiff,)

-vs-)

LUNAR SYSTEMS, LTD. and)
THOMAS J. LUSSIER,)

Third-Party Defendants)

3Y

JULIE J. ARMSTRONG
CLERK OF COURT

2010 JUN 14 PM 3:23

FILED

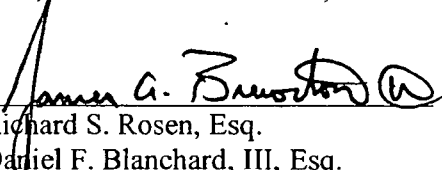
TO: THIRD-PARTY DEFENDANTS, LUNAR SYSTMES, LTD and THOMAS J. LUSSIER

YOU ARE HEREBY SUMMONED and required to answer the Third-Party Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Third-Party Complaint, on the subscribers, Rosen, Rosen & Hagood, at their offices at 134 Meeting Street, Suite 200 (P.O. Box 893), Charleston, South Carolina 29402, within thirty (30) days of the service hereof, exclusive of the day of such service.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the Third-Party Complaint as required by this Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Third-Party Complaint.

ROSEN, ROSEN & HAGOOD, LLC.

By:

 Richard S. Rosen, Esq.

Daniel F. Blanchard, III, Esq.

James A. Bruorton IV, Esq.

134 Meeting Street, Suite 200

P.O. Box 893

Charleston, SC 29402

(843) 577-6726

ATTORNEY(S) FOR ASHLEY RIVER
PROPERTIES ONE, LLC.

Charleston, South Carolina
June 14, 2010.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 05-CP-10-2434

ASHLEY RIVER PROPERTIES,)
II, LLC, as assignee of LUNAR)
SYSTEMS, LTD and ASHLEY)
RIVER PROPERTIES, II, LLC,)
in its own right,)
Plaintiffs,)

-vs-

ASHLEY RIVER PROPERTIES)
ONE, LLC successor in interest to)
RIPLEY LIGHT YACHT CLUB,)
LLC and RIPLEY LIGHT)
DEVELOPMENT, LLC,)
Defendant.)

ASHLEY RIVER PROPERTIES)
ONE, LLC.)
Third-Party Plaintiff,)

-vs-

LUNAR SYSTEMS, LTD. and)
THOMAS J. LUSSIER,)
Third-Party Defendants)

**ANSWER TO AMENDED COMPLAINT,
COUNTERCLAIMS, AND THIRD-PARTY
COMPLAINT OF ASHLEY RIVER
PROPERTIES ONE, LLC**

2010 JUN 14 PM 3:23
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

Ashley River Properties One, LLC ("ARP I"), as an answer to the Amended Complaint of Ashley River Properties II, LLC ("ARP II"), as purported assignee of Lunar Systems, LTD ("Lunar") and in its own right, and by way of Counterclaim against ARP II, and as a Third-Party Complaint against Lunar and Thomas J. Lussier ("Lussier"), alleges and states as follows:

I. AS TO THE FIRST CAUSE OF ACTION

1. Each and every allegation which is not hereinafter specifically admitted, modified or explained is hereby denied and strict proof thereof is demanded.

2. The allegations of Paragraph 1 are admitted upon information and belief, except that the Defendant denies that the Plaintiff or the Plaintiff's assignor are or were entitled to any interest in the real estate or property of ARP I.

3. In answering the allegations of Paragraph 2, ARP I admits only that it has an ownership interest in the real property which is the subject of this action. ARP I denies the remaining allegations of this paragraph and demands strict proof thereof.

4. The allegations of Paragraph 3 set forth a legal conclusion which require no response from ARP I. To the extent the allegations of Paragraph 3 can be construed to require a response from ARP I, ARP I denies the same and demands strict proof thereof.

5. In answering the allegations of Paragraph 4, ARP I craves reference to the actual terms and provisions of the Real Estate Purchase Agreement and denies any allegations that are inconsistent therewith. ARP I denies that the Plaintiff is entitled to any relief based on the document.

6. In answering the allegations of Paragraphs 5 through 8, ARP I craves reference to the actual terms and provisions of the Early Purchase Addendum and denies any allegations that are inconsistent therewith. ARP I denies that the Plaintiff is entitled to any relief based on the document.

7. In answering the allegations of Paragraph 9, ARP I admits only that it was conveyed an ownership interest in the subject property from Ripley Development. As to the remaining allegations of Paragraph 9, ARP I denies the same and demands strict proof thereof.

8. The allegations of Paragraph 10 are denied and strict proof thereof is demanded.
9. In answering the allegations of Paragraph 11, ARP I states as follows:
 - (a) The allegations of subparagraph a are denied and strict proof thereof is demanded;
 - (b) The allegations of subparagraph b are admitted; and
 - (c) The allegations of subparagraph c are admitted to the extent that they allege that a dispute existed, but any allegations inconsistent therewith are denied.
10. The allegations of Paragraph 12 are denied and strict proof thereof is demanded.
11. The allegations of Paragraph 13 set forth a legal conclusion which require no response from ARP I. To the extent the allegations of Paragraph 13 can be construed to require a response from ARP I, ARP I denies the same and demands strict proof thereof.
12. In answering the allegations of Paragraph 14, ARP I lacks sufficient information or knowledge to form a belief as to the truth or accuracy of the allegations contained in said paragraph and, therefore, denies same and demands strict proof thereof. ARP I further asserts that, if ARP II truly settled the Lunar claims by payment in full to Lunar, no claims remained to be assigned to ARP II.

II. AS TO THE SECOND CAUSE OF ACTION

13. In answering Paragraph 15, ARP I realleges its responses set forth in Paragraphs 1 through 12 above as if repeated herein verbatim.
14. In answering Paragraph 16, ARP I craves reference to the actual terms and provisions of the Indemnity Agreement and denies any allegations that are inconsistent therewith. ARP I denies that the Plaintiff is entitled to any relief based on the document.
15. The allegations of Paragraph 17 are denied and strict proof thereof is demanded.

16. The allegations of Paragraph 18 are denied and strict proof thereof is demanded.

I. FOR A FIRST DEFENSE
(Failure to State a Claim)

17. Further and affirmatively answering the Plaintiffs' Amended Complaint and as an additional and complete defense thereto, the Amended Complaint should be dismissed pursuant to S.C. R. CIV. PRO. 12(b)(6) for failure to state facts sufficient to constitute a claim or cause of action against ARP I.

II. FOR A SECOND DEFENSE
(Statute of Limitations)

18. Further and affirmatively answering the Plaintiffs' Amended Complaint and as an additional and complete defense thereto, Plaintiff's claims are barred in whole or in part by the applicable statute of limitations.

III. FOR A THIRD DEFENSE
(Waiver)

19. Further and affirmatively answering the Plaintiffs' Amended Complaint and as an additional and complete defense thereto, Plaintiff's claims are barred in whole or in part by the doctrine of waiver.

IV. FOR A FOURTH DEFENSE
(Laches)

20. Further and affirmatively answering the Plaintiffs' Amended Complaint and as an additional and complete defense thereto, Plaintiff's claims are barred by the doctrine of laches by virtue of the Plaintiff's excessive delay in bringing their claims.

V. FOR A FIFTH DEFENSE
(Estoppel)

21. Further and affirmatively answering the Plaintiffs' Amended Complaint and as an additional and complete defense thereto, Plaintiff's claims are barred in whole or in part by the doctrine of estoppel.

VI. FOR A SIXTH DEFENSE
(Release and Satisfaction and Discharge)

22. Further and affirmatively answering the Plaintiffs' Amended Complaint and as an additional and complete defense thereto, Plaintiff's payment(s) to Lunar was full payment of the claims set forth in this action which constitute a full release, discharge, and satisfaction of any and all claims that Lunar could have had against ARP I leaving no claims to assign to ARP II.

VII. FOR A SEVENTH DEFENSE
(Lack of Subject Matter Jurisdiction)

23. Further and affirmatively answering the Plaintiffs' Amended Complaint and as an additional and complete defense thereto, the Amended Complaint should be dismissed pursuant to S.C. R. CIV. PRO. 12(b)(1) for lack of subject matter jurisdiction as the Court lacks jurisdiction over this matter in that the claims are subject to arbitration.

VIII. FOR AN EIGHTH DEFENSE
(Accord and Satisfaction)

21. ARP II's claims are barred in whole or part by the doctrine of accord and satisfaction. In or about December of 2007, as a complete settlement of any disputes and claims asserted by Lunar, Lunar entered into a written agreement with ARP II under which it received valuable consideration for the settlement of its claims in full. Lunar accepted the monies and other valuable consideration in exchange for this settlement and has never returned same. ARP

II, as assignee of Lunar, simply received an assignment of Lunar's claims that had been settled and discharged in full.

IX. FOR A NINTH DEFENSE
(Res Judicata and/or Collateral Estoppel)

22. ARP II's claims are barred in whole or part by the doctrines of *res judicata* and/or collateral estoppel. In a prior arbitration proceeding in New York, ARP II was ordered to pay and satisfy the claims asserted by Lunar in this action. ARP II, as assignee of Lunar, now attempts to sue upon the same claims which the arbitrators ordered ARP II to pay and satisfy. The prior arbitration award is final and was reduced to judgment. As a result of the arbitrators' award in that prior action, ARP II's claims in this case are barred.

X. FOR A TENTH DEFENSE
(Double Recovery/Windfall)

23. ARP II's claims are barred as recovery on the claims presented would provide double recovery and/or windfall to ARP II. In a prior arbitration proceeding in New York, ARP II was awarded \$400,000 in indemnification to apply toward the satisfaction of third-party vendee claims, including the claims of Lunar. ARP II made a motion to the arbitration panel for additional indemnification, which was denied. ARP II now seeks a recovery against ARP I which would provide ARP II with double recovery and/or a windfall.

XI. FOR AN ELEVENTH DEFENSE
(Extinguishment of Debt)

24. The settlement entered into by Lunar and ARP II, which preceded the assignment of Lunar's claims to ARP II, extinguished and discharged the underlying debt upon which ARP II's current claims against ARP I now depend.

XII. FOR A TWELFTH DEFENSE
(Unclean Hands)

25. ARP II's claims are barred in whole or part by the doctrine of unclean hands based on ARP II's inequitable conduct towards ARP I, its misconduct in not satisfying Lunar's claims as required by the prior arbitration award, and ARP II's pursuit and receipt of an assignment from Lunar of its claims, which ARP II was required to pay and satisfy under the arbitration award. ARP II has attempted to take a purported assignment of Lunar's claim against ARP I in an effort to backdoor a claim for indemnity against ARP I (for the same Lunar claim) even though the New York arbitrators previously rejected ARP II and its managing member, Kriti Ripley, LLC's efforts to do this very thing in the prior arbitration proceeding.

XIII. FOR A THIRTEENTH DEFENSE
(Payment, Set-Off, and/or Offset)

26. Payments were made by ARP II to Lunar in or about December of 2007 and at times thereafter involving the same claims that were purportedly assigned by Lunar to ARP II. Therefore, ARP II's claims are barred in whole or part by these payments and/or ARP I is entitled to a set-off or offset to the extent of such payments.

XIV. FOR A FOURTEENTH DEFENSE
(Assignment Void and Invalid)

27. The purported assignment of Lunar's rights or claims to ARP II is invalid, void, and inoperable as a matter of law because the causes of action were extinguished and discharged by operation of ARP II's payments and settlement with Lunar.

XV. FOR A FIFTEENTH DEFENSE
(Insufficient Process and/or Insufficient Service of Process)

28. The Complaint should be dismissed for insufficiency of process and/or insufficiency of service of process on ARP I.

XVI. FOR A SIXTEENTH DEFENSE
(Failure to Mitigate Damages)

29. The Complaint should be dismissed in whole or part based on the failure to mitigate damages.

XVII. FOR A SEVENTEENTH DEFENSE
(Absence of Damages)

30. ARP II has not and cannot allege facts or present evidence establishing that it has suffered damages resulting from any acts alleged in the Complaint.

XVIII. FOR AN EIGHTEENTH DEFENSE
(Indemnification)

31. In a prior arbitration proceeding in New York, ARP II was ordered to pay and satisfy the claims asserted by Lunar in this action. ARP I is entitled to indemnification from ARP II for any monies ARP II may recover as assignee to Lunar against ARP I.

XIX. FOR A NINETEENTH DEFENSE
(Reservation of Additional and Further Defenses)

32. ARP I reserves any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

XX. AS A TWENTIETH DEFENSE AND BY WAY OF A FIRST
COUNTERCLAIM AGAINST ASHLEY RIVER PROPERTIES TWO, LLC.
(Indemnification)

33. ARP I repeats and realleges the allegations contained in paragraphs 1 through 32 above as if reiterated verbatim.

34. ARP II is a South Carolina limited liability company created pursuant to the South Carolina Uniform Limited Liability Company Act, S.C. CODE ANN. §§ 33-44-101 *et seq.*

35. ARP I is a South Carolina limited liability company, which owns real estate near a riverfront site on the Ashley River in Charleston, South Carolina, more particularly described as follows:

ALL that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, Charleston County, South Carolina and known and designated as Parcel 6A on a plat entitled "Plat Showing the Property Line Adjustment and Resubdivision of Parcel 8, Residual Area 5, and Ripley Point Drive into Parcel 1, Common Area 2, Parcel 3, Parcel 4, Parcel 5, Parcel 6A, Parcel 6B, Parcel 7 and Parcel 8, prepared for Ripley Point Associates, L.L.C. Located in the City of Charleston, Charleston County, South Carolina" prepared by Hoffman Lester Associates, Inc. dated August 28, 1997 and recorded in Plat Book EC, at Page 61 in the RMC Office for Charleston County, South Carolina. Said parcel having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

SUBJECT to all restrictions and easements of record.

BEING the same premises conveyed to Ripley Light Development, LLC by Emerald Investment, LLC by deed dated June 21, 2001 and recorded in the RMC Office for Charleston County on June 27, 2001 in Book K-375, Page 898.

TMS No. 421-11-00-085

36. ARP I is wholly owned by Emerald Investments, LLC ("Emerald"). Emerald is managed by Stuart Longman ("Longman").

37. Lunar Systems, Ltd. is, upon information and belief, a corporation organized and existing under the laws of the State of Ohio, and at all times hereinafter mentioned was and is doing business in the County of Charleston, South Carolina. Thomas Lussier is, upon information and belief, an adult citizen and resident of the State of Ohio, is a member, manager, director, officer, and/or agent of Lunar, and does business in the County of Charleston, South Carolina.

38. On or about June 7, 2005, Lussier caused Lunar to commence this current action against ARP II and ARP I. In its action, Lunar alleged that it had a contract to purchase a condominium unit in the proposed Ripley Light condominium project and that it had paid

\$325,000.00 towards the purchase price for the unit. Lunar's lawsuit sought a declaratory judgment declaring that it owned an interest in the real property owned by ARP I and ARP II or, alternatively, that it had a security interest or equitable mortgage on the property securing the return of its \$325,000.00 payment.

39. On or about May 2, 2005, Lussier caused Lunar to file a Lis Pendens (2005-LP-10-61) on two pieces of real property owned separately by ARP II and ARP I, including the above-described property of ARP I. Additionally, on or about June 7, 2005, Lussier caused Lunar to file an Amended Lis Pendens on the two pieces of real property owned separately by ARP II and ARP I, including the above-described property of ARP I.

40. On October 31, 2005, as the result of a prior arbitration in Case No. 13 115 Y 00698 05, styled *Kriti Ripley, LLC and Ashley River Properties II, LLC v. Emerald Investments, LLC and Stuart Longman*, ARP II was awarded indemnification of \$400,000.00 from Emerald and Longman for certain third-party contract vendee claims, which specifically included the Lunar claim that was the subject of this action. The Arbitration Award further required that the resolution of all third-party contract vendee claims, specifically including the Lunar claim, was to be made by ARP II at its own expense. The Arbitration Award required ARP II to satisfy and discharge the debt owed to Lunar, which was the subject of Lunar's claim made in this current action.

41. On February 15, 2008, the New York Supreme Court issued an Order and judgment confirming the Arbitration Award. The Arbitration Award and New York judgment confirming same are now final.

42. On or about December 20, 2007, Lunar, Lussier, and ARP II entered into a written Assignment, Covenant Not to Sue, and Full, Final and Complete Release (hereinafter

"Release") with ARP II. A true and correct copy of the Release is attached hereto as "Exhibit A" and incorporated herein by reference. The Release included language purporting to assign or transfer Lunar's rights and claims to ARP II. ARP II, as Lunar's purported assignee, has since pursued against ARP I the same claim (the Lunar claim) which the New York Arbitration Award required ARP II to pay and satisfy at its own expense.

43. Notwithstanding the mandate of the Arbitration Award and the New York judgment confirming same, ARP II has failed and/or refused to resolve the third-party contract vendee claims, including the Lunar claim, as required by the Arbitration Award and has continued to maintain a lis pendens against ARP I's property based on the same claim. As Lunar's purported assignee, ARP II has attempted to circumvent the Arbitration Award and is now pursuing the same claim against ARP I (the Lunar claim) which ARP II was required to pay and satisfy at its own expense. ARP II's conduct and actions have subjected ARP I to and proximately caused it actual damages, including but not limited to the loss of use of its property; a cloud on the title to its property; the inability to sell, transfer, or mortgage its property; the impairment of the marketability of its property; the diminishment of the fair market value of its property; attorney's fees and expenses incurred in defending the claim of Lunar and clearing the title to the property and such other consequential, incidental, and special damages as the evidence may show.

44. ARP I is entitled to indemnification from ARP II for any claim Lunar may or may not have had against ARP I and recovery of any damages incurred by ARP I as a result of having to defend against Lunar's original claims and/or assigned claims beyond the date of the Arbitration Award.

**XXI. AS A TWENTY FIRST DEFENSE AND BY WAY OF A SECOND
COUNTERCLAIM AGAINST ASHLEY RIVER PROPERTIES TWO, LLC.**
(Abuse of Process)

45. ARP I repeats and realleges the allegations contained in paragraphs 1 through 44 above as if reiterated verbatim.

46. On October 31, 2005, the New York Arbitration Award required that ARP II satisfy and discharge the debt owed to Lunar, which was the subject of Lunar's claim made in this current action.

47. On February 15, 2008, the New York Supreme Court issued an Order and judgment confirming the Arbitration Award. The Arbitration Award and New York judgment confirming same are now final.

48. In 2006, following the award issued in the New York arbitration, Lunar and Lussier pointed out to ARP II that the Arbitration Award required ARP II to pay and satisfy Lunar's claim in this current action and demanded payment of their claim from ARP II.

49. In 2006, by agreement reached between Lunar, Lussier, and ARP II, Lunar released the lis pendens as to the property owned by ARP II, but it did not release the lis pendens as to the property owned by ARP I. The Partial Release of Lis Pendens was filed by Lunar on May 12, 2006.

50. In or about June of 2007, Lunar, Lussier, and ARP II reached a further understanding or agreement involving the settlement of Lunar's claims in the current action. In September of 2007, ARP II submitted a settlement document to Lunar and Lussier the terms of which required them to release and discharge any claims or rights that they had involving the Ripley Light Development. The settlement document did not include any language attempting to assign or transfer any claims or rights from Lunar to ARP II. On or about September 24, 2007,

Lunar and Lussier executed the settlement document prepared by ARP II and returned it to ARP II's counsel.

51. However, upon information and belief, ARP II did not execute the settlement document which it had prepared and which Lunar and Lussier had executed at its request. Instead, even though the New York Arbitration Award required ARP II to pay and satisfy the Lunar claim at its own expense, ARP II decided to attempt to force or coerce ARP I to pay this same claim.

52. On or about December 20, 2007, at ARP II's request, Lunar, Lussier, and ARP II entered into a different written Release with ARP II, copy attached hereto as "Exhibit A." The new Release included language purporting to assign or transfer Lunar's rights and claims to ARP II.

53. Rather than satisfying and paying the Lunar claim as mandated by the Arbitration Award, ARP II instead attempted to purchase Lunar's claim against ARP I. Through the purported assignment of Lunar's claim, ARP II has pursued and now seeks to recover against ARP I on the same claim (the Lunar claim) that ARP II was required to satisfy and resolve at its own expense pursuant to the New York Arbitration Award and the judgment confirming same.

54. ARP II, as Lunar's purported assignee, further failed and/or refused to release or cancel the lis pendens filed against ARP I's property. ARP II, as purported assignee of Lunar's claims, has used and continues to use the lis pendens filed against ARP I's property and refuses to cancel or release same even though ARP II has no right to an ownership interest, security interest, or equitable mortgage in or involving the property owned by ARP I.

55. The lis pendens filed against ARP I's property is a cloud on the title, impairs ARP I's ability to sell, transfer, or mortgage the property, impairs the marketability of the property,

and diminishes the fair market value of the property. ARP II, as purported assignee of Lunar's claims, has used and continues to use the lis pendens on ARP I's property (and refuses to cancel or release same) as purported security or collateral for collection on the Lunar debt, which debt was extinguished by virtue of the settlement executed by Lunar and ARP II and/or which debt ARP II was specifically required to satisfy and pay at its own expense under the terms of the New York Arbitration Award and judgment confirming same. Additionally, ARP II, as purported assignee of Lunar's claims, has used and continues to use the lis pendens on ARP I's property as leverage in an effort to coerce or force Emerald (ARP I's sole member) and Longman (Emerald's manager) to acquiesce to claims made against them by ARP II in separate litigation pending between ARP II, Emerald, and Longman.

56. ARP II's use and continued use of the lis pendens statute and its refusal to cancel or release the lis pendens on ARP I's property is for the ulterior purpose of forcing ARP I to pay a debt (the Lunar claim) which ARP I does not owe and which is an obligation of ARP II, for the ulterior purpose of leveraging, coercing, and/or forcing Emerald and Longman to acquiesce to claims made by ARP II in separate litigation pending between those parties, and is an illegitimate use of the lis pendens statute that restricts the use of and impairs the sale of ARP I's property.

57. ARP II's use and continued use of the lis pendens statute and its refusal to cancel or release the lis pendens on ARP I's property is a willful and overt act in the use of the process not proper in the regular course of the proceedings, is without probable cause, and is a use of the lis pendens process that is illegal and improper under the law.

58. As a direct and proximate result of ARP II's improper use of the lis pendens statute and its refusal to cancel or release the lis pendens on ARP I's property, ARP I has suffered actual damages, including but not limited to the loss of use of its property; a cloud on

the title to its property; the inability to sell, transfer, or mortgage its property; the impairment of the marketability of its property; the diminishment of the fair market value of its property; attorney's fees and expenses incurred in clearing the title to the property and obtaining the cancellation or release of the lis pendens; and such other actual, consequential, incidental, and special damages as the evidence may show.

59. In doing the acts alleged above, ARP II has acted willfully, maliciously, knowingly, intentionally, and/or wantonly and with a wanton and reckless disregard of ARP I's rights and with the intent of causing ARP I to lose the use of its property and/or to harass, annoy, and injure ARP I. As a result, ARP I is entitled to an award of punitive damages against ARP II in an amount to be determined by the trier of fact.

**XXII. AS A TWENTY SECOND DEFENSE AND BY WAY OF A THIRD
COUNTERCLAIM AGAINST ASHLEY RIVER PROPERTIES TWO, LLC.
(Declaratory Judgment)**

60. ARP I repeats and realleges the allegations contained in paragraphs 1 through 59 above as if reiterated verbatim.

61. ARP I brings this action pursuant to S.C. CODE ANN. § 15-53-30.

62. Due to the facts, conditions, and circumstances as set forth in this Counterclaim, an actual and justiciable controversy has arisen and now exists between the Defendant ARP I and the substituted Plaintiff ARP II regarding the validity of the lis pendens on ARP I's real property. Specifically, an actual and justiciable controversy exists as to whether ARP II, as assignee of Lunar's claim, has a right to file and/or maintain a lis pendens upon ARP I's property. Declaratory relief is necessary to adjudicate the rights of the parties.

63. By virtue of the above, ARP I is entitled to a declaratory judgment declaring that ARP II, as assignee of Lunar's claim, does not have any right to claim title to the property owned

by ARP I; that ARP II does not have the right to file or continue the lis pendens filed against the property owned by ARP I; and further declaring that the lis pendens is improper, illegal, void, and should be immediately cancelled and released.

**XXIII. AS A TWENTY THIRD DEFENSE AND BY WAY OF
THIRD-PARTY COMPLAINT AGAINST LUNAR SYSTEMS, LTD.
AND THOMAS J. LUSSIER**

64. ARP I repeats and realleges the allegations contained in paragraphs 1 through 63 above as if reiterated verbatim.

65. ARP I owns real estate near a riverfront site on the Ashley River in Charleston, South Carolina, more particularly described herein-above.

66. Third-Party Defendant Lunar Systems, Ltd. is, upon information and belief, a corporation organized and existing under the laws of the State of Ohio, and at all times hereinafter mentioned was and is doing business in the County of Charleston, South Carolina.

67. Third-Party Defendant Thomas Lussier is, upon information and belief, an adult citizen and resident of the State of Ohio, is a member, manager, director, officer, and/or agent of Third-Party Defendant Lunar, and does business in the County of Charleston, South Carolina. At all times pertinent herein, upon information and belief, Third-Party Defendant Lussier acted individually and as the member, manager, director, officer, and agent of Third-Party Defendant Lunar in personally committing and/or participating in the acts and/or omissions alleged herein. Further upon information and belief, Third-Party Defendant Lussier knowingly participated in, aided, and/or abetted the unlawful acts and abusive use of the South Carolina lis pendens statute as described herein-below.

68. ARP II is a South Carolina limited liability company that is separate and distinct from ARP I. ARP I was previously involved along with ARP II in developing a mixed-use

residential condominium and marina along a riverfront site on the Ashley River in Charleston, South Carolina, known as the Ripley Light Yacht Club Marina & condominiums (hereinafter "Ripley Light condominium project"). ARP I's property described herein-above is located adjacent to the property owned by ARP II.

69. Venue for this matter is proper in Charleston County pursuant to S.C. Code Ann. § 15-7-10.

70. On or about June 7, 2005, Lussier caused Lunar to commence this current litigation against ARP II and ARP I. Lunar alleged that it had a contract to purchase a condominium unit in the proposed Ripley Light condominium project and that it had paid \$325,000.00 towards the purchase price for the unit. Lunar's lawsuit sought a declaratory judgment declaring that it owned an interest in the real property owned by ARP I and ARP II or, alternatively, that it had a security interest or equitable mortgage on the property securing the return of its \$325,000.00 payment.

71. On or about May 2, 2005, Lussier caused Lunar to file a Lis Pendens (2005-LP-10-61) on two pieces of real property owned separately by ARP II and ARP I, including the above-described property of ARP I. Additionally, on or about June 7, 2005, Lussier caused Lunar to file an Amended Lis Pendens on the two pieces of real property owned separately by ARP II and ARP I, including the above-described property of ARP I.

72. On or about December 20, 2007, Lunar and Lussier settled Lunar's claims made in the current action and entered into a written Assignment, Covenant Not to Sue, and Full, Final and Complete Release (hereinafter "Release") with ARP II. A true and correct copy of the Release is attached hereto as "Exhibit A" and incorporated herein by reference.

73. Under the terms of the Release, in exchange for the cash payment of \$325,000.00 plus interest ("Payment") and a promissory note from ARP II in the amount of \$175,000.00 ("Note"), Lunar relinquished any claims or rights it may have had involving the Ripley Light condominium project, including but not limited to any rights to an ownership interest, security interest, or equitable mortgage in or involving any condominium unit or real property located in the project, including the parcel of property owned by ARP I described herein-above. Under the terms of the Payment, Note, and Release, Lunar purportedly assigned to ARP II any remaining claims it may have involving the Ripley Light condominium project.

74. The above-referenced Payment, Note, and Release represented the full satisfaction of Lunar's claims made against ARP I in the above-referenced lawsuit involving the Ripley Light condominium project. As a result of the Payment, Note, and Release, Lunar no longer had any claims or causes of action to pursue against ARP I involving the Ripley Light condominium project.

75. Third-Party Plaintiff ARP I is not indebted to Third-Party Defendants Lunar or Lussier.

76. None of the terms in the Payment, Note, or Release grant or reserve to Lunar a lien, mortgage, security interest, or other ownership interest in any condominium unit or real property located in the Ripley Light condominium project, including the parcel of property owned by ARP I described herein-above. The payments due under the Release and Note are not secured by any lien, mortgage, security interest, or other ownership interest in any condominium unit or real property located in the Ripley Light condominium project, including the parcel of property owned by ARP I described herein-above.

77. On or about May 12, 2006, Lussier caused Lunar to file a Partial Release of Lis Pendens in which it partially extinguished and released its Amended Lis Pendens that was previously filed on June 7, 2005. Under the terms of the Partial Release of Lis Pendens, although Lunar released its lis pendens on the real property owned by ARP II, it failed and/or refused to release its lis pendens on the separate property owned by ARP I described herein-above.

78. After the above-referenced settlement agreement was entered into by and between Lunar, Lussier, and ARP II on or about December 20, 2007, ARP I discovered that Lunar had not satisfied or released the lis pendens that it had previously filed against the parcel of property owned by ARP I as described herein-above. Accordingly, on March 20, 2009, counsel for ARP I made a written demand upon counsel for Lunar and Lussier that his clients immediately release and cancel the lis pendens currently clouding the title to ARP I's real property.

79. Despite the demand for release and cancellation of the lis pendens, Lunar and Lussier have thus far failed and/or refused to cancel or release the above-referenced lis pendens currently clouding the title to ARP I's real property as described herein-above. The lis pendens is still in full force and effect and has not been cancelled in the office of the Clerk of Court, Charleston County, South Carolina, and still clouds the title to ARP I's property.

80. Legal counsel for Lunar and Lussier has advised ARP I's legal counsel that his clients refuse to release the lis pendens on the property owned by ARP I because ARP II has not made all of the payments due under the above-referenced Release and/or Note executed by ARP II. ARP I was not a party to that agreement and is not responsible for said payments.

81. The payments due under the Release and/or Note executed by ARP II and Lunar are not secured by any lien, mortgage, security interest, or other ownership interest in any

condominium unit or real property located in the Ripley Light condominium project, including the parcel of property owned by ARP I described herein-above.

82. Any rights Lunar or Lussier may have involving ARP II's failure to make payments due under the terms of the Release and/or Note would involve an action against ARP II for breach of contract to collect the sums due under the terms of the Note, but would not involve any right of ownership to any condominium unit or real property located in the Ripley Light condominium project, including the parcel of property owned by ARP I described herein-above.

83. The Third-Party Defendants Lunar and Lussier do not have any ownership interest or right to any ownership interest in the property owned by ARP I, including the parcel of property described herein-above.

84. The Third-Party Defendants do not have any claims affecting the title to the real property owned by ARP I, including the parcel of property described herein-above.

85. Notwithstanding the fact that there was, and is, no basis in fact or in law for the Third-Party Defendants' lis pendens against ARP I's property, the Third-Party Defendants have continuously asserted and maintained the lis pendens since the date of its recording and currently.

86. Lunar's and Lussier's use of the lis pendens as security for ARP II's obligation under the Release and/or Note is an illegal and improper use of the lis pendens statute and should be cancelled and released under South Carolina law.

A. FOR A FIRST CAUSE OF ACTION
(Abuse of Process)

87. Third-Party Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 86 above as if reiterated verbatim.

88. Third-Party Defendants have used and continue to use the lis pendens statute and have refused to release the lis pendens on the property owned by ARP I because of ARP II's failure to make payments due under the Release and/or Note. Third-Party Defendants have used and continue to use the lis pendens on ARP I's property as purported security or collateral for the collection of the debt owed by ARP II and/or as leverage to collect on the debt owed by ARP II.

89. Third-Party Defendants' use and continued use of the lis pendens statute and their refusal to release the lis pendens on the property owned by ARP I was committed for the ulterior purpose of collecting on the debt owed by ARP II to the Third-Party Defendants, which ARP I does not owe and is not obligated to pay, and is an illegitimate use of the lis pendens statute that restricts the use and prevents the sale of ARP I's property.

90. Third-Party Defendants' use and continued use of the lis pendens statute and their refusal to release the lis pendens on the property owned by ARP I is a willful and overt act in the use of the process not proper in the regular course of the proceedings, is without probable cause, and is a use of the lis pendens process that is illegal and improper under the law.

91. As a direct and proximate result of Lunar's use and refusal to release the lis pendens on the property owned by ARP I, Third-Party Plaintiff ARP I has suffered actual damages, including but not limited to the loss of use of its property; a cloud on the title to its property; the inability to sell, transfer, or mortgage its property; the impairment of the marketability of its property; the diminishment of the fair market value of its property; attorney's fees and expenses incurred in clearing the title to the property and obtaining the cancellation or release of the lis pendens; and such other actual, consequential, incidental, and special damages as the evidence may show.

92. In doing the acts alleged above, Third-Party Defendants Lunar and Lussier acted willfully, maliciously, knowingly, intentionally, and/or wantonly and with a wanton and reckless disregard of the Third-Party Plaintiff's rights and with the intent of causing the Third-Party Plaintiff to lose the use of its property and/or to harass, annoy, and injure the Third-Party Plaintiff. As a result, Third-Party Plaintiff ARP I is entitled to an award of punitive damages against Defendants Lunar and Lussier in an amount to be determined by the trier of fact.

B. FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment)

93. Third-Party Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 92 above as if reiterated verbatim.

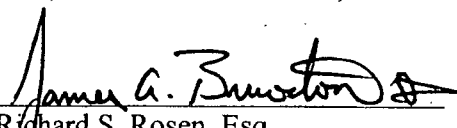
94. Third-Party Plaintiff brings this action pursuant to S.C. CODE ANN. § 15-53-30.

95. Due to the facts, conditions, and circumstances as set forth in this Complaint, an actual and justiciable controversy has arisen and now exists between the Third-Party Plaintiff and the Third-Party Defendants regarding the validity of the lis pendens filed by the Third-Party Defendants on ARP I's real property. Specifically, an actual and justiciable controversy exists as to whether Third-Party Defendant Lunar has a right to file a lis pendens upon ARP I's property, including the parcel of property described herein-above. Declaratory relief is necessary to adjudicate the rights of the parties.

96. By virtue of the above, Third-Party Plaintiff ARP I is entitled to a declaratory judgment declaring that Third-Party Defendant Lunar does not have any right to claim title to the property owned by ARP I, including the parcel of property described herein-above; that Third-Party Defendant Lunar does not have the right to file or continue its lis pendens against the property owned by ARP I; and further declaring that Third-Party Defendant Lunar's lis pendens is improper, illegal, void, and should be immediately cancelled and released.

WHEREFORE, ARP I having fully answered the Plaintiff's Amended Complaint, prays that the Amended Complaint be dismissed and ARP I be granted a judgment on its counterclaims and third-party claims set forth herein, and that the Court award such further equitable and legal relief as the Court deems just and proper.

ROSEN, ROSEN & HAGOOD, LLC.

By: 

Richard S. Rosen, Esq.

Daniel F. Blanchard, III, Esq.

James A. Bruorton IV, Esq.

134 Meeting Street, Suite 200

P.O. Box 893

Charleston, SC 29402

(843) 577-6726

ATTORNEY(S) FOR ASHLEY RIVER
PROPERTIES ONE, LLC.

Charleston, South Carolina
June 14, 2010.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2005-CP-10-2434

LUNAR SYSTEMS, LTD.,)
Plaintiff,)

vs.)

CERTIFICATE OF SERVICE

ASHLEY RIVER PROPERTIES ONE,)
LLC and ASHLEY RIVER PROPERTIES)
TWO, LLC, successors in the interest of)
RIPLEY LIGHT YACHT CLUB, LLC,)
RIPLEY LIGHT DEVELOPMENT, LLC)
and Robert C. CUNNINGHAM,)
Defendants.)

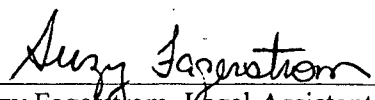
FILED
2010 JUN 14 PM 3:23
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

I hereby certify that on this date a copy of the Third-Party Summons and Answer to Amended Complaint, Counterclaims and Third-Party Complaint of Ashley River Properties One, LLC were served on counsel of record by mailing and emailing addressed as follows:

William C. Cleveland, Esquire
Buist, Moore, Smythe & McGee, P.A.
P. O. Box 999
Charleston, SC 29402

Frank Cisa, Esquire
Cisa & Dodds
858 Lowcountry Boulevard, Suite 101
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ROSEN ROSEN & HAGOOD, LLC



Suzy Fagerstrom, Legal Assistant

June 14, 2010

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June 14, 2010

James A. Bruorton, IV
cbruorton@rrhlawfirm.com

VIA HAND-DELIVERY:

The Honorable Julie J. Armstrong
Clerk of Court
County of Charleston
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Ashley River Properties II v. Ashley River Properties One, LLC, et al.
2005-CP-10-2434

Dear Julie:

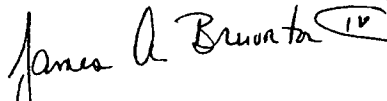
Please find enclosed for filing the original and two copies of the following in connection with the above-referenced matter:

1. Third-Party Summons; and
2. Answer to Amended Complaint, Counterclaims and Third-Party Complaint.

It would be greatly appreciated if you would please file these originals and return the clocked-in copies to me via our courier.

With kind regards, I am

Sincerely,



James A. Bruorton, IV

CAB/sef
Enclosures

cc: Frank M Cisa, Esquire (w/ encl.) (via U.S. mail)
William C. Cleveland, III, Esq. (w/ encl.) (via U.S. mail)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
Ashley Rivers Properties II, LLC, as
assignee of Lunar Systems, LTD and
Ashley River Properties II, LLC, in its
own right,

Plaintiffs,

vs.

Ashley River Properties One, LLC
successor in the interest to Ripley
Light Yacht Club, LLC and Ripley Light
Development, LLC,

Defendants.

Ashley River Properties One, LLC

Third-Party Plaintiff,

vs.

Lunar Systems, LTD and Thomas J.
Lussier,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

PLAINTIFF'S TRIAL BRIEF

Defendant and Third-Party Plaintiff, Ashley River Properties One, LLC ("ARP-I"),
by and through its undersigned counsel, submits this Trial Brief.

The core issue in this case is whether Ashley River Properties Two, LLC ("ARP-II") can compel ARP-I to pay the Lunar Systems, LTD ("Lunar") claim. As mandated by prior arbitration, ARP-II was required to settle Lunar's claim and it has done so. The same arbitration granted ARP-II a \$400,000.00 indemnification award against ARP-I's principal, Emerald Investments, LLC ("Emerald") for Lunar's claim and other

preconstruction investor claims. This indemnification award was subsequently confirmed in New York on February 15, 2008, and a New York judgment reflecting this amount enrolled in Charleston County on April 29, 2008.

Emerald and ARP-I vigorously disputed the preconstruction claims at arbitration, but they do not dispute that the arbitrators made their decision and the judgment has been enrolled. However, ARP-I does reject the notion that ARP-II is permitted to double recovery, which would occur if ARP-I is compelled to pay ARP-II for Lunar's claim in the present action.

Moreover, ARP-I is entitled to damages from ARP-II and Lunar given their highly suspect conduct in seeking to obtain double recovery from ARP-I and for maintaining a *lis pendens* on ARP-I's property.

STATEMENT OF THE FACTS

The Statement of Facts contained in Plaintiff's Trial Brief submitted in Case No. 2009-CP-10-553, i.e. Emerald's dissolution action against ARP-II and Kriti Ripley, LLC ("Kriti"), apply to this case. However, some additional facts are particularly noteworthy and are presented below.

On June 7, 2005, Lunar filed the lawsuit presently before this Court against ARP-I, ARP-II, Ripley Light Development, LLC ("RLD") and Ripley Light Yacht Club, LLC ("RLYC") alleging breach of a preconstruction real estate purchase contract. The lawsuit also sought a declaratory judgment declaring that Lunar owned an interest in the real property owned by ARP-I and ARP-II or, alternatively, that it had a security interest or equitable mortgage on the property securing the return of its \$325,000.00. Lunar also

filed a *lis pendens* on both the ARP-I Property and the ARP-II Property on May 2, 2005 and an amended *lis pendens* on June 7, 2005.

After the First New York Arbitration ruled on October 31, 2005 that ARP-II was responsible for settling all preconstruction investor claims including Lunar's at its own expense, Lunar and ARP-II began negotiating a settlement. At Davidson William's (Kriti's manager's) urging, on May 15, 2006, Lunar filed a partial release of *lis pendens* for ARP-II's property, but not ARP-I's property. On September 24, 2007 Lunar executed a settlement document with ARP-II entitled "Final Settlement Agreement and Full, Final and Complete Release." (See September 24, 2007 Settlement Agreement). This document would have "resolve[d] and "release[d] any and all claims set forth in the Complaint" and dismissed the present action "with prejudice." (Id.) Lunar transmitted the agreement to ARP-II on September 25, 2007.

However, on or about December 20, 2007, Williams had a change of heart, and asked Lunar to scrap the original agreement and execute a new one so that ARP-II could obtain a purported assignment of Lunar's claim to pursue ARP-I. On December 20, 2007 a revised settlement document entitled "Assignment, Covenant Not to Sue, and Full, Final and Complete Release" was executed ("Lunar Settlement"). Under the Lunar Settlement, Lunar is still to be paid \$325,000.00 cash and receive a promissory note from ARP-II for \$175,000.00 to settle Lunar's claims against ARP-II. However, Lunar now purportedly assigned its claims against ARP-I to ARP-II.

Before the Lunar Settlement was executed, Thomas Lussier ("Lussier"), Lunar's agent, informed Davidson Williams ("Williams"), Kriti's manager via e-mail on November

5, 2007 that he wanted to go with the original September 24, 2007 agreement and drop the assignment issue. Williams responded as follows by e-mail on December 20, 2007:

As you know, **we do not believe we are responsible for the payment of your claim. We believe Longman is.** By paying off this claim, I am taking the risk that I can recover this payment from Longman, or otherwise resolve the matter in the course of my continuing disputes with him over his conduct in this sorry affair. The arbitration awards still have not been confirmed by the NY Court. If they are overturned, this whole thing becomes a mess again, and you are stuck in the middle of it if we have not settled. **I can't take this risk without [] gaining some backstop protection and additional leverage with Longman in the form of an assignment. This is why I am asking for the assignment of claim.**

As indicated above, Lunar ultimately relented, and executed the modified settlement agreement.

On April 2, 2008 ARP-II, as assignee of Lunar, filed an affidavit of default and request for entry of default in the pending Lunar Litigation against ARP-I. ARP-II claimed to have served the default papers on Frank Guarino ("Guarino"), as registered agent for ARP-I; however, Longman never received anything from Guarino. (See August 12, 2008 Affidavit of Stuart Longman).

On May 23, 2008, ARP-II obtained a \$526,945.17 default judgment against ARP-I. On July 21, 2008, Longman first learned of the settlement agreement with Lunar during the deposition of Davidson Williams, Kriti's manager, ("Williams") in another case between the parties. Longman subsequently discovered the default judgment against ARP-I, and soon thereafter moved to vacate/set aside. By Order on December 18, 2008, the Honorable Judge Hughson set aside the default judgment, finding "excusable neglect" and "other good cause." ARP-I subsequently filed its Answer on January 14,

2009 and a motion to cancel or release the *lis pendens* against its property on July 29, 2009.

On May 19, 2010, the Honorable Judge Hughson granted ARP-I's motion to cancel Lunar's *lis pendens*, granted ARP-I's motion to substitute ARP-II as the proper plaintiff, granted ARP-I leave to amend its answer to add defenses and assert counterclaims against ARP-II and third-party claims against Lunar, and granted ARP-II's motion to amend to add an independent claim against ARP-I arising out of the ARP-II Indemnity Agreement. ARP-II and Lunar subsequently filed a document on June 11, 2010, which released the *lis pendens* on ARP-I's property.

ARP-II's claims against ARP-I as purported assignee of Lunar and "independently" under the Indemnity Agreement, which was executed upon the formation of ARP-II in December 2003, are now before this Court. So too are ARP-I's affirmative defenses and counterclaims against ARP-II, including indemnification for costs expended by ARP-I in having to defend ARP-II's obligation to Lunar, abuse of process regarding ARP-II's manipulation of ARP-I's property with the *lis pendens*, and a declaratory judgment that ARP-II has no rights to pursue ARP-I as Lunar's purported assignee. Finally, ARP-I's abuse of process claim against Third-Party Defendant Lunar and Thomas J. Lussier, involving the improper filing and maintenance of the *lis pendens* on ARP-I's property, are also before this Court.

POINTS AND ANALYSIS OF LAW

- I. ARP-II HAS NO CLAIM AGAINST ARP-I CONCERNING BOTH THE PURPORTED ASSIGNMENT OF LUNAR'S CLAIM AND ARP-II'S INDEMNIFICATION CLAIM.**

a. ARP-II's purported assignment of Lunar's claim is worthless because Lunar's claim was satisfied and discharged by ARP-II.

The purported assignment does not permit ARP-II to pursue ARP-I in this action because ARP-II, as assignee, merely stands in Lunar's shoes and receives the same rights that Lunar had at the time of the assignment. Singletary v. Aetna Cas. & Sur. Co., 316 SC 199, 447 S.E.2d 869 (Ct. App. 1994) ("assignee ... stands in the shoes of its assignor" and "an assignee of a chose in action can claim no higher rights than his assignor had at the time of the assignment"). Because the Lunar Settlement settled Lunar's claim against ARP-II and Lunar received full satisfaction on its claim from ARP-II, the party obligated to discharge Lunar's Claim under the First New York Arbitration, it had nothing left to assign to ARP II. ARP II merely received an assignment of a satisfied claim.

The First New York Arbitration required ARP-II – not ARP-I or Emerald or Longman – to resolve all disputed third-party claims at its own expense, including Lunar's. (1st Arbitration Award, p. 3, ¶ F). ARP-II satisfied this obligation by executing the Lunar Settlement, which returning all of the disputed funds originally at issue in the present action. This constitutes an accord and satisfaction of Lunar's claim. South Carolina Farm Bureau Mut. Ins. Co. v. Kelly, 345 S.C. 232, 239, 547 S.E.2d 871, 875 (Ct.App.2001) (noting that [a]n accord and satisfaction occurs when there is (1) an agreement to accept in discharge of an obligation something different from that which the creditor is claiming or is entitled to receive; and (2) payment of the consideration expressed in the new agreement).

Both elements are satisfied here, therefore, ARP-I is entitled to a declaration that ARP-II possesses no claim against ARP-I in virtue of the Lunar Settlement.

b. The First New York Arbitration Award bars ARP-II's claims under the doctrines of *res judicata* and collateral estoppel.

Allowing ARP-II to pursue Lunar's purportedly assigned claim against ARP-I would directly contradict the First New York Arbitration Award and permit the re-litigation of previously decided issues and claims. See, Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2003) (*res judicata* applies to prior arbitration awards, including claims that could have been submitted but were not).

ARP-II and Kriti had the opportunity to and actually did fully litigate the issues of third-party claims, including Lunar's, in addition to ARP-I/Emerald's obligations under the Indemnity Agreement in the First New York Arbitration. As previously discussed, the First New York Arbitration fully addressed and resolved the preconstruction investor claims and indemnification issues, and ARP-II's petition for modifying the indemnification award was denied. The New York courts subsequently confirmed the First New York Arbitration Award, and the judgment was later enrolled in Charleston County.

ARP-II is now estopped from re-litigating these issues even though ARP-I was not a named party in the First New York Arbitration. See Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2003) (*res judicata* applies to prior arbitration awards, including claims that could have been submitted but were not); Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984) (holding that verdict in prior lawsuit was binding on defendant even though plaintiff was not party to the prior action,

the Court followed the doctrine of "nonmutual collateral estoppel" which can be asserted defensively and offensively; all that is required is that the party adversely affected had a full and fair opportunity to litigate the issue in the prior proceeding and the issue was decided in the prior proceeding). ARP-II fully litigated the third-party claims and indemnification against Emerald (ARP-I's sole member), but at the end of the day, the First New York Arbitration found that ARP-II, and ARP-II alone, was responsible for resolving all preconstruction investor claims, including Lunar's. However, the Award also required Emerald (ARP-I's member/manager) to indemnify ARP-II for \$400,000.00, representing a fraction of ARP-II's total third-party repayment obligations. Therefore, ARP-II should not be permitted to relitigate these claims in the present action.

Alternatively, putting aside the issue of "non-mutual collateral estoppel," ARP-II's claims and arguments in the First New York Arbitration did address conduct by ARP-I, not just Emerald and Longman individually, and the Award reflects this fact. (1st New York Arbitration p.3, ¶F) (holding the indemnification award was based on conduct by "Emerald or Longman or **another entity controlled by Longman**") (emphasis added). This other entity was ARP-I and/or its predecessors, evidencing the fact that the First New York Arbitration considered ARP-I's involvement in making its decision concerning preconstruction investors and indemnification. Moreover, the First New York Arbitration made various other findings with respect to ARP-I's rights and obligations. (See 1st New York Arbitration p. 3, ¶E) ("allowing Kriti to enforce its right of first refusal with respect to ARP-I's property). These two examples demonstrate that the rights and obligations of ARP-I have been fully litigated and decided.

Allowing ARP-II to proceed against ARP-I in the present action would sanction the re-litigation of the third-party claims and the indemnification question, both of which were settled by the First New York Arbitration. The doctrines of *res judicata* and collateral estoppel bar such an outcome.

c. To the extent ARP-II's claim on behalf of Lunar is equitable, ARP-II should not be permitted to recover under the doctrine of unclean hands.

Kriti and ARP-II have acted deceptively with the intent to harm ARP-I and its owners Emerald and Longman. Such conduct includes ignoring the First New York Arbitration Award's holding that ARP-II satisfy Lunar's claim at its own expense and utilizing underhanded methods to obtain a default judgment against ARP-I.

Therefore, to the extent ARP-II's claims can be cognizable as equitable in nature, through equitable subrogation or some other theory, they should be barred by the doctrine of unclean hands. Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945) ("He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief."); Wilson v. Landstrom, 281 S.C. 260, 315 S.E.2d 130 (Ct. App.1984) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.").

Moreover, allowing ARP-II to maintain an action against ARP-I on the basis of Lunar's purported assignment would produce absurd results because it would provide a

windfall for ARP-II. Williams, in his December 20, 2007 e-mail to Lussier acknowledged that the only reason for the assignment was to hedge the risk of the First New York Arbitration Award not being confirmed. However, the award was confirmed by the New York courts, and subsequently enrolled in Charleston County. Therefore, ARP-II has already obtained its judgment for what it is owed as a result of Lunar's claim.

If ARP-II were allowed to recover from ARP-I on the basis of Lunar's purported assigned claim, this would allow ARP-II to pocket the \$400,000.00 and pursue additional indemnification from ARP-I with respect to the same claims underlying its indemnification award. This amounts to double dipping, and if allowed to proceed, would provide double recovery and a windfall to ARP-II in direct conflict with the First New York Arbitration Award and principals of equity.

d. ARP-II's claim is barred by the statute of limitations.

As previously discussed, the First New York Arbitration Award established that ARP-II was responsible for resolving all third-party claims. Assuming *arguendo* that ARP-I's obligations with respect to the Indemnity Agreement were not resolved with finality in the First New York Arbitration, ARP-II was certainly in the position to pursue a claim against ARP-I for violation of the Indemnity Agreement beginning on October 30, 2005, the date of the Award. In fact, Williams had been aware of the preconstruction investor claims as early as 2004.

Therefore, the three-year statute of limitations for actions arising under contract began to run on October 30, 2005 at the latest. See S.C. Code Ann. § 15-3-530(1). However, ARP-II did not file its motion to amend in the present action to include its

claim under the Indemnity Agreement against ARP-I until January 2010, almost four and a half years later. Moreover, even assuming that the entry of default somehow tolled the statute of limitations in the present action, ARP-II could have filed a separate action against ARP-I as early as October 30, 2005, but ARP-II never filed such an action. ARP-II simply waited too long to bring its claim against ARP-I under the Indemnity Agreement. Therefore, it is barred by the statute of limitations.

e. ARP-II has no claim against ARP-I for equitable subrogation.

As opposed to contractual indemnification, "equitable subrogation is based on principles of natural justice; *its purpose is to require the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it*; and it is to be applied according to the dictates of equity and good conscience in the light of the actions and relationship of the parties." Calvert Fire Ins. Co. v. James, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960) (emphasis in original). The elements of equitable subrogation are "(1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; and (4) no injustice will be done to the other party by the allowance of the equity." United Carolina Bank v. Caroprop, Ltd., 316 S.C. 1, 446 S.E.2d 415 (1994).

ARP-II's claim for equitable subrogation fails because it was primarily, not secondarily, liable for the debt. See Kuznik v. Bees Ferry Associates, 342 S.C. 579, 609, 538 S.E.2d 15 (Ct. App. 2000). ARP-II alone was responsible for resolving preconstruction investor claims, including Lunar's. Therefore, equity will not permit ARP-II's attempt to shift responsibility onto ARP-I.

II. ARP-I IS ENTITLED TO INDEMNIFICATION FROM ARP-II.

ARP-I incurred substantial attorney's fees and suffered other damages by having to defend this action after the First New York Arbitration. The obligation to pay Lunar's claim was deemed to be ARP-II's alone on October 31, 2005 (the date of the First New York Arbitration's decision). Nevertheless, ARP-II attempted to circumvent this decision by attempting to obtain Lunar's claim after settling it and going after ARP-I.

Under both the Indemnity Agreement and equitable subrogation principles, ARP-II should indemnify ARP-I for having to expend considerable time and attorney's fees in defending such a meritless and bad-faith attempt by ARP-II to obtain double recovery against ARP-I and additional leverage in the various ongoing struggles between the members of ARP-II (Kriti and Emerald). Calvert Fire Ins. Co. v. James, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960) (emphasis in original).

ARP-I's damages should include all those incurred since October 31, 2005, the date of the First New York Arbitration decision. In the alternative, ARP-I should be awarded all attorney's fees and damages suffered since February 15, 2008, the date the First New York Arbitration was confirmed.

III. ARP-I IS ENTITLED TO DAMAGES ON ITS ABUSE OF PROCESS CLAIMS AGAINST ARP-II, LUNAR AND LUSSIER

Lunar and Lussier, at ARP-II's request, repeatedly manipulated the *lis pendens* statute to ARP-I's detriment. After the First New York Arbitration decided on October 31, 2005 that Lunar's claim was ARP-II's sole obligation, Lunar should have released its *lis pendens* against ARP-I's property. At the absolute latest, Lunar should have released the *lis pendens* on February 15, 2008, the date the First New York Arbitration was

confirmed. In any event, the *lis pendens* remained on ARP-I's property until June 11, 2010 as a result of Lunar's and ARP's actions.

"The essential elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding." Hainer v. Am. Med. Intern., Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997) (citing Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967)). The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. Food Lion, Inc. v. United Food Commercial Workers Int'l Union, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." Hainer v. Am. Med. Int'l, Inc., 328 S.C. at 136, 492 S.E.2d 103 at 107. "Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required." Id.

The filing of a *lis pendens* is absolutely privileged in a slander of title action, but no such privilege exists with respect to abuse of process. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 31, 567 S.E.2d 881, 897 (Ct. App. 2002) ("The jurisdictions are in agreement that the proper action against a maliciously filed *lis pendens* is under abuse of process or malicious prosecution."). Additionally, "[t]he *lis pendens* mechanism is not designed to aid either side in a dispute between private parties. Rather, *lis pendens* is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, i.e., the fact of a suit involving property." Id. at 17, 567 S.E.2d at 889.

Both Williams and Lunar/Lussier knew that the *lis pendens* on ARP-I's property was improper from the outset, yet they refused to release it even after the First New York Arbitration declared Lunar's claim was to be satisfied at ARP-II's sole expense. On May 25, 2007, which was weeks after Lunar released the *lis pendens* against ARP-II's property, Lussier wrote to Williams acknowledging that the First New York Arbitration "seems to name ARP-II as responsible." Nevertheless, it is clear from the ensuing communications that Lunar maintained the *lis pendens* on ARP-I's property at Williams' request in order to support various collateral actions Williams had pending with Longman, ARP-I's principal. Williams and Lunar used the *lis pendens* as a means to gain additional leverage over ARP-I and Emerald. (See December 20, 2007 e-mail from Williams to Lussier). In earlier an August 17, 2007 e-mail from Lussier to Williams the former acknowledged its "cooperation with the *lis pendens*." This is precisely the sort of ulterior, collateral motive the tort of abuse of process is designed to address.

Amazingly, by mid-2009, long after the First New York Arbitration had been confirmed and the New York judgment enrolled in South Carolina, Lussier again refused to release the *lis pendens* against ARP-I. (See May 11, 2009 Letter from Frank Cisa to James A. Bruorton, IV). The reason it gave this time was that ARP-II had not fulfilled its obligations under the Lunar Settlement. (See, *id.*). Of course, this was not a permissible justification to maintain the *lis pendens* on ARP-I's property – an entity deemed to be not responsible four years earlier. Ultimately it took a May 19, 2010 court order to force Lunar to release its *lis pendens*, which it eventually did on June 11, 2010.

ARP-II and Lunar and Lussier used the *lis pendens* statute against ARP-I not as a genuine means to safeguard a legitimate interest. Rather, the *lis pendens* was used

as an insurance policy or a means of additional leverage against ARP-I and its member, Emerald, as it relates to other struggles between the members of ARP-II. (See December 20, 2007 E-mail from Williams to Lussier).

These purposes and ARP-II and Lunar/Lussier's acts were improper; therefore, ARP-I is entitled to damages including attorney's fees expended in defense of the improper *lis pendens* and damages caused by tying up ARP-I's property from October 31, 2005 to June 11, 2010.

In addition, ARP-I is entitled to damages against ARP-II, Lunar, and Lussier, jointly and severally, for those losses suffered as a result of the *lis pendens* being kept on its property long after Lunar's claim was determined to be against ARP-II – not ARP-I. The *lis pendens* prevented ARP-I from refinancing or selling the property between October 31, 2005 (when the First New York Arbitration found Lunar's claim was ARP-II's obligation) or at the latest February 15, 2008 (when the First New York Arbitration was confirmed) and June 11, 2010 when the *lis pendens* was released.

ARP-I is also entitled to a judgment against ARP-II, Lunar, and Lussier, jointly and severally, as a result of the lost opportunity costs associated with the ARP-I property. All of their actions caused ARP-I to lose the property and not be able to recoup any of its investment. As of October 24, 2007, the ARP-I property was appraised for \$5,425,000.00 by Fred Beck and Associates, the same firm that appraised ARP-II's property several times over the years. ARP-I spent considerable sums of money in its efforts to develop the property, which was completely ruined by the *lis pendens* remaining on the property for no good reason. Moreover, the mortgage interest and tax

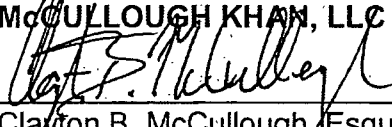
payments made by ARP-I while the *lis pendens* was on the property ought to be recoverable.

CONCLUSION

For the above reasons, ARP-I respectfully requests that this Court issue a declaratory judgment that ARP-II has no claim against ARP-I in virtue of the Lunar Settlement.

In addition, ARP-I respectfully requests that this Court award ARP-I indemnification against ARP-II for having to expend considerable attorney's fees in defending Lunar's claim against ARP-II. Finally, ARP-I respectfully requests attorney's fees and other damages against ARP-II, Lunar, and Lussier, jointly and severally, for manipulating the *lis pendens* statute to ARP-I's detriment.

McCULLOUGH KHAN, LLC


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1.17, 2013
Charleston, SC

Counsel for Defendants and Third-Party
Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

Ashley Rivers Properties II, LLC, as
assignee of Lunar Systems, LTD and
Ashley River Properties II, LLC, in its
own right,

Plaintiffs,

vs.

Ashley River Properties One, LLC
successor in the interest to Ripley
Light Yacht Club, LLC and Ripley Light
Development, LLC,

Defendants.

CERTIFICATE OF SERVICE

Ashley River Properties One, LLC

Third-Party Plaintiff,

vs.

Lunar Systems, LTD and Thomas J.
Lussier,

Third-Party Defendants.

I hereby certify that a true and correct copy of **Plaintiff's Trial Brief** has been
served upon the following by emailing a copy properly addressed and with sufficient
postage affixed thereto on this 17th day of January, 2013.

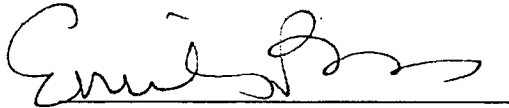
William C. Cleveland, Esquire
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Counsel for Defendant Ashley
River Properties II, LLC

[SIGNATURE ON NEXT PAGE]

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**Counsel for Third-Party Defendants
Lunar Systems, LTD and Thomas
J. Lusssier**


Emily Binns, Paralegal

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Ashley Rivers Properties II, LLC, as)
assignee of Lunar Systems, LTD and)
Ashley River Properties II, LLC, in its)
own right,)

Plaintiffs,)

vs.)

Ashley River Properties One, LLC)
successor in the interest to Ripley)
Light Yacht Club, LLC and Ripley Light)
Development, LLC,)

Defendants.)

Ashley River Properties One, LLC)

Third-Party Plaintiff,)

vs.)

Lunar Systems, LTD and Thomas J.)
Lussier,)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

FILED
JULIE J. ARMSTRONG
CLERK OF COURT
MAY -9 PM 2:27

**NOTICE & MOTION TO ALTER OR
AMEND JUDGMENT UNDER
RULE 59(e), SCRCP**

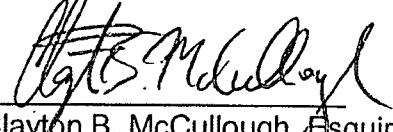
PLEASE TAKE NOTICE that Defendant and Third-Party Plaintiff, Ashley River Properties One, LLC ("ARP-I"), pursuant to Rule 59(e), SCRCP, will move before the Honorable Deadra L. Jefferson in the Court of Common Pleas at the Charleston County Courthouse, Charleston, South Carolina on the 10th day after or at such time as counsel may be heard, for an order amending and altering the Court's Order entered April 26, 2013 in this matter by Judge Jefferson. ARP-I received written notice of the aforementioned Order on April 29, 2013.

The grounds for this motion are that (a) the Order erred by finding that ARP-I did not satisfy the elements of abuse of process, and (b) that ARP-I failed to prove damages with specificity regarding the abuse of process claim.

This motion is being supported by a memorandum being filed contemporaneously with this notice & motion.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

McCULLOUGH KHAN, LLC


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Counsel for Ashley River Properties One, LLC

5.9, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Ashley Rivers Properties II, LLC, as
assignee of Lunar Systems, LTD and
Ashley River Properties II, LLC, in its
own right,)

Plaintiffs,)

vs.)

Ashley River Properties One, LLC
successor in the interest to Ripley
Light Yacht Club, LLC and Ripley Light
Development, LLC,)

Defendants.)

Ashley River Properties One, LLC)

Third-Party Plaintiff,)

vs.)

Lunar Systems, LTD and Thomas J.
Lussier,)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

CERTIFICATE OF SERVICE

2013 MAY -9 PM 2:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

I hereby certify that a true and correct copy of the **Notice & Motion to Alter or Amend Judgment Under Rule 59(e), SCRPC** has been served upon the following by mailing a copy properly addressed and with sufficient postage affixed thereto on this 9TH day of May, 2013.

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Counsel for Lunar Systems, LLC
and Thomas J. Lussier

Charleston, South Carolina


Elizabeth Plasters, Paralegal

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Ashley Rivers Properties II, LLC, as
assignee of Lunar Systems, LTD and
Ashley River Properties II, LLC, in its
own right,)

Plaintiffs,)

vs.)

Ashley River Properties One, LLC)
successor in the interest to Ripley
Light Yacht Club, LLC and Ripley Light
Development, LLC,)

Defendants.)

Ashley River Properties One, LLC)

Third-Party Plaintiff,)

vs.)

Lunar Systems, LTD and Thomas J.
Lussier,)

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

**MEMORANDUM IN SUPPORT OF
DEFENDANT AND THIRD PARTY
PLAINTIFF'S MOTION TO ALTER OR
AMEND JUDGMENT UNDER
RULE 59(e), SCRCP**

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2013 MAY -9 PM 2:27

FILED

Defendant and Third-Party Plaintiff Ashley River Properties One, LLC ("ARP-I") files this Memorandum in Support of its Motion to Alter or Amend Judgment Under Rule 59(e) (the "Memorandum") concerning the Order in the above-captioned case, which was entered on April 26, 2013 by the Honorable Deadra L. Jefferson. Emerald received written notice of the aforementioned Order on April 29, 2013. The Order denied both of Plaintiff Ashley River Properties Two, LLC's ("ARP-II") claims against ARP-I, namely (a) the claim ARP-II purportedly purchased from Lunar Systems, Ltd.'s ("Lunar") against ARP-I and (b) ARP-II's claim against ARP-I under the Indemnity Agreement. The Order

also denied ARP-I's claim against ARP-II and Lunar and its principal, Thomas J. Lussier ("Lussier"), for abuse of process.

The Order properly dismissed both of ARP-II's claims; however, ARP-I respectfully maintains that the denial of ARP-I's abuse of process claim constitutes an error of law. For the reasons set forth and discussed below, ARP-I respectfully requests that this Honorable Court alter or amend its Order and find that ARP-I is entitled to recover against ARP-II, Lunar, and Lussier for abuse of process.

ARGUMENT

I. The Order erred by finding that ARP-I did not satisfy the elements of abuse of process.

The Order properly states that law on abuse of process, (Order, p. 10-11, ¶12), but the Order did not appropriately apply that law to the facts of this case.

Abuse of process requires a showing of (a) "an ulterior purpose" and (b) "a willful act in the use of the process not proper in the regular course of the proceeding." Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999). Moreover, a "[d]efendant who has done nothing more than carry out process to its authorized conclusion, even though with bad intentions, cannot be liable for abuse of process." Hainer v. Am. Med. Int'l, 328 S.C. 128, 492 S.E.2d 103 (1997) (emphasis added).

Lunar filed the *lis pendens* against ARP-I's property on June 7, 2005. (Order, p. 10, ¶10). On October 30, 2005, the First New York Arbitration Award found that ARP-II, not ARP-I, was required to resolve Lunar's claim "at the expense of ARP-II," and that Stuart Longman (ARP-I's principal) was required to indemnify ARP-II for some, but not

all, of the third-party claims, including Lunar's. (Order, p. 4-5, ¶¶11-12). This award was subsequently confirmed on February 15, 2008 and the corresponding judgment enrolled in Charleston County. (Order, p. 6, ¶¶20-21). On December 20, 2007 ARP-II paid Lunar \$325,000 and gave it a note in the amount of \$175,000. (Order, p. 6, ¶¶18). The Order, among other things, held that this Assignment and Release constituted an accord and satisfaction of Lunar's claim, which the arbitration found ARP-II was obligated to discharge, and that "the Assignment and Release fully settled Lunar's claim." (Order, p. 8, ¶¶1-5). Therefore, the Order concluded that "ARP-II possesses no claim against ARP-I by virtue of the Assignment and Release." (Order, p. 8, ¶¶6).

Even assuming that Lunar "was within its rights to file the *lis pendens* initially," (Order, p. 11, ¶¶15), in connection with its claim against ARP-I, given the foregoing, by the terms of the Order itself, as of December 20, 2007 at the latest, neither ARP-II nor Lunar and Lussier had any claim against ARP-I since Lunar's claim had been fully satisfied and settled. Nevertheless, ARP-II, Lunar and Lussier actively and willfully maintained the *lis pendens* on ARP-I's property for approximately two and a half years. The *lis pendens* was ultimately released pursuant to a court order on June 11, 2010. (Order, p. 6, ¶¶22). During this two and half-year time period, ARP-I was essentially prohibited from further developing or marketing its property.

ARP-II, Lunar, and Lussier could have (and should have) released the *lis pendens* on ARP-I's property right after Lunar's claim was fully settled on December 20, 2007. See S.C. Code Ann. § 15-11-10, et. seq. However, it did not occur until a court order required them to do so on June 11, 2010, and the evidence in the record

demonstrates that ARP-II, Lunar, and Lussier each had an ulterior purpose for willfully leaving the *lis pendens* on ARP-I's property.

E-mail communications between ARP-II and Lunier/Lussier reveals this ulterior purpose. For example, on August 17, 2007, Lussier sent Davidson Williams (ARP-II's manager) an e-mail referencing the former's "cooperation with the *lis pendens*." (Third Party Plaintiff's Exhibit #3). Prior e-mail communication between these entities and individuals demonstrates Lussier was well aware of the First New York Arbitration's findings. Specifically, on May 25, 2007, Lussier e-mailed Williams an acknowledgement that "your arbitration agreement seems to name ARP-2 as responsible." (*Id.*) Taking these communications together, it is clear that Lussier's "cooperation" with the *lis pendens* meant keeping it in place against ARP-I for ARP-II's benefit. This constitutes an ulterior purpose because Lunar and Lussier knew they no longer had a claim against ARP-I, and the *lis pendens* was, therefore, not to apprise third-parties of Lunar's pending claim, but to serve ARP-II's interests in its struggles against ARP-I and its principal, Stuart Longman.

ARP-II's ulterior purpose is also evidenced by emails with Lunar and Lussier.

Most notably, Williams writes to Lussier by e-mail on December 20, 2007 the following:

As you know, **we do not believe we are responsible for the payment of your claim. We believe Longman is.** By paying off this claim, I am taking the risk that I can recover this payment from Longman, or otherwise resolve the matter in the course of my continuing disputes with him over his conduct in this sorry affair. The arbitration awards still have not been confirmed by the NY Court. If they are overturned, this whole thing becomes a mess again, and you are stuck in the middle of it if we have not settled. **I can't take this risk without [] gaining some backstop protection and additional leverage with Longman in the form of an assignment. This is why I am asking for the assignment of claim.**

(Third Party Plaintiff's Exhibit #4) (emphasis added). Earlier, Lussier had written to Williams acknowledging that the *lis pendens* "could complement the ARP-II property." (*Id.*) Taken together with Lussier's discussion regarding "cooperation with the *lis pendens*," it is clear that the *lis pendens* was being kept in place in order to obtain "backstop protection and additional leverage with Longman." This was the case even though the First New York Arbitration, which had found ARP-I was not liable to Lunar, was decided back in October 30, 2005 and subsequently confirmed.

The lawful purpose of a *lis pendens* is not to gain leverage against a non-party (Longman) for matters collateral to and separate from the grounds for the *lis pendens* (Lunar's claim), but this is exactly the ulterior purpose pursued by ARP-II. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002) ("[t]he *lis pendens* mechanism is not designed to aid either side in a dispute between private parties. Rather, *lis pendens* is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, *i.e.*, the fact of a suit involving property."); *Hewitt v. Rice*, 154 P.3d 408, 412-13 (Colo. 2007) ("A *lis pendens* has serious consequences because '[o]nce a *lis pendens* is filed, it renders title unmarketable and therefore effectively prevents the property's transfer until the litigation is resolved or the *lis pendens* is expunged.").

ARP-II, Lunar and Lussier's coordination and willful failure to release the *lis pendens* constitutes a willful act in the use of the process not proper in the regular course of the proceeding. The *lis pendens* mechanism may not be used in the absence of a valid claim and may not be used to gain additional backstop and leverage against a non-party in separate disputes between the parties.

Moreover, although counsel for ARP-I did not have the opportunity to introduce this evidence at trial (although it was pre-marked and included as Plaintiff's Exhibit #10 and Exhibit #11), on March 20, 2009, counsel for ARP-I wrote to counsel for Lunar and Lussier demanding the *lis pendens* be released. During this time, ARP-I had taken the position that ARP-II did not obtain any rights with respect to the December 20, 2007 Assignment and Release. The Order found that ARP-II did not obtain any rights either. Counsel for Lunar and Lussier replied that they would not release the *lis pendens* because ARP-II had not completely fulfilled its obligations under the December 20, 2007 Assignment and Release. This too was a *willful* and improper use of the *lis pendens* statute because ARP-II's failure to pay Lunar pursuant to their settlement agreement did not concern ARP-I whatsoever. There was a continued, and willful, decision to keep the *lis pendens* in place, and this damaged ARP-I.

II. ARP-I's damages claims are not speculative and are capable of ascertainment with a reasonable degree of certainty.

At trial, ARP-I claimed various damages caused by ARP-II, Lunar and Lussier's abuse of process regarding keeping the *lis pendens* on its property. These damages included, site design and engineering fees, legal fees, and certain carrying costs on the property (taxes and interest payments). ARP-I also testified as to lost profits.

Our supreme court recognized the principle that when the defendant's tortious conduct has caused the plaintiff to become involved in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages. Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971). The site design and

engineering fees are recoverable damages because ARP-I had made these investments into the property, but the *lis pendens* prohibited further improvement and sale of the property, so these investments were ultimately lost once the bank took the property back. The legal fees were expended by ARP-I in order to have the *lis pendens* released, which, as argued above, was illegally maintained on the ARP-I property for years and which ARP-II, Lunar and Lussier vigorously defended and refused to release – despite repeated demands by ARP-I to do so. The taxes and interest payments are included as damages because these costs were born by ARP-I during the period in time where the *lis pendens* rendered the property undevelopable and essentially useless. Finally, the lost profits are in connection with ARP-I's inability to sell the property due to the *lis pendens*.

All of the above damages are recoverable and capable of ascertainment to a reasonable degree of certainty. Although Emerald was prevented from introducing this evidence, ARP-I can provide invoices and financial records regarding the above mentioned engineering costs, legal fees,¹ and carrying expenses. Moreover, lost profit damages can be ascertained based on similar sales of real property in the market during the period in question when the *lis pendens* was on the property. Finally, the fact that the Defendants committed abuse of process is sufficient to establish, at the very least, nominal damages. See Cook v. Atl. Coast Line R. Co., 183 S.C. 279, 190 S.E. 923, 924 (1937).

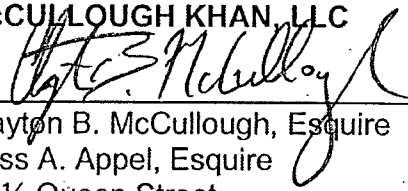
¹ Attorney fees are sufficient damages to establish the final element of abuse of process. Dawley v. La Puerta Architectural Antiques, Inc., 133 N.M. 389, 62 P.3d 1271 (N.M. 2003).

All of the above damages are casually connected to ARP-I's abuse of process claim. Should this Honorable Court reverse its decision regarding the abuse of process claim, damages can certainly be established.

CONCLUSION

For the foregoing reasons, Emerald respectfully requests that this Court reconsider its Order and alter and amend its decision based on the points raised in this Memorandum.

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5.9, 2013
Charleston, SC

Counsel for Ashley River Properties One, LLC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-10-2434

Ashley Rivers Properties II, LLC, as
assignee of Lunar Systems, LTD and
Ashley River Properties II, LLC, in its
own right,)

Plaintiffs,)

vs.)

Ashley River Properties One, LLC
successor in the interest to Ripley
Light Yacht Club, LLC and Ripley Light
Development, LLC,)

Defendants.)

Ashley River Properties One, LLC)

Third-Party Plaintiff,)

vs.)

Lunar Systems, LTD and Thomas J.
Lussier,)

Third-Party Defendants.)

CERTIFICATE OF SERVICE

BY JULIE J. ARMSTRONG
CLERK OF COURT
2013 MAY -9 PM 2:28

FILED

I hereby certify that a true and correct copy of the **Memorandum in Support of Defendant and Third-Party Plaintiff's Motion to Alter or Amend Judgment Under Rule 59(e), SCRCP** has been served upon the following by mailing a copy properly addressed and with sufficient postage affixed thereto on this 9TH day of May, 2013.

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Counsel for Ashley River Properties II

Frank M. Cisa, Esquire
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Counsel for Lunar Systems, LLC
and Thomas J. Lussier



Elizabeth Plasters, Paralegal

Charleston, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

NINTH JUDICIAL CIRCUIT

CASE NO.: 2005-CP-10-2434

Ashley Rivers Properties II, LLC, as assignee
of Lunar Systems, LTD and Ashley River
Properties II, LLC, in its own right,

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVERSHEET

vs.)

Ashley River Properties One, LLC, successor
in the interest to Ripley Light Yacht Club,
LLC and Ripley Light Development, LLC

Ashley River Properties One, LLC

Third-Party Plaintiff,

vs.

Lunar Systems, LTD and Thomas J. Lussier,
Third-Party Defendants

Defendant.)

Plaintiff's Attorney:

William C. Cleveland, Esquire, Bar No. _____

Address:

5 Exchange Street, Charleston, SC 29401

Phone: _____ Fax: _____

E-mail: _____ Other: _____

Defendant's Attorney:

Clayton McCullough, Bar No. _____

Address:

68 1/2 Queen Street, Charleston, SC 29401

Phone: _____ Fax: _____

E-mail: _____ Other: _____

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Notice & Motion to Alter or Amend Judgement Under Rule 59 (e), SCRPC

Estimated Time Needed: 20

Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/☒ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____	
☐ MOTION FEE COLLECTED: \$ _____	
☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2005-CP-10-2434

Ashely River Properties II,
LLC, as assignee of Lunar
Systems, LTD; Ashley River
Properties II, LLC, in its own
right; Lunar Systems, LTD;
and Thomas J. Lussier,

Respondents,

v.

Ashley River Properties I,
LLC,

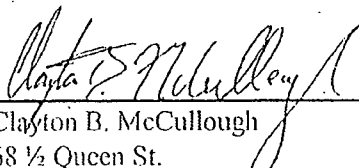
Appellant.

2013 SEP -9 PM 4:46
JULIE J. ARMSTRONG
CLERK OF COURT

NOTICE OF APPEAL

Ashley River Properties I, LLC appeals the order of the Honorable Deadra L. Jefferson dated April 26, 2013. Appellant timely filed and served on all counsel of record a motion to Alter or Amend Judgment pursuant to Rule 59(e) on May 9, 2013, and received written notice of entry of the order denying said motion on August 9, 2013.

September 3, 2013


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Attorney for Appellant

Other Counsel of Record:

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Frank M. Cisa
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Attorney for Respondents Lunar Systems, LTD
and Thomas J. Lussier
(843) 881-6530

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2005-CP-10-2434

Ashley River Properties II,
LLC, as assignee of Lunar
Systems, LTD; Ashley River
Properties II, LLC, in its own
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and Thomas J. Lussier,

Respondents,

v.

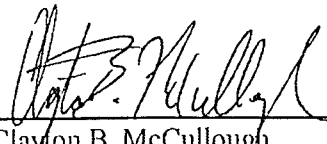
Ashley River Properties I,
LLC,

Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the filing of the Notice of Appeal with Charleston County Court of Common Pleas on (1) Ashley River Properties II, LLC by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2013, addressed to its respective attorney of record, William C. Cleveland, Post Office Box 999, Charleston, South Carolina 29402; and on (2) Lunar Systems, LTD and Thomas J. Lussier by depositing a copy of it in the United States Mail, postage prepaid, on September 4, 2013, addressed to their respective attorney of record, Frank M. Cisa, 858 Lowcountry Boulevard, Suite 101, Mt. Pleasant, South Carolina 29464

September 9, 2013


Clayton B. McCullough
68 1/2 Queen St.
Charleston, South Carolina 29401
(843) 937-0400
Attorney for Appellant

2013 SEP -9 PM 4:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2005-CP-10-2434
	)	
	)	
ASHLEY RIVER PROPERTIES II,	)	
LLC as assignee of LUNAR	)	
SYSTEMS, LTD.	)	
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
ASHLEY RIVER PROPERTIES I,	)	
LLC successor in the interest	)	
to RIPLEY LIGHT YACHT CLUB,	)	
LLC and RIPLEY LIGHT	)	
DEVELOPMENT, LLC	)	
	)	
Defendants	)	
	)	
	)	TRANSCRIPT OF RECORD

January 23, 2013
Charleston, South Carolina

OUT OF ORDER WITNESS (from January 22, 2013)

B E F O R E:

THE HONORABLE DEADRA JEFFERSON, JUDGE

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

WILLIAM C. CLEVELAND, ESQ.
Attorney for the Plaintiff

CLAYTON B. MCCULLOUGH, ESQ.
Attorney for the Defendant

FRANK M. CISA, ESQ.
Attorney for Third Party Plaintiff

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

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THIRD PARTY PLAINTIFF (Lunar Systems)

<u>No.</u>	<u>Description</u>	<u>Marked / Admitted</u>	
1	Assignment	8	8
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THIRD PARTY PLAINTIFF (ARP I)

<u>No.</u>	<u>Description</u>	<u>Marked / Admitted</u>	
3	Email	18	18
4	Email	18	18

PROCEEDINGS

[From January 22, 2013: Out of order witness]

MR. CISA: Your Honor, I'd call Tom Lussier back to the stand.

[Whereupon, Mr. Lussier comes forward]

THE COURT: Mr. Lussier, I'll remind you, you are under oath. And you said this is for the third case correct, which is ---

MR. CISA: --- which is really just the defense of the abuse of process claim, Your Honor.

THE COURT: Which is 05-2434?

MR. CISA: That's correct, Your Honor.

THOMAS LUSSIER,

Having previously been duly sworn,

Was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CISA:

Q. Mr. Lussier, what's your full name?

A. Thomas Lussier.

Q. Mr. Lussier where do you reside, sir?

A. Warren, Ohio.

Q. Are you familiar with a company called Lunar Systems, Limited?

A. Yes, I am.

1 Q. What's your position with that company?

2 A. I'm the president.

3 Q. And what does that company do?

4 A. We hold real estate, three parcels of real estate.

5 Q. Okay. Did you enter into a contract to purchase a
6 unit at Ripley Light Marina project?

7 A. Yes.

8 Q. Okay. Is that what has been marked as exhibit 1?

9 THE COURT: Is that an exhibit that has been
10 admitted Mr. Cisa?

11 MR. CISA: Your Honor, exhibit 1 was admitted in
12 the second trial. It's the ---

13 THE COURT: --- it's not up there anywhere?

14 MR. CISA: It's right here. They had it over on
15 the table and I just grabbed it.

16 THE COURT: Okay. But has the court reporter --
17 have you actually marked it? I mean is it out of that
18 notebook marked?

19 THE COURT REPORTER: Pre-marked, no.

20 THE COURT: Yes, it needs to come -- everything
21 that has been admitted needs to come out of that
22 notebook. It doesn't need to stay in that notebook as
23 we're going along because all of those things are not
24 going to be admitted.

25 MR. CISA: I'll be glad to take it out.

1 THE COURT: Thank you.

2 MR. CISA: There has been only a few exhibits that
3 have been introduced as I understand it ---

4 THE COURT: --- that's fine. Yes, maybe 7 or 8.

5 MR. CISA: And I just want to use the same exhibit.

6 Q. [Mr. Cisa] Is the exhibit that has been marked as
7 exhibit 1 -- is this the real estate purchase agreement
8 entered into between Lunar Systems...

9 [Whereupon, the witness is shown document]

10 A. Yes, it is.

11 Q. Okay. And pursuant to that agreement did you put
12 down an earnest money deposit?

13 A. Yes, I did.

14 Q. All right. And how much?

15 A. 325,000.

16 Q. And what was that for; the purchase of what?

17 A. It was for the purchase of a condominium.

18 Q. Did the condominiums ever get built?

19 A. No, it did not.

20 Q. Okay. Now looking at I think its exhibit 8 to that
21 agreement. Could you turn to that?

22 [Whereupon, the witness complies]

23 Q. It's the addendum.

24 A. The early purchase addendum?

25 Q. Yes, the early purchase addendum. Read for me if

1 you will I think its paragraph 2 (a) the first two
2 sentences.

3 A. Okay. That's 2 (b)?

4 Q. 2 (b).

5 A. [Reading] Purchaser agrees to allow the company to
6 apply said funds to the actual purchase in closing of the
7 underlying real estate of the condominium project set
8 forth in schedule A here attached hereto the condominium
9 property. In such event as the collateral for repayment
10 of the funds purchaser will receive a pari passu dollar
11 for dollar interest in the purchase of the condominium
12 property.

13 Q. Okay. Now when the condominiums weren't built did
14 you make a demand for the return of your earnest money
15 deposit?

16 A. Yes, I did.

17 Q. Did they return it?

18 A. No.

19 Q. Did you file suit in 2005?

20 A. Yes.

21 Q. Did you name ARP I and ARP II?

22 A. Yes ---

23 Q. --- as defendants?

24 A. Yes, I did.

25 Q. Did you ultimately settle that litigation?

1 A. Yes. I settled it in 2007.

2 Q. Okay. Let me show you a document entitled
3 assignment and covenant not to sue and full and final
4 complete release.

5 [Whereupon, the witness is shown document]

6 Q. Are you familiar with that document?

7 A. Yes.

8 Q. What is that document?

9 A. That's a document whereby I signed -- it's a release
10 of -- this is my settlement with ARP II.

11 Q. Okay. And pursuant to that settlement what did you
12 receive?

13 A. I received a promissory note for -- I received
14 325,000 plus interest in the escrow account and 175,000
15 dollar promissory note.

16 Q. All right. And why did you enter into that
17 agreement?

18 A. In order to settle.

19 Q. Okay. To get your money back?

20 A. To get my money back.

21 MR. CISA: I'd like to mark this, Your Honor, as
22 exhibit number 2 and move it into evidence..

23 THE COURT: Actually, it should be marked -- would
24 it be 2 in the next case?

25 MR. CISA: Well, I put it in in the first case,

1 Your Honor, as exhibit -- I put it in the first case as
2 exhibit number 1.

3 THE COURT: You're referring to the 2009 case?

4 MR. CISA: Correct.

5 THE COURT: You put it in as exhibit what now?

6 MR. CISA: Exhibit 1.

7 THE COURT: The same document that you're ---

8 MR. CISA: --- the same document that I was going
9 to put in in the third case.

10 THE COURT: So that would be the '05 case. What
11 number would that be in the '05 case Madame Court
12 Reporter?

13 THE COURT REPORTER: That is number 1.

14 THE COURT: Yes, keep them separately. It would be
15 number 1 in the '05 case.

16 MR. CISA: Okay. We'll just do it that way;
17 number 1 in the '05 case.

18 THE COURT: She needs to mark it.

19 [Whereupon, third party plaintiff Lunar Systems
20 exhibit number 1 is marked by the court reporter]

21 [Whereupon, third party plaintiff Lunar Systems
22 exhibit number 1 is entered into evidence by the court]

23 MR. CISA: Let me go back and make sure we've got
24 this straight. This contract was entered into evidence
25 in this -- in the second case, Your Honor, and marked as

1 exhibit number 2, which is the contract for the purchase
2 of a condominium. I would like this exhibit to be marked
3 as an exhibit also in this -- in the third case ---

4 THE COURT: --- do you have another copy of this so
5 she can mark that as an exhibit in the '05 case?

6 MR. CISA: I do have another copy Your Honor and I
7 ask that this be introduced as exhibit number 2 ---

8 THE COURT: --- that would be number 2 wouldn't it
9 Madame Court Reporter?

10 THE COURT REPORTER: Yes, ma'am.

11 THE COURT: I assume there is no exception?

12 MR. CLEVELAND: No objection, Your Honor.

13 THE COURT: Marked and admitted without objection.

14 [Whereupon, third party plaintiff Lunar Systems
15 exhibit number 2 is marked by the court reporter]

16 [Whereupon, third party plaintiff Lunar Systems
17 exhibit number 2 is entered into evidence by the court]

18 Q. [Mr. Cisa] Now again looking at plaintiff's exhibit
19 1, which is the assignment and covenant not to sue why
20 did you agree to assign the pending lawsuit between Lunar
21 Systems Limited and ARP I and II to ARP II?

22 A. It was a settlement to get our money back for our
23 investment.

24 Q. Okay. After you signed the assignment did you have
25 any other involvement with the 2005 action whereby your

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(2005-CP-10-2434)
January 23, 2013

1 company had originally sued Ashley River Properties II
2 and Ashley River Properties I?

3 A. I don't believe so.

4 Q. Okay. No further action?

5 A. No.

6 Q. Okay. What were you doing after you received the
7 325,000 dollars? Were you trying to get payment on the
8 note?

9 A. Just trying to get payment on the note.

10 Q. Do you know who took over the representation of ARP
11 II or Lunar Systems in the action you filed in 2005 after
12 you signed the cause of action? Do you know who took
13 over the representation?

14 A. You did.

15 Q. Well, after you signed the assignment?

16 A. Oh, after I signed the assignment? ARP II.

17 Q. Took it over?

18 A. Right.

19 Q. Okay. And you had no further involvement?

20 A. That's correct.

21 Q. I have nothing further. Thank you, sir.

22 THE COURT: Who wants to go?

23 MR. CLEVELAND: I have no questions, Your Honor.

24 THE COURT: Okay. You may proceed.

25 MR. MCCULLOUGH: Thank you, Your Honor.

1 THE COURT: You're welcome.

2 CROSS-EXAMINATION

3 BY MR. MCCULLOUGH:

4 Q. You got the notebook in front of you?

5 A. I don't. I need the big -- the exhibits.

6 [Whereupon, the witness is provided documents]

7 Q. A couple of quick questions. I know we covered this
8 -- some of this before. You had the lis pendens filed on
9 ARP I and ARP II's property correct?

10 A. Correct.

11 Q. You settled your lawsuit and received a full
12 settlement of 325,000 dollars plus a note of another
13 175,000 dollars correct?

14 A. Correct.

15 Q. And that was the amount that you felt you were owed
16 as a result of the breach of contract claim you had
17 arising out of the contract that your lawyer just
18 submitted as an exhibit correct?

19 A. I think that was the amount that I felt I could
20 settle for at that time with ARP II.

21 Q. And you settled for ARP II?

22 A. Yes.

23 Q. And you had a lawsuit and a settlement agreement
24 where you had originally executed for a complete
25 dismissal of the lawsuit which included ARP I right?

1 That's the one we discussed this morning; the September
2 settlement agreement?

3 A. That included ARP I?

4 Q. Yes, sir. Let's turn to tab 6 for me.

5 [Whereupon, the witness complies]

6 Q. On page 2 it included a dismissal of that lawsuit of
7 which ARP I was a party correct; that's on paragraph 5?

8 A. Right. I don't know if this is what we signed for
9 the agreement of 12/24/07. This is the agreement of
10 9/24.

11 Q. Yes, sir. If I misspoke -- that was the agreement
12 that you signed in September of 2007 right?

13 A. I did. I signed them both. I signed the other one
14 in December that we actually ended up agreeing to. That
15 was the final agreement.

16 Q. And what changed from September to December of 2007
17 was a change from the settlement agreement that is tab 6
18 to the subsequent assignment agreement that Mr. Cisa just
19 admitted into the record correct?

20 A. Yes, the assignment and the fact that our 175,000
21 dollar note would be payable on December 31st of 2008
22 rather than 2007. To me that was the major change.

23 Q. All right. And if you'll turn to tab 5 for me?

24 [Whereupon, the witness complies]

25 Q. We went through this this morning but I'll touch on

1 it again. These are some emails from May of 2007 and --
2 between you and Mr. Williams correct?

3 A. Correct.

4 Q. And again in May of 2007 you had read the 2005
5 arbitration award from New York.

6 A. Correct.

7 Q. And you were of the opinion that it appeared that
8 the Lunar obligation that you had sued over was an ARP II
9 responsibility. That's what you thought?

10 A. Yes, according to my email I think I say it seems.

11 Q. And David Williams was saying there is still some
12 uncertainty and that uncertainty was based on the fact
13 that the New York arbitration had not been approved
14 right?

15 A. I think that's what his thoughts were.

16 Q. And so based on that it was determined eventually
17 that you would do an assignment rather than a complete
18 release right?

19 A. Based on the fact that he thought that?

20 Q. Based on the fact that David Williams was pushing
21 for an assignment. He's the one that wanted an
22 assignment of that claim right?

23 A. He did want an assignment, yes.

24 Q. If you'll turn to tab 7 for me.

25 [Whereupon, the witness complies]

1 Q. In December of 2007 -- this is the fourth page in
2 you actually emailed Mr. Williams on December 20, 2007
3 saying you had planned to let the lis pendens on ARP I
4 lapse is that right?

5 A. I sent that to Mr. Cleveland and a copy to Mr.
6 Williams.

7 Q. Actually isn't it to David Williams addressed to
8 David?

9 A. I'm sorry. I'm looking at the wrong email. Yes, I
10 did say that in the email.

11 Q. And again turning the page as the basis for this
12 continued negotiation Mr. Williams had emailed you. I'll
13 read it again, [Reading] As you know we do not believe we
14 are responsible for the payment of your claim.

15 We believe Longman by paying off this claim I am
16 taking the risk I can recover this payment from Longman
17 or otherwise resolve the matter in the course of my
18 continued disputes with him over his conduct in this
19 sorry affair.

20 The arbitration award still has not been confirmed
21 by the New York court. If they are overturned this whole
22 thing becomes a mess again and you are stuck in the
23 middle of it if we have not settled. I can't take this
24 risk without some -- gaining some backstop protection and
25 additional leverage with Longman in the form of an

1 assignment. That is why I am asking for the assignment.

2 Q. Did I read that correctly?

3 A. Yes.

4 Q. So David Williams told you that he didn't believe
5 that he was responsible for this claim right? He thought
6 it was Longman.

7 A. That's what it says.

8 Q. He said he felt that the New York arbitration might
9 change the award right?

10 A. I think he felt that maybe he -- the arbitration may
11 not be confirmed.

12 Q. And then he felt like he needed some backstop
13 protection and additional leverage with Longman. Do you
14 see that?

15 A. Yes.

16 Q. So that was his motivation to get you to agree to
17 the assignment?

18 A. That's correct.

19 Q. Now did you ever stop to consider whether or not
20 after receiving a settlement you should dismiss the lis
21 pendens filed on ARP I's property?

22 A. I don't recall. I felt that when I signed the
23 release that I was out of it. Basically what's what I
24 wanted to be.

25 Q. And you're focusing -- the answer to that question

1 focuses on your liability and I'm asking you a different
2 question.

3 Did you ever consider that based on the fact that
4 you thought it was an ARP II obligation based on these
5 emails and that you had entered into a settlement
6 agreement for 500,000 dollars that regardless of what
7 David Williams wanted that you should release the lis
8 pendens that you had filed on the ARP I property?

9 A. I thought that my agreement and assignment was the
10 end of my part in this matter.

11 Q. But you are the one that filed the lis pendens
12 right?

13 A. Correct.

14 Q. But you didn't dismiss the lis pendens on ARP I's
15 property did you?

16 A. No, I didn't. I ---

17 Q. --- you released it on the ARP II property.

18 A. That was another agreement.

19 Q. So you felt as long as you were insulated in your
20 release you were comfortable letting David Williams go
21 after Stu Longman and ARP I.

22 A. I signed the release in order to get my money; the
23 325,000 principal and the promissory note. That was my
24 goal and I obtained that.

25 Q. And while you were searching and going for your goal

1 you didn't stop to consider that maybe you should release
2 the lis pendens that you had filed on Stu Longman's
3 property, ARP I's property did you?

4 A. That's correct. I did not.

5 Q. And you think -- do you understand the ramifications
6 of what a lis pendens does?

7 A. I felt that with my assignment that I was out of the
8 situation. So I didn't ---

9 Q. --- did Mr. Williams ever tell you that the
10 arbitration award had been confirmed in 2008?

11 A. I don't recall.

12 Q. If you knew that it had been confirmed in 2008 would
13 you have wanted a lis pendens that you had filed on the
14 property removed?

15 A. I would think that they would have removed that at
16 that time. I didn't realize it was my responsibility to
17 remove that lis pendens.

18 Q. But now that we sit here today you know that the lis
19 pendens wasn't removed until 2010.

20 A. That's correct.

21 Q. So it sat on there at least two years following when
22 you feel like it should have been removed.

23 A. I don't know when it should have been.

24 MR. MCCULLOUGH: Your Honor, we would move the
25 emails from tab 5 and tab 7 into the record based on

1 these were communications between Lunar and Williams
2 associated with the assignment and the motivation behind
3 keeping the lis pendens on the property.

4 THE COURT: Any objection Mr. Cisa or Mr.
5 Cleveland?

6 MR. CLEVELAND: No, I don't Your Honor.

7 THE COURT: I'm sorry; you said you have no
8 objection?

9 MR. CLEVELAND: No objection, Your Honor.

10 THE COURT: Mr. Cisa?

11 MR. CISA: No objection, Your Honor.

12 THE COURT: Marked and admitted without objection
13 in the 2005 case. You need to give them to the court
14 reporter to be marked.

15 [Whereupon, third party plaintiff ARP I exhibit
16 numbers 3 and 4 are marked by the court reporter]

17 [Whereupon, third party plaintiff ARP I exhibit
18 numbers 3 and 4 are entered into evidence by the court]

19 MR. MCCULLOUGH: That's all I have, Your Honor.
20 Thank you.

21 THE COURT: Any redirect of the witness?

22 MR. CISA: None, Your Honor.

23 THE COURT: Mr. Cleveland?

24 MR. CLEVELAND: No, Your Honor.

25 THE COURT: Any objection to the witness being

1 excused?

2 MR. CLEVELAND: None from the defendant.

3 MR. CISA: No, Your Honor.

4 MR. MCCULLOUGH: None from -- I don't know which --
5 if I'm the defendant or the third party plaintiff but
6 none from me.

7 THE COURT: Sir, you are excused. Have a good
8 flight.

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: You're welcome, sir.

11 [Whereupon, the witness is excused and exits the
12 witness stand]

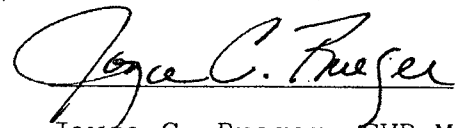
13 *****END OF OUT OF ORDER WITNESS TESTIMONY*****
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record [of the out of order witness] of the proceedings
had and evidence introduced in the trial of the captioned
case, relative to appeal, in the Court of Common Pleas
for Charleston County, South Carolina on the 23rd day of
January, 2013.

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

November 6, 2013



Joyce C. Rueger, CVR-M

Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ASHLEY RIVER PROPERTIES II,
LLC as assignee of LUNAR
SYSTEMS, LTD

Plaintiffs

vs.

ASHLEY RIVER PROPERTIES I,
LLC successor in the interest
to RIPLEY LIGHT YACHT CLUB,
LLC and RIPLEY LIGHT
DEVELOPMENT, LLC

Defendants

THE COURT OF COMMON PLEAS

DOCKET NO. 2005-CP-10-2434

TRANSCRIPT OF RECORD

January 23, 2013
Charleston, South Carolina

B E F O R E:

THE HONORABLE DEADRA JEFFERSON, JUDGE

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

WILLIAM C. CLEVELAND, ESQ.
Attorney for the Plaintiff

CLAYTON B. MCCULLOUGH, ESQ.
Attorney for the Defendant

FRANK M. CISA, ESQ.
Attorney for Third Party Plaintiff

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Circuit Court Reporter

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[All exhibits pre-marked prior to start of trial unless otherwise indicated in transcript]

PLAINTIFF

<u>No.</u>	<u>Description</u>	<u>Marked</u> / <u>Admitted</u>
1	Contract	12 12
2	Assignment/Covenant	13 13
3	Order	24 24
4	Demand	32 (I.D. only)
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6	Indemnity Agreement	8 8

DEFENDANT

<u>No.</u>	<u>Description</u>	<u>Marked</u> / <u>Admitted</u>
1	2005 Award	34 35
2	Request to Modify	34 35
3	Arbitration Disposition	34 35
4	Judgment	34 35
5	2010 Arbitration Award	34 35
6	Settlement Agreement	43 (I.D. only)
7	Email	66 (I.D. only)

1 PROCEEDINGS

2 THE COURT: All right. You may proceed.

3 MR. CLEVELAND: Yes, Your Honor. Your Honor, I'd
4 call Mr. Davidson Williams to the stand.

5 THE COURT: Sir, if you'll come to the stand and be
6 sworn.

7 [Whereupon, Mr. Williams comes forward]

8 [Whereupon, the witness is duly sworn by the Court]

9 CLERK OF COURT: Thank you. Please be seated. Sir
10 for the record if you will, please state your name
11 spelling your last name.

12 THE WITNESS: Davidson Williams, W-I-L-L-I-A-M-S.

13 THE COURT: You may proceed.

14 MR. CLEVELAND: Thank you, Your Honor.

15 THE COURT: You're welcome.

16 - - - - -

17 DAVIDSON WILLIAMS,

18 Having been first duly sworn,

19 Was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. CLEVELAND:

22 Q. Mr. Williams, state your name for the court please?

23 A. I just did I think.

24 Q. All right. Mr. Williams, what is your position
25 with Kriti Ripley?

1 A. I am the managing member.

2 Q. And is it true that Kriti Ripley in 2003 entered
3 into an operating agreement with Emerald Investments to
4 form Ashley River Properties II?

5 A. That's correct.

6 Q. And was there a discussion at that time about
7 liabilities that might exist because of Mr. Longman's
8 prior activities before formation of Ashley River
9 Properties II?

10 A. Yes, there was.

11 Q. And what discussions were there about that? What
12 agreements were reached about that?

13 A. As part of the agreements which brought us together
14 as members in Ashley River II Kriti Ripley wanted to
15 identify and know the liabilities that we would be
16 assuming by becoming a member of this new entity.

17 And so we wanted it clearly stated what those
18 liabilities and claims would be and be indemnified for
19 any claims that might arise that are not on the agreed
20 list.

21 Q. And I've handed you a copy of what has been marked
22 as plaintiff's exhibit 6 entitled indemnity agreement.

23 [Whereupon, the witness reviews documents]

24 Q. Would you tell me what exhibit 6 is?

25 A. It is an indemnity agreement dated December 30th

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(2005-CP-10-2434)
January 23, 2013

1 2003; same date as the operating agreement of ARP II,
2 between Ripley Light development, Emerald, ARP I,
3 Sapphire [phonetic] and Mr. Longman as indemnitors in
4 favor of Kriti Ripley and ARP II.

5 Q. And does the indemnity agreement have attached to it
6 a description of the liabilities that the parties agreed
7 to?

8 A. Yes. There are schedules of assumed liabilities.

9 Q. Now had Mr. Longman been involved in marketing the
10 sale of condominiums that he intended to build on the
11 property that ultimately became part of ARP II and ARP I?

12 A. Prior to the formation of ARP II?

13 Q. Yes?

14 A. Yes, I believe he was.

15 Q. And did Mr. Longman take some deposits from folks
16 interested in buying condominiums once they got built?

17 A. It turns out he did, yes.

18 Q. And is Mr. Lussier who testified here yesterday one
19 of those?

20 A. Yes, he was.

21 Q. And is Mr. Von Grotthus another one?

22 A. Von Grotthus.

23 Q. And that's spelled V-O-N space G-R-O-T-T-H-U-S-S.

24 Was Mr. Cunningham one of those?

25 A. Yes, Mr. and Mrs. Cunningham.

1 Q. Now were any of those liabilities for the potential
2 claim arising from the issue of whether they could get
3 the return of their deposits listed as liabilities to
4 exhibit 6?

5 A. No, sir.

6 Q. And therefore what was the -- what did exhibit 6
7 provide with regard to liability for the refund of those
8 deposits made by the Von Grothuses, the Cunninghams, and
9 the Lussiers?

10 A. Well, it didn't address the refund of those deposits
11 at all because they were undisclosed and it was a lot of
12 money. Between the three of them it was I think close to
13 900 or a million -- 900,000 or a million dollars.

14 But the indemnity was there to protect us in case
15 these undisclosed liabilities came up. And these were
16 three big ones; those three buyers.

17 And the protection is in 2 (b) on page 2 is the
18 indemnity extended to claims arising from events prior to
19 the date of this agreement asserted by any lender, trade
20 creditor, or other party related to new parcel A except
21 for those matters identified on schedule 1 to this
22 agreement as assumed liabilities of ARP II.

23 New parcel A was the piece of property that was
24 owned by Ashley River II.

25 Q. All right, sir. If you will look at the --

1 MR. CLEVELAND: Your Honor, at this time I would
2 offer exhibit 6 into evidence?

3 THE COURT: Any objection?

4 MR. MCCULLOUGH: No, Your Honor.

5 THE COURT: Marked and admitted without objection.
6 It's the indemnity agreement?

7 MR. CLEVELAND: Yes --

8 [Whereupon, plaintiff's exhibit number 6 is marked
9 by the court reporter]

10 [Whereupon, plaintiff's exhibit number 6 is entered
11 into evidence by the court]

12 Q. [Mr. Cleveland] Now when did you discover that Mr.
13 Longman had obtained deposits from the folks that we've
14 been talking about the Von Grotthuses, Cunninghams, and
15 the Lussiers and that claims may be presented to ARP II
16 with respect to those deposits? When did that come to
17 your attention?

18 A. I first learned about those three claims in or about
19 October of 2004.

20 Q. And how did you learn about that?

21 A. I recollect that Mr. Guarino gave me copies of these
22 agreements and said these guys want their money.

23 THE COURT: Would you spell his name please for the
24 court reporter.

25 THE WITNESS: Yes. G-U-A-R-I-N-O.

1 [Whereupon, the witness is shown documents]

2 Q. [Mr. Cleveland] Mr. Williams, I've handed you what
3 has been marked as exhibit 1, which is a contract real
4 estate purchase agreement between the Lussiers and Ripley
5 Light, LLC. Are you familiar with this document?

6 A. Yes. This was one of the three agreements that I
7 received in or about October of 2004.

8 Q. And is this the purchase agreement that Mr. Lussier
9 entered into with Mr. Longman's entity prior to the
10 formation of ARP II?

11 A. Yes, that's correct, through his company Lunar
12 Systems.

13 Q. And was this disclosed to ARP II and to Kriti at the
14 time ARP II was formed?

15 A. Not that he had taken this money, no -- this
16 deposit. He took 50 percent deposit here.

17 Q. And does -- would you look at the inside of exhibit
18 1 and turn to the early purchase addendum that is the
19 last three pages or two pages of the exhibit?

20 [Whereupon, the witness reviews documents]

21 A. I'm with you.

22 Q. And does the second page of the early purchase
23 addendum, which is the last page of plaintiff's exhibit
24 1, identify the parcels of property on which the
25 condominiums were purposed to be built?

1 A. Yes, it does. It covers land owned by both ARP I
2 and ARP II. If I -- may I just explain, please?

3 Q. Yes, please?

4 A. Parcel 6-A was the property owned by ARP I. There
5 are five other parcels identified on this property.
6 Those were the parcels which constituted the property
7 owned by ARP II.

8 Those properties were all combined into one single
9 parcel described as new parcel A shortly before we
10 invested in ARP II.

11 Q. Does the early purchase addendum, the second to last
12 page of plaintiff's exhibit 1 have any provisions with
13 regard to providing the Lussiers with an interest in the
14 property on which the condominiums were going to be
15 built?

16 A. Yes, it does under 2 (b).

17 Q. And would you read that into the record please?

18 A. Yes.

19 Q. Those first two sentences.

20 A. [Reading] Purchaser agrees to allow the company to
21 apply said funds to the actual purchase and closing of
22 the underlying real estate of the condominium project set
23 forth in Schedule A hereto -- that's what we just looked
24 at -- defined as the condominium property. In such event
25 as collateral for repayment of the funds the purchaser

1 will receive pari passu dollar for dollar interest in the
2 purchase of the condominium property.

3 Q. Now in 2005 did Mr. Cisa representing Mr. Lussier
4 and Lunar Systems bring this lawsuit, the 2005-2434 --
5 did Mr. Lussier file the 2005-2434 lawsuit, the one we're
6 trying right now, and sue ARP I and ARP II?

7 A. He brought a lawsuit in 2005 against ARP I and ARP
8 II. I can't keep track of all the numbers, the docket
9 numbers; I think it's the same one.

10 Q. Well, trust me its 05-2434. And ultimately did you
11 on behalf of ARP II enter into an agreement with Mr.
12 Lussier toward the disposition of his claim?

13 A. Yes, we did. There were two elements to it.

14 MR. CLEVELAND: Before I go on I'd like to move for
15 the admission of exhibit 1 into evidence. It's the
16 purchase agreement.

17 THE COURT: Any objection?

18 MR. CISA: It's already in the record.

19 MR. CLEVELAND: Well, it may be. In working with
20 the court reporter I just want to make sure that it is in
21 this case.

22 MR. MCCULLOUGH: Let's make sure that all of them
23 are because I think we separated that whole packet that
24 we put in through a witness yesterday. So I believe
25 everything -- I have no objection but I think it's

1 already in the record.

2 MR. CLEVELAND: And you may be right and I ---

3 THE COURT: --- all these are separate records.

4 MR. CLEVELAND: And I certainly agree ---

5 THE COURT: --- all of them are separate records.

6 I did it that way for a reason so that you have a
7 complete record in each case. Are you offering the
8 document ---

9 MR. CLEVELAND: --- Your Honor, I move to admit
10 plaintiff's exhibit 1, the purchase contract into
11 evidence.

12 THE COURT: Any objection?

13 MR. CISA: None, Your Honor.

14 MR. MCCULLOUGH: No, Your Honor.

15 THE COURT: Marked and admitted without objection.

16 [Whereupon, plaintiff's exhibit number 1 is marked
17 by the court reporter]

18 [Whereupon, plaintiff's exhibit number 1 is entered
19 into evidence by the court]

20 MR. CLEVELAND: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 Q. [Mr. Cleveland] Now Mr. Williams, I've shown you
23 what has been marked as exhibit 2, which is the
24 assignment and covenant not to sue.

25 [Whereupon, the witness reviews documents]

1 Q. Is this agreement -- does this agreement memorialize
2 the agreement that you reached with Mr. Lussier
3 concerning the resolution of Mr. Lussier's claim against
4 ARP II?

5 A. Yes.

6 MR. CLEVELAND: Your Honor, I would offer
7 plaintiff's exhibit 2 into evidence.

8 THE COURT: Any objection?

9 MR. MCCULLOUGH: No objection, Your Honor.

10 MR. CISA: No objection.

11 THE COURT: Marked and admitted without objection.

12 [Whereupon, plaintiff's exhibit number 2 is marked
13 by the court reporter]

14 [Whereupon, plaintiff's exhibit number 2 is entered
15 into evidence by the court]

16 Q. [Mr. Cleveland] Mr. Williams, will you summarize
17 what plaintiff's exhibit 2 provides with regard to
18 payments made to Lussier and the assignment of Lussier's
19 claim against ARP I?

20 A. Yes. At the time this agreement was concluded
21 325,000 dollars was being held in escrow by our
22 attorneys, Buist Moore; a predecessor to your firm.

23 Those were monies that were put up about a year and
24 a half earlier out of loan proceeds from a loan from Bank
25 of America. I had negotiated with Mr. Lussier to lift

1 the lis pendens on Ashley River Properties II in exchange
2 for putting up 325,000 dollars in escrow as security for
3 his claim until this would be resolved in some future
4 date. So that money was there accruing interest.

5 And then in December of 2007 I negotiated with Mr.
6 Lussier to have that money released to him, the 325,000
7 dollars plus interest; that was his principal amount of
8 his claim, and to give him a note for an agreed amount
9 for the accrued interest on that money, which he put up
10 in 2002 or whenever that agreement was that we just
11 looked at.

12 And in exchange for that I negotiated for and
13 obtained an assignment of his claim against ARP I. There
14 were two defendants in his case.

15 Q. And who is primarily responsible for the payment of
16 the Lussier claim as between ARP II and ARP I based on
17 the indemnity agreement which has been marked as
18 plaintiff's exhibit 6?

19 A. That would be ARP I.

20 Q. And after you made the payment to Mr. Lussier and
21 gave him a note did you -- and you took an assignment of
22 his claim back against ARP I is that correct?

23 A. Yes.

24 Q. And is that the claim for indemnity that you are
25 here today seeking to be indemnified for the amounts you

1 have to pay Mr. Lussier?

2 A. I believe I have two claims today; one assigning of
3 Mr. Lussier's, and one under the indemnity agreement.

4 Q. But both of those seek to on behalf of ARP II to be
5 repaid the amount of money that has been ordered against
6 ARP II in favor of Mr. Lussier?

7 A. Correct.

8 Q. And that if I believe -- based on what Mr. Cisa
9 reported in the record earlier is 238,871 dollars and 38
10 cents, plus attorney's fees of 6,110 dollars is that
11 correct?

12 A. No, it's not correct. It's plus the 325,000 dollars
13 that we paid -- that came out of escrow.

14 Q. I apologize ---

15 A. --- so it's more like 500 and some odd thousand
16 dollars.

17 Q. Well it is the two numbers I said into the record or
18 cited into the record plus 325,000 dollars, which is the
19 cash that you already paid Lussier is that correct?

20 A. Yes.

21 Q. Now, one of the suggestions that have been made --
22 oh, and you took as an assignment Mr. Lussier's claim
23 against ARP I did you not?

24 A. I did.

25 Q. And Mr. Lussier had the benefit of his purchase

1 agreement which gave him an interest in the ARP I
2 property did it not?

3 A. Yes, it did.

4 Q. And was that the reason that you left the lis
5 pendens in effect?

6 A. It was. It was better than a simple indemnity
7 claim, which I also had.

8 Q. Now ultimately in 2010 I believe you agreed to
9 release the lis pendens. Do you recall that?

10 A. Yes.

11 Q. And why did you do that?

12 A. I recollect at about that time it was clear that the
13 real estate market had crashed at that point. And my
14 perception of things at that time was that Mr. Longman
15 was under water on the Ashley River Properties I
16 property.

17 He was -- I checked the public records and there was
18 -- he was in default of his loan on that. At the time
19 according to the public records it was about 2.1 million
20 dollars.

21 And at the same time I've had a long litigation
22 experience with Mr. Longman at great expense and I took
23 the business decision that it was not worth fighting over
24 the lis pendens on this property and incurring legal
25 fees. So I lifted the lis pendens.

1 Q. Was that done pursuant to a consent order that was
2 entered into the court?

3 A. I think so. I think that's the way it was handled.

4 Q. Now the suggestion has been made that -- in the 2005
5 arbitration did you seek indemnification, by you I mean
6 ARP II and Kriti, did you seek indemnification from Mr.
7 Longman and Emerald for the amounts that you would have
8 to pay to the Von Grotthuses, the Cunninghams, and the
9 Lussiers?

10 A. I did. And there were two other small ones. There
11 was Ron Acierno A-C-I-E-R-N-O, and I think a fellow by
12 the name of Patterson. They were much smaller amounts
13 but yes, I sought to recover from Emerald and Mr.
14 Longman.

15 Q. And was the amount, the total amount that you were
16 going to have to pay to those three purchasers known at
17 the time of the 2005 arbitration?

18 A. Most of it was. We knew what the principal amounts
19 were and we had an idea of what the interest claim was.
20 Some had been paid off and some had not as I recall.

21 Q. And were you awarded 400,000 dollars on your
22 indemnity claim against Emerald and Mr. Longman?

23 A. In the 2005 arbitration, yes.

24 Q. And how much does -- the suggestion has been made
25 that if you were to prevail on your indemnity claim here

1 that you would be receiving a double recovery. And I
2 have two questions to ask you about that. First, has Mr.
3 Longman or Emerald ever paid any of the 400,000 dollars
4 that was awarded to you in the 2005 arbitration?

5 A. No. That was included in the judgment as part of
6 the overall damage award and I haven't collected anything
7 on that.

8 Q. Now, how much total did ARP II end up paying to the
9 Von Grotthuses, Cunninghams, Lussiers, Aciernos, and the
10 Pattersons on these claims that you were seeking
11 indemnity for?

12 A. Well, I wrote an affidavit for that which I don't
13 have in front of me. But I know what we paid, what we
14 will pay Lussier; we just determined that the other day.
15 He was the last one. But on the others -- on Von
16 Grotthus we paid 67,765 dollars ---

17 MR. MCCULLOUGH: --- Your Honor, I would object to
18 relevance. These cases are not before you. The Lunar,
19 Lussier case is the only one before you.

20 THE COURT: He brought a claim on indemnity.

21 MR. MCCULLOUGH: For this claim. Not the Von
22 Grotthus claim or any other ---

23 THE COURT: --- do the pleadings specify that?

24 MR. CLEVELAND: I believe that the indemnity claim
25 -- well, I'm not sure.

1 THE COURT: Let's look at the pleadings and see.

2 [Whereupon, the court and counsel review documents]

3 MR. CLEVELAND: Your Honor, I believe Mr.
4 McCullough is right that our indemnity claim only extends
5 to that that was paid for the Lussier claim. Our point
6 here is not that we are entitled to indemnification from
7 these others but simply that there is no double recovery.

8 So I'm not seeking to bring these other claims in
9 but rather to show the court that the 2005 arbitration
10 awarded 400,000 dollars for indemnification on all of
11 these claims; not just Lussier. And the total amount of
12 the claims is really close to a million dollars.

13 So that even if the 400,000 dollars was paid, which
14 it hasn't been, if we were to receive indemnification
15 there would be no double recovery. That's the relevance
16 of this testimony.

17 THE COURT: I'll give you some latitude --

18 MR. CLEVELAND: Thank you. I'm sorry, I
19 interrupted you

20 THE COURT: No, you didn't.

21 Q. [Mr. Cleveland] Mr. Williams, what is the total
22 amount that you've paid to those folks as shown on your
23 affidavit that is filed in this case?

24 [Whereupon, the witness reviews documents]

25 A. 957,523 dollars.

1 Q. Thank you.

2 THE COURT: He needs to specify what he paid to Mr.
3 Lussier individually because if it is your contention
4 that this is not a double recovery and that this other
5 recovery was for all three of these debts or expenditures
6 or advances; however you want to characterize it the
7 record needs to be clear.

8 MR. CLEVELAND: Yes, Your Honor. I believe I will
9 stipulate for the record that the claim for
10 indemnification that we are making today is for the
11 amounts paid to Mr. Lussier and the amounts that were
12 ordered by way of judgment in favor of Mr. Lussier this
13 morning. And that -- but I'll also state for the record
14 that the indemnification award in the 2005 arbitration
15 was with respect to the payments of all of these
16 purchasers; not just Mr. Lussier.

17 THE COURT: I'm clear about that but I need to know
18 exactly what sums you're seeking to recover regarding Mr.
19 Lussier in this case because you've specified Mr. Von
20 Grotthus was paid a 67,000 dollar sum. You've specified
21 what the total sum was that was repaid but if you're only
22 seeking recovery on Mr. Lussier other than the 325 and
23 the 175 and the attorney fees that's all you're seeking
24 to recover in this cause of action?

25 MR. CLEVELAND: Yes it is, Your Honor.

1 THE COURT: Okay. I just wanted ---

2 MR. CLEVELAND: --- I read those numbers. I'll
3 read them again if the court...

4 THE COURT: No, I'm clear. I just needed to be
5 clear as to what you were seeking.

6 MR. CLEVELAND: Yes, Your Honor.

7 THE COURT: That there were not any additional sums
8 you were claiming.

9 MR. CLEVELAND: That's correct, Your Honor. Thank
10 you.

11 THE COURT: You're welcome.

12 Q. [Mr. Cleveland] Mr. Williams, what is -- I'm just
13 going to ask you for the record what is the amount being
14 claimed?

15 A. Okay. There is 325,000 dollars from the escrow
16 account plus the interest that had accrued on that while
17 it was in escrow, which was about 22,000 dollars. A
18 total of 347,000 dollars was released from the escrow
19 account to Mr. Lussier.

20 Then we have on top of that 175,000 dollar note plus
21 interest and attorney fees. And we can look but I went
22 over the numbers with Mr. Cisa before we started today.

23 And the claim with interest was 238,000 dollars on
24 the note plus interest and another 6,910 dollars for
25 attorney's fees. So those are the numbers; if you add

1 them up that's the claim.

2 Q. Mr. Williams was ARP II -- excuse me. Mr. Williams
3 was ARP I a party to the 2005 arbitration?

4 A. No, sir.

5 Q. Has there been any order from any authority either
6 by arbitration or otherwise to the effect that ARP I's
7 obligations under plaintiff's exhibit 6 the indemnity
8 agreement have been altered, extinguished, or changed in
9 any way whatsoever?

10 A. No.

11 Q. And are you seeking today to enforce your rights as
12 a subrogated assignee of Mr. Lussier on the one hand?

13 A. Yes.

14 Q. And under the indemnity agreement that has been
15 marked as plaintiff's exhibit 6?

16 A. Yes.

17 Q. Now with respect to whether ARP I's rights were
18 adjudicated ---

19 THE COURT: --- let me ask another question before
20 you go any further and it saves me from having to ask it
21 at the end while we are in this train of thought. How
22 much of the sum that was in the -- and this may be in the
23 arbitration findings and I apologize because it's all
24 starting to run together to me a little bit because they
25 are fairly lengthy. Of the 400 and some thousand dollars

1 we're talking about from the arbitration how much of that
2 is attributed to Mr. Lussier's claim or did they separate
3 them out?

4 MR. CLEVELAND: They did not separate them out ---

5 THE COURT: --- I didn't think they did. I just
6 wanted to make sure my memory was accurate. So they gave
7 a lump sum but did not specify what was attributable to
8 Mr. Cunningham or Mr. and Mrs. Cunningham, the Von
9 Grotthus and -- I need you to spell that for the record
10 as well. Von Grotthus, how is that spelled?

11 THE WITNESS: V-O-N-G-R-O-T-T-H-U-S.

12 THE COURT: I'm so glad I asked for the court
13 reporter's benefit because she was just going to call
14 y'all later and ask.

15 MR. CLEVELAND: Excuse me?

16 THE COURT: I said I'm glad I asked because she was
17 just going to call y'all later and ask. And the Lussier;
18 so it did not separate or apportion these between that
19 400,000 dollar sum?

20 MR. CLEVELAND: That's right.

21 THE COURT: Okay. You may continue.

22 MR. CLEVELAND: Thank you, Your Honor.

23 THE COURT: You're welcome.

24 Q. [Mr. Cleveland] Mr. Williams I'm going to hand you
25 what has been marked as plaintiff's exhibit 3, which is

1 the order issued by Judge Gammerman confirming the 2005
2 award.

3 [Whereupon, the witness reviews documents]

4 MR. CLEVELAND: First of all I want to move that
5 into evidence so I don't forget.

6 MR. MCCULLOUGH: No objection.

7 MR. CISA: No objection.

8 THE COURT: Marked and admitted without objection.

9 [Whereupon, plaintiff's exhibit number 3 is marked
10 by the court reporter]

11 [Whereupon, plaintiff's exhibit number 3 is entered
12 into evidence by the court]

13 Q. [Mr. Cleveland] Mr. Williams, did Judge Gammerman
14 address the issue of whether ARP I was a party in the
15 2005 arbitration?

16 A. Yes, he did.

17 Q. Where does he do that?

18 A. You'll find that at the bottom of page 23 going on
19 over to page 24. It's really only the caption at the
20 bottom of 23, its item (b) the arbitration panel and the
21 rights of ARP I.

22 Q. And does Judge Gammerman's order affect or change
23 any of the rights or obligations of ARP I? Let me ask it
24 this way. What did Judge Gammerman order on that issue?

25 A. The issue that was before him was that Emerald and

1 Longman contended that the arbitrators did not have
2 authority to exercise jurisdiction over ARP I or
3 adjudicate rights. And what he found was that if --
4 maybe it's better if I just read from this.

5 He says -- and this had to do with the right of
6 first refusal agreement which was between Kriti Ripley
7 and ARP I. This was what this was about. And we argue
8 that they lack standing to challenge this aspect of the
9 award; that Emerald and Longman lack standing to
10 challenge this part of the award on behalf of ARP I.

11 And what Judge Gammerman said here is this aspect of
12 the award does not affect the rights of Emerald and
13 Longman. It does have a bearing on the rights of ARP I,
14 which is not a party to this proceeding.

15 Respondents -- this is Emerald and Longman -- lack
16 standing to raise these objections and since petitioners
17 have indicated they are not seeking enforcement of this
18 provision in this proceeding the matter is not before me.

19 Q. Now in the 2010 arbitration did Emerald seek to
20 obtain a judgment against ARP II for the way in which it
21 took an assignment of the Lunar claim and proceeded to
22 seek indemnification for the amounts paid to Lussier?

23 A. That was one of the many allegations of bad acts
24 that was in their demands that we took assignment of the
25 Lussier claim.

1 MR. CLEVELAND: Your Honor, plaintiff's exhibit 4
2 is Emerald's demand in the 2010 arbitration. I would
3 move to put that into evidence.

4 MR. MCCULLOUGH: There again, same objection to --
5 this was done in the underlying dissolution case. If we
6 are going to start piecemealing it I'd like all of the
7 pleadings brought in otherwise this is just cherry
8 picking. We got the awards and the outcome.

9 THE COURT: Would you like to respond to the
10 objection?

11 MR. CLEVELAND: Yes, Your Honor. Our point is
12 simply that in the 2010 arbitration the claims made for
13 damages for the very same events that the defendant is
14 seeking to obtain an award on his abuse of process claim.
15 And so we contend that this was submitted to the
16 arbitrators and they didn't make any award of damages.

17 Now having said that so there is full disclosure ARP
18 I was not a party to this but I'm seeking to offer it
19 into evidence in the event that the arbitration is deemed
20 to be some type of estoppel or res judicata with respect
21 to ARP I.

22 MR. MCCULLOUGH: There is nothing in the 2010
23 arbitration award stating that this was decided upon,
24 ruled upon or considered. And again if we're going to
25 start piecemealing various pleadings and arguments we

1 need to have the entire record before us which I don't
2 think is relevant to this particular claim.

3 THE COURT: The 2005 arbitration does make a
4 finding.

5 MR. MCCULLOUGH: Right. And I think he is
6 referencing 2010 document.

7 MR. CLEVELAND: Yes, Your Honor. This is the more
8 recent demand ---

9 THE COURT: --- why is that relevant to a 2005
10 finding?

11 MR. CLEVELAND: It's not relevant to that. What
12 it's relevant to is if the defendants are precluded --
13 they've already asked once for damages because of the way
14 the Lussier claim was handled. And now they are here
15 asking again for damages.

16 And so I think that it may be precluded by the
17 doctrine document for res judicata or collateral estoppel
18 but I want to be quick to advise the court ARP I was not
19 a party to the arbitration. And so that's the legal
20 issue that I'm going to have to deal with before I can
21 assert to the court that I know that this ought to be
22 given preclusive effect. I'm simply offering it into
23 evidence so that it's in the record and then we can ---

24 THE COURT: --- ARP I was not a party?

25 MR. CLEVELAND: That's correct.

1 THE COURT: I think you all can stipulate to that
2 can't you? Is there any real contention that they
3 weren't a party to the first one?

4 MR. CLEVELAND: No. We can stipulate to that
5 effect that they weren't a party. This goes to a
6 separate issue as to whether or not these claims have
7 already been adjudicated in the 2010 arbitration. Not
8 the 2005 the 2010.

9 THE COURT: Now you've confused me because there
10 are no findings in the 2010 arbitration award about this.
11 There are findings in the 2005 arbitration award; very
12 specific findings.

13 MR. CLEVELAND: I agree with that. What the -- in
14 the 2010 arbitration in the demand there was a claim for
15 damages related to the way in which the Lussier claim was
16 handled. And I don't content that the consent order
17 causes that to be binding.

18 What I'm submitting is that the general proposition
19 of res judicata and collateral estoppel operates to
20 prevent a party who has submitted his claims one time
21 before a tribunal and gotten full relief and the relief
22 didn't award any damages on the claim that he submitted
23 he can't come back and relitigate that claim again. And
24 so this goes purely to the abuse of process claim. This
25 evidence is in the defense of the abuse of process claim.

1 It's not in furtherance of our claim for indemnification.
2 I'm just anticipating their counter claim for abuse of
3 process and arguing that they've already submitted that
4 in their demand for the 2010 arbitration and they were
5 denied any right to damages and they shouldn't be allowed
6 to come and relitigate that.

7 THE COURT: You're saying the 2010 arbitration they
8 asked the arbitrator to give them damages relating to
9 this 400,000 dollars?

10 MR. CLEVELAND: Relating to Mr. Williams taking the
11 assignment and proceeding with the Lunar claim against
12 them they contend that was wrongful activity and they are
13 claiming it's an abuse of process here, they claimed it
14 was wrongful.

15 THE COURT: Well, if you're trying to -- if you're
16 trying to deal with the abuse of process claim wouldn't
17 what would be germane would be the fact that there was a
18 finding against him in that regard?

19 MR. CLEVELAND: That's right; the denial of that
20 claim.

21 THE COURT: So why would -- I guess I'm still lost
22 as to why the demand would have any relevance.

23 MR. CLEVELAND: I apologize for not being clear.

24 THE COURT: No, I may just be playing catch up,
25 which is possible.

1 MR. CLEVELAND: We are here on our claim seeking
2 indemnification.

3 THE COURT: I got that.

4 MR. CLEVELAND: They claim that our seeking it is
5 wrongful. They claim that the 2005 arbitration
6 adjudicated that and that our engaging in taking the
7 assignment and suing under the indemnity agreement that
8 those two acts constituted an abuse of process.

9 THE COURT: I got that part.

10 MR. CLEVELAND: In the 2010 arbitration they
11 submitted that claim to the arbitrators as well and
12 sought damages there so that they actually had parallel
13 claims going up to ---

14 THE COURT: --- is that correct Mr. McCullough?

15 MR. MCCULLOUGH: No. ARP I the plaintiff in this
16 case was not a party to that litigation. The 2010
17 arbitration award makes no reference to that claim. My
18 understanding ---

19 THE COURT: --- res judicata not only applies to
20 issues it applies to parties. And it really doesn't
21 matter the compilation of those parties if it's the same
22 parties own and the same corporation or different
23 incantation of the corporation of the same issue.

24 MR. MCCULLOUGH: That issue had not been decided.
25 And we both read the 2010 arbitration award numerous

1 times.

2 THE COURT: No, it says your client is not entitled
3 to anything. No damages is what it says.

4 MR. MCCULLOUGH: Because they had already decided
5 who was supposed to pay for it ---

6 THE COURT: --- I don't think it ---

7 MR. MCCULLOUGH: --- Your Honor, we flatly reject
8 that this arbitration has decided that issue. And
9 piecemeal pleadings -- if we need to get the entire
10 record of the court ---

11 THE COURT: --- it's up to you to admit what you
12 want to admit into the record. Right now I'm dealing
13 with what Mr. Cleveland is seeking to admit into the
14 record. So I need a basis for the objection.

15 MR. MCCULLOUGH: It's not relevant.

16 THE COURT: Okay. Overruled; subject to
17 connection.

18 MR. CLEVELAND: Thank you, Your Honor.

19 THE COURT: And it's going to be marked for I.D.
20 only at this time until I see what that connection is.

21 MR. CLEVELAND: Thank you. This is plaintiff's
22 exhibit 4, which is the demand. I'm going to submit it
23 marked I.D. if now is the appropriate time.

24 THE COURT: So I.D. only at this time.

25 MR. CLEVELAND: Thank you, Your Honor.

1 [Whereupon, plaintiff's exhibit number 4 is marked
2 for identification only by the court reporter]

3 Q. [Mr. Cleveland] Would you turn to page 13 of
4 plaintiff's exhibit 4?

5 [Whereupon, the witness is shown documents]

6 Q. And referencing paragraph 30 does paragraph 30
7 contain a claim that relates to the way in which ARP II
8 took the assignment and proceeded to continue with this
9 claim against ARP I?

10 A. This was an allegation of one of the bad things that
11 we had done as managers here. It falls under the
12 category of Kriti's breaches, mismanagement and
13 misappropriation of ARP II's property.

14 This was an allegation that taking that assignment
15 was some kind of breach of the operating agreement or
16 mismanagement of some kind.

17 Q. And let me show you plaintiff's exhibit 5 which is
18 the order and judgment in the 2010 arbitration.

19 [Whereupon, the witness reviews documents]

20 Q. Was anything awarded to Emerald or Longman with
21 respect to that claim? I think Emerald was the only
22 party. Was anything awarded to Emerald with regard to
23 that claim?

24 A. No. And there was another allegation in here having
25 to do with Lussier too.

1 MR. CLEVELAND: Your Honor, I would move for the
2 admission of plaintiff's exhibit 5, which is the order
3 and judgment of the 2010 arbitration.

4 THE COURT: Any objection?

5 MR. MCCULLOUGH: No, Your Honor.

6 THE COURT: Marked and admitted without objection.
7 Plaintiff's 5 without objection.

8 [Whereupon, plaintiff's exhibit number 5 is marked
9 by the court reporter]

10 [Whereupon, plaintiff's exhibit number 5 is entered
11 into evidence by the court]

12 MR. CLEVELAND: That's all I have, Your Honor.

13 Q. [Mr. Cleveland] Would you answer any questions other
14 counsel may have.

15 THE COURT: Who wants to go first?

16 CROSS-EXAMINATION

17 BY MR. MCCULLOUGH:

18 Q. You just touched on it so we'll talk about it now.
19 That portion you just cited dealt with efforts at
20 dissolution; further evidence and reasons to dissolve the
21 company correct?

22 A. Are you talking about the demand?

23 Q. Yes. The 2010 case was about efforts to dissolve
24 the entity right?

25 A. There were a lot of things going on in this case; a

1 lot of claims and allegations.

2 Q. You have a notebook --

3 A. Is it this one [indicates]?

4 Q. Well, I think we've moved a lot of the exhibits out
5 so I'm going to get some additional records for you.

6 MR. MCCULLOUGH: Your Honor, would you give Will
7 and I one second to maybe agree on some exhibits?

8 [Whereupon, Mr. McCullough, Mr. Cleveland, and Mr.
9 Cisa confer]

10 [Whereupon, defendant's exhibit numbers 1, 2, 3, 4,
11 and 5 are marked by the court reporter]

12 MR. MCCULLOUGH: Your Honor, I believe without
13 objection we've got additional exhibits that we're moving
14 into evidence. And we'll figure out -- currently list as
15 exhibit number 1, defendant's exhibit is the 2005
16 arbitration award. Exhibit 2 is the request for
17 modification of that award. Exhibit 3 is denial -- the
18 arbitrator's decision on that modification request.
19 Exhibit 4 is the enrollment of the judgment in South
20 Carolina. And exhibit 5 is the 2010 arbitration award.

21 THE COURT: And whose exhibits are those?

22 MR. MCCULLOUGH: We're submitting them.

23 THE COURT: Defendant's exhibits?

24 MR. MCCULLOUGH: Yes, ma'am.

25 THE COURT: Without objection?

1 MR. CLEVELAND: That's correct, Your Honor.

2 MR. CISA: No objection, Your Honor.

3 THE COURT: Marked and admitted without objection.

4 [Whereupon, defendant's exhibit numbers 1, 2, 3, 4,
5 and 5 are entered into evidence by the court]

6 MR. MCCULLOUGH: Thank you, Your Honor.

7 THE COURT: You're welcome. You may proceed.

8 MR. MCCULLOUGH: Thank you.

9 Q. [Mr. McCullough] I'm going to hand you what we just
10 marked as defendant's exhibit number 1 which is the 2005
11 arbitration award.

12 [Whereupon, the witness is shown document]

13 Q. Do you see that?

14 A. I do.

15 Q. If you would turn to the third page of that document
16 please?

17 A. Okay.

18 Q. I'm going to read something and I want you to read
19 along and make sure I get it right.

20 Subsection (f) We find that Kriti and ARP II are
21 entitled to indemnification from Emerald and Longman in
22 the amount of 400,000 for all claims to date of third
23 party contract vendees against ARP II. We question
24 Kriti's conduct in encouraging some of these third
25 parties to assert claims against ARP II and not accept

1 partial reimbursement of their deposits. However we are
2 persuaded that Emerald or Longman or another entity
3 controlled by Longman received and kept the deposits; did
4 not use these funds for the benefit of ARP II and ARP II
5 must now resolve all of these third party claims.

6 Q. Did I read that accurately?

7 A. You did.

8 Q. Now the entity that -- one of the entities
9 controlled by Longman is ARP I is that correct?

10 A. Through Emerald. I believe Emerald owns 100 percent
11 of ARP I.

12 Q. And then Longman controls that entity correct?

13 A. As far as I know he does.

14 Q. Now ARP I -- your allegation is that ARP I got those
15 deposits -- kept the deposits right; that's what you're
16 suing them for?

17 A. No, that's not correct.

18 Q. You're suing them for indemnification for keeping
19 those funds right?

20 A. No, that's not correct. If you look at the contract
21 the contract was between Lussier and Von Grotthus and
22 Cunningham; it was not with ARP I. It was another entity
23 that got ---

24 Q. --- you litigated the indemnity claim in New York
25 didn't you?

1 A. Under the operating agreement, yes.
2 Q. And under the indemnification agreement that we've
3 marked?
4 A. No, that's not correct.
5 Q. They use the work indemnification right? That's the
6 word they use?
7 A. That's correct.
8 Q. And its 400,000 dollars correct?
9 A. Well, that was the award here.
10 Q. 400,000 dollars?
11 A. Correct.
12 Q. Indemnification correct?
13 A. By Emerald and Longman.
14 Q. And related entities.
15 A. No. That's not what it says. The indemnitors are
16 Emerald and Longman; not and the other entities.
17 Q. It questioned your actions or Kriti's actions in
18 conjuring up these three lawsuits didn't it?
19 A. Well, it says what it says ---
20 Q. --- and I'm asking you ---
21 A. --- we question our conduct.
22 Q. They questioned your conduct?
23 A. Uh huh.
24 Q. Correct?
25 A. That's what it says. That's what they said.

1 Q. Now -- and they also determined that ARP II was
2 responsible for paying 400,000 dollars related to those
3 third party contracts right?

4 A. No, that's not right. That's not what they said.

5 Q. It doesn't say ARP II is responsible?

6 A. No. It says ARP II must now resolve all of these.

7 Q. And only allow 400,000 dollars in indemnity correct?

8 A. Yes, that was part of the damage award.

9 Q. If you turn to page number 7 it states we find that
10 Kriti and ARP II are entitled to indemnification from
11 Emerald and Longman in the amount of 400,000 dollars for
12 all claims to date of third party vendors against ARP II
13 and requires the resolution of all such claims to be at
14 the expense of ARP II. Do you see that?

15 [Whereupon, the witness reviews documents]

16 A. I see that.

17 Q. Let me make sure I understand. [Reading] Requires
18 the resolution of all such claims to be at the expense of
19 ARP II. And one of those claims is a Lunar claim
20 correct?

21 A. That's right.

22 Q. All right. That's what the arbitrators found?

23 A. It says what it says.

24 Q. And you were there?

25 A. I was there.

1 Q. Now you didn't like that decision did you?

2 A. We didn't understand where the number came from.

3 Q. And in response to that you filed or had your
4 attorney file a request for a modification correct?

5 A. I believe a request for modification was filed.

6 Q. And in this seven page document that I'll hand to
7 you you requested that the arbitrators reconsider the
8 amount that ARP II was obligated to pay under the third
9 party contract claims right?

10 [Whereupon, the witness reviews documents]

11 A. Could you repeat your question? I'm sorry, I was
12 looking at ---

13 Q. --- yes. You asked the arbitration panel to
14 reconsider the amounts that it had obligated ARP II to
15 pay related to the third party contracts didn't you?

16 A. It wasn't a reconsideration. We were asking to
17 modify the award.

18 Q. Jack it up considerably against or basically reduce
19 the obligation for ARP II isn't that true?

20 A. Well, as I testified we did not understand where the
21 \$400,000 dollar number came from. If you look at this
22 letter -- and this was all presented in the 2005
23 arbitration is what was paid to Von Grotthus and
24 Cunningham and what the exposure was to Lunar, Acierno,
25 and Patterson and some of these other guys here we didn't

1 understand where the number came from. That was the
2 purpose of this.

3 Q. You thought that Mr. Longman and Emerald should be
4 obligated to pay for the third party contract claims
5 right?

6 A. That was the argument in the arbitration, yes.

7 Q. And the arbitrators decided that actually ARP II was
8 required to pay right?

9 A. As between us and Emerald and Longman, yes.

10 Q. The paragraph we just stated said that ARP II is
11 responsible for the settlement and the cost of settlement
12 with the third party contract vendors' right; those three
13 sub party contractors.

14 A. We were obligated to resolve these claims at our
15 expense.

16 Q. At ARP II's expense?

17 A. Yes.

18 Q. You didn't like that?

19 A. We didn't understand it. We didn't understand the
20 number. That was the purpose in the request for
21 modification. We didn't understand where the number came
22 from.

23 Q. The first paragraph of page 3 of your request for a
24 modification I'm going to -- on page 2 you actually go
25 through and spell out the amount you feel is owed on the

1 Von Grotthus, Cunningham, and Lunar claims right? That's
2 what your lawyer does on your behalf?

3 A. Yes, this was uncontroverted. This was evidence
4 presented in the arbitration proceedings back then.

5 Q. Don't you also say on page 3 that amount of one
6 million some odd thousand dollars, which is the total on
7 all of these third party claims should be paid by
8 Emerald?

9 A. Well, that's what we were asking. We were asking
10 them to amend the award so that Emerald and Longman would
11 pay the cost of settlement 100 percent.

12 Q. The arbitrators disagreed with you right?

13 A. Well, they didn't modify the award.

14 Q. And that's exhibit number 3 they didn't change the
15 amounts or who was responsible. They kept it just the
16 way it was right?

17 A. They didn't change the amount. They made some
18 grammatical corrections and they said our motion to
19 modify the award was denied.

20 Q. And so after a week of arbitrating this issue among
21 others and requests by your New York counsel to modify
22 the award we're back to ARP II to settle all of the
23 claims at its expense correct?

24 A. That's what the award says, yes.

25 Q. Now you were here for Mr. Lussier's testimony

1 yesterday correct?

2 A. I was.

3 Q. I'm going to hand you materials that we marked
4 yesterday.

5 [Whereupon, the witness is shown documents]

6 Q. Let's start with the assignment. You had Lunar
7 assign you whatever rights Lunar had correct?

8 A. That is correct.

9 Q. Now Lunar had previously executed a settlement
10 agreement and had signed and returned the settlement
11 agreement that didn't include an assignment right?

12 A. Is this defendant's exhibit 1 from the Lunar case;
13 the '05 case? Are you asking me about a document? I'm
14 sorry I'm confused.

15 Q. I'm going to hand you --

16 [Whereupon, Mr. McCullough, Mr. Cleveland, and Mr.
17 Cisa confer]

18 MR. CISA: I object on relevance. It's part of
19 their settlement negotiations. It wasn't consummated.

20 THE COURT: Where did it come from again? I didn't
21 hear that part. Settlement negotiations from what? A
22 mediation or something else?

23 MR. CISA: When Mr. Lussier was negotiating with
24 Mr. Williams they talked about resolving it pursuant to
25 this document and they didn't come to an agreement as far

1 as this document and entered into the second document
2 which is the assignment that is in evidence. So my
3 objection is to relevance. Why is it relevant?

4 MR. MCCULLOUGH: It's relevant to show that there
5 was a deal consummated, executed, and returned and then
6 subsequently rejected and we know why because we believe

7 ---

8 THE COURT: --- a deal can't be consummated and
9 rejected. It's either consummated and it becomes a
10 binding contract or there is some deviation of something
11 else. But if it was never signed it was never
12 consummated. There was never a meeting of the minds of
13 settlement negotiations. And under the rules it's
14 inadmissible. Marked for I.D. only.

15 [Whereupon, defendant's exhibit number 6 is marked
16 for identification only by the court reporter]

17 Q. [Mr. McCullough] Mr. Williams you had negotiated for
18 the resolution of the Lunar claim prior to the execution
19 of the assignment correct?

20 A. You're using a past tense. We were in negotiations
21 at that time. We hadn't negotiated or concluded
22 anything.

23 Q. Now pull out the packet of emails. The first one
24 is dated Wednesday, June 6th.

25 [Whereupon, the witness complies]

1 Q. You got that in front of you?

2 A. It says plaintiff's 3?

3 Q. Yes. Now

4 A. --- what's the date on it? I'm sorry.

5 Q. June 6th, 2007.

6 A. I've got the wrong one. I think its 4 not 3.

7 Q. Now do you recall the testimony yesterday, and you
8 can use this email in front of you; this May 25, 2007
9 email.

10 Mr. Lussier was of the opinion that the arbitration
11 agreement seemed to name ARP II as the responsible party.
12 Do you see that?

13 A. Are you asking me if I recall the testimony?

14 Q. I'm asking you if you see that written in front of
15 you.

16 A. Oh, yes I see it in front of me.

17 Q. And you were discussing back and forth who was
18 ultimately responsible for the Lunar claim correct?

19 A. I think that came up in later emails, yes.

20 Q. And you even say my logic is as follows, the maximum
21 recovery you can possibly get is your deposit plus
22 statutory interest. There is still some uncertainty
23 whether ARP II is responsible for it or ARP I or even Stu
24 Longman. Do you see that?

25 A. Yes, I do.

1 Q. And the date of this email, which is May 27, 2009 --
2 I'm sorry, 2007 was before the New York arbitration had
3 been confirmed correct?

4 A. Yes. You know this email says settlement purposes
5 only on it.

6 Q. And it's admitted into evidence and I'm asking you
7 questions about it.

8 A. Okay.

9 Q. And so my question was when this email was sent this
10 was before the New York arbitration was confirmed
11 correct?

12 A. Yes, the New York arbitration wasn't confirmed until
13 I think in March of 2008.

14 Q. And so there was some uncertainty in your mind as to
15 whether or not this was an ARP II obligation right?

16 A. We had an unconfirmed arbitration award at that
17 time.

18 Q. Right. And that was -- we just went through what
19 the arbitration award itself said but you still held out
20 hope that the New York courts would modify that award.

21 A. No, that's not correct.

22 Q. Was that not a basis for your holding out hope that
23 ARP II might not ultimately be responsible?

24 A. No. Mr. Longman was vigorously contesting the
25 arbitration awards at that time so I did not know what

1 the end result would be.

2 Q. Until it was resolved?

3 A. Until it was confirmed by the court, yes.

4 Q. Which it was subsequently confirmed in 2008?

5 A. That's correct.

6 Q. If you would pull out the packet of emails with the
7 first one dated November 2nd, 2007.

8 [Whereupon, the witness complies]

9 A. It's plaintiff's 3.

10 Q. If you would flip to the email the fourth page in at
11 the top an email from Mr. Lussier to you dated December
12 20, 2007. Do you see that?

13 A. Yes, I'm with you.

14 Q. I'll read it. I had planned either to let the lis
15 pendens on ARP I lapse when the next required court
16 action occurred. Do you see that?

17 A. I do.

18 Q. Turn the page. This is an email from you also dated
19 November 20, 2007. I'm going to read this and tell me if
20 I got this right. This is something you wrote to Mr.
21 Lussier.

22 As you know we do not believe we are responsible for
23 the payment of your claim. We believe Longman is. By
24 paying off this claim I am taking the risk that I can
25 recover this payment from Longman or otherwise resolve

1 the matter in the course of my continuing disputes with
2 him over his conduct in this sorry affair. The
3 arbitration awards have still not been confirmed by the
4 New York court.

5 If they are overturned this whole thing becomes a
6 mess again and you are stuck in the middle of it if we
7 have not settled. I can't take this risk without gaining
8 some back stop protection and additional leverage with
9 Longman in the form of an assignment. That is why I am
10 taking -- asking for the assignment of the claim.

11 Q. Do you see that?

12 A. I do see it.

13 Q. So as of December 2007 despite the '05 award you
14 still didn't think you were responsible for paying this
15 claim is that correct?

16 A. That's correct.

17 Q. And you were using the failure of the New York court
18 to confirm the award as further proof that it is yet to
19 be decided in a final matter of who should pay that
20 claim, correct?

21 A. That was one of my reasons.

22 Q. And another reason was to -- your effort to gain
23 some back stop protection and additional leverage against
24 Mr. Longman on your ongoing tussles correct?

25 A. My goal here was to settle with Mr. Lussier. That's

1 what this was all about.

2 Q. And to gain some back stop protection and additional
3 leverage. Those were your words correct?

4 A. That's what I wrote.

5 Q. And so you settled with Mr. Lussier paying him
6 325,000 dollars and a note for 175,000 dollars correct?

7 A. At this time yes. It was the 325 plus interest;
8 whatever it was at the time, and the note.

9 Q. But the interest didn't come out of your pocket.
10 That was interest that was earned sitting in a bank
11 account right?

12 A. Yes. Well, it would have been in our pocket if it
13 had been put in escrow.

14 Q. So the amount that Mr. Lussier was owed was resolved
15 when you entered the settlement agreement and paid him
16 325,000 dollars and a promissory note for another 175
17 correct?

18 A. It was resolved as between Mr. Lussier and ARP II.

19 Q. Okay. And that was his entire damage claim as a
20 result of this right?

21 A. That was the agreed settlement amount. His damage
22 claim was actually higher.

23 Q. He resolved his claim with you and released ARP II's
24 lis pendens right?

25 A. The lis pendens had already been released a year and

1 a half earlier when I put up the escrow money.
2 Q. But the money -- the lis pendens remained on Mr.
3 Longman's tract ARP I right?
4 A. When? It was on there continuously.
5 Q. Right. And when you executed the assignment and
6 took hold of the Lunar claim you also got that lis
7 pendens that was still on ARP I's property right?
8 A. ARP II stepped into Lunar's shoes, yes.
9 Q. And you were making all these decisions.
10 A. Yes.
11 Q. And you had 100 percent voting right at that point
12 correct?
13 A. Well at that point it depends on who you ask because
14 we had an unconfirmed award.
15 Q. Well let's turn to that. It was confirmed in 2008
16 right?
17 A. Yes.
18 Q. And as of that date you certainly had 100 percent
19 voting right in ARP II right?
20 A. Yes.
21 Q. And any questions you might have had about the
22 legitimacy of the 2005 award certainly had been resolved
23 when that New York court stamped its seal of approval on
24 that award in 2008 correct?
25 A. The order was confirmed at that time. The judgment

1 says what is says, yes.

2 Q. Right. So that 2005 arbitration award that stated
3 that ARP II was responsible to pay the Lunar claim was
4 confirmed and at that point beyond question as of 2008
5 correct?

6 A. I think we have to look at the judgment because I'm
7 not sure the judgment says that.

8 Q. The New York judgment does it or does it not enroll
9 the arbitration award and confirm the arbitration award?

10 A. It confirms the arbitration award but the actual
11 award awards a damage amount and says that it was 400,000
12 dollars on account --

13 Q. And based on that you knew as of December of 2008
14 that your concerns about whether or not you were
15 responsible to pay the Lunar claim that issue was gone
16 because it had been confirmed.

17 A. Well, it confirmed the award. It was our obligation
18 to resolve these claims.

19 Q. And so in December of 2007 in your email to Mr.
20 Lussier where you say it's still up in the air because
21 the New York courts have not confirmed that arbitration.
22 That issue was done by 2008 when they confirmed it right?

23 A. That issue was done -- I'm sorry?

24 Q. You stated one of the reasons you didn't feel like
25 this issue was resolved in your negotiations with Mr.

1 Lussier was the fact that the New York arbitration had
2 not been confirmed at that point correct?

3 A. I believe I testified that was one of my reasons,
4 yes.

5 Q. And that reason was gone after the New York courts
6 confirmed the arbitration right?

7 A. I knew I was entitled to 400,000 dollars on account
8 of settling these matters.

9 Q. You did not release your lis pendens that you owned
10 that Lunar had filed on ARP I's property after the 2008
11 arbitration award did you?

12 A. No, I did release it.

13 Q. After the 2008 award you released it two years later
14 in 2010 right?

15 A. Well, you didn't specify a time. It was after, yes;
16 it was 2010.

17 Q. Two years later?

18 A. It was 2010; somewhere. Whatever.

19 Q. What is 2010 minus 2008?

20 A. Its two years.

21 Q. Two years later, right?

22 A. Yes..

23 Q. Thank you. Now you enrolled a judgment -- had a
24 judgment enrolled in South Carolina?

25 A. Are you talking about the judgment from the 2005

1 arbitration proceedings?

2 Q. Yes. I'm going to hand you what we marked as
3 exhibit 4.

4 [Whereupon, the witness is shown document]

5 Q. This is a New York judgment that was enrolled here
6 in South Carolina correct?

7 A. Yes, we had it domesticated down here. That's the
8 word they use up there. It's called enrolled here. I
9 assume it's the same thing.

10 Q. And you are -- and that amount is 1 million 184,581
11 dollars as of the date it was enrolled here; from the
12 date it was signed right?

13 A. Plus whatever post judgment interest had accrued,
14 yes.

15 Q. Which is now about 1 and a half million bucks;
16 something like that?

17 A. I think it's more than that but yes, it's up there.

18 Q. And that included -- if you would turn to page 2 (d)
19 the 400,000 dollars representing indemnification for the
20 third party claims correct?

21 A. Yes.

22 Q. And so an arbitration award rendered a decision as
23 to the amounts owed on the Lunar debt and that award was
24 confirmed in New York and enrolled in South Carolina and
25 you are actively pursuing that judgment against Emerald

1 and Stu Longman correct?

2 A. I was -- we're talking at the time it was enrolled
3 here through then I think 2009, yes we were trying to
4 collect this money from Stu.

5 Q. And so you've already got a judgment against Stu
6 Longman and Emerald for the amounts related to the Lunar
7 obligation; the 400,000 dollars right?

8 A. What I've got is an uncollected judgment against Stu
9 and Emerald.

10 Q. For the Lunar debt?

11 A. No, not specifically for -- on account of settling
12 these third venders.

13 Q. All three party vendors including the Lunar?

14 A. Well all the other little guys. There were two or
15 three others, yes.

16 Q. You met with these three parties Von Grotthus,
17 Cunningham, and Lussier before they filed claims correct?

18 A. Actually that's -- you're testing my memory going
19 back so far. Von Grotthus and Cunningham were local. I
20 met with them.

21 I did meet with Tom Lussier at some later point but
22 I don't recall the date. He was in Ohio. He lives in
23 Ohio; he wasn't local.

24 Q. Jamie George is somebody who worked for ARP II;
25 worked for you?

1 A. Yes, she was a clerical type that worked in the
2 office.

3 Q. I'm going to hand you an email from her to you dated
4 March 4, 2005.

5 [Whereupon, the witness is shown document]

6 Q. On the second paragraph after the indention I'm
7 going to read this and you tell me if I got this correct.
8 I set up a 10 a.m. meeting on Wednesday in our office
9 with the waterside gang. I also contacted Garrow
10 [phonetic] to update him on the capital call and to set
11 up the meeting here on Wednesday at 2 p.m. Do you see
12 that?

13 A. I do.

14 Q. Now Garrow is Garrow Von Grotthus correct?

15 A. Yes.

16 Q. And you were discussing -- you were updating him on
17 the capital call. Do you see that?

18 A. I do.

19 Q. And that would be the capital call where you had
20 sent that we discussed in the dissolution case to Emerald
21 and Stu Longman correct?

22 A. I made the capital call in February of 2005.

23 Q. And this is March, early March ---

24 A. --- this is March. So yes, we sent out the capital
25 call to the members at that time.

1 Q. And as the date of your meeting none of these three
2 parties had filed a lawsuit against Longman, ARP I, or
3 Emerald correct?

4 A. Boy, you're testing my memory. I think Garrow was
5 the first one to file but I don't recall the date.

6 Q. Regardless, you set up a meeting with who she
7 describes as the waterside gang. Do you see that?

8 A. I do.

9 Q. And the waterside gang are the three people that own
10 those claims right?

11 A. No. that's not correct.

12 Q. Was Garrow Von Grotthus one of those three people
13 who owned one of those claims?

14 A. He was but the waterside gang was not a reference to
15 him. This was a separate meeting. And if you read this
16 it's pretty clear that the meeting is at 10 and the
17 waterside gang with Garrow was at 2. The waterside gang
18 were the engineers and all the people involved with the
19 construction of the marina.

20 Q. Garrow is not a member -- Garrow Von Grotthus is not
21 a member of ARP II is he?

22 A. No.

23 Q. Yet you were meeting with him to discuss the capital
24 call on ARP II and Emerald and Stu Longman?

25 A. Yes, because he had claims and he was very

1 interested in what is going on with this project and how
2 he was going to get paid ultimately.

3 Q. And he certainly hadn't filed a claim -- to you
4 knowledge he hasn't filed any claims before you met with
5 him?

6 A. My memory is that somebody filed in February and I
7 met him in November I think of 2004.

8 Q. Frank Guarino was a Broker that from time to time
9 acted on behalf of ARP II for sales correct?

10 A. Yes.

11 Q. And worked for Ripley -- Ripley Light Marina in
12 various capacities or whatever entity they were trying to
13 sell either condos or slips?

14 A. Yes, he was involved in some of the early sales
15 effort, yes.

16 Q. Now Mr. Guarino was involved in the default because
17 he was the one that was served the lawsuit that you then
18 owned suing ARP I on behalf of the assigned claims
19 correct?

20 A. He was the registered agent for ARP I, correct.

21 Q. And you as an attorney with 100 percent voting
22 rights in ARP II prosecuted the assigned claims that you
23 bought from Lunar against ARP I correct?

24 A. I didn't do it. I hired an attorney to do it. It
25 was Mr. Cleveland.

1 Q. And I'm sure he did a great job. But you also are
2 an attorney correct?

3 A. I am.

4 Q. And at the time you knew when you got the assignment
5 that part of what you were buying was the lis pendens on
6 ARP I's property right?

7 A. Yes.

8 Q. And that remained until 2010 right?

9 A. Yes.

10 Q. And around the same time period in 2008 Frank
11 Guarino was working on behalf of ARP II on behalf of you?

12 A. He was an independent Broker. One of his many jobs
13 was he was trying to sell for us. He was doing other
14 Brokerage for other people.

15 Q. And he was also trying to sell for you?

16 A. He was for ARP II, correct.

17 Q. And during this timeframe when you were prosecuting
18 the Lunar case you served Frank Guarino with your claims
19 against ARP I correct?

20 A. That's not correct.

21 Q. I thought that's what you just testified that he was
22 a registered agent and you served Frank Guarino with the
23 lawsuit on behalf of ARP I.

24 A. No. May I clarify?

25 Q. First answer did you serve Frank Guarino the

1 lawsuit?

2 A. No, I didn't serve him the lawsuit.

3 Q. Did your attorney have him served?

4 A. No. Mr. Lussier filed the lawsuit. We were his
5 assignee.

6 Q. All right. Mr. Lussier never filed for default did
7 he?

8 A. No, I don't believe he did.

9 Q. You did?

10 A. We filed for default because Mr. Longman never
11 responded to Mr. Lussier's claim or ARP I never
12 responded.

13 Q. And so when you bought the claim from Lunar you also
14 then moved for default against your co-member in ARP II
15 Stu Longman right?

16 A. No, that's not right. I moved for default against
17 ARP I.

18 Q. And at the time you served those default -- or your
19 attorney served those default papers on Frank Guarino.

20 A. As a registered agent, yes he did.

21 Q. Now did you communicate that default to Mr. Longman?

22 A. Me? No.

23 Q. You knew how to find him.

24 A. Not really. He moved around a lot.

25 Q. Okay. So we've got emails and you didn't know how

1 to send him a letter, send an email, give him a phone
2 call? You didn't know how to get in touch him? That's
3 your testimony?

4 A. No, it's not my testimony. You asked me if I knew
5 where to find him. I'm not trying to fight you but your
6 questions are not very specific. I'm trying to help you.

7 Q. Could you have told him that there had been a
8 default filed if you wanted to?

9 A. Could I have told him? I suppose I could have, yes.

10 Q. Now, you were aware as I'm sure your attorney was
11 aware that Mr. Longman was represented by Richard Rosen
12 during this time period correct?

13 MR. CLEVELAND: Objection, Your Honor.

14 THE COURT: Basis?

15 MR. CLEVELAND: I don't believe there is any
16 foundation for that.

17 THE COURT: Well, I think he would know who the
18 opposing attorney was in the case. I just don't know how
19 any of it is relevant.

20 MR. MCCULLOUGH: Cost. We spent a tremendous
21 amount of money unwinding this orchestrated default.

22 THE COURT: Then you need to ask that direct
23 question. Who represented him is immaterial to how much
24 money he spent.

25 MR. MCCULLOUGH: I think its material to the fact

1 that this entire ---

2 THE COURT: --- I've ruled Mr. McCullough ---

3 MR. MCCULLOUGH: --- default nobody notified Mr.
4 Longman, nobody ---

5 THE COURT: --- he has no duty to once someone is
6 served to notify them of the default. We all know that;
7 that's why it's called default judgment. Once you're
8 served you have a duty to answer. If you don't under the
9 rules they have the right to obtain judgment.

10 He has no duty to notify someone that a suit is
11 pending against him once there has been effective
12 service. You need to move on to the questions that
13 relate to these that you -- it is your contention your
14 client incurred, which is germane to the issue of the
15 remaining cause of action.

16 Q. [Mr. McCullough] Your default was based on service
17 on Frank Guarino; somebody who was working for you right?

18 A. My default was based on service on Frank Guarino as
19 registered agent for ARP I. And Mr. Guarino worked as an
20 independent Broker who happened to have as one of his
21 assignments to try and sell boat slips and condominiums
22 at ARP II.

23 Q. I'm going to hand you an email that you wrote to Mr.
24 Guarino dated August 14, 2008. Take a look at that.

25 [Whereupon, the witness reviews documents]

1 Q. Now you wrote to Mr. Guarino in the subject line is
2 ARP I and ARP II correct?

3 A. Yes.

4 Q. And this included -- this email included an
5 affidavit that you had forwarded relating to the default
6 right?

7 A. Yes. Mr. Cleveland had drafted an affidavit and he
8 asked me to contact Mr. Guarino.

9 Q. And the affidavit was executed and you used it as a
10 default here correct?

11 A. It was.

12 Q. In this same email you also discuss the incremental
13 value of gaining marina expansion permits correct? At
14 the top of page 2, FYI the incremental value -- 7 and a
15 half million dollars resulted from the marina expansion
16 permits. Do you see that?

17 [Whereupon, the witness reviews documents]

18 A. Yes, I do see that.

19 Q. All right. And the marina expansion permits are the
20 ones we've discussed in the dissolution case that were
21 finally permitted in 2012 is that correct?

22 A. Yes. I guess we filed the permits in 2008. I may
23 have testified yesterday it was 2007 but I guess we just
24 filed it at this time.

25 Q. And so what you were considering is selling the

1 property once you got the permits and placing additional
2 value on the property at that point correct?

3 MR. CLEVELAND: Objection, Your Honor.

4 THE COURT: Basis?

5 MR. CLEVELAND: I don't believe it's relevant. It
6 sounds like we are re-litigating the dissolution case.

7 MR. MCCULLOUGH: The relevance is the execution of
8 Mr. Guarino's affidavit includes what we deem to be a
9 carrot on a stick. The stick being that we will pull and
10 hire a national Broker unless you sign the affidavit.
11 The second portion of this email discusses finding
12 national Brokers to market this property.

13 THE COURT: I'm trying to figure out how any of
14 that is relevant to an abuse of process cause of action.
15 There was no motion to -- the default is valid. There
16 was no challenge made to it. There was no motion made to
17 vacate -- at least not that I am aware of.

18 MR. MCCULLOUGH: It was removed. It was vacated.

19 THE COURT: Okay. By consent or by judicial
20 order?

21 MR. MCCULLOUGH: The judge's order.

22 THE COURT: After a hearing?

23 MR. MCCULLOUGH: I believe after a vigorous
24 hearing.

25 THE COURT: What's the number on it? What's the

1 case number?

2 MR. MCCULLOUGH: It should be under 05-2434.

3 THE COURT: A default was filed in this case?

4 MR. MCCULLOUGH: Yes, ma'am. The default was
5 entered and then subsequently withdrawn after a fight
6 between when Mr. Rosen was involved and Mr. Cleveland.
7 And the issue of whether service was effected ---

8 THE COURT: --- I'm still trying to figure out how
9 does that relate to an abuse of process cause of action?
10 What element of that cause of action does this testimony
11 make more or less probable?

12 MR. MCCULLOUGH: An ulterior motive behind the
13 continuation of the filing of the lis pendens and having
14 the lis pendens remain on the property the ulterior
15 purpose, which is part of the abuse of process claim.
16 Something over and above something related to the
17 property because we're dealing with continued efforts to
18 as he said gain additional leverage on Longman and run up
19 attorney's fees ---

20 THE COURT: --- I'm going to give you some
21 latitude. But the critical element in an abuse of
22 process is your prevailing in the action. And so I
23 haven't -- I'm going to give you a little latitude but
24 you need to get to the heart of it.

25 Q. [Mr. McCullough] There was a default entered in this

1 case and then the Judge subsequently withdrew or struck
2 down the default correct?

3 A. There was a default entered and it was later
4 removed. I don't recollect how. I think it was by a
5 judge signing an order.

6 Q. And in this email dated August 14 you were
7 discussing the affidavit that you needed Frank Guarino to
8 execute as part of that default right?

9 A. Yes.

10 Q. You were also discussing selling ARP II's property
11 at some future date correct?

12 A. Yes. I was discussing that with him.

13 Q. And the value you placed on that is 27 and a half
14 million dollars correct?

15 A. [No response]

16 Q. ARP II we've decided to ask 27 and a half million
17 dollars for the property and assets. Do you see that?

18 A. Yes. It also says sale will include marina
19 expansion permits which we expect to receive in the next
20 60 days; but it was four years.

21 Q. And the value on those was 7 and a half million.
22 Now this last paragraph ---

23 THE COURT: --- you need to ask questions, Mr.
24 McCullough. Don't make editorial comments.

25 Q. [Mr. McCullough] This last paragraph you were

1 discussing with Mr. Guarino the possibility of obtaining
2 national Brokers to sell the marina correct?

3 A. Yes.

4 MR. MCCULLOUGH: Your Honor, we would move into
5 evidence the email from Mr. Williams to Frank Guarino
6 dated August 14, 2008 that we just discussed.

7 MR. CLEVELAND: I object on the grounds of
8 relevance, Your Honor.

9 THE COURT: I need to see the email please?

10 [Whereupon, Mr. McCullough provides documents to the
11 court for review]

12 THE COURT: What is the basis of the objection Mr.
13 Cleveland?

14 MR. CLEVELAND: That it is not relevant to any of
15 the elements of the abuse of process claim.

16 THE COURT: How is it relevant Mr. McCullough?

17 MR. MCCULLOUGH: Your Honor, the case law says we
18 have to show some ulterior purpose behind the filing and
19 having a lis pendens stuck on the property ---

20 THE COURT: --- this email doesn't relate to the
21 lis pendens.

22 MR. MCCULLOUGH: We feel like the default was
23 engineered and manufactured and I think this is evidence
24 of that. And he incurred damages as a result of that.
25 Mr. Longman increased attorney's fees and everything

1 else. We feel this is relevant to show a continuing
2 pattern here related to the use of any legal means
3 possible to gain in Mr. Williams words gain additional
4 leverage against Mr. Longman.

5 THE COURT: That language is not in this email.
6 That's a mischaracterization.

7 MR. MCCULLOUGH: I did not mean to imply it was in
8 this document.

9 THE COURT: This email talks about the transmittal
10 of an affidavit in Mr. Guarino's capacity as the
11 registered agent at the time he received service of these
12 pleadings and his request to be removed as a registered
13 agent and in turn the substitution of the registered
14 Agent which coincided with the service.

15 I do not find it -- it does not make more or less
16 probable any issue of consequence on the issues of abuse
17 of process. And so the objection is sustained. It will
18 be marked for I.D. only.

19 [Whereupon, defendant's exhibit number 7 is marked
20 for identification only by the court reporter]

21 THE COURT: You may proceed. How many more
22 questions do you have?

23 MR. MCCULLOUGH: I'm finished, Your Honor.

24 THE COURT: Any redirect of the witness? Oh I'm
25 sorry, Mr. Cisa. I didn't mean to leave you out.

1 MR. CISA: I'll be very brief, Judge.

2 THE COURT: Take as much time as you need.

3 MR. CISA: Thank you.

4 CROSS-EXAMINATION

5 BY MR. CISA:

6 Q. Mr. Williams, once Lunar executed the assignment and
7 covenant not to sue and full and final release in
8 December of 2007 transferring his rights to this lawsuit
9 to ARP II Lunar had no further involvement in this
10 lawsuit isn't that correct?

11 A. I believe that's correct.

12 Q. Because of the fact Lunar had assigned all its
13 rights so it had no right to any claim made in this
14 lawsuit correct?

15 A. I think it was out of the lawsuit at that time, yes.

16 Q. And in fact Lunar had no control over the lis
17 pendens that had been filed back in 2005 once they
18 executed this assignment to ARP II correct?

19 A. Well they assigned it to us we were in control of
20 it, yes.

21 Q. Okay. Let me ask you a question because I'm
22 confused about this indemnity claim. You testified to a
23 900,000 dollar figure that ARP II had paid. Do you
24 recall that?

25 A. Well we've actually paid more. That was a reference

1 to a figure at an earlier point in time.

2 Q. I guess my question is this. How much has ARP II
3 paid out to third party claims that weren't disclosed in
4 the indemnity agreement over and above what you've paid
5 to Lunar or are obligated to pay to Lunar?

6 A. Well, Lunar's total is around 550,000 or more and we
7 paid out another 500,000 dollars plus or minus to the
8 others.

9 Q. Thank you. No further questions.

10 MR. CLEVELAND: Just briefly, Your Honor.

11 THE COURT: Yes, sir.

12 REDIRECT EXAMINATION

13 BY MR. CLEVELAND:

14 Q. Mr. Williams, you said earlier in your testimony
15 that you released the lis pendens because you
16 investigated public records and found that there were
17 substantial mortgages on that property. Do you know
18 whether or not ARP I still owns the ARP I property?

19 A. I do know that because I check records periodically.
20 About a year ago ARP I did a deed in lieu of foreclosure
21 to the bank that held the mortgage on the property.

22 Q. Now Mr. Williams is there any arbitration agreement
23 between ARP II and ARP I?

24 A. No, there is not.

25 Q. Is there any arbitration agreement between Kriti

1 Ripley LLC and ARP I?

2 A. No, there is not.

3 MR. CLEVELAND: That's all I have, Your Honor.
4 Thank you.

5 THE COURT: Sir, you may step down.

6 MR. MCCULLOUGH: I have some redirect on that one
7 point?

8 THE COURT: Are you asking the court's permission
9 to redirect?

10 MR. MCCULLOUGH: With the court's permission.

11 THE COURT: You may proceed.

12 RE CROSS-EXAMINATION

13 BY MR. MCCULLOUGH:

14 Q. In the emails between you and Mr. Lussier you were
15 aware that ARP I had potential suitors for the purchase
16 of this property correct?

17 A. I'm lost. What point in time ---

18 THE COURT: --- your questions need to be confined
19 to the questions that Mr. Cleveland asked. You only get
20 limited recross ---

21 MR. MCCULLOUGH: --- basically he lost the property
22 ---

23 THE COURT: --- you only get limited recross on the
24 questions that Mr. Cleveland asked.

25 MR. MCCULLOUGH: And that's what this is intended

1 to do.

2 THE COURT: How is it related to -- Mr. Cleveland
3 asked about who were parties to certain agreements.

4 MR. MCCULLOUGH: Mr. Cleveland asked if he had lost
5 the property a year ago. And ---

6 THE COURT: --- did I miss something?

7 MR. CLEVELAND: I just asked him ---

8 THE COURT: --- I'm sorry I must not have heard --
9 I told y'all this -- over my head because your voices are
10 starting to drone out and I don't hear what you say so I
11 apologize. Go ahead and ask your question Mr.
12 McCullough.

13 Q. [Mr. McCullough] And I'll pull the email if you'd
14 like but do you recall telling Mr. Lussier in an email in
15 a P-S-S that you knew -- that you had heard that ARP I
16 had potential suitors for its property?

17 A. I don't recall the email. You'd have to show it to
18 me.

19 Q. If you find the packet with the first email dated
20 November 2nd, 2007.

21 A. Yes, I have that packet.

22 Q. The second page of that, P-P-S rumor has it that Stu
23 has a buyer for ARP I parcel. Do you see that?

24 A. Yes, but I don't believe it.

25 Q. Is it -- one of the things a lis pendens does is

1 notification to subsequent purchasers of that obligation
2 or that claim correct? It's harder to sell ---

3 A. --- there's a cloud on title for a lis pendens.

4 Q. Thank you.

5 THE COURT: Any further questions, Mr. Cleveland?

6 MR. CLEVELAND: No, Your Honor. Thank you.

7 THE COURT: Sir, you may step down.

8 [Whereupon, the witness is excused and exits the
9 witness stand]

10 THE COURT: Mr. Cisa, I assume you had...

11 MR. CISA: I have none, Judge.

12 THE COURT: We're going to break for lunch until
13 2:30. That gives us about an hour and 15 minutes. Enjoy
14 your lunch.

15 MR. CLEVELAND: Your Honor, I expect Mr. Williams
16 to come back with me but in case there are problems may
17 he be excused?

18 THE COURT: Sure, if you don't need to recall him
19 later.

20 MR. CLEVELAND: I just wanted to make sure.

21 THE COURT: It's up to you. Y'all have a good
22 lunch.

23 [Whereupon, court is in recess from 1:15 p.m. until
24 2:38 p.m.]

25 THE COURT: Is the plaintiff ready to proceed?

1 MR. CLEVELAND: Yes, Your Honor.

2 THE COURT: Is the defense ready to proceed?

3 MR. MCCULLOUGH: Yes, Your Honor.

4 MR. CISA: Yes, Your Honor.

5 THE COURT: Okay. You may call your next witness.

6 MR. MCCULLOUGH: I'll call Stu Longman.

7 [Whereupon, Mr. Longman comes forward]

8 [Whereupon, the witness is duly sworn by the Clerk
9 of Court]

10 CLERK OF COURT: Thank you. Please be seated.
11 Sir, for the record if you will please state your name
12 spelling your last name.

13 THE WITNESS: Stuart Longman, L-O-N-G-M-A-N.

14 THE COURT: You may proceed.

15 - - - - -

16 STUART LONGMAN

17 Having been first duly sworn,

18 Was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. MCCULLOUGH:

21 Q. Mr. Longman, what is your involvement with the
22 entity known as Ashley River Properties I?

23 A. I am the operating manager of Emerald Investments,
24 the 100 percent member of Ashley I.

25 Q. And what is your involvement in Ashley River

1 Properties II?

2 A. None at the moment although I am a through Emerald
3 the ---

4 THE COURT: --- sir, I need you to speak directly
5 into the microphone for me. I'm having some difficulty
6 hearing you.

7 THE WITNESS: I'm sorry.

8 THE COURT: That's okay.

9 A. I'm the operating manager of Emerald which is the 70
10 percent member of Ashley II.

11 Q. [Mr. McCullough] All right. Now you are here
12 representing Ashley River Properties I successor in the
13 interest to Ripley Light Yacht Club, LLC and Ripley Light
14 Development, LLC correct?

15 A. Yes.

16 Q. And you are defending as that entity an
17 indemnification claim brought by Ashley River Properties
18 II?

19 A. Yes.

20 Q. Of which you are a 70 percent owner?

21 A. Yes.

22 Q. And you've also asserted a third party complaint
23 against -- you counterclaimed against ARP II for abuse of
24 process.

25 A. Yes.

Ashley River Properties II, LLC et al. vs. Ashley River Properties I, LLC et al.
(2005-CP-10-2434)
January 23, 2013

1 Q. And sued Thomas Lussier, Lunar for abuse of process?

2 A. Correct.

3 Q. What is the abuse of process arising out of? What
4 does that claim arise out of?

5 A. A default judgment that was entered against Ashley I
6 by Ashley II.

7 Q. Does it also include a lis pendens that was filed by
8 Thomas Lussier that remained on ARP I's property until
9 2010?

10 MR. CISA: I object to the leading.

11 THE COURT: Sustained. Leading.

12 Q. [Mr. McCullough] Does it also include a lis pendens?

13 A. Yes, it does.

14 Q. When was that lis pendens filed?

15 A. In 2008 I believe. No, I'm sorry it was filed in
16 2006..

17 Q. And when was it ---

18 A. --- June of 2006.

19 Q. And when was it finally removed?

20 A. In 2010.

21 Q. Okay. Now before we talk about the affirmative
22 claims you brought let's talk ---

23 THE COURT: --- let me interrupt you one second.

24 Mr. Cleveland, do you have any further witnesses?

25 MR. CLEVELAND: No, Your Honor.

1 THE COURT: So did you rest your case?

2 MR. CLEVELAND: I rest.

3 THE COURT: Okay. We'll reserve motions. You may
4 continue.

5 Q. [Mr. McCullough] Did you -- let's talk about the
6 indemnification claim. Were you present at the 2005
7 arbitration?

8 A. I was.

9 Q. Were you there in your capacity as Emerald?

10 A. Yes.

11 Q. As a -- through Emerald as a member of Ashley River
12 Properties II?

13 A. Yes.

14 Q. Were you there also representing the interest of
15 Ripley Light Yacht Club, LLC?

16 A. Yes.

17 Q. And Ripley Light Development, LLC?

18 A. Yes.

19 Q. Now in summary fashion explain to me the Lunar claim
20 meaning what was his claim against ARP I based on?

21 A. A preconstruction contract that we had arranged in
22 2001 whereby he would be able to purchase a unit in the
23 to be developed Ashley I project as soon as it was built.

24 Q. And what was your position at the arbitration about
25 whose obligation the Lunar debt was?

1 A. It was Ashley I based upon my understanding and also
2 the understanding of Richard Brownyard, the attorney for
3 Mr. Lussier who created the document contract that was
4 introduced earlier today.

5 Q. So I want to make sure I understand you were of the
6 position at the arbitration that the Lunar debt was an
7 ARP I responsibility not an ARP II responsibility?

8 A. Correct.

9 Q. What was Kriti's position at the arbitration?

10 A. That it was an ARP II -- a cloud on the title of ARP
11 II not on ARP I -- or perhaps both but also ARP II.

12 Q. Now what you just said is counter intuitive so
13 explain to me why -- what was the benefit to Kriti by
14 taking the position that the Lunar debt was an ARP II
15 responsibility?

16 A. Kriti was looking to have claims against Emerald and
17 if these preconstruction contracts were not against or
18 with ARP II there would be nothing to claim.

19 Q. Was that some of the main ammunition that they used
20 in the arbitration to strip you of your voting rights?

21 A. That was almost 100 percent of it.

22 Q. And so who owned that debt litigated in New York?

23 A. At the end of the arbitration it was owned by ARP
24 II.

25 Q. But I mean was that heavily contested in the

1 arbitration?

2 A. It certainly was.

3 Q. And you lost?

4 A. We lost.

5 Q. Meaning that it was an ARP II debt?

6 A. Yes.

7 Q. And because it was an ARP II debt you were stripped
8 of voting rights among other things correct?

9 A. Exactly.

10 Q. Now what is your understanding of how the 400,000
11 dollar -- came to be?

12 A. The arbitration panel determined after thinking
13 through the equities that they amount that should be
14 returned to ARP II ---

15 MR. CISA: --- Your Honor, I would submit an
16 objection.

17 THE COURT: Basis?

18 MR. CISA: The basis that he is testifying to what
19 the arbitration panel thought and did. He's not
20 qualified to do that.

21 THE COURT: To the extent that he is opining as to
22 the thoughts of the arbitration panel the objection is
23 sustained. The arbitration findings in the final order
24 speak for themselves.

25 Q. [Mr. McCullough] Mr. Longman, have you reviewed the

1 2005 award?

2 A. I have.

3 Q. Based on your review what was the 400,000 dollar
4 based on?

5 A. It was to pay back partially ARP II for all costs of
6 settling the three preconstruction debts.

7 Q. Was the word indemnification used at the
8 arbitration?

9 A. It was.

10 Q. Was the indemnification agreement marked as exhibit
11 number 6 part of the arbitration proceedings?

12 A. Yes.

13 Q. So this indemnification agreement between Emerald
14 and Ripley Light development, Stu Longman, and Kriti was
15 in fact admitted into evidence at the arbitration.

16 A. Yes.

17 Q. And was litigated in the arbitration.

18 A. It was.

19 Q. And ruled upon in the arbitration.

20 A. It was.

21 Q. And the decision of the arbitrators is contained in
22 the 2005 award?

23 A. It is.

24 Q. Which held that there was a 400,000 dollar amount

25 ---

1 MR. CISA: --- Your Honor, I object to the leading.

2 I know we're in non-jury ---

3 THE COURT: --- sustained, leading; rephrase.

4 Q. [Mr. McCullough] All right, read it. I'm trying to
5 speed this along but let's read the award.

6 THE COURT: The award is already part of the
7 record. I think this court has already taken judicial
8 notice of it; it's fine -- you can ask your next
9 question.

10 Q. [Mr. McCullough] Does it include the word
11 indemnification?

12 A. It did.

13 Q. And does it require the resolution of all these
14 claims to be at the expense of ARP II?

15 A. It does.

16 Q. Over your objection?

17 A. Of course.

18 Q. And so have they taken the exact opposite position
19 here today, Kriti ARP II than they took in the 2005
20 arbitration on these very same issues?

21 MR. CLEVELAND: Objection.

22 THE COURT: Basis?

23 MR. CLEVELAND: He's asking him to characterize our
24 position. I don't think that's an appropriate question.

25 THE COURT: Well he can -- if he was present and

1 it's based on his rational perception if he was present
2 at the arbitration and he's been present at this hearing
3 I think he can -- in his opinion he can say what he
4 thinks your position is. It's overruled.

5 MR. CLEVELAND: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 A. Yes.

8 Q. [Mr. McCullough] In what way?

9 A. They are now claiming that it is an ARP I
10 responsibility when in fact at the arbitration they
11 claimed precisely the opposite and were successful.

12 Q. And that was in large part the basis for them
13 stripping you of your voting rights was that very conduct.

14 A. From a monetary standpoint it was almost the entire
15 arbitration.

16 Q. And they subsequently took that judgment -- first of
17 all that judgment, the award, was confirmed in New York
18 correct?

19 A. It was.

20 Q. In 2008.

21 A. Yes.

22 Q. Was the lis pendens removed upon the confirmation of
23 the New York award?

24 A. No, it was not.

25 Q. How much longer did it remain?

1 A. Two years.

2 Q. Looking to exhibit number 4 is that an enrollment of
3 the South Carolina -- in South Carolina of the judgment
4 of New York?

5 [Whereupon, the witness is shown document]

6 A. It is.

7 Q. And does that include the very dispute and the
8 amounts owed arising out of that dispute that was decided
9 in the 2005 award?

10 A. Exactly.

11 Q. So they have a judgment against you for these very
12 amounts?

13 A. Yes.

14 Q. So they've already won that arbitration and enrolled
15 the judgment against you for the ---

16 MR. CISA: --- objection, leading, Your Honor.

17 THE COURT: Sustained, leading. Rephrase.

18 Q. [Mr. McCullough] Is this the same money that they
19 are claiming now?

20 A. Yes.

21 Q. All right Stu, let's turn to the abuse of process
22 claim.

23 [Whereupon, the witness complies]

24 Q. When did you first learn that there had been a
25 default entered in the Lunar case?

1 MR. CISA: I object, Your Honor.

2 THE COURT: Basis?

3 MR. CISA: It's not relevant. There is nothing in
4 the pleadings that I see about a default judgment.

5 THE COURT: What page are you referring to in the
6 pleadings?

7 MR. MCCULLOUGH: The entire ---

8 THE COURT: --- I didn't ask that. I asked Mr.
9 Cisa a question.

10 MR. MCCULLOUGH: Oh, I'm sorry.

11 THE COURT: What page and what paragraph are you
12 referring to?

13 MR. CISA: Judge, if you look at page ---

14 THE COURT: --- which pleading are you referring
15 to?

16 MR. CISA: I'm referring to the third party
17 complaint that was filed on June 14, 2010.

18 THE COURT: Which would be the -- I think it has
19 another title to it ---

20 MR. CISA: --- it was signed by ---

21 THE COURT: --- James Brewer.

22 MR. CISA: Right, exactly.

23 THE COURT: It's actually the answer to amended
24 complaint, counterclaims and the third party complaint of
25 Ashley River Properties I, LLC -- yes, third party

1 summons of June 14th. Is that the one you're referring
2 to?

3 MR. CISA: That's the one I'm referring to.

4 THE COURT: What page are you referring to?

5 MR. CISA: I'm looking at page 14.

6 THE COURT: And which paragraph?

7 MR. CISA: Judge, its paragraph 55 right above
8 where they couch their claim starting with additionally
9 ARP II.

10 [Whereupon, the court reviews documents]

11 THE COURT: Actually it starts on page -- well, you
12 said paragraph 14 -- no, wait a minute. Page 14 ---

13 MR. CISA: --- on page 14 ---

14 THE COURT: --- paragraph ---

15 MR. CISA: --- 55.

16 THE COURT: Okay, it was secured by a staple;
17 that's why I didn't see it.

18 MR. CISA: 55 starts on page 13 ---

19 THE COURT: --- on page 13. That's what I was
20 about to say.

21 [Whereupon, the court reviews documents]

22 THE COURT: Okay. There is no reference to the
23 default in your allegations in your complaint. It only
24 references the lis pendens.

25 MR. MCCULLOUGH: Your Honor, these are notice

1 pleadings putting them on notice of a ---

2 THE COURT: --- you still have to put them on
3 notice of what you are going to try. You can't simply
4 make -- you're correct, it is a notice of pleading. But
5 you made a very specific allegation regarding the lis
6 pendens. You said nothing about default judgment in
7 these pleadings.

8 Unless through discovery or otherwise you all have
9 implicitly conceded that issue you can always make a
10 motion to conform. But you don't just make allegations
11 especially regarding an abuse of process and then throw
12 in other allegations that you have not put them on notice
13 of because they have a right to prepare for trial.

14 So you're correct it is a notice pleading but you
15 are required to in plain and concise terms state what the
16 basis of your abuse of process claim is. And if they
17 have been laboring under the impression that the only
18 factual posture that you've taken regarding that issue is
19 the lis pendens then they are prejudiced. And I need to
20 know what notice you've given them that this is a part of
21 your abuse of process claim.

22 MR. MCCULLOUGH: Your Honor, the case was based on
23 the remainder of the lis pendens. And the abuse of
24 process case law requires us ---

25 THE COURT: --- I'm clear what the elements are.

1 That was not my question. My question was what notice
2 have you given them that this was a part factually of
3 your abuse of process claim?

4 MR. MCCULLOUGH: Had we amended the pleadings to
5 state that the holding in default generated attorney's
6 fees associated with the abuse of process claim, no.
7 It's my understanding that under South Carolina law we
8 can simply put the party, write abuse of process, sign it
9 and that's sufficient --

10 THE COURT: --- no, you can't; that's not
11 sufficient. You have to have something underlying your
12 cause of action. You don't have to plead every
13 particular but you have to at least have given them some
14 indication because you went into great detail about the
15 lis pendens. You made no mention of the default judgment
16 being a part of your abuse of process cause of action.

17 You're correct you don't have to plead every single
18 detail about the default. But you at least should have
19 had a paragraph that said -- because it is integral to
20 the damages claim that as a part of what we contend is a
21 abuse of process they procured a default judgment, that
22 they had nefarious means in doing it, that is was
23 malicious, and they had some ulterior motive in doing it.
24 That should have at least been pled. You don't have to
25 give every detail about it in the pleadings except in

1 fraud. That's the only one that requires you to plead
2 every single element on it. But when you're pleading a
3 cause of action you're correct; it is a notice pleading
4 and you don't have to give every single detail. But you
5 have to at least put someone on notice that that is a
6 part of your claim.

7 And the only thing you are giving them notice of in
8 this third party summons and complaint is you go on for
9 about eight paragraphs about the lis pendens. You make
10 no mention of the default.

11 So to the extent that he is indicating -- and that's
12 why I asked the very specific question what other means
13 would you have given them notice that you intended to try
14 this particular issue as a part of your abuse of process
15 claim such that they were on notice that that was a
16 factual allegation they would have to confront and
17 defend.

18 MR. MCCULLOUGH: Your Honor, other than the fact
19 that there has been extensive litigation -- first of all
20 Mr. Cisa hasn't been involved in this so I'm confused as
21 to why he is objecting to a cause of action against
22 another party regardless -- there was signification
23 litigation and memorandums filed back and forth and
24 hearings held on the default issue between ARP I and ARP
25 II and they are in the court's record. We've got a copy

1 if you would like to see them. And so the issues -- and
2 this was litigated for months and months and months
3 between Mr. Rosen and Mr. Cleveland. And so the idea
4 that somehow this is some surprise is frankly a surprise
5 in and of itself.

6 MR. CISA: Well my understanding is Your Honor that
7 I'm here because my client is being sued for abuse of
8 process both Mr. Lussier individually as well as Lunar
9 Systems who is a contracting party. And the ---

10 THE COURT: --- excuse me ---

11 MR. CISA: --- this is part of the abuse of process
12 claim. I knew nothing about it. I wasn't involved with
13 it. I haven't looked at it and this is the first....

14 MR. MCCULLOUGH: Mr. Cleveland was present at all
15 those hearings. ---

16 THE COURT: --- Mr. Cisa isn't bound by what Mr.
17 Cleveland did. He represents an entirely different
18 party.

19 MR. MCCULLOUGH: And we're not objecting to -- Mr.
20 Lussier has not been involved since the claim was sold to
21 ARP II.

22 THE COURT: But you haven't removed him as a party
23 have you?

24 MR. MCCULLOUGH: No, we think it was -- he
25 wrongfully kept it ---

1 THE COURT: --- he's still a party ---

2 MR. MCCULLOUGH: --- when he settled out ---

3 THE COURT: --- he's still a party, his lawyer is
4 here, he's entitled to object, and he's entitled to be
5 put on notice that this was a basis of claim against him.

6 MR. MCCULLOUGH: The default has nothing to do with
7 him claim. The basis of the claim against his client is
8 not part of the default. That is entirely ARP II.

9 MR. CLEVELAND: Let me join in Mr. Cisa's ---

10 THE COURT: --- yes?

11 MR. CLEVELAND: I'm sorry.

12 THE COURT: No, that's okay ---

13 MR. CLEVELAND: --- I join in Mr. Cisa's objection.

14 It's true that I litigated against Mr. Rosen whether they
15 should be in default or not but I don't think that has
16 anything to do with the fact. That happens all the time;
17 people are in default and then they litigate whether or
18 not the default should be removed. Abuse of process
19 claims don't flow from that. And there was no indication
20 at that time that one would flow from that controversy
21 that we had.

22 MR. MCCULLOUGH: Your Honor, in closing argument I
23 am assuming Mr. Cleveland is going to stand up and say we
24 have not shown any ulterior purpose or anything
25 associated with wrongful conduct. Without us being able

1 to explore why this was done then there is no way for us
2 to establish that this lis pendens was wrongfully -- that
3 it is an abuse of process. And this was an issue that
4 had been heavily litigated ---

5 THE COURT: --- how are those two things tied
6 together?

7 MR. MCCULLOUGH: Because it's an element of what we
8 have to show to show abuse of process ---

9 THE COURT: --- you didn't answer my question. How
10 is it -- how is the default tied to the lis pendens?

11 MR. MCCULLOUGH: Because the lis pendens -- that
12 was the only claim they had was a default on the keeping
13 of -- the lis pendens was the only thing that they had
14 that tied up this property.

15 The testimony has been that the judgment was an
16 effort to get ARP I -- the email was to put additional
17 leverage on Mr. Longman. And so it's the theory of our
18 case is that the filing of the lis pendens, the purchase
19 of that claim, and the default was all manufactured in an
20 effort to put additional leverage on Mr. Longman. And
21 that is an ulterior purpose for the abuse of process.

22 MR. CISA: He's not alleged, Your Honor, that the
23 ulterior purpose was ---

24 THE COURT: --- you alleged that the ulterior
25 purpose was the placing of the lis pendens. That's what

1 paragraphs 45 through 59 say.

2 MR. MCCULLOUGH: A filing in and of itself is not
3 an abuse of process. We also have to establish that it
4 was done for wrongful purposes. We have to show ulterior
5 purpose.

6 [Whereupon, the court reviews documents]

7 THE COURT: Which default order are you referring to
8 Mr. McCullough?

9 MR. MCCULLOUGH: Your Honor, that entire default
10 packet ---

11 THE COURT: --- I just need the ---

12 MR. MCCULLOUGH: --- I'll pull it out now.

13 [Whereupon, Mr. McCullough reviews documents]

14 MR. MCCULLOUGH: There was an order of default
15 filed April 3, 2008 and there is an order for default
16 judgment dated May 23, 2008. And then the order setting
17 aside the default judgment dated December 18 ---

18 THE COURT: --- those are not the filing dates
19 though.

20 MR. MCCULLOUGH: Would you like me to hand up ---

21 THE COURT: --- you referred to the dates they were
22 signed not the dates they were actually filed.

23 [Whereupon, the court reviews documents]

24 THE COURT: Now again, why is this relevant?

25 MR. MCCULLOUGH: We have to show an ulterior

1 purpose and I think it goes to show the ulterior purpose.

2 THE COURT: I'm going to give you a little latitude
3 subject to connection. But you need to connect the dots
4 because right now I don't really see a connection but I'm
5 going to -- I'm going to give you the latitude to try to
6 establish it?

7 Q. [Mr. McCullough] When did you first discover that a
8 default had been entered?

9 A. In the 2010 arbitration during Mr. William's
10 testimony.

11 Q. Now you are still an owner of -- 70 percent owner of
12 ARP II?

13 A. Yes.

14 Q. Does the possibility of owning ARP I confer a
15 benefit on ARP II?

16 A. A significant benefit.

17 Q. Explain that.

18 A. If the properties are enjoined the density of the
19 residential units on ARP II increases by triple.

20 Q. And so was part of the permitting from the very
21 beginning some efforts to potentially join ARP I and ARP
22 II?

23 A. It was exactly that way in the approvals.

24 Q. And so if ARP II was successful in obtaining ARP I
25 what would be the impact -- the end impact of ARP II, the

1 value of ARP II?

2 A. The value ---

3 MR. CISA: --- objection. Objection if he is
4 going to testify to value, Your Honor. He's not a real
5 estate appraiser and he's not qualified.

6 MR. MCCULLOUGH: He can testify about his own
7 property.

8 MR. CISA: No, he doesn't own the property. ARP I
9 and ARP II own the property.

10 MR. MCCULLOUGH: He owns 70 percent of ARP II.

11 MR. CISA: He doesn't -- my objection is that he's
12 not qualified. He's not an expert in the field of real
13 estate appraisals. And he does not -- Stuart Longman
14 does not own any of this property.

15 THE COURT: I'm a still a little lost as to why
16 it's relevant. Why is the value of this property
17 relevant on abuse of process case?

18 MR. MCCULLOUGH: We're trying to establish if --
19 the idea is to get ARP I because it has a tremendous
20 potential value to ARP II.

21 THE COURT: You aren't accomplishing that with a
22 default judgment are you?

23 MR. MCCULLOUGH: I think you are. If you ---

24 THE COURT: --- how? That was a very minimal ---

25 MR. MCCULLOUGH: --- if you get a big judgment and

1 you foreclose on that judgment you can push Mr. Longman
2 out.

3 THE COURT: I doubt very seriously a 526,000 dollar
4 judgment was going to foreclose a property that is worth
5 7 million dollars.

6 MR. MCCULLOUGH: Well, when you also have a lis
7 pendens on it which means you can't sell it to anybody
8 else, you can't refinance it to anybody else, you've got
9 a cloud on the title you're basically handcuffed.

10 THE COURT: I understand that part. But I still
11 don't see what the issue is relevant to. He can testify
12 to the extent of his ownership interest in the property.
13 He is technically an owner because he is a member. But
14 really when you talk about people testifying as to their
15 lay person's knowledge of the value of the property,
16 you're usually talking about something you personally own
17 like your residence and other things.

18 And all the while I've given you some latitude about
19 it -- it just isn't relevant really to anything at least
20 in the abuse of process case. It's not relevant to
21 damages. It's not -- I haven't heard any connection
22 regarding the fact of consequence in this case that it
23 makes more or less probable.

24 MR. CISA: Judge?

25 THE COURT: Yes, sir.

1 MR. CISA: I want to make sure you're clear on my
2 objection that Mr. Longman is not qualified, he's not an
3 expert in real estate appraisals, and he is not -- and I
4 understand the case law that says an individual can
5 testify to ---

6 THE COURT: --- yes absolutely. They can testify
7 as to their opinion of the value of their property.

8 MR. CISA: He does not own this property. One
9 piece of property is owned by a limited liability company
10 ARP I and the other piece of property is owned by ARP II.
11 He is not the owner of this property and I submit that
12 under the case law he's not qualified to give an opinion
13 as to ---

14 THE COURT: --- I really don't have to reach that
15 issue because I've not been persuaded that it's relevant
16 to any of the elements in abuse of process. You may
17 proceed Mr. McCullough.

18 Q. [Mr. McCullough] Was the default subsequently set
19 aside?

20 A. It was.

21 Q. And we have pursued a lawsuit on abuse of process
22 against Lunar and ARP II?

23 A. Yes.

24 Q. Was the issue resolved and -- the 2005 arbitration
25 award was confirmed in 2008 correct?

1 A. Yes.

2 Q. And the lis pendens remained on your property for an
3 additional ---

4 MR. CISA: --- objection as to leading.

5 THE COURT: I can't hear you.

6 MR. CISA: Objection to leading.

7 Q. [Mr. McCullough] How much longer did the lis pendens
8 stay ---

9 THE COURT: --- first of all let's start over.

10 When there is an objection I need to rule on it so don't
11 speak. I need you to speak louder because I really can't
12 hear you. And the objection is sustained; you may
13 rephrase the question.

14 Q. [Mr. McCullough] How much longer did the lis pendens
15 stay on the property?

16 A. For approximately four years after the -- five years
17 after the arbitration.

18 Q. And how long after the arbitration award was
19 confirmed?

20 A. Two years after it was confirmed.

21 Q. Was one of the issues at the 2005 arbitration did it
22 relate to Mr. Williams conduct in bringing about the
23 Lunar lawsuit amongst others?

24 A. It was.

25 Q. All right, explain that.

1 A. The arbitration decision said that the arbitrators
2 were troubled using different words by his actions in
3 essentially ginning up the lawsuits among the three third
4 party vendees.

5 Q. And again the benefit to ARP II of those lawsuits
6 would be what?

7 A. Would be winning the arbitration by showing that I
8 had not disclosed something that should have been
9 disclosed.

10 Q. And then the ending result would be what?

11 A. They would win that first arbitration.

12 Q. Did you have the property appraised in 2007?

13 A. I did.

14 Q. This is ARP I's property?

15 A. Yes.

16 Q. What was the value of ARP I's property in 2007?

17 MR. CISA: Objection.

18 THE COURT: Basis?

19 MR. CISA: On the basis that it is hearsay. He
20 said he had the property appraised. Now he is going to
21 testify to what the appraiser put in the report and its
22 hearsay, Your Honor.

23 THE COURT: Would you like to respond to the
24 objection?

25 MR. MCCULLOUGH: I've got a copy of the appraisal.

1 The appraisal was for ARP I's property and ---

2 THE COURT: --- has it been admitted in the record?

3 MR. MCCULLOUGH: Pardon me?

4 THE COURT: Has it been admitted in the record as
5 to one of those things you all stipulated to?

6 MR. MCCULLOUGH: No ma'am.

7 THE COURT: Then it's hearsay. He can't testify as
8 to what somebody else appraised the value of the property
9 because the defendants -- well, the plaintiffs in this
10 case however --

11 MR. CISA: Plaintiff and third party defendant ---

12 THE COURT: --- in any event the opposing party has
13 the ability and should have the ability to cross-examine
14 the appraiser on the methodology used as well as cross-
15 examining the weight of the opinion and the value of the
16 appraisal. So its hearsay and it's offered for its
17 truth. The objection is sustained.

18 Q. [Mr. McCullough] What did you think the value of the
19 properties were?

20 MR. CISA: Same objection, Your Honor.

21 THE COURT: You have to -- it has to be based on
22 his knowledge. It can't be based on the appraisal.

23 Q. [Mr. McCullough] Did you own this property?

24 A. Yes.

25 Q. How much dirt was it?

1 A. A little over an acre.

2 Q. And what permits did you have on it around the 2007
3 timeframe?

4 A. Approvals for 77 condominium units.

5 Q. And did you -- had you worked through that approval
6 process?

7 A. Yes.

8 Q. And had you been working with the local government
9 agencies on the Ripley Light marina process as well?

10 A. I had personally done all of the permitting work
11 with the appropriate architects and engineers.

12 Q. And as the owner with personal knowledge what did
13 you feel it was worth?

14 MR. CISA: Objection, Your Honor.

15 THE COURT: You have to establish that he has an
16 opinion based on his rational perception that is not
17 related to an appraisal.

18 MR. MCCULLOUGH: We'll set the appraisal aside.

19 THE COURT: I don't think you can at this point.
20 How would he disabuse his mind from something he has read
21 and that you've prepared him to testify to? He has to
22 have some other independent knowledge the value of the
23 property.

24 Q. [Mr. McCullough] How long have you been a real
25 estate developer?

1 A. Forty years.

2 Q. And in that experience do you evaluate your own
3 personal property and real property every day?

4 A. That's part of the job.

5 Q. And does that include not only the dirt but the
6 permits and everything associated with that property?

7 A. Of course.

8 Q. And were you doing so at the time when this lis
9 pendens was filed?

10 A. We had -- I had done extensive financial modeling on
11 this particular project, which you have to do in order to
12 get to the point of being able to get financing to build
13 it.

14 Q. And what did you think it was worth?

15 MR. CISA: I object --- the same objection, Your
16 Honor.

17 THE COURT: Overruled. It goes to weight and not
18 admissibility. Sir, you may answer the question.

19 Q. [Mr. McCullough] What did you think it was worth?

20 A. Five and half million dollars.

21 Q. What was the amount of debt on the property?

22 A. At that time a million 810.

23 Q. So at the time this lis pendens was filed you had
24 less than two million dollars of debt on the property?

25 A. Correct.

1 Q. And in this timeframe were you approached by folks
2 about possibly purchasing that property?

3 MR. CLEVELAND: Objection, Your Honor. Hearsay.

4 MR. MCCULLOUGH: I haven't asked him what they
5 said.

6 THE COURT: He can answer the question yes or not.
7 He cannot say what they said to him. He can say what he
8 did as a result. The objection as regards to any future
9 questions eliciting what someone told him is sustained;
10 hearsay.

11 Q. [Mr. McCullough] Did people approach you about
12 purchasing your property?

13 A. Two separate hotel chains approached me as well as
14 obviously the Centex people.

15 Q. And the Centex was part of the purchase of the ARP
16 II property?

17 A. It was.

18 Q. Now how much did the Centex folks offer you?

19 MR. CISA: Objection, Your Honor. Hearsay. Centex
20 is not here to cross-examine.

21 MR. MCCULLOUGH: The documents which are included
22 were sent to both Mr. Williams and Mr. Longman and
23 negotiated.

24 THE COURT: I understand that. But it's still
25 hearsay. It's an out of court statement offered for its

1 truth. And unless it culminated in a deal where there
2 was more than an offer and more than negotiating it's
3 speculative. If it were an offering and acceptance and
4 there were a deal in fact in place and somehow he had to
5 forfeit that deal because of the lis pendens I would
6 believe it's relevant. But at this point it's
7 speculative.

8 There is no indication that the deal actually would
9 have gone through. And as we know real estate
10 development deals fall through for many reasons all the
11 time. So unless there was an offer and an acceptance and
12 they were ready to move forward and consummate the deal
13 then I agree with them that it would be hearsay and it's
14 not relevant. -- it's speculative.

15 MR. MCCULLOUGH: Would a letter of intent be
16 relevant?

17 THE COURT: Speculative unless there has been an
18 offer, acceptance and some consideration.

19 THE WITNESS: I did accept the offer on my piece.

20 THE COURT: They didn't accept it. So until they
21 accepted it was not a deal.

22 THE WITNESS: The one that I own; ARP I.

23 THE COURT: If you can establish -- if you can meet
24 that criteria, then proceed.

25 Q. [Mr. McCullough] Mr. Longman, were you provided an

1 offer for your ARP I property?

2 A. A formal offer from Centex, yes.

3 Q. And was that offer accepted? Did you accept that
4 offer?

5 A. I did. I signed it and returned it.

6 Q. Was that deal consummated?

7 A. No, it was not.

8 Q. Why?

9 A. Because it was contingent upon the acceptance of
10 another offer on the ARP II property, which I also
11 accepted but Mr. Williams refused to accept.

12 Q. And that was in the amount of -- on the ARP I
13 property of 5.5 million?

14 A. It was ---

15 MR. CISA: --- objection, Your Honor.

16 THE COURT: It's not relevant. They were
17 contingent deals and so it's still speculative. It had a
18 condition precedent that had to be met in order for the
19 deal to be consummated. And there was no exchange of
20 consideration. And so until it was actually consummated
21 it's speculative in terms of its value and it's
22 speculative on damages.. Sustained.

23 Q. [Mr. McCullough] What happened from the date the lis
24 pendens was filed on your property in 2006 to 2010 with
25 regards to the real estate market?

1 A. It went down and then back up.

2 Q. Did you have opportunities to sell, and I don't want
3 to get specific, but just generally based on your
4 development experience in 2006 and 2007 that would not
5 have materialized in 2009 and 2010?

6 A. Yes.

7 Q. Was the lis pendens on your property throughout that
8 time period?

9 A. It was.

10 Q. What's the impact, again based on your knowledge of
11 this particular lis pendens and generally of a lis
12 pendens on property like this; development property?

13 A. It means that it's not developable. No one is going
14 to pursue a purchase of a property that they know they
15 cannot close on.

16 Q. Were you able to refinance during this time period?

17 A. No.

18 Q. Why?

19 A. Again the same reason; there was a cloud on the
20 title and you can't -- that would have succeeded to first
21 position if it had not been paid off. So we were stuck.

22 Q. Now you mentioned potential hotels. Were there
23 other options with ARP I other than the condo option that
24 had been permitted?

25 A. Yes. The zoning allowed for a mixed use building

1 that would have been approximately the same size as the
2 77 units of residential whereby if I had a floor of
3 commercial I could have three floors of residential and
4 we designed the building exactly that way.

5 Q. Now there was testimony earlier that this property
6 has gone back to the bank. Is that true?

7 A. It has.

8 Q. When did that occur?

9 A. June of last year.

10 Q. Why did that occur?

11 A. Because there was nothing I could do with it.

12 Q. Was the lis pendens one of those causes?

13 A. It was.

14 Q. Stu, have you ---

15 MR. CLEVELAND: --- objection, Your Honor.

16 THE COURT: Basis?

17 MR. CLEVELAND: The lis pendens was removed in
18 2010. And he's saying that something happened last year
19 that based on the lis pendens that had been removed.

20 THE COURT: So what is the basis of the objection
21 Mr. Cleveland?

22 MR. CLEVELAND: That the -- it mischaracterizes the
23 prior testimony and is therefore not relevant.

24 THE COURT: Would you like to respond to the
25 objection?

1 MR. MCCULLOUGH: Your Honor, he can cross-examine
2 him on this point.

3 THE COURT: I've asked you to respond to the
4 objection regarding relevance.

5 MR. MCCULLOUGH: The reason he defaulted -- his
6 testimony is one of the reasons is the lis pendens. I
7 think that's relevant to show damages for the abuse of
8 process.

9 THE COURT: It goes to the weight to be accorded to
10 testimony I'm giving him some latitude. The objection is
11 overruled. And of course Mr. Cleveland and Mr. Cisa
12 because I hear you chiming in you can cross-examine him
13 regarding that issue and the liability of a lis pendens
14 that was cancelled two years prior to the foreclosure.
15 You may proceed.

16 Q. [Mr. McCullough] Let's talk about that. Why didn't
17 everything get fixed after the lis pendens was removed?

18 A. Why didn't it get fixed? The ---

19 Q. --- what was the market condition in 2010 after the
20 lis pendens was removed?

21 A. The market condition in 2010 was bad. There was no
22 possibility at that point of executing on the potential
23 deals that I had worked out prior to that time when there
24 was a lis pendens. So the fact that the lis pendens was
25 removed at the end of 2010 sometime was -- the damage had

1 been done I guess is what I'm trying to say.

2 Q. You've heard either through testimony or argument
3 earlier today about ARP II missing the window of
4 opportunity. Do you recall that?

5 A. Yes.

6 Q. Does that also apply to ARP I's property?

7 A. It definitely does.

8 Q. Now on property that you had less than two million
9 dollars of debt what is the amount of equity you feel
10 like you've lost as a result of this lis pendens?

11 A. About three and half million dollars; 3 million 6 is
12 my calculation.

13 Q. Now in addition to the loss of your equity did you
14 incur costs associated with your continued running of ARP
15 I?

16 A. Yes, there were ownership and development costs.

17 Q. And how much money did you spend creating the
18 engineering and the design for the possibility of selling
19 to the hotels?

20 A. The two different designs ended up costing in
21 engineering and architectural about 41,000 dollars.

22 Q. How much money -- what were the carry costs on this?
23 How much were the taxes?

24 A. Taxes were about 40,000 dollars during that period
25 as well.

1 Q. And how much was the carry cost on the interest of
2 the property that was encumbered?

3 A. I paid about a million 2 to the Marshall Bank for
4 the mortgage.

5 Q. And how much in attorney's fees did you pay to Rosen
6 and Hagood as a result of dealing with this particular
7 claim?

8 MR. CLEVELAND: Objection, Your Honor.

9 THE COURT: Basis?

10 MR. CLEVELAND: I don't believe there is any -- the
11 objection is based on relevance because the parties
12 aren't entitled to recover attorney's fees incurred
13 unless there is a statute or the contract provides for
14 that. I'm not aware that attorney's fees are an element
15 of damages in an abuse of process claim.

16 THE COURT: You know actual damages unless they are
17 instituted by statute or agreement are not recoverable.
18 Do you have a statute that says an abuse of process
19 action or did they have a contract that says attorney's
20 fees are recoverable as an element of actual damages?

21 MR. MCCULLOUGH: No, Your Honor.

22 THE COURT: Then it is sustained.

23 Q. [Mr. McCullough] All right. So taking that out
24 we've got 1.2 for carry costs on the loan, 40 plus on
25 taxes, 40 plus on design and engineering?

Ashley River Properties II, LLC et al. vs. Ashley River Properties I, LLC et al.
(2005-CP-10-2434)
January 23, 2013

1 A. Yes.

2 Q. So about 1.3 million?

3 A. Yes.

4 Q. Plus 3.6 in lost equity?

5 A. Exactly.

6 Q. What do you think you could have done with your
7 property without this lis pendens?

8 MR. CLEVELAND: Objection.

9 THE COURT: Basis?

10 MR. CLEVELAND: It calls for speculation.

11 THE COURT: It is speculative to some extent but
12 I'm going to give him some latitude.

13 A. We were ready to build. I had two hotel companies
14 that wanted to do that project. I can tell you about
15 them if you want.

16 Q. [Mr. McCullough] Please?

17 MR. CLEVELAND: Objection. Hearsay.

18 THE COURT: Sustained to the extent of what someone
19 told him. He can say what he did as a result.

20 Q. [Mr. McCullough] Stu, you've looked at the emails
21 that we've admitted into the record correct?

22 A. Yes.

23 Q. Again, you were not aware that ARP II had purchased
24 Lunar's claims were you?

25 A. No, I was not.

1 Q. Have you reviewed the emails between David Williams
2 and Thomas Lussier?

3 A. Yes.

4 Q. What was your reaction when you read Mr. Williams
5 saying that he can't take this risk meaning paying
6 Lussier without some backstop protection and additional
7 leverage with Longman? What was your reaction to that?

8 MR. CISA: Objection, Your Honor.

9 THE COURT: Basis?

10 MR. CISA: On relevance. Was his reaction -- the
11 emails speak for themselves.

12 THE COURT: Well, first of all you have to prove
13 your client was a party to the email because he would not
14 have read it until later. So really to some extent it
15 would not be relevant; his reaction. Next I don't think
16 the email has been admitted. I think it's been marked
17 for I.D. only or did I admit that email?

18 MR. MCCULLOUGH: I believe all these by agreement.

19 THE COURT: Were they by agreement because I marked
20 some for I.D. only. I know I took several things under
21 advisement and I thought the emails were one of them.

22 MR. MCCULLOUGH: These were admitted.

23 MR. CISA: I believe they were.

24 THE COURT REPORTER: Your 7 from today Mr.

25 McCullough that's -- if that's the one that is I.D. only.

1 MR. MCCULLOUGH: Were 3 and 4. I thought we
2 admitted these yesterday.

3 THE COURT: They were in another case. They were
4 not admitted in this case. They are under separate ---

5 MR. MCCULLOUGH: --- we called Mr. Lussier I
6 thought -- I'm sorry Judge.

7 THE COURT: I don't know. That's why I'm asking.

8 MR. CISA: I agree with Mr. McCullough. When we
9 called Mr. Lussier out of order yesterday Mr. McCullough
10 put those two documents into evidence through Mr.
11 Lussier. Those are the emails 3 and 4.

12 MR. MCCULLOUGH: Right.

13 MR. CISA: I agree with that, Judge.

14 THE COURT: Okay. You may ---

15 MR. CISA: --- I still object to getting a reaction
16 from ---

17 THE COURT: --- he can't speculate or opine as to
18 what they mean if he was not a party to them and he
19 didn't respond in some way to them. What he now thinks
20 in hindsight after he saw them in discovery is really not
21 relevant.

22 Q. [Mr. McCullough] What was the benefit to your
23 company ARP II as a result of the assignment of these
24 claims?

25 A. ARP II would be able if they merged the properties

1 to essentially nearly double the density of the
2 condominiums that they could build on their property,
3 which obviously has a significant value.

4 Q. After the 2005 arbitration finding that ARP II had
5 to pay for the Lunar claims among others ARP II filed --
6 its lawyer filed a seven page request for modification
7 right?

8 A. It did.

9 Q. And the result of that was what?

10 A. It was denied.

11 Q. And that issue was litigated and put to bed in New
12 York?

13 A. It was very heavily litigated.

14 Q. And it was enrolled in South Carolina?

15 A. It was.

16 Q. And they are actively trying to collect on that
17 judgment?

18 A. They are.

19 Q. And that's the same monies that they are trying to
20 get you to indemnify them for again here?

21 A. Yes, in fact they have started. They did collect a
22 partial judgment so far so yes.

23 THE COURT: I'm sorry. I didn't hear your last
24 answer, sir.

25 A. In fact they have partially collected on a judgment

1 so far. That was my comment.

2 THE COURT: You may continue.

3 Q. [Mr. McCullough] The impact that this lis pendens
4 had from the date it was filed in 2006 to the date it was
5 removed in 2010 on ARP I was what?

6 A. It meant that ARP I was not developable and I lost
7 the property as a direct result of the lis pendens.

8 MR. CISA: Objection to the relevance. Judge, this
9 is an abuse of process case. There is no claim that the
10 lis pendens -- they are not suing on a slander of title
11 because it is not available. He's got to show an
12 ulterior purpose for filing the lis pendens. This line
13 of questioning has no relevance.

14 THE COURT: Well I would assume that he is arguing
15 it as part of his damages. But you've already asked and
16 answered that question so.

17 MR. MCCULLOUGH: I was just trying to summarize,
18 Your Honor. I won't ask it at least twice --

19 THE COURT: I know. It's the nature of attorneys;
20 you can't help yourselves. You may proceed.

21 Q. [Mr. McCullough] Stu, what was the purpose -- what
22 do you think the purpose was for filing it for the
23 remaining -- having that lis pendens remain on the
24 property -- I knew everybody was going to stand up ---

25 THE COURT: --- there is an objection. I'll hear

1 first from Mr. Cisa ---

2 MR. CISA: --- objection ---

3 THE COURT: --- he made it up first before Mr.
4 Cleveland and then I'll hear from Mr. Cleveland. What's
5 the basis of the objection?

6 MR. CISA: He's not competent to testify and he's
7 asking him to look into my client's mind to determine
8 what the objective was. He's not qualified, Judge.

9 THE COURT: And Mr. Cleveland?

10 MR. CLEVELAND: I join in that objection.

11 THE COURT: Sustained. Speculative. Lack of
12 foundation and lack of personal knowledge based on his
13 rational perception. You can't speculate about somebody
14 else's state of mind.

15 MR. MCCULLOUGH: It's not talking about the state
16 of mind.

17 THE COURT: What were their motives? You can't
18 speculate about what somebody else was thinking. He's
19 not competent to do that. It's speculative unless it's
20 based on his rational perception, which deals with some
21 objective looking at someone seeing how they reacted.

22 Q. [Mr. McCullough] Let's not speculate. Davidson
23 Williams told Thomas Lussier why he needed the lis
24 pendens right?

25 MR. CISA: Object to leading.

1 THE COURT: Sustained ---

2 Q. [Mr. McCullough] --- did Davidson Williams tell
3 Thomas Lussier ---

4 THE COURT: --- wait. There is an objection
5 pending Mr. McCullough; there's several actually. What
6 is your objection Mr. Cisa? Mr. Cisa, what is your
7 objection?

8 MR. CISA: I object to the leading.

9 THE COURT: What's your objection Mr. Cleveland?

10 MR. CLEVELAND: He's again asking him to
11 characterize the motive of somebody who wrote an email
12 based on an email.

13 MR. MCCULLOUGH: I'm just asking what the email
14 said. I'm not speculating as to the motive.

15 MR. CLEVELAND: That's been asked and answered
16 several times.

17 THE COURT: Okay. The emails speak for
18 themselves. He was not a party to the emails. He can't
19 speculate as to what somebody meant when they wrote an
20 email. And I'll sustain leading. You may rephrase your
21 question -- and sustain Mr. Cleveland's objection as well
22 to the characterization of the email.

23 MR. MCCULLOUGH: Your Honor, I don't want to get
24 into objection -- or run afoul ---

25 THE COURT: --- it's their job. A good trial has

1 lots of objections. That's the purpose of...

2 MR. MCCULLOUGH: I believe you ruled on this. I
3 want to make sure. I would like to get into the basis
4 behind filing or service on Frank Guarino the default and
5 things associated with that. I believe you told me I
6 can't do that but I want to make sure.

7 THE COURT: Mr. Cisa made an objection and I
8 sustained it based on the fact that they were not on
9 notice of that allegation. Now that is twofold because
10 your client unless you can establish he has personal
11 knowledge of it is not competent to testify about it
12 unless he was there when Mr. Guarino got served, unless
13 he had some conversation with Mr. Guarino about it that
14 would amount to some exception to the hearsay rule
15 because they need to be able to cross-examine Mr.
16 Guarino. So unless you can establish and bring that
17 testimony within the rules you may...

18 MR. MCCULLOUGH: Thank you, Your Honor. No
19 further questions.

20 THE COURT: You're welcome. Any -- who goes next?

21 MR. CLEVELAND: Your Honor, I hate to ---

22 THE COURT: --- who wants to go first I guess or
23 who wants to go next? Yes, sir?

24 MR. CLEVELAND: I'll defer to Mr. Cisa but would
25 you mind us taking just a five minute break?

1 THE COURT: No worries. Do you need to go to the
2 restroom?

3 MR. CLEVELAND: Yes, ma'am.

4 THE COURT: I know; everybody drinks a lot at
5 lunch. And time goes so fast. Why don't we take a quick
6 recess for everyone to refresh themselves. Sir, you may
7 go to the restroom as well if you would like just please
8 don't discuss your testimony with anyone during the
9 break.

10 [Whereupon, the witness exits the witness stand]

11 [Whereupon, court is in recess from 3:30 p.m. to
12 3:50 p.m.]

13 THE COURT: You may be seated. Are we ready to
14 resume testimony?

15 MR. CLEVELAND: We're ready from the plaintiff,
16 Your Honor.

17 THE COURT: Sir, will you retake the stand?

18 [Whereupon, the witness retakes the witness stand]

19 THE COURT: You may proceed when you're ready.

20 MR. CISA: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 CROSS-EXAMINATION

23 BY MR. CISA:

24 Q. Mr. Longman, did you testify a few minutes ago that
25 you were damaged to the tune of three and a half million

1 dollars because this lis pendens was on the property?

2 A. Yes.

3 Q. And did you testify a few minutes ago that you were
4 damaged in the approximate amount of 41,000 dollars for
5 engineering fees because the lis pendens was on the
6 property?

7 A. Architectural and engineering fees, yes.

8 Q. Okay. And then you testified that you had to pay
9 taxes of about 40,000 dollars and you feel you have been
10 damaged in that amount because the lis pendens was on the
11 property correct?

12 A. Yes.

13 Q. Okay. Now, did you ever read the complaint that
14 Lunar filed against ARP I and II?

15 A. Yes.

16 Q. Okay. What did you understand the complaint to be
17 about?

18 A. It's been quite a while since I've read the
19 complaint. I don't remember.

20 Q. Well, do you recall that Lunar Systems put down a
21 325,000 dollar earnest money deposit for a condominium
22 unit?

23 A. Yes.

24 Q. And you agree that the condominium unit was never
25 built?

1 A. Yes.

2 Q. Okay. And did you understand that Lunar was trying
3 to get that 325,000 dollars back?

4 A. Yes.

5 Q. Okay. Well, why didn't you just pay Lunar the
6 325,000 dollars and ask them to cancel the lis pendens of
7 record and dismiss the lawsuit?

8 A. I think we did.

9 Q. You did? When did you pay Lunar?

10 A. We didn't pay Lunar. What I did was offer Lunar a
11 settlement very early on before this lawsuit went on
12 there. I believe there was a letter from you, sir
13 communicating Mr. Lussier's desire not to settle.

14 Q. So you offered 325,000 -- to pay Lunar 325,000
15 dollars?

16 A. I believe so. And there is a letter back and forth
17 between Richard and you, or a series of letters rather,
18 culminating in that last one from you.

19 Q. You got that letter?

20 A. I don't but maybe we do in our files.

21 Q. Do you understand that Lunar has been paid at least
22 a portion of their claim back at this time? Do you
23 understand that?

24 A. Yes, sir.

25 Q. Okay. And you understand that they still owed in

1 excess of 175,000 dollars?

2 A. I do understand that the loan portion has not been
3 paid.

4 Q. And it's still not been paid?

5 A. That's what I understand.

6 Q. Okay. And then you testified I believe that back
7 in June of 2012 you deeded the property to the bank in
8 lieu of foreclosure correct?

9 A. Yes.

10 Q. And you did that because there was a lis pendens on
11 the property is that correct?

12 A. There had been a lis pendens on the property, yes.

13 Q. Do you understand the lis pendens was cancelled back
14 in 2010?

15 A. Yes.

16 Q. Okay. So you didn't deed the property to the bank
17 because there was a lis pendens on it did you?

18 A. Yes, as I explained. If you would like me to repeat
19 it, I will.

20 Q. You deeded the property to the bank in June of 2012
21 because there was a lis pendens on it that had been
22 cancelled in 2010?

23 A. That's my testimony. And the reason for it if you
24 would like me to explain again is that the opportunity to
25 sell the property had disappeared by that 2012 date. And

1 the reason it had disappeared was I couldn't sell it back
2 when the lis pendens was on the property.

3 Q. You could have sold it to pay off the lawsuit
4 couldn't you?

5 A. I'm not clear.

6 Q. At any time?

7 A. Well, we had offered to pay it.

8 Q. I don't have anything further. Thank you.

9 THE COURT: Mr. Cleveland?

10 MR. CLEVELAND: May it please the court?

11 CROSS-EXAMINATION

12 BY MR. CLEVELAND:

13 Q. Mr. Longman, I'm going to give you what has been
14 marked as plaintiff's exhibit 6. It's the indemnity
15 agreement of December 2003.

16 [Whereupon, the witness is shown documents]

17 Q. Are you familiar with that agreement?

18 A. Yes.

19 Q. Mr. Longman, in the 2005 arbitration proceeding did
20 the arbitrators order ARP II to resolve the Lunar claim?

21 A. They did.

22 Q. And did ARP II resolve the Lunar claim?

23 A. Ultimately, yes.

24 Q. And ---

25 A. --- perhaps in part because what Mr. Cisa just asked

1 me was about whether the claim has in fact been paid and
2 apparently it has not been completely paid.

3 Q. Are you aware that ARP II provided substantial cash
4 in the amount of 325,000 dollars and a note in the amount
5 of 175,000 dollars in 2007 to Lunar?

6 A. Yes.

7 Q. Has anyone since the 2005 arbitration asked ARP I to
8 pay Lunar any money directly?

9 A. If by asked you mean a letter requesting that ARP I
10 make a payment, no. But there is a lis pendens on ARP
11 I's property for all that time securing that payment.

12 Q. Yes, sir. My question to you is has anybody -- let
13 me narrow it. Has anybody from ARP II asked ARP I since
14 the filing of the Lunar lawsuit -- I'm sorry, since the
15 2005 arbitration award has anybody on behalf of ARP II
16 asked anyone at ARP I to pay Lunar directly the Lunar
17 claim?

18 A. If you -- again, it seems like that's exactly your
19 previous question the answer is the same. If by asked do
20 you mean ---

21 Q. --- just yes or no and then you can explain it.

22 MR. MCCULLOUGH: Your Honor, he was in the process
23 of answering the question. I would ask that he continue
24 to be ---

25 THE COURT: --- I'm going to instruct all witnesses

1 that they should answer the questions yes or no and then
2 they may explain their answer. Sir, if you would answer
3 yes or no then you may give an explanation of your
4 answer.

5 A. No. May I explain?

6 Q. [Mr. Cleveland] Certainly.

7 A. The property of ARP I was encumbered for all of
8 those years by a lis pendens from both Lussier and then
9 from ARP II.

10 So the ask as you say would have been -- if it's not
11 irrelevant certainly not necessary. The debt was being
12 secured by ARP I's property.

13 Q. Well let's talk about that for a minute. When Lunar
14 filed its lawsuit in 2005 and filed its lis pendens
15 against ARP I do you agree with me that Lunar had a valid
16 claim at that time against ARP I?

17 A. In June of 2005, which is when I believe the lawsuit
18 was filed -- if I'm not mistaken I believe if that was --
19 if I'm correct then yes they do.

20 Q. And do you agree with me that Lunar had the right to
21 file a lis pendens at that time because it had an
22 interest in the property since the building had not been
23 built; the condominiums?

24 A. I'm not going to make a legal opinion about it. But
25 what I'm saying to you is yes, they had a debt and they

1 had a right to sue on that debt.

2 Q. But as you sit here today you're not making any
3 contentions that the filing of the lis pendens at that
4 time was wrongful, are you?

5 A. I am not.

6 Q. So we have the filing of the lis pendens in 2005,
7 the filing of the lawsuit; you're not making any
8 contentions of any wrongful conduct at that time are you?

9 A. Prior to the 2005 arbitration award I am not.

10 Q. Now in the 2005 arbitration award you and -- you
11 personally and Emerald Investments, LLC were ordered to
12 indemnify ARP II and Kriti with regard to Mr. Lussier's
13 claims were you not?

14 A. Yes.

15 Q. At the time that ARP II and Kriti took the
16 assignment from Lunar and gave Lunar cash and a note and
17 took over the claims did you understand that ARP II was
18 asking ARP I to pay it to indemnify it for what it had
19 had to pay for Lunar?

20 A. At the time they took the assignment no because I
21 didn't know about it. At the point in time when I
22 learned about it I understood that was what they were
23 trying to accomplish.

24 Q. And they had -- ARP II and Emerald -- excuse me, ARP
25 II and Kriti had the right to be indemnified under the

Ashley River Properties II, LLC et al. vs. Ashley River Properties I, LLC et al.
(2005-CP-10-2434)
January 23, 2013

1 indemnity agreement from ARP I did it not?

2 MR. MCCULLOUGH: Objection. That calls for a legal
3 conclusion.

4 A. No, it is my understanding that the arbitration --
5 oh I'm sorry.

6 THE COURT: You may answer the question, sir.

7 A. The answer is no. It is my understanding that the
8 arbitration award of 2005 adjudicated that exact
9 question.

10 Q. [Mr. Cleveland] What -- you've got the arbitration
11 award in front of you do you not? If you don't we can
12 help you find it.

13 [Whereupon, the witness reviews documents]

14 A. Yes.

15 Q. Okay. Is that the '05?

16 A. Yes, sir.

17 Q. Now before I ask you to search through the award do
18 you -- you acknowledge do you not that ARP I was not a
19 party to the arbitration in 2005?

20 A. I don't believe it was.

21 Q. Okay. And you agree with me that until the 2005
22 arbitration ARP I just like Emerald and just like you had
23 an obligation under the indemnity agreement plaintiff's
24 what is it plaintiff's 6? Do you have the indemnity
25 agreement in front of you?

- 1 A. It's defendant's 1?
- 2 Q. The indemnity agreement; plaintiff's 6.
- 3 A. Oh, I'm sorry. Yes.
- 4 Q. Do you agree with me that up until the time of the
5 arbitration award that ARP I and Emerald and you had an
6 obligation under plaintiff's exhibit 6, the indemnity
7 agreement, to indemnify ARP II from Lussier's claims?
- 8 A. Prior to the arbitration agreement, yes.
- 9 Q. Now what in the arbitration award do you contend
10 excused ARP I from its obligation to indemnify ARP II?
- 11 A. The judgment of the arbitrators that ARP II was to
12 take over this debt for a payment by Emerald of 400,000
13 dollars.
- 14 Q. But Emerald never made the payment did they?
- 15 A. Yes. You have a judgment against Emerald, which has
16 been enrolled in both Connecticut and here I believe.
- 17 And there have been two -- there has been a payment
18 against it and there has been an offset against it
19 because you refused to pay the arbitrators for their
20 costs of the third arbitration; even though you required
21 that we go to that arbitration.
- 22 Q. All right. The third arbitration there was some
23 administrative and arbitration fees correct?
- 24 A. About 60,000 dollars.
- 25 Q. All right. And you paid those?

1 A. Yes, sir.

2 Q. And you got a credit for having paid those fees on
3 the judgment that was awarded against you did you not?

4 A. You refused to pay it and that was the only way that
5 we could deal with the situation.

6 Q. My point is you got a credit for that ---

7 A. --- there is a letter ---

8 Q. --- did you get a credit or not?

9 A. There was a letter saying ---

10 Q. --- I'd like a yes or no ---

11 A. --- that you would have them offset. Then no.

12 Q. You didn't get a credit on the judgment?

13 A. We have a letter from you; not a credit. We have a
14 letter from either you or Mr. Williams saying that you're
15 not going to pay it but that we could take it off of that
16 debt.

17 Q. As a credit?

18 A. And it went to Bob Ward not to me.

19 Q. All right. But that -- have you actually written a
20 check for any of the judgment that was entered against
21 you?

22 A. No.

23 Q. So you've not paid any of the 400,000 dollars other
24 than whatever credit you got for the administrative fees
25 you paid?

1 A. No.

2 Q. Is that correct?

3 A. Yes.

4 Q. Okay. Now that's why I mentioned as why you think
5 -- I'm interested in finding out why you think the 2005
6 arbitration award excused ARP I? You admitted that
7 Emerald didn't pay the 400,000 right?

8 A. Yes.

9 Q. You've admitted you didn't pay the 400,000?

10 A. Yes.

11 Q. What in the arbitration award says that in the event
12 of your non-payment, your refusal to indemnify as you've
13 been ordered to do that ARP I is not still on the hook?

14 A. We've not refused to indemnify. What we have done
15 is we've been assigned a judgment, which is your
16 recompense and which will at some point have to be paid.

17 Q. My question to you is not having paid a dime under
18 the order to indemnify why do you contend that the 2005
19 arbitration award excuses ARP I from its obligation under
20 plaintiff's exhibit 6 to indemnify?

21 A. Because you'd be double dipping. The award clearly
22 gave ARP II what it had -- what Mr. Williams was angling
23 for which is that ARP II was responsible for it when it
24 had been my contention that ARP II was not responsible
25 for it and it had been the contention of the attorney who

1 wrote all the deal documents themselves and represented
2 each of those clients.

3 Q. Mr. Longman you've already conceded that ARP II paid
4 325,000 dollars and gave 175,000 dollar note to Lussier
5 to resolve that claim. Lussier is not making any more
6 claims against ARP I is he?

7 A. I believe that because the lis pendens has been
8 withdrawn I assume that means that Mr. Lussier is out of
9 it. But ARP II continues to press as I understand it
10 based upon this indemnity agreement.

11 Q. You are correct, sir. And my question to you is
12 what in the arbitration award excuses ARP I given that
13 nobody has paid the 400,000 dollars that Emerald and you
14 were ordered to pay?

15 A. I think I've answered it three times but I'll answer
16 it again.

17 Q. Is there anything in the award that you can point
18 to?

19 A. Yes. It is the -- if you'd like me to read it.

20 Q. Sure.

21 [Whereupon, the witness reviews documents]

22 A. It is paragraph F of the award and it says,
23 [Reading] We find that Kriti -- would you like me to read
24 it?

25 Q. The first sentence. Read the first sentence please?

1 A. [Reading] We find that Kriti and ARP II are entitled
2 to indemnification from Emerald and Longman in the amount
3 of 400,000 dollars for all claims to date with third
4 party contract vendees against ARP II.

5 We question Kriti's conduct in encouraging some of
6 these third parties to assert claims against ARP II and
7 not accept partial reimbursement of their deposits.

8 However, we are persuaded that Emerald or Longman or
9 another entity controlled by Longman a) received and kept
10 the deposits, b) did not use these funds for the benefit
11 of ARP II, and c) ARP II must now resolve all these third
12 party claims.

13 Q. Yes sir and they did that did they not? ARP II
14 resolved the Lussier claim.

15 A. Ultimately through a partial payment and a note.

16 Q. Yes, sir. Leaving it with its right to be
17 indemnified by you, by Emerald, and by ARP I?

18 A. That is not my understanding.

19 Q. I understand it is not. And I understand -- and I'm
20 trying to find out why is it not. Is there anything else
21 you can tell us? I don't want to limit you.

22 A. If ---

23 Q. --- let me give you an example ---

24 A. --- well, let me -- could I ---

25 Q. --- sure. I didn't mean -- I thought you were...

1 A. I was thinking. Sometimes it takes me a while.

2 Q. That's all right. I didn't mean to interrupt.

3 A. If by taking a note back from ARP II Lussier has
4 been paid. Then by taking a judgment against Emerald and
5 me Kriti has been paid. It's precisely the same thing.

6 Q. Let me give you an example and then I'll be done.

7 If you as a developer were to take -- to loan money to an
8 entity, and LLC, and get guarantees from three of the
9 principles; A, B, and C and the entity defaults and you
10 sued two of the guarantors and get judgments against them
11 and then can't collect on the judgments do you contend
12 that you can't sue the third guarantor?

13 A. Yes.

14 Q. Do you contend that the first two judgments
15 constitute payment that excused the third guarantor even
16 though nothing has been paid on it?

17 A. Yes, that's my understanding.

18 Q. All right. I appreciate that.

19 MR. CLEVELAND: That's all I have. Thank you, Your
20 Honor.

21 THE COURT: Any redirect?

22 MR. MCCULLOUGH: Please.

23 REDIRECT EXAMINATION

24 BY MR. MCCULLOUGH:

25 Q. Mr. Longman if somebody is owed 100,000 dollars and

1 they're paid 100,000 dollars do they still have a claim?

2 A. No.

3 Q. Why?

4 A. Because they've been paid.

5 Q. Now has ARP II taken the position that Lunar has
6 been paid by the 325,000 and then the judgment against
7 it?

8 A. They have.

9 Q. How is that any different than the judgment they've
10 gotten against you?

11 A. It's not.

12 Q. So it's the same; they've been paid.

13 A. Correct.

14 Q. Was the 2005 arbitration diametrically opposed on
15 this issue to the position that ARP II has taken here
16 today?

17 A. It's diametrically opposed.

18 Q. How do you explain that?

19 A. The time that was in their interest. At this time
20 taking the opposite position is in their interest.

21 Q. And they were willing to take the bullet on the
22 Lunar case if it meant squeezing you out of your voting
23 rights?

24 A. That was the point.

25 Q. And it worked?

1 A. It did.

2 Q. And that indemnity agreement that was part of the
3 arbitration?

4 A. It was.

5 Q. And the arbitrators litigated this issue for days
6 and days?

7 A. Days and days.

8 Q. And made an award?

9 A. They did.

10 Q. And ARP II is pursuing the judgment against you using
11 as part of that judgment the same 400,000 dollars?

12 A. Yes, they are.

13 Q. And when making their determination as to who owed
14 this debt did the arbitrators question Kriti's conduct?

15 A. They did.

16 Q. And is the fact that the arbitrators determined that
17 this was an ARP II debt is that the trigger in your mind
18 for when the Lunar claim lis pendens needs to be removed?

19 A. Yes. They can't have it all ways.

20 Q. And if it had been removed once that arbitration
21 award came down would you have suffered the damages
22 you've testified to here today?

23 A. No, the property would have been developed and sold.

24 Q. Okay.

25 MR. MCCULLOUGH: No further questions, Your Honor.

1 MR. CLEVELAND: No redirect from me -- no recross.

2 MR. CISA: Nothing for me, Judge.

3 THE COURT: Sir, you may step down.

4 [Whereupon, the witness is excused and exits the
5 witness stand]

6 THE COURT: Any further witnesses, Mr. McCullough?

7 MR. MCCULLOUGH: No, Your Honor.

8 THE COURT: Does the defense rest?

9 MR. MCCULLOUGH: Yes. I forgot what side I'm on.

10 THE COURT: I know.

11 MR. MCCULLOUGH: We rest.

12 THE COURT: Okay. And Mr. Cisa you've already
13 called your witness?

14 MR. CISA: Yes, Your Honor.

15 THE COURT: I assume there are no rebuttal
16 witnesses?

17 MR. CLEVELAND: That's correct, Your Honor.

18 THE COURT: Okay. I'll hear motions.

19 MR. MCCULLOUGH: Your Honor, at this point we would
20 move for a directed verdict on both their -- I guess mine
21 too on both their claim on indemnification and on
22 affirmatively. And I can take those separately if you'd
23 like?

24 THE COURT: Make your full argument.

25 MR. MCCULLOUGH: Okay.

1 MOTION FOR DIRECTED VERDICT

2 MR. MCCULLOUGH: On the indemnification this was a
3 matter that was litigated, determined. They asked it to
4 be modified; they lost that modification. The only
5 testimony in the record was that Kriti wanted it to be an
6 ARP II responsibility so they could strip Mr. Longman of
7 voting rights by showing bad conduct. The arbitrators in
8 the award questioned Kriti's conduct.

9 We think it is clear that this was litigated, the
10 indemnify agreement was completed in the arbitration so
11 we think that as a matter of law at this point the
12 indemnity obligation should be -- their claim for
13 indemnity should be dismissed.

14 THE COURT: They had an abuse of process claim did
15 they not?

16 MR. MCCULLOUGH: Did you want me to go ahead and
17 talk about that now too.

18 THE COURT: I told you to make your argument in
19 full.

20 MR. MCCULLOUGH: Yes, Your Honor.

21 ABUSE OF PROCESS CLAIM

22 MR. MCCULLOUGH: On the abuse of process again we
23 feel like even taking all the evidence in a light most
24 favorable to the non-moving party that you can determine
25 this as a matter of law at this point. We have proven

1 and I think it's undisputed that the lis pendens remained
2 on the property for several years following the
3 arbitration award in 2005. The excuse provided in the
4 emails was that it was -- they were waiting on the New
5 York arbitration to be confirmed. That was confirmed in
6 2008 and the lis pendens remained for an additional two
7 years.

8 I think that Pond Place Partners 567 S.E.2d 881 is a
9 case where -- attempts of a great deal of time, energy,
10 and effort discussing lis pendens. And I'll read from
11 this case: the purpose of a notice of pendency of an
12 action is to inform a purchaser or encumbered that a
13 particular piece of real property is subject to
14 litigation, the properly filed lis pendens by subsequent
15 purchasers or encumbers to all proceedings involving the
16 litigation.

17 The lis pendens mechanism is not designed to aid
18 either side in a dispute between private parties; rather
19 a lis pendens is designed primarily to protect
20 unidentified third parties by alerting prospective
21 purchasers of property as to what is already in public
22 record.

23 We would take the position that the original filing
24 by Lunar was in bad faith and violated or was an abuse of
25 process because it was not intended to aid in the

1 dispute. It was -- or to notify subsequent purchasers.
2 It was actually an effort to put additional leverage on
3 ARP I. More importantly when the arbitration award came
4 down it should have been removed immediately. And the
5 idea -- and we've got emails in the record that show Mr.
6 Williams explanation for wanting to keep the lis pendens
7 on the property is to apply additional pressures to Mr.
8 Longman and have backstop protection.

9 We spent two days discussing their continued fights
10 over ARP II, over the marina. We would cite to the
11 Hainer v American Medical International case which
12 states, the essential elements of abuse of process for an
13 ulterior purpose and a willful act of the use of the
14 process not proper in the conduct of the proceeding.

15 Your Honor, we believe the original filing of the
16 lis pendens was done for an ulterior purpose. It's
17 certainly not the original filing and once that 2005
18 arbitration award came down and ARP II argued for and won
19 the issue that it was its responsibility then this lis
20 pendens should have been removed immediately and
21 certainly upon the confirmation of the award in 2008 it
22 should have been removed immediately. And so we think
23 that it was an abuse of process. We've testified as to
24 the damages for that abuse of process.

25 THE COURT: Would you like to respond?

1 MR. CISA: I'll respond on behalf of my client
2 first, Judge if I may? I respectfully submit that Mr.
3 McCullough is -- he's got a misapprehension about what
4 the law is. What Mr. Longman has testified to in this
5 trial is that he was damaged because there was a lis
6 pendens filed on his property. That was his testimony.

7 The law is very clear and Mr. McCullough cites the
8 case, this leading case Pond Place Partners v Poole and
9 it's found at 567 S.E.2d 881. It's a 2002 case that was
10 written by Judge Anderson and -- was denied in 2003 by
11 the Supreme Court. This is what the case stands for; we
12 find that filing of a lis pendens is absolutely
13 privileged in South Carolina.

14 The filing of the lis pendens enjoys the same --
15 enjoys the absolute privilege according to judicial
16 proceedings because the recording of a lis pendens is
17 specifically authorized by statute and has no existence
18 separate and apart from the litigation of which it gives
19 notice. The filing of a lis pendens cannot form the
20 basis of an action for slander of title.

21 So what the Supreme -- what the Court of Appeals has
22 held and the Supreme Court denied -- is that the filing
23 of a lis pendens is absolutely privileged. You can't sue
24 somebody because they filed a lis pendens. Now what they
25 are seeking to recover for in this particular case is

1 abuse of process. And it sounds to me like he's getting
2 it confused with what the court held about slander of
3 title. Abuse of process you have to show an ulterior
4 purpose and a willful act in the use of the process not
5 proper in the regular conduct of the proceeding.

6 Well the only testimony was is that Mr. Longman was
7 harmed because a lis pendens was filed. There has been
8 no evidence whatsoever put forth by the third party
9 plaintiff, ARP I, to show any ulterior purpose, to show
10 any willful act in the use of the process not proper in
11 the regular conduct of the proceedings.

12 What they are complaining about is that a lis
13 pendens was filed against the property and it was filed
14 against the property because the contract my client
15 entered into has provisions saying that they have an
16 interest in the property, in the condominium property.
17 And there is no question that both ARP I and ARP II
18 separate parcels were part of the condominium property.

19 In fact Mr. Longman testified during his examination
20 that Ashley River Properties I was responsible for the
21 Lunar debt. So what I'm suggesting to the court is
22 Judge, he is arguing it like it's a slander of title case
23 and the case law is clear that you can't sue for -- to
24 sue somebody for filing a lis pendens because it's
25 absolutely privileged. And they have not put forth any

1 evidence at all of any ulterior purpose or any willful
2 act that there was abuse in the process. My client filed
3 a lis pendens and filed a lawsuit because they wanted to
4 get paid back their earnest money deposit with interest.
5 That's what it was all about; nothing more, nothing less.
6 They had no ulterior purpose.

7 And then what we did is when we worked out a
8 resolution with ARP II they wanted us to assign our
9 lawsuit to them in exchange for paying the 325,000
10 dollars and a note that was due and payable within a
11 year. That's what we did and we stepped away and let Mr.
12 Longman and ARP II go about their litigation.

13 So we had no ulterior purpose and there has been no
14 evidence of any. And he can't recover, Your Honor, I
15 respectfully submit under the Poole case based on slander
16 of title; it's absolutely privileged. So I ask that
17 their third party complaint be dismissed because based on
18 the law and the facts that are presented in this
19 particular case they can't prevail; they have no right to
20 prevail. Thank you.

21 THE COURT: You're welcome. Mr. Cleveland?

22 MR. CLEVELAND: Your Honor, I join in the motion
23 Mr. Cisa just made and just briefly to state what I
24 believe the evidence has shown in the case is that the
25 2005 arbitration award required us to resolve Mr.

1 Lussier's claim and allowed us to seek indemnification up
2 to 400,000 dollars from Mr. Longman and Emerald. It did
3 not adjudicate or otherwise bridge our rights to
4 indemnification from ARP I.

5 I concede that ARP I has an argument that the amount
6 of our indemnification may be limited to 400,000 dollars.
7 I would argue against that but I can understand that may
8 be an argument. But that's the best argument they've
9 got. There is no argument that ARP I is not liable under
10 the indemnity agreement just like Emerald and Longman are
11 under the indemnity agreement.

12 The reason their rights were not adjudicated is
13 because they weren't a party to the arbitration
14 provision. There is no arbitration agreement between ARP
15 I and ARP II. But there is the indemnity agreement. And
16 at the time in 2007 when we turned our sights on ARP I
17 for indemnification we had that right.

18 Mr. Longman said there was nothing wrong with
19 Lussier filing the complaint. Nothing wrong with Lussier
20 filing the lis pendens; they had the right to do that.
21 We resolved the Lussier claim as the arbitrators asked us
22 -- told us to do and then we turned it on indemnification
23 by way of taking an assignment of the claim and bringing
24 this lawsuit that we are here today seeking adjudication
25 and under the indemnity agreement we have the right to be

1 indemnified by ARP I. And there is nothing in the 2005
2 arbitration that would preclude our getting the money
3 that they told us we would get and we haven't been able
4 to get it from the first two guarantors and I think we're
5 entitled to get it from the third. Thank you.

6 THE COURT: You're welcome.

7 MR. MCCULLOUGH: Your Honor, can I respond briefly?

8 THE COURT: I need Mr. Cleveland to address his
9 abuse of process claim. Because really what I'm going to
10 do is I'm denying any motions to dismiss based on Rule 41
11 and I'm going to take your arguments in the nature of
12 closing argument because that's really what they are.
13 You may proceed.

14 MR. CLEVELAND: Your Honor, I second what Mr. Cisa
15 said. There has to be evidence that the filing of the
16 lis pendens or the actions taken were for some ulterior
17 purpose. There is no evidence in this case ---

18 THE COURT: --- no, you need to argue why your
19 abuse of process claim should not be -- didn't you have a
20 counterclaim or was that Mr. Cisa's counterclaim for
21 abuse of process?

22 MR. CISA: Yes, we were both sued because Will
23 Cleveland's client, ARP II, and Lunar were both sued for
24 saying ---

25 THE COURT: --- for abuse of process ---

1 MR. CISA: --- by ARP I ---

2 THE COURT: --- I misunderstood. I apologize. But
3 you can go ahead and address Mr. McCullough's argument on
4 the abuse of process.

5 MR. CLEVELAND: Yes, Your Honor. The only evidence
6 in the case I submit is that at the time we took over the
7 claim we were seeking to be paid back by ARP I for the
8 amounts that we had to pay Lunar. And there is no
9 ulterior purpose there. That is what happens in a
10 subrogation cases when a party who is secondarily liable
11 pays off a claim and has a right to take an assignment
12 and pay the party who is primarily liable, which ARP I is
13 under its indemnity agreement.

14 So I would submit to the court there was no wrongful
15 act. There was no ulterior purpose and that all of the
16 steps taken were purely for the sake of trying to be paid
17 the indemnification that we were entitled to be paid.

18 THE COURT: Thank you, sir.

19 MR. CLEVELAND: Thank you.

20 THE COURT: You're welcome. Yes, sir?

21 MR. MCCULLOUGH: Briefly. Ashley River Properties
22 II filed the arbitration in New York. They chose not to
23 sue ARP I for whatever reason. Mr. Longman testified
24 that their position throughout the arbitration was that
25 these were ARP II responsibilities and the purpose behind

1 that was to try to show bad conduct of Mr. Longman. We
2 cited in our brief Palmetto Homes v Bradley which states
3 that res judicata applies to prior arbitration awards
4 including claims that could have been submitted but were
5 not. The issue of indemnification was before the
6 arbitration panel. They certainly could have brought ARP
7 I into that case, but they chose not to and they chose
8 not to for the reasons that Mr. Longman testified to.

9 So then now to stand up here and argue the exact
10 opposite we feel is unjustified and unwarranted.
11 Furthermore, they have gotten the judgment for the
12 400,000 dollars. They've enrolled that judgment both
13 here and in Connecticut and are prosecuting that judgment
14 similar to Lunar's judgment against ARP II and they are
15 seeking a double recovery.

16 Finally, Pond Place does say that a slander -- that
17 a lis pendens is absolutely privileged so that you can't
18 file a slander of title claim. It also states and I'll
19 quote; lastly we are not unmindful of the fact that our
20 holding above may limit the prosecution of actions for
21 slander of title in South Carolina. However, it does not
22 extinguish a reform of relief when a party files a lis
23 pendens, which is motivated by some malicious intent.
24 The jurisdictions are in agreement that the proper action
25 against a maliciously filed lis pendens is under abuse of

1 process. In this case that's exactly what we filed for.
2 And we think in South Carolina that is the appropriate
3 cause of action for this conduct.

4 THE COURT: I'm going to take the matter under
5 advisement. If you all could provide me with proposed
6 orders within ten days of today by email in Word format
7 to djeffersonsc@sccourts.org and make any findings of
8 fact or conclusions of law that are supported by the
9 record and that support your posture in this case and the
10 relief that your clients are seeking.

11 I will however -- my gut feeling at this time, and
12 it may change over the course of me thinking about it is
13 that the indemnity claim although I have to look back at
14 the pleadings because I'm not sure collateral estoppel
15 was pled as a defense in this case is whether the issue
16 of preclusion would apply.

17 Although the parties are different because in my
18 estimation at this moment I feel like or my perception is
19 that it is an attempt to circumvent the arbitrators fact
20 findings and that y'all just didn't get everything you
21 wanted from them in terms of those claims having been
22 submitted to them. By the same token and on the other
23 side of the equation I really do not feel there is any
24 evidence to support an abuse of process claim. While
25 there is some argument that the lis pendens should have

1 been cancelled there was still a valid judgment out there
2 to be executed. And whether it was poor judgment in not
3 removing it I do not perceive at this point that there
4 was any proof of any malicious intent.

5 The other part of that is that there has been no
6 proof of damages. Everything that has been submitted
7 really is speculative in terms of any actual damages
8 claimed to have been suffered by the plaintiff in terms
9 of the abuse of process claim, which would be the third
10 party claim.

11 But I'm going to think about it some more, I'm going
12 to study it a little more, I'm going to look at the case
13 law and then once you all get your orders to me I'll
14 think about it some more. But that's my minimal thought
15 process at this time without having had the opportunity
16 to review your submissions.

17 MR. CLEVELAND: May I ask for clarification?

18 THE COURT: Sure.

19 MR. CLEVELAND: Your Honor, normally in requesting
20 proposed orders both sides would send up orders in which
21 you rule in favor of our client on all issues. I
22 understood and take to heart your comments and so what I
23 would intend to do unless you -- or what I would...

24 THE COURT: You'd write an order like you have
25 prevailed is how you should submit it to me.

1 MR. CLEVELAND: All right, thank you.

2 THE COURT: Yes. And that's how Mr. McCullough
3 should submit his and Mr. Cisa. But I never sign orders
4 the way they're submitted. I always -- I have already
5 pretty much started writing an order. I read your orders
6 really in the nature -- I find that it is a more succinct
7 argument of what your position is. And so it helps me in
8 terms of really understanding the full nature of your
9 argument and what facts you feel in the record support
10 that argument and case law you feel supports that
11 argument.

12 But I probably in 17 years have never signed an
13 order exactly the way someone has submitted to me. You
14 probably wouldn't recognize it when you get it back
15 because I have a form -- I have a way that I like my
16 orders written so I pretty much write it myself.

17 But it helps me to be able to be guided by your
18 thought process as well because I think sometimes in
19 hindsight with the clarity of everything having been
20 tried that it gives you all the benefit of summarizing
21 your arguments and creating -- and showing at least
22 pointing out to the court what you believe is in the
23 record that supports your posture on it. Is there
24 anything else we need to take up before we adjourn for
25 the afternoon from the plaintiff?

1 MR. CLEVELAND: No, Your Honor.

2 THE COURT: Both --

3 MR. CISA: Whoever we are -- nothing from my
4 clients, Your Honor.

5 THE COURT: All right. Please make sure the court
6 reporter has all the exhibits. And y'all have a
7 wonderful evening; try to get some rest. It's been a
8 pleasure seeing everybody.

9 [Whereupon, court is in recess]

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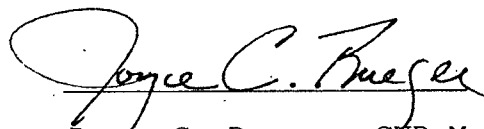
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 23rd day of January, 2013.

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

November 6, 2013

A handwritten signature in cursive script, reading "Joyce C. Rueger". The signature is written in dark ink and is positioned above the printed name.

Joyce C. Rueger, CVR-M

Court Reporter

THE RIPLEY LIGHT
YACHT CLUB

REAL ESTATE PURCHASE AGREEMENT
(Phase I)

THIS REAL ESTATE PURCHASE AGREEMENT (this "Agreement") is made by and between RIPLEY LIGHT YACHT CLUB, LLC, a South Carolina limited liability company or its assigns (the "Company"), whose mailing address is 44 Seagrass Lane, Isle of Palms, South Carolina 29451, and the below-named purchaser identified in Part I hereof.

Part I

Identifications

A. The Purchaser

Name(s): LUNAR Systems, Ltd

Address: 766 N. RIVER RD N.W.

Telephone (Work): 330-847-7000

Telephone (Home): 330-856-6696 -STEVE

FAX Number: 330-847-0528

E-Mail: SLUSSIER @ TECHNICAL.COM

TAX ID
Soc. Sec. No.(s): 34-1904102

Name(s): THOMAS J. LUSSIER - STEVEN LUSSIER

Address: WARREN, OHIO 44453

Telephone (Work): 330-847-7000

Telephone (Home): 330-856-1970 -TOM

FAX Number: 330-847-0528

E-Mail: TLUSSIER @ TECHNICAL.COM

Soc. Sec. No.(s): 34-1904102

TAX ID

B. The Unit and Purchase Price

Unit Number: D-403 (the "Unit")

Purchase Price: \$650,000

(a) Purchase Price. The Purchase Price for this Unit shall be paid as set forth below. The purchase Price of this Unit is equal to the total of the following:

- (i) \$650,000 the base price for a Standard Residence ("Base Price"), plus
- (ii) the amount shown on Exhibit "B-1", Total Cost of Selections, which sum reflects the net additional cost required to be paid by Purchaser for Selections, if any. Exhibit "B-1" will be completed within 120 days after execution of this Agreement and shall become a part of this Agreement.

Buyer's Initials TL

Seller's Initials SL
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PLAINTIFF'S
EXHIBIT

05-2434

(b) Payment of Purchase Price. The Purchaser will pay the Purchase Price set forth above in installments as follows:

- (i) Earnest Money Deposit. Purchaser agrees to pay an earnest money deposit equal to:

~~30%~~ 10% of the Base Price of the Unit(s) upon execution of this Agreement

\$ 325,000

~~10%~~ of the Base Price of the Unit(s) upon commencement of construction

\$ _____

- (ii) Selection Deposit. Further, if applicable, Purchaser agrees to pay a deposit for selections equal to the total cost, if any, of Custom Work/Selection shown on Exhibit "B" upon execution of Exhibit "B-1" and at such time any Selections requiring additional cost is added to Exhibit "B". All custom work must be selected and paid for no later than 120 days following the execution of this agreement. The amount of all costs for Custom Work will be added to the Total Purchase Price upon execution of Exhibit "B-1".

- (iii) Balance at Closing. The balance of the Purchase Price (not including all of Purchaser's Closing costs, prepaids, and deposits required hereunder) in cash or certified funds.

\$ _____

Total Purchase Price (The cost of all Custom Work will be added to the Total Purchase Price upon execution of Exhibit "B-1")

\$ _____

C. Definitions:

(a) "Standard Residence" means a residence constructed substantially in conformance with Exhibit "A-2" Standard Residence Finishes. These exhibits are attached to this document and incorporated hereto. The Company reserves the right to substitute items listed in those exhibits with items of equal or better quality.

(b) "Custom Work" means all selections/modifications made to the Standard Residence as "A-1" and "A-2" and shall specifically include upgrade finish selections and extras offered from time to time by the Company as well as any modifications to the floor plans or Standard Residences finishes. All such Custom Work/Selections, if any, shall be described in Exhibit "B" and any amendment hereto subject to the provisions of this Agreement.

Buyer's Initials TJC

Seller's Initials SL

Financing. Purchaser affirms that financing is not a contingency of this Agreement. Purchaser, however, acknowledges that Company is required to provide credit verification of all unit purchasers to its construction lender. Purchaser shall provide the financial information required by said construction lender and requested by the Company and/or its construction lender WITHIN 15 DAYS of the execution of this Agreement. If the requested financial information is not received by the Company and/or its construction lender within 15 days after the execution of this Agreement, Company will have the option to (a) charge the Purchaser interest at the rate of 18% per annum on the Purchase Price for the period of time after the expiration of the 15 day period that the requested information is not provided; or (b) declare this Agreement terminated and retain the Earnest Money and Selection Deposit as liquidated damages.

E. Association and Regime. The Purchaser does hereby acknowledge that the following assessments and working capital contributions due from the Purchaser, at the Closing will apply to the Unit. These figures outlined below are estimates and subject to change prior to closing.

	<u>Unit A</u>	<u>Unit B</u>	<u>Unit C</u>	<u>Unit D</u>	<u>Unit E</u>	<u>Unit F</u>
(a) The Ripley Light Yacht Club Homeowner's Association Estimated Master Insurance Policies Assessments, (1 year)	\$127.08	\$113.56	\$81.08	\$92.36	\$100.75	\$50.83
(b) The Ripley Light Yacht Club Homeowner's Association Estimated Working Capital (2 months) Payable at Closing.	\$1287.50	\$1150.50	\$821.42	\$935.74	\$1020.72	\$515.00
Current Month Estimated Homeowner's Regime Fee.	\$643.75	\$575.25	\$410.71	\$467.87	\$510.36	\$257.50

F. Real Estate Agent: FRANK GUARINO

Broker: FRANK GUARINO PROPERTIES LLC

G. Government Approvals Contingency. It is understood and agreed that this Agreement and all obligations under this Agreement are contingent upon the Company receiving all necessary governmental approvals for the construction of the Ripley Light Yacht Club project.

Buyer's Initials

TLC

Seller's Initials

SL

Part II

Terms and Conditions

The rights and obligations of the Company and the Purchaser are determined solely by reference to the terms and conditions set forth in this Part II.

1. The Purchase Price. The Purchaser will pay as the full purchase price for the Unit a sum equal to the Purchase Price of the Unit set forth in Paragraph B of Part I of this Agreement.

1.1 Earnest Money. The Company will receive the Earnest Money, as set forth in Paragraph B of Part I and will deposit said sum in an escrow account to be held by the Company as Earnest Money and disbursed by the Company in accordance with the terms set forth in Exhibit "D."

1.2 Payments at Closing. The Purchase Price, together with all of the Purchaser's Closing costs, prepaids, and deposits required hereunder, less the sum of the Purchaser's Earnest Money and any prepaid Custom Work costs, will be paid in cash or by certified collected funds at the Closing hereinafter referred to.

2. Financing.

2.1 Purchaser's Responsibility. The Purchaser will be responsible for obtaining any financing for the purchase of the Unit(s) provided that Purchaser acknowledges and agrees that this Agreement is not contingent on financing. By suggesting a source of financing and/or providing the applications for such financing, the Company will not be deemed to have assumed any responsibility for obtaining such financing for the Purchaser or to represent or warrant that such financing will be available to the Purchaser.

2.2 Failure to Provide Financial Information for Construction Lender. If the Company and/or its construction lender does not receive the required and requested financial information from the Purchaser in accordance with Part I, Section D, which meets the requirements of this Agreement within 15 days of the execution of this Agreement by the Purchaser, the Company will have the option to (a) charge the Purchaser interest at the rate of 18% per annum on the Purchase Price for the period of time after the expiration of the fifteen day period that the requested information is not provided; or (b) declare this Agreement terminated and retain all of the Earnest Money and Selection Deposit as liquidated damages.

3. Company Contingency.

3.1 Promise Contingencies to Closing. The Company's obligations under this Agreement are contingent upon the satisfaction of one of the following conditions and requirements:

(a) On or before the expiration of 180 days from the date of execution by a party to be bound to the terms of this form of Agreement, the Company will have entered into enforceable agreements for the sale of 80 % of the condominium Units in Phase I of the project (including this Agreement) substantially in the form of this Agreement and at such price and other terms and conditions as will be acceptable to the Company, in its sole discretion; or

(b) The Company having waived, in writing, the condition set forth in (a) above.

Buyer's Initials

TLC

Seller's Initials

SL
[Signature]

Rights of Termination. In the event the contingency set forth in the above Section 3.1 is not satisfied on or before the expiration of the term set forth in subparagraph 3.1(a) above hereto, the Company and the Purchaser will each have the right, at its option, to terminate this Agreement by delivery of written notice to the other; provided that, if the Purchaser elects to exercise such right, the Purchaser must deliver notice to the Company of its intent to terminate this Agreement, and the Company will thereafter have 5 business days within which to waive the said contingency pursuant to Section 3.1(b).

4. **Master Deed.** The Company will provide the Purchaser at Closing and transfer of title with a copy of the executed and recorded or recordable Master Deed of The Ripley Light Yacht Club Horizontal Property Regime (the "Regime Master Deed") and By-laws for The Ripley Light Yacht Club Homeowners' Association, Inc. (the "Regime Association").

5. **Title.** In consideration of the conditions and covenants contained in this Agreement, the Company agrees to convey to the Purchaser a marketable title in fee simple to the Unit by general warranty deed subject only to the following:

- 5.1 All rights, covenants, conditions, restrictions and easements of record;
- 5.2 Licenses and easements for utilities serving the Unit;
- 5.3 Covenant that the Unit(s) conveyed will not be used for or subject to any type of Vacation Time Sharing Plan or Vacation Multiple Ownership Plan as defined by the 1976 Code of Laws for the State of South Carolina, as amended, Section 27-32-10, et. seq., or any similar ownership plan, without prior written consent of Company, its successors and assigns, which consent may be granted or denied in the Company's sole discretion;
- 5.4 Interest created by, or limitation on use imposed by, the Federal Coastal Zone Management Act or other federal law or S.C. Code Section 48-39-200, as amended, or any regulations promulgated pursuant to said state or federal laws;
- 5.5 Taxes and assessments not yet due and payable;
- 5.6 Charleston, South Carolina ordinances and applicable building codes and development standards, if any;
- 5.7 Regime Master Deed and the Regime Association By-laws, as amended, formed under the laws of the State of South Carolina, recorded, or to be recorded on or before the Closing, in the office of the Register of Mesne Conveyance for Charleston County (the "RMC Office");
- 5.8 Other applicable covenants and restrictions of record affecting the Unit(s).
- 5.9 Seller has arranged with Fidelity National Title Insurance Company to provide a policy of title insurance to the Purchaser and its lender, if any, at Purchaser's cost and expense. As a matter of law, Purchaser has the right to engage and use another title insurer of its choice. However, the parties acknowledge that using a company other than that arranged by Seller will increase the closing expenses of Seller, and in such event, Purchaser shall pay a title closing fee of \$500 to Seller at closing, in addition to any and all other adjustments.

Buyer's Initials

TL

Seller's Initials

SL

If a title insurance company which is a member of the American Land Title Association will issue a binder to issue an owner's title insurance policy at the Purchaser's expense insuring the title to the Unit(s) in an amount equal to the Purchase Price (which owner's title insurance policy will have as exceptions only standard exceptions and those exceptions as are herein agreed and set forth), the Company will be deemed to be able to convey a marketable title in fee simple. If at the Closing, the Company cannot deliver a general warranty deed to the Unit(s) subject only to the exceptions above, the Company will have the right to extend the Closing for an additional 120 days to comply with the terms of the title policy.

6. **Company's Reservation of Flexibility.** The Company reserves the right to make architectural, structural or design changes as it deems necessary or desirable, which may be occasioned by expediency, practicability or as commonly accepted in the construction industry in general, or as required by governmental authorities, which make no substantial change in the size or floor plan of the Unit(s). The Company expressly reserves the right to make substitution of materials, appliances, products or brand names provided such substitutions are substantially equal quality to those shown in the Plans and Specifications, as determined solely by the Company. The Company cannot guarantee a firm completion and availability date for any uncompleted condominium units within the phase of the Regime of which the Units(s) is a part. The Company will make every reasonable and diligent effort to meet or exceed estimated construction schedule; however, the Company will not be obligated to make, provide or compensate for any accommodations or costs to the Purchaser or any other damages as a result of construction or other delays. Further, such delays will not serve to cancel, amend or diminish any of the Purchaser's obligations herein undertaken.

7. **Closing Costs.** The Company will pay for the preparation of the deed and the documentary stamps required to be affixed to the deed. The Purchaser will pay for any and all other Closing costs, including but not limited to, the transfer fee, recording fees, prepaid items, the Purchaser's attorney's fees and title insurance premiums. The Purchaser will also pay, at the Closing; assessments and working capital contributions as are due and payable under the Regime Master Deed and The Ripley Light Yacht Club Homeowner's Association By-laws, estimates of which are set forth in Paragraph E of Part I hereof, and ad valorem taxes for the pro rata portion of the calendar year during which the Purchaser holds title to the Unit.

8. **Closing.** Closing of the transaction will take place at the offices of the Company's attorneys in Charleston, South Carolina, or such other place as may be designated by Company. The Closing shall take place at a time, date and location selected by the Company. Purchaser must inspect the Unit immediately prior to closing and notify the Company and Contractor of any items which are not completed in a workmanlike manner so that arrangements can be made with the contractor to correct same. Because the Company is providing the one (1) year warranty hereafter mentioned, the failure of the contractor to correct these items prior to the closing date shall not delay closing so long as these items do not prevent the Purchaser from occupying the unit. Acceptance at closing by Purchaser of the Deed from the Company shall constitute full performance by the Company in accordance with this Contract; except for items correctable under the terms of the one (1) year warranty. The Purchaser will close the purchase of the Unit(s) within 10 days after he is notified by the Company that the Company is prepared to tender title. Failure to close on the date set by the Company shall be a default by Purchaser under this Agreement.

The Company shall have the right to charge the Purchaser interest at a rate up to 18% annum for each day the Purchaser delays his closing or pursue all other remedies available to Company under the law or equity. The Company will complete all the condominium units in the phase of the Regime development of which the Unit(s) is a part within 24 months of the date of execution of this Agreement by the Purchaser, and the only allowable excuse for the Company's failure to meet this completion schedule will be the acts of others or

Buyer's Initials TRC

Seller's Initials SL

circumstances beyond its control, specifically: war, national strike, material shortage, major tropical storm, or other acts of God. The acceptance of a deed by the Purchaser will be deemed to be a full performance and discharge of every agreement and obligation on the part of the Company, and the Purchaser will not be entitled to possession of the premises or any portion thereof until conclusion of Closing.

9. Defaults.

9.1 Default by Purchaser. In the event of a default in the performance of any obligation of the Purchaser pursuant to this Agreement, the Company will have the right to specifically enforce this Agreement according to its terms and/or to pursue any and all other remedies available to the Company at law or in equity, or the Company will, at the Company's election, be released from any further obligations to the Purchaser pursuant to this Agreement, and in such event will be entitled to retain all of the Earnest Money and Selection Deposit as agreed liquidated damages, it being the intention and agreement of the parties hereto that the amount of such Earnest Money and Selection Deposit will act as a fair measure of compensation for actual damages incurred by the Company as a result of the Purchaser's said default.

9.2 Default by Company. If the Company defaults in the performance of any of the Company's obligations as set forth in this Agreement and such default is not cured within 90 days after written notice of default is given by the Purchaser to the Company, the Purchaser will be entitled to rescind this Agreement and receive the immediate return of the Purchaser's Earnest Money and Selection Deposit, as well as pursue any and all other remedies available at law or in equity; provided, however, that in the event of the nonmaterial breach of any term or condition of this Agreement, the Purchaser's remedies will not include termination of this Agreement.

10. Warranty. For a period of one (1) year from the date of Closing, the Company will, at no cost to the Purchaser, repair or replace any portion of the Unit(s), except for fixtures and appliances covered by a manufacturer's warranty, which are defective as to materials or workmanship. Furthermore, Purchaser acknowledges and agrees that the Purchaser will perform such routine maintenance as is set forth in any written manual, instruction booklet or other writing as may be provided to Purchaser by the Company or any such manufacturer. The failure of Purchaser to observe and perform any such recommended maintenance may invalidate any warranty with respect to the item for which maintenance was not performed. The Company's liability is expressly limited to such repair or replacement and THE COMPANY MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED. THE COMPANY IS NOT RESPONSIBLE FOR ANY CONSEQUENTIAL DAMAGES PROXIMATELY CAUSED BY A BREACH OF WARRANTY, THE COMPANY'S TOTAL LIABILITY BEING THE COST OF REPLACEMENT OR REPAIR, AND THE PURCHASER WILL NOT BE ENTITLED TO ANY COMPENSATION FOR LOST RENTAL OR INCONVENIENCE. NO OTHER WARRANTIES SHALL APPLY, INCLUDING BUT NOT LIMITED TO THE UNIFORM COMMERCIAL CODE AS ADOPTED IN THE STATE OF SOUTH CAROLINA. In the event of suit, the Purchaser agrees that its damages for breach of warranty shall be limited to the lower of the "actual economic loss" or the replacement cost of the item claims. THE PARTIES AGREE THAT IN NO EVENT SHALL THE LIABILITY OF THE SELLER EXCEED 50% OF THE PURCHASE PRICE OF THE CONDOMINIUM SOLD HEREUNDER. Completion of minor punch list items will not be grounds for withholding funds or for the Purchaser's refusal to close.

11. Insulation. Pursuant to FTC regulations, notice is hereby given by the Company to the Purchaser that each condominium unit within the building of which the Unit(s) is a part will have batt insulations installed in all exterior walls to a minimum thickness of R-13; in all ceilings other than the top floor roof ceiling to a thickness of R-19; and in the top floor roof ceiling to a thickness of R-30. The Company does not warrant that the insulation will yield the R-values as represented by the manufacturer.

Buyer's Initials

TL

Seller's Initials

SL JP

14.7 Time is of the essence. It is expressly understood and agreed that TIME IS OF THE ESSENCE as to all obligations hereunder, including the Purchaser's obligation to obtain a mortgage commitment and provide the Lender with all information requested.

14.8 Entire Agreement. The parties further covenant and agree that this written instrument, executed in duplicate originals, expresses the entire agreement between the said parties and there is no other agreement, oral or otherwise, varying or modifying the terms of this Agreement.

14.9 Modification of Agreement. This Agreement may not be otherwise changed or modified, absent some subsequent written instrument executed by both parties to this Agreement.

14.10 Interpretation Presumption. This Agreement has been negotiated by the parties hereto and/or by the respective attorneys for each party. The parties represent and warrant to one another that each has, by counsel or otherwise, actively participated in the finalization of this Agreement, and in the event of a dispute concerning the interpretation of this Agreement, each party hereby waives the doctrine that an ambiguity should be interpreted against the party which has drafted the document.

14.11 Binding Effects; Assignment. This Agreement is binding upon the heirs, devisees, personal representatives, successors and assigns of the parties; provided however, this Agreement and any rights of the Purchaser hereunder may not be assigned by the Purchaser without express written agreement of the Company.

14.12 Unenforceable Provisions. Should any provision of this Agreement be void or become unenforceable at law or in equity, the remaining provisions will remain in full force and effect and will not in any manner be thereby affected or impaired.

14.13 Survival. This Agreement and all the terms and conditions hereof will survive the Closing of the transaction contemplated hereby and will thereafter continue to bind the parties to this Agreement.

14.14 Effective Date. This Agreement will become effective the last date executed by a party to be bound hereby.

14.15 Governing Law. This Agreement shall be governed by the Laws of the State of South Carolina.

14.16 Additional Phase or Phases. In the event the Company decides to build additional phases of The Ripley Light Yacht Club, the Company reserves the right, but shall not be obligated, to add additional phases. In the event an additional phase(s) is constructed, it/they may be added to and merged with the initial horizontal property regime and homeowners association, and the Purchasers of Unit(s) in such additional phase(s) shall have all the rights and obligations, to include the use of the common elements, as those initial Units(s) Purchasers and owners. Should an additional phase(s) be added, then the percentage of ownership in the common elements of all owners would be diminished, so that at all times the total ownership in the project, as completed, would total 100% percent.

The Company is not liable for development of any other phase except such as may be covered by this Agreement. The Company may make changes as it deems fit to future phases, including site plans and building plans. All maps, brochures, and plans are purely for planning purposes and are not to be relied upon as the final maps for recording. The Company shall be obligated for, and Purchaser shall rely solely upon, the plans and plats that are or will be recorded with the master deed for each phase. Copies of the plans and plats shall be available to the Purchasers for inspection if he/she so desires.

Buyer's Initials

TL

Seller's Initials

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Mediation. This Agreement shall be subject to mediation as set forth on Exhibit "C" attached hereto. Purchaser hereby waives a trial by jury in connection with any dispute.

15. **Selections for Units.** Purchaser shall have the right to request selections for their unit to be known as Custom Work. Company shall, in good faith, attempt to accommodate such requests provided that such changes and additions do not alter the structural, mechanical, plumbing, and electrical systems of the building, or in Company's sole judgment affect the schedule of construction for the project or the anticipated issuance date of a Certificate of Occupancy for the Units.

No legal obligation to make changes and/or additions shall arise until Purchaser and Company have agreed to the scope of the selection and the price (in accordance with Exhibits "B" and "B-1", attached hereto) in a written amendment to this Agreement signed by the parties. Company reserves the right not to agree to any proposed amendment requesting changes and additions, and the failure of Company to agree to the same shall not constitute a default by Company or be a valid reason for Purchaser not to fulfill Purchaser's obligations hereunder. All requests for selections/modifications must be accomplished no later than 120 days after the execution of this purchase agreement.

15.1 **Delays.** Company shall have no liability for any delays in construction caused by Purchaser's change orders and/or selection of materials.

16. **Subordination.** This contract of sale is subordinate to any mortgages for loans now or hereafter obtained by Company for the purchase or development of the Property.

NOTE

This is a legally binding contract. Please read each of the foregoing pages carefully and be sure each blank has been filled in.

Buyer's Initials

TR

Seller's Initials

SL 29

IN WITNESS WHEREOF, Purchaser and the Company have each caused this instrument to be executed on the day and year set forth below their respective names.

WITNESSES:

PURCHASER:

Luxar Systems Ltd.
Steven J. Lussier 3/8/01
Print Name STEVEN LUSSIER

Thomas J. Lussier 3/8/01
Print Name Tom Lussier

Month Day Year

WITNESSES:

[Signature] 3/8/01

COMPANY:

RIPLEY LIGHT YACHT CLUB, LLC

By: [Signature] [Signature]
3-12-2001

2 - 28 - 2001
Month Day Year

Buyer's Initials TL

12

Seller's Initials [Signature]

EARLY PURCHASE ADDENDUM

Purchaser and the Company further agree as follows:

- I. At closing Purchaser will receive a credit of 50% of the Base Price (as set forth on Page 2 of the Real Estate Purchase Agreement dated of even date herewith).
- II. In consideration for the above credit, Purchaser agrees as follows:
 - A. The sale of the Unit may be closed on a pre-sale basis and the net proceeds of the sale placed into an escrow account (as defined below), in advance of actual construction.
 - B. Purchaser agrees to allow the Company to apply said funds to the actual purchase and closing of the underlying real estate of the condominium project (set forth in schedule A attached hereto - the "Condominium Property"). In such event, as collateral for repayment of the funds, the Purchaser will receive a *pari passu*, dollar for dollar, interest in the purchase of the Condominium Property. This will be accomplished by conversion of the Purchaser's interest to a membership interest in Ripley Light Development, LLC pro rata. The Company will be the member to the extent of funds paid toward the purchase of the Condominium Property and shall serve as the Operating Manager of such entity. All capital accounts, both general and limited, will be based upon gross actual cash invested in the land purchase.
 - C. Closing on the Condominium Property will occur on or before July 31, 2001. Unit construction will commence upon: i) the receipt of the required development approvals from municipal, state, federal, and any other required bodies politic; and ii) the satisfaction of the construction lender's preconstruction requirements.
 - D. In the event that construction does not commence on or before December 31, 2001, either i) the Condominium Property will be sold and the sale proceeds distributed deducting only direct sales costs, but without fees to the Members, pro rata, according to their capital accounts; or ii) the amounts paid will be returned with accrued interest to the Purchaser, or iii) the Purchaser will allow the Seller additional time to complete construction.
 - E. In the event that construction timely commences, upon the completion of the Unit purchased and closing of title, the Purchaser's Interest in the Limited Liability Company shall be converted, without further payment to or interest of Purchaser, back to the Company.

F. Seller agrees to indemnify and hold Purchaser harmless from any and all obligations, claims, demands, causes, causes of action, liabilities, losses or damages of whatever kind or nature, by whomsoever asserted, including, but not limited to, investigation and court costs and attorneys' fees, arising out of claims by any person, firm or corporation against Purchaser arising solely because of Purchaser's ownership interest, as collateral, in Ripley Light Development LLC

G. This Addendum shall be fully assignable.

III. Escrow Account

A. The funds paid in furtherance of the contract shall be paid to Fidelity National Title Insurance Company, 111 Executive Center Drive, #208, Columbia, SC 29210, as trustee ("Escrow Holder.").

B. Said funds shall be placed in an interest bearing account for the benefit of the Company and subject to the terms of this Addendum.

Stuart J. Longman 3/5/01
("Purchaser")

Thomas J. Longman 3/8/2001

RIPLEY LIGHT YACHT CLUB, L.L.C.
("Company")

BY: Stuart L. Longman, Operating Manager

Stuart L. Longman 3/12/2001

Schedule A - Property Description

Common Area #2	2.268 acres
Parcel 1	1.381 acres
Parcel 4	0.694 acres
Parcel 5	2.012 acres
Parcel 6B	0.717 acres
Parcel 6A	1.114 acres
TOTAL	8.186 acres, more or less

Each of the parcels listed above is more particularly shown and described on that certain plat by Hoffman Lester Associates, Inc. dated August 28, 1997, and recorded in the RMC Office for Charleston County in Plat Book EC at page 61.

STEVEN LUSSIER C/O TECHNICO INC. 766 N. RIVER RD. NW WARREN, OH 44483		SchwabOne DATE <u>3/8/01</u>	175 3-5/310 150
PAY TO THE ORDER OF <u>Fidelity National Title Insurance Co</u>		<u>\$ 162,500.00</u>	
<u>One Hundred Sixty Two Thousand and Five hundred</u>		<u>DOLLARS</u>	
Charles Schwab PNC BANK N.A. Philadelphia, PA		FOR <u>Repley Light Yacht Club Project</u> <u>Steven J. Lussier</u>	
⑆03⑆000053⑆ 70⑆0300864⑆		20⑆75	

THOMAS J. LUSSIER 766 N. RIVER RD. NW WARREN, OH 44483-2257		Schwab DATE <u>3/8 2001</u>	171 3-5/310 150
PAY TO THE ORDER OF <u>Fidelity Title Insurance</u>		<u>\$ 162,500</u>	
<u>one hundred sixty two thousand & five hundred</u>		<u>DOLLARS</u>	
PNC BANK N.A. Philadelphia, PA		FOR <u>Repley Light Yacht Club Project</u> <u>Thomas J. Lussier</u>	
⑆03⑆000053⑆ 70⑆1277890⑆		20⑆71	

NBSC

The South Carolina bank for you.
Member FDIC



The National Bank of South Carolina

www.NationalBankSC.com

All items are credited subject to verification and final payment. Transactions received after 2:00 p.m. will be processed on the bank's next business day. Deposits may not be available for immediate withdrawal. Please retain this receipt until you receive your account statement.

RECEIPT

0111 0030 748 3010 03/12/01 11:10 S
4536300804 DOADP \$325,000.00
ANY TIME, ANYWHERE---ONLINE ACCESS!

T1-0199-860M

Thank you for banking with NBSC

LUNAR/APR11 0235

0278

NBSC

NOTICE OF HOLD

Customer's Name

Supervisor's Signature

Fidelity Title / Ripley Marina M.M.

We are delaying the availability of funds in your account.

Our policy is to place holds on deposited items only until such time as we receive credit for the item from the issuing bank. If this hold is for a longer period of time than normal, the reason will be indicated on the reverse of this form.

Calendar Date &

Time of Deposit

Deposit Date

Total Deposit Amount

Amount of Hold

3/12/013/12/01\$325,000.00\$325,000.00

Funds will be available on

Local Check

Depositor's Initials

3/21/01Yes ☐ No ☒FTRM

DESCRIPTION OF CHECK

Account Title

Check Payable to

Date

Check Number

Thomas LussierFidelity Title3/8/01175Steve Lussier

If you did not receive this notice at the time you made the deposit and the check you deposited is paid, we will refund to you any fees for overdrafts or returned checks that result solely from the additional delay that we are imposing. To obtain a refund of such fees, please contact any NBSC Customer Service Representative.

044536300804

032001

325000.00

03/20/01

748

030

Amman

2 - CUSTOMER COPY

CP03 - 0924 - 10M

NBSC

The South Carolina bank in you.

Member FDIC



The National Bank of South Carolina

www.NationalBankSC.com

All items are credited subject to verification and final payment. Transactions received after 2:00 p.m. will be processed on the bank's next business day. Deposits may not be available for immediate withdrawal. Please retain this receipt until you receive your account statement.

RECEIPT

0111 0030 748 3010 03/12/01 11:10 S

4536300804 DDAOP \$325,000.00

ANY TIME, ANYWHERE---ONLINE ACCESS!

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 - A. The sale of the Unit may be closed on a pre-sale basis and the net proceeds of the sale placed into an escrow account (as defined below), in advance of actual construction.
 - B. Purchaser agrees to allow the Company to apply said funds to the actual purchase and closing of the underlying real estate of the condominium project (set forth in schedule A attached hereto - the "Condominium Property"). In such event, as collateral for repayment of the funds, the Purchaser will receive a *pari passu*, dollar for dollar, interest in the purchase of the Condominium Property. This will be accomplished by conversion of the Purchaser's interest to a membership interest in Ripley Light Development, LLC pro rata. The Company will be the member to the extent of funds paid toward the purchase of the Condominium Property and shall serve as the Operating Manager of such entity. All capital accounts, both general and limited, will be based upon gross actual cash invested in the land purchase.
 - C. Closing on the Condominium Property will occur on or before July 31, 2001. Unit construction will commence upon: i) the receipt of the required development approvals from municipal, state, federal, and any other required bodies politic; and ii) the satisfaction of the construction lender's preconstruction requirements.
 - D. In the event that construction does not commence on or before December 31, 2001, either i) the Condominium Property will be sold and the sale proceeds distributed deducting only direct sales costs, but without fees to the Members, pro rata, according to their capital accounts; or ii) the amounts paid will be returned with accrued interest to the Purchaser, or iii) the Purchaser will allow the Seller additional time to complete construction.
 - E. In the event that construction timely commences, upon the completion of the Unit purchased and closing of title, the Purchaser's Interest in the Limited Liability Company shall be converted, without further payment to or interest of Purchaser, back to the Company.

F. Seller agrees to indemnify and hold Purchaser harmless from any and all obligations, claims, demands, causes, causes of action, liabilities, losses or damages of whatever kind or nature, by whomever asserted, including, but not limited to, investigation and court costs and attorneys' fees, arising out of claims by any person, firm or corporation against Purchaser arising solely because of Purchaser's ownership interest, as collateral, in Ripley Light Development LLC

G. This Addendum shall be fully assignable.

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B. Said funds shall be placed in an interest bearing account for the benefit of the Company and subject to the terms of this Addendum.

Stuart J. Longman 3/8/01
("Purchaser")

Thomas J. Longman 3/8/2001
RIPLEY LIGHT YACHT CLUB, L.L.C.
("Company")

BY: Stuart L. Longman, Operating Manager

Stuart L. Longman 3/12/2001

Schedule A - Property Description.

Common Area #2	2.268 acres
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Parcel 6B	0.717 acres
Parcel 6A	1.114 acres
TOTAL	8.186 acres, more or less

Each of the parcels listed above is more particularly shown and described on that certain plat by Hoffman Lester Associates, Inc. dated August 28, 1997, and recorded in the RMC Office for Charleston County in Plat Book EC at page 61.

Davidson Williams

From: Tom Lussier [tlussier@yahoo.com]
Sent: Wednesday, June 06, 2007 3:23 PM
To: Davidson Williams
Subject: Fwd: RE: settlement

Please advise a time we can meet in person or speak on the phone to finish this matter.

Best Regards,

Tom Lussier

Tom Lussier <tlussier@yahoo.com> wrote:

Date: Fri, 25 May 2007 09:14:38 -0700 (PDT)
From: Tom Lussier <tlussier@yahoo.com>
Subject: RE: settlement
To: Davidson Williams <ddwilliams@kritingmt.com>

David,

I believe in a SC case, we could be awarded a percentage of the underlying land as stated in our original agreement.

In addition, your arbitration agreement seems to name ARP-2 as responsible.

We however would simply like this to end as quickly as possible... waiting until 12/31/07 for the second payment without any compensation doesn't accomplish this.

The structure I propose is a simple settlement for consideration, rather than a court mandated settlement which could take a statutory interest form but also some other form including a percentage of a sale of the property based on our underlying interest. We are, again, not interested in pursuing this type of arrangement as it would entail substantial delays for both of us.

We would propose \$500,000 if we can finish this by 2 weeks, or a release of \$325,000 and an additional \$185,000 by 6 months. We would very much prefer option 1.

Please advise

Best Regards,

Tom Lussier

5/27/2009

**PLAINTIFF'S
EXHIBIT**

cm 4⁰⁵⁻
3rd 2434
party

LUNAR/ARPII 051

0283

Davidson Williams <ddwilliams@kritingmt.com> wrote:

Settlement Purposes Only

Tom,

How about we agree on an even \$500,000 -- \$325,000 payable when we sign docs and \$175,000 payable on 12/31/07.

My logic is as follows: The maximum recovery you possibly can get is your deposit plus statutory interest. There is some still uncertainty whether ARP-2 is responsible for it, or ARP-1 or even Stu Longman. This may be no consequence to you, but it is of major consequence to me and may make a trial more complicated and almost certainly delay the outcome. Also, the structure you propose provides possible tax benefits to you but does nothing for me. A round number actually helps you -- a smart tax person can do the interest math as easily as you can and figure out the true intent if you figure it that closely.

Kind regards,
David

From: Tom Lussier [mailto:tlussier@yahoo.com]
Sent: Monday, May 21, 2007 10:33 AM
To: Davidson Williams
Cc: Steve Lussier
Subject: settlement

David,

Per our conversation, my calculations show

3/8/01 to approx contract date of 6/4/07 = 2280 days
 $\$325,000 (2280)(.0875)/365 = \$177,637$

6/4/07 to 12/4/07 = 184 days
 $\$177,637(184)(.0875)/365 = \$7835$

Proposed settlement - structured as lump payments

Pay \$502,637 round to \$503,000 on 6/4/07

or

Pay \$325,000 on 6/4/07 and second payment of \$185,472 round to \$185,500 on 12/4/07

As we have previously discussed, this is far short of our initial expectations, but also an accommodation for you.

I hope you find this proposal fair for both parties and allow us to move on.

I will be travelling for the rest of this afternoon, but will check email tonight.

Best Regards,

5/27/2009

Tom Lussier

Tom Lussier
766 N River Rd NW
Warren, OH 44483
cell 330-219-4787
work 330-847-7000
fax 330-847-0528
tlussier@yahoo.com
www.technico.com

Tom Lussier
766 N River Rd NW
Warren, OH 44483
cell 330-219-4787
work 330-847-7000
fax 330-847-0528
tlussier@yahoo.com
www.technico.com

5/27/2009

LUNAR/ARPII 053

0285

Davidson Williams

From: Tom Lussier [tlussier@technico.com]
Sent: Wednesday, June 13, 2007 11:04 AM
To: Davidson Williams
Cc: Frank Cisa; Steve Lussier-work
Subject: Re: settlement Lunar Systems interest in Ripley Light

David,

Please draw up the agreement this way and get to Frank Cisa for review (please have Will Cleveland copy me). He has a new office address. His contact information is :

Frank Cisa

Cisa & Dodds

Work: 843-881-6530

Fax: 843-881-5433

E-Mail: frank@cisadodds.com

Work Address:

858 Lowcountry Blvd

Suite 101

Mt Pleasant, SC 29464

If ARPII completes a sale of the property, we would like to see the last payment moved up. Please advise a time frame for completion.

Thank you in advance for your attention to this matter.

Best Regards,

Tom Lussier

Technico, Inc.
766 N River Rd NW
Warren, OH 44483

5/27/2009

LUNAR/ARPII 049

phone 330-847-7000
fax 330-847-0528
website www.technico.com
email tlussier@technico.com

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

From: Davidson Williams

To: tlussier@technico.com

Sent: Wednesday, June 13, 2007 10:02 AM

Tom,

Got your messages. I have been on the road a lot recently. I think what I proposed in my last email to you is reasonable, and still stands.

Kind regards,
David

5/27/2009

LUNAR/ARPII 050

0287

Davidson Williams

From: Tom Lussier [tlussier@yahoo.com]
Sent: Friday, August 17, 2007 1:51 PM
To: Davidson Williams
Subject: no draft agreement yet

David,

We agreed to terms in principle on 6/13/07.

We spoke on 8/6/07 and Will Cleveland was to send draft agreement around 8/7 Tues. Per Frank Cisa most recently on 8/13/07 no word yet.

Please ask Will Cleveland to finish this agreement and send to Cisa if he has not already done so. (The delay may now be on my end)

With the combination of an informational blackout on my end and this matter stretching on for so long, it feels as though our cooperation with the lis pendens and in general has only resulted in the resolution being delayed.

Thank you for any help you can be expediting the close of this matter.

Best Regards,

Tom Lussier

Tom Lussier
766 N River Rd NW
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5/27/2009

LUNAR/ARPII 048

0288

OCT. 31. 2005 3:30PM

NO. 0295 P. 4/15

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Re: 13 115 Y 00698 05

Kriti Ripley, LLC & Ashley River Properties II, LLC

"Claimants"

and

Emerald Investments, LLC and Stuart Longman

"Respondents"

AWARD OF ARBITRATORS

THE UNDERSIGNED ARBITRATORS, having been duly designated pursuant to the arbitration agreement dated December 29, 2003 and having duly executed their oaths, and having duly considered the proofs and arguments of the parties, and the parties having agreed to extend the deadline in the arbitration agreement for the rendering of the award to October 31, 2005, do hereby Find as follows:

A. Based upon our evaluation of the credibility of the witnesses and our analysis of the exhibits and evidence, we Find that Claimants Kriti Ripley, LLC ("Kriti") and Ashley River Properties II, LLC ("ARP II") have established that certain conduct of Respondents Emerald Investments, LLC ("Emerald") and Stuart Longman ("Longman") constitutes Emerald Member Defaults pursuant to Section 13.01 of the Operating Agreement of Ashley River Properties, II, LLC (the "Operating Agreement"), dated December 29, 2003. Specifically, Kriti has established that the following violations of the Operating Agreement constitute Emerald Member Defaults:

1. Emerald and Longman violated Section 5.2(g) by wrongfully making payments of ARP II which were not on the approved marina budget or on the budget for future phases of the project or otherwise approved by Kriti.

2. Emerald and Longman violated Section 5.2(p) by making payments to or for the benefit of Longman or other entities Longman controlled, which were totally unrelated to ARP II.

3. Emerald and Longman violated Sections 5.2, 5.7 and 13.01(b and c). Section 5.7 states that, "The funds of the Company shall not be commingled with the funds of any other party." From the first day Kriti sent investment funds to ARP II, Emerald and Longman commingled these funds in various non-ARP II accounts, including an account, in part, in the name of Longman's wife, Gayla Longman. Moreover, we Find that Kriti did not waive any of its claims of breach of the Operating Agreement by waiting to exercise its remedies in the hope that Emerald and/or Longman would return to ARP II all the wrongfully taken funds. (See Section 12.6 of the Operating Agreement.)

4. Emerald and Longman violated Section 3.9(a) by failing to disclose that Sapphire Development, LLC ("Sapphire") had filed a petition in bankruptcy before execution of the Operating Agreement. Sapphire, another entity controlled by Longman, was the party which entered into certain agreements regarding the neighboring Collins property and, in consideration of Kriti's investment, assigned these rights to ARP II. (See Joint Exhibit 3). Since the Sapphire bankruptcy proceeding could reasonably be expected to have a material adverse effect on the business of ARP II, the failure to disclose the proceeding was a clear material breach of Section 3.9(a). The subsequent adverse litigation results regarding the Collins property did not obviate Emerald's and Longman's duty to Kriti to disclose Sapphire's bankruptcy filing, as required by Section 3.9(a).

**DEFENDANT'S
EXHIBIT**

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Re: 13 115 Y 00698 05
Kriti Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

5. Emerald and Longman violated Section 5.2(m) by retaining Knetzer and MacIntyre to act as broker and/or finder for premises including the ARP II property (see Claimant's Exhibit 14). The fact that Kriti may have later communicated with such broker or finder does not amount to any waiver of Kriti's claims for breach of Section 5.2(m).

6. Emerald and Longman violated Sections 3.9(a) and 3.9(f) by failing to fully disclose certain third-party contracts for the purchases of units and marina slips, and/or a proposed boat storage facility. Although there was reference to customer deposits in certain financial statements made available to Kriti prior to closing, the contracts at issue were of such magnitude and potential significance, that Emerald and Longman should have made more affirmative disclosures to comply with Sections 3.9(a) and 3.9(f).

7. Emerald and Longman violated Sections 5.2(g), 5.2(p) and 5.7 by diverting \$150,000 of Marshall loan proceeds and paying themselves instead of paying Bellingham Marine, even though the application to draw down the funds certified that the \$150,000 would be paid to Bellingham Marine. Moreover, it is undisputed that when Bellingham Marine was finally paid, ARP II was charged an additional \$64,000 because of the delay in payment occasioned by Emerald and Longman.

B. Since Kriti has established Emerald Member Defaults, Kriti is entitled to remedies under Section 13.02 of the Operating Agreement. We therefore find and confirm that Kriti validly exercised its rights to the following Section 13.02 remedies:

1. By notice dated January 14, 2005 (Joint Exhibit 186), Kriti validly exercised its remedy, pursuant to Section 13.02(a), that the Emerald Member thereafter forfeited all voting rights in ARP II.
2. By the same notice dated January 14, 2005, Kriti validly terminated the Project Development Agreement, without penalty or premium, pursuant to Section 13.02(b).
3. As more fully set forth below, Kriti's right pursuant to Section 13.02(c), to purchase the Membership Shares of the Emerald Member at a cost equal solely to the Emerald Member's unreturned Capital Contribution is also confirmed.
4. We do not find that, pursuant to the last paragraph of Section 13.02, the Emerald Member shall forfeit all of its Membership Shares because it contested the foregoing remedies, since we believe that the Emerald Member had probable cause for such a challenge thereby obviating forfeiture pursuant to applicable South Carolina law. The portion of the claim seeking the forfeiture of the Respondent's Membership Shares is denied based on our finding that the Emerald Member had probable cause to challenge the capital call thereby obviating forfeiture pursuant to applicable South Carolina law and the inequity of such forfeiture. Probable cause existed because of question about the propriety of Kriti's capital call because (a) Kriti demanded that Emerald immediately fund a full 70% of a \$2 million capital call even though it knew that Emerald and/or Longman did not have the funds available to meet such a call; (b) Kriti demanded such a large capital call without an adequate explanation of the need for such an amount; (c) Kriti demanded that Emerald and/or Longman make a full deposit of 70% of the \$2 million capital call, even though its own deposits later proved that this was not necessary, and (d) funding might have been available from the lender, Marshall Bank, thereby obviating the need for all or part of the capital call. Kriti's insistence upon the capital call therefore provided probable cause for Emerald's challenge of Kriti's assertion of the above remedies. See Cope v.

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NO. 0295 P. 6/15

Re: 13 115 Y 00898 05
Kriti Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

Jefferson Standard Life Ins. Co., 133 S.C. 532, 133 S.E. 440 (1926), Litchfield Company v. Kiriakides, 290 S.C. 220, 349 S.E.2d 344 (Ct. App. 1986) and Rouse v. Branch, 91 S.C. 112, 74 S.E. 133 (Sup. Ct 1912).

We also note the inequity of enforcing forfeiture in light of the fact that Longman initiated the development project and worked long and hard on it, including rendering significant services even after Krill's November 4, 2004 notice of default (Joint Exhibit 152). We therefore deny the forfeiture remedy.

C. Section 3.7(a) of the Operating Agreement defines Emerald's Initial Capital Contribution as \$2.5 million. Pursuant to Section 13.02(c), we confirm that Kriti "may purchase the Membership Shares of the Emerald Member at a cost equal solely to the Emerald Member's unreturned Capital Contribution to the Company..." Kriti has not established any clearly defined Emerald returned capital contribution. We therefore Find that Kriti has the option to purchase the Emerald Member Shares for \$2.5 million subject to no offsets or adjustments except as set forth below in this Award. The closing shall take place pursuant to the terms of Section 13.02(c) within 10 days and no later than 120 days after the date of this Award. As noted hereinafter, the Panel has not made any adjudication regarding claims and/or counterclaims related to a final accounting of the commingled funds as such claims and counterclaims have been severed from this proceeding.

D. We Find that ARP II is entitled to no further relief under the Bill of Sale and General Assignment (Joint Exhibit 3).

E. We confirm that Kriti remains entitled to enforce its rights under the Right of First Refusal Agreement (Joint Exhibit 6).

F. We Find that Krill and ARP II are entitled to indemnification from Emerald and Longman in the amount of \$400,000 for all claims to date of third party contract vendees against ARP II. We question Kriti's conduct in encouraging some of these third parties to assert claims against ARP II and not accept partial reimbursement of their deposits. However, we are persuaded that Emerald or Longman or another entity controlled by Longman (a) received and kept the deposits, (b) did not use these funds for the benefit of ARP II and (c) ARP II must now resolve all these third party claims.

G. Pursuant to Section 12.18 of the Operating Agreement we find that Emerald and Longman were the "non-prevailing" parties in this matter. As such, (a) Emerald and Longman shall pay all costs and expenses of this arbitration including arbitration fees and transcript expenses, (b) Emerald and Longman shall pay Kriti the sum of \$251,000 for legal fees and disbursements, and (c) the sums set forth in this paragraph and the \$400,000 referred to in paragraph F above may be offset against the \$2.5 million to be paid to Emerald as set forth above in paragraph C in connection with Kriti's exercise of its remedy pursuant to Section 13.02(c).

Based upon the above, We Award as follows:

1. We confirm that as of January 14, 2005 the Emerald Member has forfeited all voting rights in ARP II.
2. We confirm that as of January 14, 2005, Kriti and ARP II validly terminated the Project Development Agreement, without penalty or premium.

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NO. 0295 P. 7/15

Re: 13 115 Y 00698 09

Kriti Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

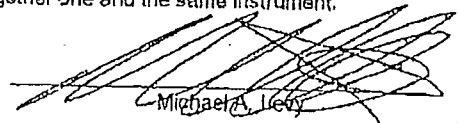
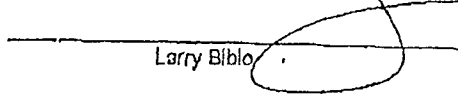
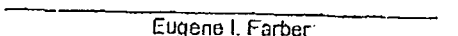
3. Kriti has the right to purchase the Emerald Member shares for \$2.5 million subject to no offsets or adjustments except as set forth below. The closing shall take place pursuant to the terms of Section 13.02(c) of the Operating Agreement.
4. We deny the application of Kriti and ARP II for forfeiture by the Emerald Member for contesting remedies of Kriti and ARP II.
5. We deny any further claim for relief by ARP II under the Bill of Sale and General Assignment.
6. We confirm Kriti's rights under the Right of First Refusal Agreement.
7. We Find that Kriti and ARP II are entitled to indemnification from Emerald and Longman in the amount of \$400,000 for all claims to date of third party vendors against ARP II and require to the resolution of all such claims to be at the expense of ARP II.
8. We find that Emerald and Longman were the "non-prevailing" parties in this matter. Emerald and Longman shall therefore pay to Kriti the sum of \$251,000.00 for Kriti's legal fees and disbursements.
9. The administrative fees of the American Arbitration Association totaling \$17,500.00 and the compensation of the arbitrators totaling \$86,200.00 shall be borne by Emerald and Longman. Therefore Emerald and Longman shall reimburse Kriti and ARP II the sum of \$55,225.00, representing that portion of said fees in excess of the apportioned costs previously incurred by Kriti and ARP II.
10. The amounts owed by Emerald and Longman to Kriti and ARP II pursuant to paragraphs 8 and 9 above and the \$400,000 owed pursuant to paragraph 7 above may be offset against the \$2.5 million payment referred to above in paragraph 3.
11. This Award is in full settlement of all claims and counterclaims submitted in this arbitration. All other claims and counterclaims in this proceeding are denied, except that pursuant to the parties' Stipulation on the record, the Panel has not made any adjudication regarding claims and/or counterclaims related to a final accounting in connection with the use of ARP II funds by Emerald and Longman, which claims and counterclaims have been severed from this proceeding.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

10/31/05
Date

Date

Date


Michael A. Levy

Larry Biblo

Eugene I. Farber

OCT. 31. 2005 3:31PM

NO. 0295 P. 8/15

Re: 13 115 Y 00698 05

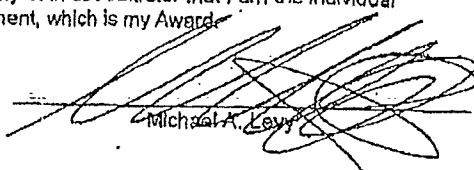
Kristi Ripley, LLC & Ashley River Properties II, LLC

and

Emerald Investments, LLC and Stuart Longman

I, Michael A. Levy, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

10/31/05
Date


Michael A. Levy

I, Larry Biblo, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Larry Biblo

I, Eugene I. Farber, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Eugene I. Farber

OCT. 31. 2005 3:31PM

NO. 0295 U.P. 9/15

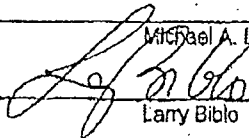
Re: 13 115 Y 00888 05
Krill Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

3. Krill has the right to purchase the Emerald Member shares for \$2.5 million subject to no offsets or adjustments except as set forth below. The closing shall take place pursuant to the terms of Section 13.02(c) of the Operating Agreement.
 4. We deny the application of Krill and ARP II for forfeiture by the Emerald Member for contesting remedies of Krill and ARP II.
 5. We deny any further claim for relief by ARP II under the Bill of Sale and General Assignment.
 6. We confirm Krill's rights under the Right of First Refusal Agreement.
 7. We find that Krill and ARP II are entitled to indemnification from Emerald and Longman in the amount of \$400,000 for all claims to date of third party vendors against ARP II and require to the resolution of all such claims to be at the expense of ARP II.
 8. We find that Emerald and Longman were the "non-prevailing" parties in this matter. Emerald and Longman shall therefore pay to Krill the sum of \$261,000.00 for Krill's legal fees and disbursements.
 9. The administrative fees of the American Arbitration Association totaling \$17,600.00 and the compensation of the arbitrators totaling \$88,200.00 shall be borne by Emerald and Longman. Therefore Emerald and Longman shall reimburse Krill and ARP II the sum of \$55,225.00, representing that portion of said fees in excess of the apportioned costs previously incurred by Krill and ARP II.
 10. The amounts owed by Emerald and Longman to Krill and ARP II pursuant to paragraphs 8 and 9 above and the \$400,000 owed pursuant to paragraph 7 above may be offset against the \$2.5 million payment referred to above in paragraph 3.
 11. This Award is in full settlement of all claims and counterclaims submitted in this arbitration. All other claims and counterclaims in this proceeding are denied, except that pursuant to the parties' Stipulation on the record, the Panel has not made any adjudication regarding claims and/or counterclaims related to a final accounting in connection with the use of ARP II funds by Emerald and Longman, which claims and counterclaims have been severed from this proceeding.
- This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Date
10/28/05

Date

Date

Michael A. Levy


Larry Biblo

Eugene I. Farber

OCT. 31. 2005 3:31PM

NO. 0295 P. 10/15.

Re: 13 115 Y 00888 05
Kriti Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

I, Michael A. Levy, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Michael A. Levy

I, Larry Biblo, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

10/28/05
Date

Larry Biblo
Larry Biblo

I, Eugene I. Farber, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Eugene I. Farber

OCT. 31. 2005 3:31PM

NO. 0295 P. 11/15

Re: 13 115 Y 00098 05

Kriti Ripley, LLC & Ashley River Properties II, LLC

and

Emerald Investments, LLC and Stuart Longman

3. Kriti has the right to purchase the Emerald Member shares for \$1.5 million subject to no offsets or adjustments except as set forth below. The closing shall take place pursuant to the terms of Section 13.02(c) of the Operating Agreement.
4. We deny the application of Kriti and ARP II for forfeiture by the Emerald Member for contesting remedies of Kriti and ARP II.
5. We deny any further claim for relief by ARP II under the Bill of Sale and General Assignment.
6. We confirm Kriti's rights under the Right of First Refusal Agreement.
7. We Find that Kriti and ARP II are entitled to indemnification from Emerald and Longman in the amount of \$400,000 for all claims to date of third party vendors against ARP II and require to the resolution of all such claims to be at the expense of ARP II.
8. We find that Emerald and Longman were the "non-prevailing" parties in this matter. Emerald and Longman shall therefore pay to Kriti the sum of \$251,000.00 for Kriti's legal fees and disbursements.
9. The administrative fees of the American Arbitration Association totaling \$17,500.00 and the compensation of the arbitrators totaling \$86,200.00 shall be borne by Emerald and Longman. Therefore Emerald and Longman shall reimburse Kriti and ARP II the sum of \$55,225.00, representing that portion of said fees in excess of the apportioned costs previously incurred by Kriti and ARP II.
10. The amounts owed by Emerald and Longman to Kriti and ARP II pursuant to paragraphs 8 and 9 above and the \$400,000 owed pursuant to paragraph 7 above may be offset against the \$2.5 million payment referred to above in paragraph 3.
11. This Award is in full settlement of all claims and counterclaims submitted in this arbitration. All other claims and counterclaims in this proceeding are denied, except that pursuant to the parties' Stipulation on the record, the Panel has not made any adjudication regarding claims and/or counterclaims related to a final accounting in connection with the use of ARP II funds by Emerald and Longman, which claims and counterclaims have been reserved from this proceeding.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Date

Date

10/21/05

Date

Michael A. Levy

Larry Blum

Eugene Farber

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OCT. 31. 2005 3:31PM

NO. 0295 P. 12/15

Re: 13 115 Y 00098 05
Kirk Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

I, Michael A. Levy, do hereby affirm upon my oath as Arbitrator that I am the Individual described in and who executed this instrument, which is my Award.

Date

Michael A. Levy

I, Larry Bibb, do hereby affirm upon my oath as Arbitrator that I am the Individual described in and who executed this instrument, which is my Award.

Date

Larry Bibb

I, Eugene I. Farber, do hereby affirm upon my oath as Arbitrator that I am the Individual described in and who executed this instrument, which is my Award.

Date

Eugene I. Farber

OCT. 31. 2005 3:31PM

NO. 0295 - P. 13/15

10/28/2005

Kriti Ripley, LLC & Ashley River Properties II,
LLC

and

Emerald Investments, LLC and Stuart Longman

Case Manager: LAURA VANETTEN
Case Number: 13 115 Y 00698 05
Close Type: Awarded

Total Administrative Fees
and Expenses \$ 17,500.00
Total Neutral Compensation
and Expenses \$ 86,200.00

*Note that the financial reconciliation reflects costs as they were incurred during the course of the proceeding. Any apportionment of these costs by the arbitrator, per section R-43 of the rules, will be addressed in the award and will be stated as one party's obligation to reimburse the other party for costs incurred. Any outstanding balances the parties may have with the AAA for the costs incurred during the arbitration proceedings remain due and payable to the AAA even after the award is issued, and regardless of the arbitrator's apportionment of these costs between the parties in the award.

OCT. 31. 2005 3:31PM

NO. 0295 P. 14/15

KRITI RIPLEY, LLC & ASHLEY RIVER PROPERTIES II, LLC.

Administrative Fees and Expenses:

Filing Fees: \$	<u>8,000.00</u>
Case Service Fees: \$	<u>3,250.00</u>
Hearing Room Expenses: \$	<u>0.00</u>
AAA Hearing Room Rental: \$	<u>875.00</u>

Your Share of Administrative Fees and Expenses: \$ 12,125.00

Amounts Paid for Administrative Fees and Expenses: \$ 12,125.00

Balance Administrative Fees and Expenses: \$ 0.00

Neutral Compensation and Expenses:

Eugene Farber: \$	<u>39,725.00</u>
Larry Biblo: \$	<u>19,775.00</u>
Michael A. Levy: \$	<u>26,700.00</u>
: \$	<u>0.00</u>

Your Share of Neutral Compensation and Expenses: \$ 43,100.00

Amounts Paid for Neutral Compensation and Expenses: \$ 45,000.00

Balance Neutral Compensation and Expenses: \$ (1,900.00)

Party Balance: \$ (1,900.00)

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NO. 0295 P. 15/15

EMERALD INVESTMENTS, LLC AND STUART LONGMAN

Administrative Fees and Expenses:

Filing Fees: \$	<u>3,250.00</u>
Case Service Fees: \$	<u>1,250.00</u>
Hearing Room Expenses: \$	<u>0.00</u>
AAA Hearing Room Rental: \$	<u>875.00</u>

Your Share of Administrative Fees and Expenses: \$ 5,375.00

Amounts Paid for Administrative Fees and Expenses: \$ 4,125.00

Balance Administrative Fees and Expenses: \$ 1,250.00

Neutral Compensation and Expenses:

Eugene Farber: \$	<u>39,725.00</u>
Larry Biblo: \$	<u>19,775.00</u>
Michael A. Levy: \$	<u>26,700.00</u>
: \$	<u>0.00</u>

Your Share of Neutral Compensation and Expenses: \$ 43,100.00

Amounts Paid for Neutral Compensation and Expenses: \$ 45,000.00

Balance Neutral Compensation and Expenses: \$ (1,900.00)

Party Balance: \$ (650.00)

RAND ROSENZWEIG RADLEY & GORDON LLP

BERNARD S. GORDON
E. COOKE RAND
CHARLES L. ROSENZWEIG

CATHERINE S. CAMPELL
MICHELE L. KUGLER

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TELEPHONE: (1) 47.23.64.02
CHARLES G.G. CAMPBELL
RESIDENT COUNSEL

November 15, 2005

VIA EMAIL

VanEtten1@adr.org

Larry Biblo, Esq.
Eugene I. Farber, Esq.
Michael A. Levy, Esq.
c/o Ms. Laura E. VanEtten
American Arbitration Association
950 Warren Avenue
East Providence, RI 02914

Re: 13 115 Y 00698 05 -Kriti Ripley, LLC & Ashley River
Properties II, LLC adv. Emerald Investments, LLC and Stuart Longman

Dear Ms. VanEtten:

Claimants Kriti Ripley, LLC ("Kriti") and Ashley River Properties II, LLC ("ARP-II"), by their attorneys Rand Rosenzweig Radley & Gordon LLP, hereby request modification of the Award of Arbitrators ("Award") rendered in the above-referenced case, dated October 31, 2005, pursuant to Rule 46 of the Commercial Arbitration Rules.

We are mindful of the limitations of Rule 46 and write this letter only to request clarification and modification of what appear to be certain clerical, typographical and computational errors in the Award. It is manifestly not Claimants' intent to reargue the merits of the case. However, as will be discussed below, certain issues are unclear, others were not mentioned at all, and therefore a question exists as to intent of the arbitrators regarding those issues. Moreover, as shown by the annexed complaint, petition and application to modify or vacate the arbitration award, filed by Respondents in the courts of South Carolina, the parties and the reviewing courts would be better served if the arbitrators clarified their Award.

The Claims of Third-Party Contract Vendees

The arbitrators found that Claimants are entitled to indemnification in the amount of \$400,000 from Emerald and Longman, for all claims to date of third party contract vendees against ARP-II. (See Finding "F", at p. 3) Accordingly, in item 7 (at p. 4), the Award states that "Kriti and

**DEFENDANT'S
EXHIBIT**

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Ms. Laura E. VanEtten

November 15, 2005

Page 2

ARP-II are entitled to indemnification from Emerald and Longman in the amount of \$400,000 for all claims to date of third party vendors [sic] against ARP-II, and require to [sic] the resolution of all such claims to be at the expense of ARP-II."

The identity of the third party vendees who have "claims to date" is not specified in the Award. The awarded amount of \$400,000 also does not correspond to any subset or grouping of such vendees. More importantly, as discussed in more detail below, the awarded amount is at odds with the arbitrators' other findings, which support the conclusion that the full amount of all of these third party claims should have been awarded.

It was uncontroverted that the following persons asserted the following claims or were paid the following amounts by ARP-II in settlement of claims:

1. Von Grotthuss -- Paid \$67,765.94 by ARP-II check No. 2256 pursuant to a Settlement Agreement dated July 22, 2005, representing the balance due on their claim for the return of a contract deposit in the amount of \$295,000 plus accrued interest from February 28, 2001. (JE 345)
2. Cunningham -- Paid \$356,816.80 by ARP-II by promissory note dated June 30, 2005 due and payable on or before December 31, 2005, with interest on \$265,000 (\$8,879.37, if paid on December 31, 2005), in settlement of their claim for the return of a contract deposit in the amount of \$265,000 plus accrued interest from February 28, 2001. (JE 344)
3. Lunar Systems, Inc. (Lussiers) -- The complaint seeks the recovery of a contract deposit in the amount of \$325,000 plus interest of \$129,959 since March 2001. (JE 343, ¶¶ 2 and 12, see Exh. A to Claimants' post-hearing memorandum).

The claims of the foregoing three sets of pre-construction buyers, which amount to \$879,541.74 (well over the \$400,000 calculated as the offset), are indistinguishable in form and substance.

4. Acierno -- Paid \$1,891 by ARP-II pursuant to a Settlement Agreement dated August 3, 2005, in settlement of his claim for the return of a contract deposit of \$1291.00 plus interest. (JE 339, 346)
5. Patterson -- Claim in the amount of \$31,050 plus interest for return of cash deposit pursuant to a Reservation Agreement dated May 18, 2002 (JE 340), which deposit funds were never turned over to ARP-II pursuant to § 1(g) of the Bill of Sale and General Assignment (JE 3).
6. Marler -- \$100,000 cash deposit plus interest due under an undisclosed contract dated October 18, 2000 to acquire certain marina assets. (JE 335).

Ms. Laura E. VanEtten

November 15, 2005

Page 3

Paragraph F of the Award states that the arbitrators "are persuaded that Emerald or Longman or another entity controlled by Longman (a) received and kept the deposits, (b) did not use these funds for the benefit of ARP-II and (c) ARP-II must now resolve all these third party claims." This finding would apply to all of the above with the possible exception of the Marler claim, for the reasons described below. The six enumerated claims -- all of which were undisputed by Emerald and Longman -- amount to \$1,012,482.74, far in excess of the \$400,000 awarded, even without adding amounts for anticipated future interest payable on the Cunningham promissory note, interest on the Patterson deposit and interest on the Marler deposit. Pursuant to §3.10 of the Operating Agreement and §2 of Indemnity Agreement (JE 1, 5), Respondents should also have reimbursed Claimants for \$18,578 in defense costs paid by ARP-II to Hagood & Kerr through September, 2005 in defending and/or settling those claims. (See Affidavit of Ben A. Hagood, sworn to September 19, 2005) Consequently, the total amount which should have been awarded on account of buyers claims should have been \$1,031,060.74, plus unliquidated interest on account of the Cunningham, Patterson and Marler claims.

With regard to the Marler claim, as was proven by Claimants, Marler paid a deposit of \$100,000 to Sapphire, a Longman controlled entity, for the right to purchase certain marina assets located on the adjacent Collins property for \$4 million, subject to Sapphire first closing on its contract with Collins to acquire his land and marina assets. This contract also granted Marler the option to acquire certain marina boat slips to be built on the parcel acquired by ARP-II. (JE 335, Tr. 1144-47). As reflected in paragraph A(6) of the Award, Respondents failed to disclose the existence of the downstream contract to sell portions of the Collins assets to Marler in violation of §3.9(a) and (f) of the Operating Agreement. As with the other buyer deposits, Respondents: "received and kept the deposits [and] did not use the funds for the benefit of ARP-II."

Marler's claim against ARP-II may be weaker than the claims of von Grotthuss, Cunningham, Lussiers (Lunar), Aciermo and Patterson because ARP-II ultimately never acquired the Collins land and marina assets, and Marler's claim to recover his deposit may more properly lie against Sapphire and/or Longman, not ARP-II. However, paragraph 7 of the Award can be read to state that "all claims to date of third-party vendors [sic]" are to be resolved "at the expense of ARP-II", even though Marler may not have a provable claim against ARP-II. Thus, it must be anticipated that Respondents will now argue that ARP-II has the obligation to pay Marler for his claim, even though no offset was granted to ARP-II or Kriti for the principal and interest of Marler's claim. Consequently, responsibility for this matter must be clarified.

Accordingly, Claimants ask that paragraph 7 of the Award be corrected to provide for the amount of \$931,060.74, being the amount of the Cunningham, Von Grotthuss, Lunar Systems, Aciermo and Patterson claims (including \$18,578 in Hagood & Kerr defense expenses) and that these claims be defined as the "Covered Third-Party Claims" or similar term. ARP-II would then be responsible to obtain the resolution of the Covered Third-Party Claims at its expense. Other third-

RAND ROSENZWEIG RADLEY & GORDON LLP

Ms. Laura E. VanEtten

November 15, 2005

Page 4

party claims, not within the defined term, would be outside of ARP-II's responsibility to resolve, at least to the extent the Award seeks to shift responsibility.

In the case of Marler, either the amount set forth in paragraph 7 of the Award should be raised by \$143,313 for the principal and interest (at 8.75% from 10/18/2000) of the Marler claim to \$1,074,373.74 or, at a minimum, the award should be modified to state that Respondents must hold harmless and indemnify ARP-II and Kriti for all losses and damages in accordance with the indemnity provisions of §3.10 of the Operating Agreement and §2 of the Indemnity Agreement.

Delay Damages

The Award does not expressly address Claimants' claims for delay damages despite recognizing that Claimants suffered delay damages. Thus, the arbitrators wrote, in paragraph A7, on page 2 of the Award:

[I]t is undisputed that when Bellingham Marine was finally paid, ARP-II was charged an additional \$64,000 because of the delay in payment occasioned by Emerald and Longman.

Claimants argued, in Section F of their post-hearing memorandum, that "the entry into the construction loan agreement with Marshall on a fraudulent basis and the diversion of loan funds [violated] §§5.2 (g) and (p), 5.7, 6.2 and 6.3 of the Operating Agreement And §2 of the Management Agreement." As the arbitrators found, this diversion damaged ARP-II in the amount of \$64,000. Claimants should be awarded damages in this amount.

Claimants should also be awarded its other delay damages. A redesign of the docks, in the fall of 2004, resulted in an additional and unnecessary expense of \$56,775. (JE 37) Most significantly, and although the Marshall construction loan agreement contemplated marina completion by December 31, 2004 (JE 15), Longman failed to commission final construction drawings of the pier (party deck) and bulkhead until January 2005. (JE 180) The consequences were a delay of between 12 and 13½ months (JE 334) and \$494,000 in extra and unnecessary overhead and interest costs. (JE 333) (See Claimants' posthearing memorandum Point I (G))

Longman is not an unsophisticated builder who was mistaken about how to build a marina. He should be held responsible for the \$614,775 in damages to Claimants caused by Longman's actions in derogation of his contractual and fiduciary obligations to construct the marina as agreed and contemplated.

Additional Claims

The arbitrators correctly found that Emerald and Longman's failure to disclose the existence of Sapphire's bankruptcy was a "clear material breach of Section 3.9(a)." The arbitrators failed,

RAND ROSENZWEIG RADLEY & GORDON LLP

Ms. Laura E. VanEtten

November 15, 2005

Page 5

however, to reimburse Claimants for the amount of \$40,338 in litigation expenses paid by ARP-II to Pratt-Thomas Epting & Walker, P.A. to prosecute the litigation with Collins for the benefit of Sapphire's creditors (JE 333, p 8).

As the Award reflects, the issues of whether and in what amount Respondents repaid the funds they diverted from ARP-II has been severed from this arbitration. However, the arbitrators have determined that Respondents diverted funds from ARP-II in breach of the Operating Agreement. ARP-II's costs in the amount of \$25,688 to restate the financial statements and trace the funds that were diverted are a direct consequence of Respondents' breach of the Operating Agreement and should be awarded as damages.

Claimants' Arbitration Costs

The arbitrators correctly determined, pursuant to Section 12.18 of the Operating Agreement, that Respondents, as the "non-prevailing" parties shall pay all costs and expenses of the arbitration. The application for such reimbursement consisted of the following:

- A. \$225,981.30 for the fees of Rand Rosenzweig Smith Radley & Gordon LLP (the "Rand Firm") through the post-hearing brief.
- B. \$8,967.86 for disbursements recorded by the Rand Firm.
- C. \$10,604.84 in court stenographer bills for the arbitration.
- D. \$10,000 in charges by Fortenberry Lambert (appraisal experts).
- E. \$15,527.31 in charges of Stantec Consulting (engineers).
- F. \$32,479.44 in charges of Pratt-Thomas, Gumb & Co. (forensic accountants) for testimony.
- G. Hagood & Kerr, fees of \$17,883.05 and disbursements of \$1,072.27 for a total of \$18,955.32 (these charges differ from the defense costs relating to the claims of the third-party buyers).

All of the foregoing were reflected in or annexed to my affidavit and that of Ben Hagood, Esq., and were submitted together with the posthearing memorandum. The above total \$322,516.07.

All of the items were reasonable (especially in comparison with almost triple the costs incurred by Respondents) and relevant to the claims which prevailed in the arbitration. Thus, Hagood & Kerr were essential in issues of South Carolina law (and charged far less than Respondents' South Carolina counsel). The Fortenberry Lambert report was significant in showing that ARP-II's property was more valuable than the Centex offer. The Pratt-Thomas report and testimony were significant in showing the amounts diverted by plaintiffs, although the precise amounts repaid or still

Ms. Laura E. VanEtten

November 15, 2005

Page 6

owing from Respondents were severed during and from this arbitration. Although the damages for delay in the project were not specifically addressed in the Award, the report and testimony of Eddie Porcher of Stantec Consulting were an important contribution in understanding the construction aspects of the project and the failure of Longman to proceed with construction of the marina in accordance with the permits and timetables.

Section 12.18 of the Operating Agreement provides that the prevailing party shall recover "the *entire* cost of the arbitration, including without limitation all arbitrators' fees and expenses, transcription costs and the expert witness fees, and reimburse the reasonable attorneys' fees and disbursements." (emphasis supplied). Thus, the awarded sum of \$251,000 for legal fees and disbursements should be increased to the \$322,516.07 sought by Claimants.

Respondents' Motion To Vacate And Associated Relief

As the annexed papers indicate, Respondents and ARP-I assert four causes of action in South Carolina relating to issues that were the subject of this arbitration. The first two causes of action are frivolous, and are matters best left to the courts. The first cause of action, which seeks relief for ARP-I, is premature until such time as ARP-II seeks to enforce the Award against ARP-I. ARP-II has not yet sought to do so. The second cause of action to vacate the Award is insufficient as a matter of law and fact. Claimants do not need the assistance of the arbitrators in upholding the Award against the same arguments that this panel has rejected.

The parties and the reviewing court would benefit however, from an express statement by the arbitrators rejecting Respondents' effort to obtain judicial dissolution of ARP-II. While it is implicit in the Award that the bases for dissolution are inappropriate, especially as Kriti will be purchasing all of the interests of Emerald in ARP-II, the parties would benefit from a statement by the arbitrators expressly denying this claim.

Finally, although the Fourth Cause of Action is pleaded as a cause of action by ARP-I, many of the claims raised by ARP-I were issues referred to this arbitration. Given that the arbitrators granted no relief to Respondents on account of their counterclaims against Kriti for "oppressive conduct" or for any failure on its part to accept the Centex offer to purchase, modification of the Award which makes clear that these specific issues were raised and rejected, would be beneficial, Claimants submit, to any court seeking to understand the nature of what was decided.

Mindful of the arbitrators' previous request for submission of a proposed award, we annex a proposed amendment to the Award correcting certain clerical, typographical and computational errors and expressly setting forth those issues which were decided but not specifically referenced. We further indicate our willingness to meet with the arbitrators and respondents to review any the clerical, typographical and computational issues raised.

RAND ROSENZWEIG RADLEY & GORDON LLP

Ms. Laura E. VanEtten
November 15, 2005
Page 7

Very truly yours,

/s/
Charles L. Rosenzweig

cc: David Olov, Esq.
Mr. Davidson Williams

DEC. 9. 2005 1:55PM

NO. 9436 P. 2/8



American Arbitration Association
Dispute Resolution Services Worldwide

Northeast Case Management Center
Catherine Shanks
Vice President

Christopher Fracassa, Yvonne Nelson
Assistant Vice Presidents

950 Warren Avenue, East Providence, RI 02914
telephone: 866-293-4053 facsimile: 401-435-4529
internet: <http://www.adr.org/>

December 9, 2005

VIA FACSIMILE

Charles L. Rosenzweig, Esq.
Rand Rosenzweig Radley & Gordon, LLP
800 Third Avenue, 26th Floor
New York, NY 10022

David M. Olsav, Esq.
Brown, Raysman, Millstein, Felder & Steiner LLP
900 Third Avenue
New York, NY 10022

Scott H. Wyner, Esq.
Brown Raysman Millstein Felder & Steiner, LLP
900 Third Avenue
New York, NY 10022

Re: 13 115 Y 00698 05
Kriti Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

Dear Parties:

By direction of the arbitrators, we herewith transmit to you the duly executed Disposition of Application for Modification of Award in the above matter.

Sincerely,

Laura E. VanEtten
Case Manager
401 431 4787
VanEttenl@adr.org

Supervisor Information: Carli H. Del Solio, 401 431 4810, soliodc@adr.org

Encl.

cc: Michael A. Levy, Esq.
Larry Biblo, Esq.
Eugene I. Farber, Esq.

DEFENDANT'S
EXHIBIT

CM-3 05-
3434
0309

1 DEC. 9. 2005.: 1:55PM 318 385 3184

LEVY & SCHNEPS, P.C.

NO. 9436 P. 3/8

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AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 Y 00698 05

Kriti Ripley, LLC & Ashley River Properties II, LLC
and

Emerald Investments, LLC and Stuart Longman

"Claimants"

"Respondents"

DISPOSITION FOR APPLICATION OF MODIFICATION OF AWARD

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated December 29, 2003, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and having previously rendered an Award dated October 31, 2005, and Claimants having filed an application for modification dated November 15, 2005, and Respondents having responded by letter dated November 28, 2005, do hereby, DECIDE, as follows:

Paragraph 7 of page 4 of the Award is amended as follows:

- (a) The word "vendors" on line 2 is deleted and the word "vendees" is substituted therefor, and
- (b) The word "to" on line 2 is omitted.

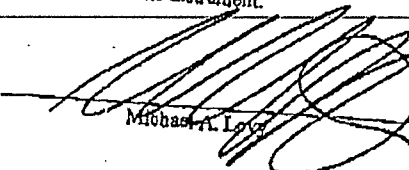
In all other respects, Claimants' motion to Modify the Award is denied.

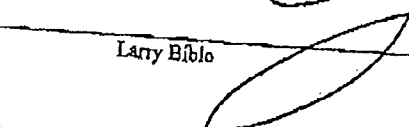
This Modification of Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

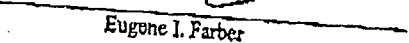
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Date

Date

Date

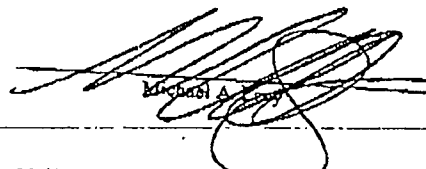

Michael A. Levy


Larry Biblo


Eugene I. Farber

I, Michael A. Levy, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

12/9/05
Date


Michael A. Levy

RECEIVED TIME DEC. 9 11:20AM

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1:DEC. 9. 2005: 1:56PM

518 385 3164

LEVY & MCHNEPS, P.C.

NO. 9436 P. 4/8

0003

Kriti Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

I, Larry Biblo, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Larry Biblo

I, Eugene I. Farber, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Eugene I. Farber

1:DEC. 9. 2005: 1:56PM

DEC. 9. 2005 10:13AM

NO. 9436 P. 5/8

003/004

NO. 7747

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 Y 00698 03

Kristi Ripley, LLC & Ashley River Properties II, LLC

"Claimants"

and

Emerald Investments, LLC and Stuart Longman

"Respondents"

DISPOSITION FOR APPLICATION OF MODIFICATION OF AWARD

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated December 29, 2003, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and having previously rendered an Award dated October 31, 2005, and Claimants having filed an application for modification dated November 15, 2005, and Respondents having responded by letter dated November 28, 2005, do hereby, DECIDE, as follows:

Paragraph 7 of page 4 of the Award is amended as follows:

- (a) The word "vendors" on line 2 is deleted and the word "vendoer" is substituted therefor, and
- (b) The word "to" on line 2 is omitted.

In all other respects, Claimants' motion to Modify the Award is denied.

This Modification of Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Date

Michael A. Levy

Date

Larry Billo

Date

Eugene J. Packer

I, Michael A. Levy, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Michael A. Levy

RECEIVED TIME DEC. 9 12:13PM

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1 DEC. 9. 2005 1:56PM

NO. 9436 P. 6/8

DEC. 9. 2005 10:13AM

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Ref ID: A50698 03
Krisl Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

I, Larry Biblo, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Larry Biblo

I, Eugene I. Farber, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Eugene I. Farber

DEC. 9. 2005 1:56PM 6317524048

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NO. 9436 P. 7/8

NY 9429

0002
3/4

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 Y 00698 05

Kriti Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

"Claimants"

"Respondents"

DISPOSITION FOR APPLICATION OF MODIFICATION OF AWARD

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated December 29, 2003, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and having previously rendered an Award dated October 31, 2005, and Claimants having filed an application for modification dated November 15, 2005, and Respondents having responded by letter dated November 28, 2005, do hereby, DECIDE, as follows:

Paragraph 7 of page 4 of the Award is amended as follows:

- (a) The word "vendors" on line 2 is deleted and the word "venders" is substituted therefor, and
- (b) The word "to" on line 2 is omitted.

In all other respects, Claimants' motion to Modify the Award is denied.

This Modification of Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Date

12/9/06

Date

Michael A. Levy

Larry B. Blo
Larry B. Blo

Larry B. Blo

Date

Eugene I. Farber

I, Michael A. Levy, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Michael A. Levy

RECEIVED TIME DEC. 9. 12:33PM

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DEC. 9. 2005. 1:57PM 6317524049

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NO. 9436 P. 8/8

Ref: 13 115 Y 00698 05

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0003
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Krist Ripley, LLC & Ashley River Properties II, LLC
and
Emerald Investments, LLC and Stuart Longman

I, Larry Biblo, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

12/4/05
Date

Larry Biblo
Larry Biblo

I, Eugene I. Farber, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Eugene I. Farber
Eugene I. Farber

RECEIVED TIME DEC. 9. 12:33PM

AMERICAN ARBITRATION ASSOCIATION
NEW YORK CITY

-----X
KRITI RIPLEY, LLC and ASHLEY RIVER
PROPERTIES II, LLC,

Claimants,

CASE NO. 13 115 Y 00698 05

-against-

EMERALD INVESTMENTS, LLC and
STUART LONGMAN

MODIFICATION TO AWARD

Respondents.

-----X
WHEREAS, Claimants Kriti Ripley, LLC ("Kriti") and Ashley River Properties II, LLC
("ARP-II") have timely requested modification of the Award herein dated October 31, 2005, in
accordance with Rule 46 of the Commercial Arbitration Rules; and

WHEREAS, it appears that the Award contains certain clerical, typographical and
computational errors that should be corrected;

THE UNDERSIGNED ARBITRATORS, hereby modify the Award herein as follows:

A. Paragraph 7 on page 4 of the Award is deleted in its entirety and replaced with:

7. We find that Kriti and ARP-II are entitled to indemnification from Emerald and
Longman in the total amount of \$931,060.74 [*If Marler added: \$1,031,060.74*]¹ for
reimbursement of \$18,578 in Hagood & Kerr defense expenses and the following claims to date
from the following third-party vendees (the "Covered Third-Party Claims"):

a. Von Grotthuss – in the amount of \$67,765.94.

b. Cunningham – in the amount of \$356,816.80.

¹ The italicized words are to be added if the arbitrators determine that Claimants should pay
Marler as a Covered Third-Party Claim, and offset the amount otherwise payable to respondents
for their interest in ARP-II.

c. Lunar Systems, Ltd. – in the amount of \$454,959 arising out of a Real Estate Purchase Agreement dated March 8, 2001 and related documents between Lunar Systems, Inc. and Ripley Light Yacht Club, LLC.

d. Acierno – in the amount of \$1,891.

e. Patterson – in the amount of \$31,050 arising out of a Reservation Agreement dated May 18, 2002.

f. *[Marler – in the amount of \$100,000 arising out of an Agreement to Buy and Sell dated October 18, 2000 with Sapphire Development, LLC.]*

In addition, Respondents shall, jointly and severally, promptly indemnify Claimants for (i) amounts paid by Claimants to Patterson, Lunar Systems, Ltd. or Cunningham *[or Marler]* in excess of the above amounts on account of additional interest² and (ii) for amounts paid by Claimants to Marler arising out of an Agreement to Buy and Sell dated October 18, 2000 with Sapphire. Upon payment of the foregoing amounts or offset pursuant to paragraph 10 below, the resolution of the Covered Third-Party Claims shall be at the expense of ARP-II.

B. The amount of \$251,000 set forth in paragraph 8 of the Award is deleted and replaced with the amount of \$322,516.07.

C. A new paragraph “9A “ shall be added as follows:

We find that Kriti and ARP-II are entitled to recover additional damages in the total amount of \$680,801 as follows: (i) \$614,775 for construction delays occasioned by Respondents’ wrongful conduct, (ii) \$40,338 in litigation expenses paid on account of a claim assigned by Sapphire, and (iii) \$25,688 in accounting charges to trace funds and restate financial statements as a consequents of Respondents’ breach.

D. Paragraph 10 of the Award is amended as follows:

a. The amount of \$400,000 is deleted and replaced with the amount of \$931,060.74 *[or \$1,031,060.74 if Marler included as a Covered Third-Party Claim].*

b. The following is added after “paragraph 7”: “and \$680,801 owed pursuant to paragraph 9A”.

E. The following should be added after the word “denied” in paragraph 11:

² Anticipated additional interest on the Cunningham claim (\$8,879.37 as per settlement agreement) and Marler (\$43,313 at the legal rate) amounts to \$52,192.37. No amount for

"including without limitation, all counterclaims by Respondents for contractual or judicial dissolution of ARP-II and any claim by Respondents against Kriti for violation of its fiduciary or contractual duties as a member, manager or operator of ARP-II."

F. Except as expressly modified or amended herein, the Award is hereby ratified and unchanged.

Dated: New York, New York
December , 2005

ARBITRATOR:

EUGENE I. FARBER

ARBITRATOR:

MICHAEL A. LEVY

ARBITRATOR:

LARRY A. BIBLO

[acknowledgement]

interest for Patterson, or for future interest to resolve the Lunar claim has been calculated.

Davidson Williams

From: Tom Lussier [tlussier@yahoo.com]
Sent: Friday, November 02, 2007 3:41 PM
To: William Cleveland
Cc: Frank Cisa; Steve Lussier; Davidson Williams
Subject: Ripley Light escrow settlement

Mr. Cleveland,

Per my telephone message of 11/2/07, please advise when we will receive our escrowed \$325,000.

On 6/13/07 David Williams and I agreed to the settlement terms in principle. On 9/24/07 I received the settlement agreement, which I executed and sent back to Frank Cisa the same day.

We are looking forward to concluding this matter as soon as possible. Thank you in advance for your attention to this matter.

Best Regards,

Tom Lussier
Lunar Systems, Ltd.
766 N River Rd NW
Warren, OH 44483
cell 330-219-4787
work 330-847-7000
fax 330-847-0528
tlussier@yahoo.com
www.technico.com

5/27/2009

**PLAINTIFF'S
EXHIBIT**

3 05-2434
3rd party
EM

LUNAR/ARPII 047

0319

Davidson Williams

From: Tom Lussier [tlussier@yahoo.com]
Sent: Monday, November 05, 2007 10:42 PM
To: Davidson Williams
Cc: Steve Lussier
Subject: Re: Ripley Light escrow settlement

David,

Steve and I would like to keep the present settlement in place, with the \$175,000 due on 12/31/07.

My wife and I are expecting twins any day now (our first kids), and I had hoped to have this piece of our financial puzzle completed before year-end. I would appreciate any help you can give in expediting the release of the escrowed \$325,000.

I will certainly keep you apprised of any information concerning ARP-I and our lis pendens, as I know this could complement the ARP-II property. Thank you in advance for attention to this matter.

Best Regards,

Tom Lussier

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

From: Davidson Williams <ddwilliams@kritimgmt.com>
To: Tom Lussier <tlussier@yahoo.com>
Sent: Monday, November 5, 2007 7:42:26 PM
Subject: RE: Ripley Light escrow settlement

Tom,

Thank you for your message. I have a question to ask you. Would you be willing to agree to extend the due date of the \$175K note to the sooner of 12/31/08 or the sale of the property? We would accrue interest on the note from 1/1/08 to pay off at the statutory rate. Reason I ask is that our sale of the property blew up. Buyer got into trouble elsewhere supposedly and had to walk.

I am traveling tomorrow but checking email. I do want to get this done and I do appreciate your patience and understanding.

David

P.S. Believe it or not, we observed the 2nd anniversary of the arbitration award in our favor and against Stu on Oct 31. We still have no decision confirming the award from the New York State court. I think the judge must be dead or comatose. What a legal system we have, I tell you. When it doesn't work, it can really hurt you.

P.P.S. Rumor has it that Stu has a buyer for the ARP-1 parcel (the one between the two hotels, on which you still have a lien), but I don't believe it.

5/27/2009

Davidson Williams

From: William Cleveland [wcleveland@buistmoore.com]
Sent: Monday, November 05, 2007 11:49 AM
To: Tom Lussier
Cc: Christine Eadie; Frank Cisa; Davidson Williams; Steve Lussier
Subject: Re: Ripley Light escrow settlement

Dear Mr. Lussier,
I just spoke with Frank Cisa and hope to have an answer for you shortly. I know that things were delayed because David Williams did not receive the materials I had sent to him in September. I will report to Frank as soon as I have more information.

Will

William C. Cleveland
Buist Moore Smythe & McGee
Five Exchange Street
P.O. Box 999
Charleston, SC 29402
843-722-3400

>>> Tom Lussier <tlussier@yahoo.com> 11/2/2007 3:41 PM >>>
Mr. Cleveland,

Per my telephone message of 11/2/07, please advise when we will receive our escrowed \$325,000.

On 6/13/07 David Williams and I agreed to the settlement terms in principle. On 9/24/07 I received the settlement agreement, which I executed and sent back to Frank Cisa the same day.

We are looking forward to concluding this matter as soon as possible.
Thank you in advance for your attention to this matter.

Best Regards,

Tom Lussier
Lunar Systems, Ltd.
766 N River Rd NW
Warren, OH 44483
cell 330-219-4787
work 330-847-7000
fax 330-847-0528
tlussier@yahoo.com
www.technico.com

Davidson Williams

From: Tom Lussier (tlussier@yahoo.com)
Sent: Thursday, December 20, 2007 12:32 PM
To: Davidson Williams
Cc: Frank Cisa; William Cleveland
Subject: Re: Lunar Systems

David,

Please write language of any assignment so that Lunar Systems is, from a layman's perspective, out of any future conflict in this matter.

I had planned either to let the lis pendens on ARP-I lapse when the next required court action occurred, or to try to extract some settlement from Longman separately upon his sale or optioning of the property between the hotels. As the arbitration award is still not finalized, I will agree with you on the assignment. I don't want to wrack up any additional legal entanglements.

Please proceed with your plan today. Thank you for expediting this matter. If possible, could you direct Will Cleveland to UPS letter next day air the check to me at the address below;

Thomas Lussier
600 Pintall Dr SE
Warren, OH 44484

Our offices are closed on 12/24/07, though the banks are open. I am trying to make some end of year payments that I don't want to leak into 2008.

Please advise if we can expect the check on Monday.

Thank you

Tom Lussier
766 N River Rd NW
Warren, OH 44483
cell 330-219-4787
work 330-847-7000
fax 330-847-0528
tlussier@yahoo.com
www.technico.com

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

From: Davidson Williams <ddwilliams@kritimgmt.com>
To: Tom Lussier <tlussier@yahoo.com>
Sent: Thursday, December 20, 2007 12:09:15 PM
Subject: Lunar Systems

Tom,

I received the message below from Will Cleveland. Please consider the following:

5/27/2009

1. As you know, we do not believe we are responsible for the payment of your claim. We believe Longman is. By paying off this claim, I am taking the risk that I can recover this payment from Longman, or otherwise resolve the matter in the course of my continuing disputes with him over his conduct in this sorry affair. The arbitration awards still have not been confirmed by the NY court. If they are overturned, this whole thing becomes a mess again, and you are stuck in the middle of it if we have not settled. I can't take this risk without some gaining some backstop protection and additional leverage with Longman in the form of an assignment. That is why I am asking for the assignment of claim.

2. Will Cleveland has the signed note from me. He can deliver this note to Frank Cisa today with an attorney trust fund check for the escrow funds, with instructions to release the note and check to you immediately against delivery of the settlement agreement with the assignment language signed by you. Then we're done. It can all be done today.

I know this has been a nightmare for you, but it has been even worse for me. We are so close, let's just get it done.

Thanks,
David

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

From: William Cleveland [mailto:wcleveland@buistmoore.com]
Sent: Thursday, December 20, 2007 9:29 AM
To: Davidson Williams
Cc: Christine Eadie
Subject: RE: 00994137.DOC

David,
I just reviewed a message from Frank Cisa saying that Lussier wants to stick w/ the original deal and will consider an assignment after the deal is done. I think you should call him directly. Let me know if you think we should proceed differently.
Will

William C. Cleveland
Buist Moore Smythe & McGee
Five Exchange Street
P.O. Box 999
Charleston, SC 29402
843-722-3400

5/27/2009

LUNAR/ARPII 040

0323

ASSIGNMENT
COVENANT NOT TO SUE
AND
FULL, FINAL AND COMPLETE RELEASE

THIS AGREEMENT (the "Agreement") is entered into this 20th day of December 2007 by and between LUNAR SYSTEMS, LTD., an Ohio limited liability company ("Lunar") and ASHLEY RIVER PROPERTIES II, LLC, a South Carolina limited liability company ("ARP II").

RECITALS

WHEREAS, Lunar filed a Complaint in the Charleston County Court of Common Pleas on June 3, 2005 alleging claims against ARP II and Ashley River Properties, I and bearing Case Number 05-CP-10-2434 (the "Complaint"); and

WHEREAS, BUIST MOORE SMYTHE MCGEE P.A., acting as an escrow agent ("Escrow Agent"), is holding Three Hundred Twenty-Five Thousand and No/100ths Dollars (\$325,000.00) in escrow; and

NOW, THEREFORE, in consideration of the promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which being hereby acknowledged, the parties agree as follows:

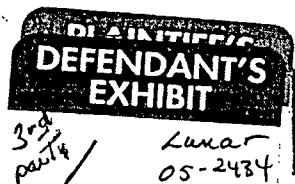
1. With respect to the funds held in escrow pursuant to the Escrow Agreement among Lunar, ARP II and Buist Moore Smythe McGee, P.A., dated April 11, 2006, ARP II and Lunar shall authorize Escrow Agent to release Three Hundred Twenty-Five Thousand and No/100ths Dollars (\$325,000.00) plus such interest as shall have accrued thereon from escrow to Lunar ("Payment").

2. ARP II shall execute a promissory note, in the form attached hereto as Exhibit A, in the amount of One Hundred Seventy Five Thousand and No/100ths Dollars (\$175,000.00) in favor of Lunar (the "Note"). The Note shall bear interest starting on January 1, 2008 at the rate applicable to money judgments in South Carolina and be due and payable in full on December 31, 2008.

3. For and in consideration of the Payment and Note, Lunar, for itself, its representatives, successors and assigns, and all other persons and entities that can or may claim through Lunar, hereby assigns to ARP II, all of its right, title and interest to the claims asserted in the lawsuit, including any and all rights under the March 8, 2001 Real Estate Purchase Agreement between Lunar Systems, LTD and Ripley Light Yacht Club, LLC referenced in the Complaint and the March 8, 2001 Early Purchase Addendum also referenced in the Complaint and hereby covenants not to sue ARP, II with respect to such claims.

4. This Agreement and the relations between the parties under it shall be construed and governed in accordance with the laws of the State of South Carolina.

(00994137.3)



0325

5. The Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original, and all of which counterparts taken together shall constitute one and the same instrument.

[IN WITNESS WHEREOF, Lunar and ARP II have duly executed this Agreement as of the day and year first above written.

WITNESSES:

Eleanor L. Latta
Catherine Pedigo

WITNESSES:

LUNAR SYSTEMS, LTD., an Ohio
limited liability company

Thomas Lussier
By: Thomas Lussier
Its: President

ASHLEY RIVER PROPERTIES II,
LLC, a South Carolina limited liability
company

By: _____
Its: _____

5. The Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original, and all of which counterparts taken together shall constitute one and the same instrument.

[IN WITNESS WHEREOF, Lunar and ARP II have duly executed this Agreement as of the day and year first above written.

WITNESSES:

LUNAR SYSTEMS, LTD., an Ohio
limited liability company

By: _____
Its: _____

WITNESSES:

ASHLEY RIVER PROPERTIES II,
LLC, a South Carolina limited liability
company

Deirdre H. Harrison

Davidson D. Williams
By: DAVIDSON D. WILLIAMS
Its: MANAGING MEMBER
KRISTY RIPLEY LLC
MANAGING MEMBER

0
1
(OVER)
08-CP-10-2344
ORIGINAL
2008-CP-10-2344
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
IN THE MATTER OF THE ARBITRATION BETWEEN

KRITI RIPLEY, LLC and
ASHLEY RIVER PROPERTIES II, LLC,

INDEX No. 650196/06

PETITIONERS,

JUDGMENT

-against-

EMERALD INVESTMENTS, LLC
and STUART LONGMAN

RESPONDENTS.
-----X

Upon the Decision and Order of Hon. Ira Gammerman, J.H.O., dated February 15, 2008, and filed February 20, 2008, it is:

I. ADJUDGED AND DECREED that the Award of Arbitrators rendered on October 31, 2005, as modified on December 9, 2005, in the arbitration case *In the Matter of the Arbitration between Kriti Ripley, LLC & Ashley River Properties II, LLC, Claimants, and Emerald Investments, LLC and Stuart Longman, Respondents* (American Arbitration Association Case No. 13 115 Y 00698 05) is confirmed in all respects as against Respondents Emerald Investments, LLC, a Connecticut limited liability company with its principal place of business located at 424 West Mountain Drive, Ridgefield, CT 06877 ("Emerald") and Stuart Longman, residing at 424 West Mountain Drive, Ridgefield, CT 06877 ("Longman"), and more specifically as follows:

A. That Petitioners Kriti Ripley, LLC ("Kriti") and Ashley River Properties II, LLC ("ARP-II") recover of Emerald and Longman, jointly and severally, the sum of Seven Hundred Six Thousand Two Hundred Twenty-Five Dollars (\$706,225.00), together with interest from October 31, 2005 until the date of Judgment in the amount of \$144,751.94 calculated at the South Carolina statutory rate of eight and three-quarters percent (8.75%);

B. That, as of January 14, 2005, Emerald forfeited all voting rights in ARP-II;

DEFENDANT'S
EXHIBIT

C.M. 4 05-
2434
0329

C. That, as of January 14, 2005, Kriti and ARP-II validly terminated the Project Development Agreement, dated December 30, 2003, without penalty or premium; and

D. That Kriti has the right to purchase the Emerald Member shares for Two Million Five Hundred Thousand Dollars (\$2,500,000.00) subject to no offsets except for the items enumerated in Section 10 of the award, which include Four Hundred Thousand Dollars (\$400,000.00) representing indemnification for third party vendor claims, Two Hundred and Fifty One Thousand Dollars (\$251,000.00) representing legal fees, and Fifty Five Thousand Two Hundred and Twenty Five Dollars (\$55,225.00) representing administrative and arbitrators' fees for a total of Seven Hundred Six Thousand and Two Hundred and Twenty Five Dollars (\$706, 225.00), less any amounts already paid by respondents under Paragraph I: A of this Judgment at the time of closing. The closing shall take place pursuant to the terms of Section 13.02 (c) of the Operating Agreement dated December 29, 2003, (the "Buyout Right");

E. That Kriti's right to specific performance or otherwise to enforce its Buyout Right against Emerald is denied without prejudice to Kriti seeking such relief in another action or proceeding, including the action pending before this Court entitled *Emerald Investments, LLC v. Kriti Ripley, LLC*, Index No. 111957/06;

and it is further

II. ADJUDGED AND DECREED that the Award of Arbitrator rendered on July 22, 2006, as modified on July 28, 2006 in the arbitration case *In the Matter of the Arbitration between Kriti Ripley, LLC & Ashley River Properties II, LLC, Claimants, and Emerald Investments, LLC and Stuart Longman, Respondents* (American Arbitration Association Case No. 13 115 02570 05) is

confirmed in all respects as against Respondents Emerald and Longman; and more specifically that:

A. Kriti and ARP-II recover of Emerald and Longman, jointly and severally:

1. One Hundred Forty-Three Thousand Three Hundred Forty Dollars (\$143,340.00), together with interest from November 1, 2005 until the date of Judgment in the amount of \$29,345.43 calculated at the South Carolina statutory rate of eight and three-quarters percent (8.75%); plus

2. One Hundred Thirty-Three Thousand Six Hundred Fifty-Three Dollars and fourteen cents (\$133,653.14), together with interest from June 22, 2006 until the date of Judgment in the amount of \$19,896.92 calculated at the South Carolina statutory rate of eight and three-quarters percent (8.75%); plus

3. Five Thousand Six Hundred Thirty-One Dollars (\$5,631.00), together with interest from June 22, 2006 until the date of Judgment in the amount of \$838.29 calculated at the South Carolina statutory rate of eight and three-quarters percent (8.75%);

B. Kriti and ARP-II shall pay or negotiate settlement of the unpaid balance of the payables assumed by ARP-II upon entering the Operating Agreement of ARP-II dated December 29, 2003 in an amount not to exceed One Hundred Twenty-Six Thousand Eight Hundred Ninety-Seven Dollars and Forty-Three Cents (\$126,897.43), which obligation, however, may not be offset against the amounts due from Emerald and Longman to Kriti and ARP-II;

and it is further

III. ADJUDGED AND DECREED that the Clerk tax legal costs against Respondents in the amount of 900, as set forth in the annexed bill of costs and as permitted by law;

and it is further;

IV. ADJUDGED AND DECREED, that the petitioners Kriti and ARP-II recover the total money judgment awarded herein, jointly and severally, against Respondents Emerald and Longman, inclusive of interest and the costs of this proceeding, amounting to the sum of 1,184,581⁷², and that petitioners have execution therefor.

Judgment signed this 27 day of March 2008

10
Ira Gammelman
Judicial Hearing Officer

FILED
APR 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

Neuman Gammelman
CLERK

PETITIONERS

345 E. 37TH STREET
New York, NY 10016

STATE OF NEW YORK, COUNTY OF NEW YORK,
SS: I, NORAHAN SOLOMON, COUNTY CLERK AND
CLERK OF THE SUPREME COURT OF THE JUDICIARY,
COUNTY OF NEW YORK, do hereby certify that

2008 APR -4 A 11:41

4/2/08
AND HEREBY CERTIFY THAT

FILED
COUNTY CLERK'S OFFICE
NEW YORK

304774

FILED
COUNTY CLERK'S OFFICE
NEW YORK

2008-CP-10-2344

RAND ROSENZWEIG
RADLEY & GORDON LLP
Attorneys for Petitioners
50 Main Street, 12th Floor
White Plains, New York 10606

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IN THE MATTER OF THE ARBITRATION BETWEEN

KRITI RIPLEY, LLC and
ASHLEY RIVER PROPERTIES II, LLC,

INDEX No. 650196/06

PETITIONERS,

INTEREST CALCULATION AND
BILL OF COSTS

-against-

EMERALD INVESTMENTS, LLC
and STUART LONGMAN

RESPONDENTS.

Principal pursuant to paragraph I.A of the Judgment	\$ 706,225.00
Interest from 10/31/05 to 03/04/08 at 8.75% (SC Statutory Rate)	\$ 144,751.94
Principal pursuant to paragraph II.A of the Judgment	\$ 143,340.00
Interest from 11/01/05 to 03/04/08 at 8.75% (SC Statutory Rate)	\$ 29,345.43
Principal pursuant to paragraph II.B of the Judgment	\$ 133,653.14
Interest from 06/22/06 to 03/04/08 at 8.75% (SC Statutory Rate)	\$ 19,896.92
Principal pursuant to paragraph II.C of the Judgment	\$ 5,631.00
Interest from 06/22/06 to 03/04/08 at 8.75% (SC Statutory Rate)	\$ 838.29
SUBTOTAL	\$1,183,681.72
Per diem at 8.75% after 03/04/2008 = \$ 237.05	

Statutory Costs
CPLR § 8201

\$ 200

Disbursements
Fee for Index No.
Service of Process
Request for Judicial Intervention

\$ 420.00
\$ 320.00
\$ 240.00

TOTAL

\$ 900

I HEREBY CERTIFY THAT I HAVE
RECEIVED THIS BILL OF COSTS BY
APR 02 2008
Clerk

FILED
CLERK OF COURT
2008 APR 29 PM 4:39

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

The Undersigned, an attorney admitted to practice before the courts of the State of New York, affirms under penalty of perjury that:

I am a member of the firm of Rand Rosenzweig Radley & Gordon LLP, attorneys for the Petitioners, KRITI RIPLEY, LLC AND ASHLEY RIVER PROPERTIES II, LLC, in this action and that the foregoing disbursements have been necessarily made or incurred in this action and are accurate in amount and necessarily obtained for use. The undersigned affirms that the foregoing statement is true, under penalty of perjury.

February 26, 2008

FILED
APR 02 2008
CLERK'S OFFICE
WEST YORK

/s/
Charles L. Rosenzweig

08 CP-10-2344

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**FILED AND
DOCKETED**
APR 02 2008
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AT
NY CO CLERK OFFICE

DOCKETED BY
M G
[Signature]

INDEX NO. 850 195/2000

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK	
KRM RIPLEY, LLC AND ASHLEY RIVER PROPERTIES III, LLC	PETITIONERS
- AGAINST -	
EMERALD INVESTMENTS, LLC AND STUART LONGMAN	RESPONDENTS
JUDGMENT	
RAND ROSENZWEIG RADLEY & GORDON LLP ATTORNEYS FOR DEFENDANTS 50 MAIN STREET WHITE PLAINS, NY 10606 (914) 406-7000	

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 00216 10
Emerald Investments, LLC ("Emerald")
and
Kriti Ripley, LLC ("Kriti")

AWARD OF ARBITRATORS

We, the undersigned arbitrators, having been designated pursuant to Article 12.18 of the operating agreement, dated as of December 29, 2003, by and among Kriti Ripley, LLC ("Kriti"), Emerald Investments, LLC ("Emerald") and Ashley River Properties II, LLC ("Company") ("hereinafter "Operating Agreement"), and, during July, 2010, the Arbitrators (hereinafter sometimes referred to as "Panel"), each having been duly sworn, held six duly noticed hearing days pertaining to the within matter, during which time the Panel heard evidence and admitted various exhibits in furtherance of the position of both Emerald and Kriti, and, the parties having submitted post hearing briefs and reply briefs, and, having read the briefs and ancillary submissions, do hereby FIND and AWARD as follows:

This arbitration arises from a dispute between the only two members of the Company which was formed to own and develop waterfront property located in Charleston, South Carolina. This dispute has its genesis in 2005 when the principal of Emerald, Stuart Longman, admittedly, diverted funds from the Company contrary to the Operating Agreement. As a consequence, Kriti commenced an arbitration to strip Emerald of its voting rights in accordance with the Operating Agreement. As a result, Emerald, which held a 70% membership interest in the Company, lost all of its voting rights, leaving Kriti, which held the remaining 30% membership in the Company, with the sole right to manage the Company and as the sole voting member of the Company.

Thereafter, the parties engaged in a continuous series of litigations and arbitrations, spanning three states, to further each of their interests. The initial arbitration affirmed Emerald's loss of voting rights and awarded Kriti certain moneys arising from the diversion of Company funds (JE 47). The initial award denied the remedy of forfeiture and held that Kriti could exercise its right to acquire the interests of Emerald for Emerald's cost as set forth on the books of the Company as provided in the Operating Agreement (JE52, Article 13.02). Due to the manner in which the Operating Agreement provided for a buy out of the interests of each member, the arbitrators did not need to address whether or not Emerald's membership interests were reduced from 70% to something less. During the initial arbitration and, consistently thereafter, Emerald took the position that it continued to own a 70% interest in the Company and Kriti took the position that Emerald's interests had been diluted.

Thereafter, Kriti commenced a second arbitration to recover moneys due from Emerald arising from its diversion of funds and for legal fees. That arbitrator, by an award, dated June 22, 2006, awarded Kriti legal fees and damages (JE 48). Kriti then moved to confirm both awards in the Supreme Court of the State of New York, New York County. In February, 2008, both awards were affirmed by the Hon. Ira Gammerman, Judicial Hearing Officer (JE 49). In a separate action, Emerald sought a judicial determination, also in the Supreme Court of the State of New York, that Kriti's right to acquire Emerald's interest in the Company had expired, which motion was granted in 2009.

In 2009, Emerald commenced an action in the Court of Common Pleas for the Ninth Judicial Circuit, sitting in Charleston, South Carolina, to dissolve the Company and to declare that Kriti owned 70% of the Company ("South Carolina Dissolution Action"). The Court, in that proceeding, explicitly held that "the suit is based on events (e.g. ...the alleged dilution of Emerald's interest...) that occurred after the New York arbitration. Therefore, the current claims are not barred by *res judicata* or collateral estoppel (JE... at 21)."

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 00216 10

Emerald Investments, LLC	("Emerald")
and	
Kriti Ripley, LLC	("Kriti")

AWARD OF ARBITRATORS CONTINUED

When the parties realized that the determination of Emerald's membership interest was properly the subject of arbitration pursuant to Article 12.18 of the Operating Agreement, they agreed to stay the South Carolina Dissolution Action and proceed with arbitration in New York on the issue of Emerald's membership interest (JE 536). The consent order of the South Carolina Court also provided:

"The parties further stipulate and agree that the findings of the above-referenced New York arbitration, upon confirmation of the award, shall be admissible in and binding upon the parties in any action (including, but not limited to, this action) seeking an order of judicial dissolution of ARP II (the Company)."

Emerald then commenced the within arbitration, seeking, in part: (i) a declaration that Emerald owns 70% of the membership interests of the Company, (ii) a finding that the amounts contributed as loans by affiliates of Kriti should be treated as equity and not debt on the books of the Company, (iii) an order expelling Kriti from the Company, (iv) an injunction preventing Kriti from violating the Operating Agreement, (v) damages, and (vi) costs of the arbitration, including legal fees. Kriti answered and denied the material allegations contained in the arbitration demand and sought relief of its own: (i) dismissal of the arbitration, (ii) forfeiture of Emerald's interests in the Company, pursuant to South Carolina law, (iii) confirmation that Emerald holds a 21.3% interest in the Company, (iv) a determination of the amount of long term liabilities on the books of the Company, and (v) costs and expenses of this proceeding, including legal fees.

Ownership Interests

Based upon the evidence adduced at the hearing, We find that the Capital Call, dated February 28, 2005 (JE 115) ("Capital Call") was defective on its face and, thus, ineffective to trigger a dilution of Emerald's membership interests. The Capital Call imposed conditions on the application of Emerald's capital contribution which were contrary to the terms of the Operating Agreement. Accordingly, We find that Emerald continues to own a 70% interest in the Company and Kriti continues to own a 30% interest. This holding does not impact, however, the finding that Kriti continues to be the sole member with voting rights as determined by the initial arbitration and affirmed by J.H.O. Gammerman (JE 47 at 11).

The Panel finds that Emerald is not precluded by either the statute of limitations or *res judicata* from seeking the relief requested herein. J.H.O. Gammerman's decision, dated February 15, 2008, was settled by a judgment, dated April 2, 2008. Sometime in 2009, Emerald commenced the South Carolina Dissolution Action to declare that it held a 70% interest in the Company, well within the three year statute of limitations for such proceedings applicable under South Carolina law. Through every litigation and arbitration, over five years, Emerald has sought to affirm its 70% owner of the Company, thus tolling any statute of limitations.

Loans as Equity and Not Debt

The Panel finds that Kriti and its affiliates loaned to the Company the sum of \$7,493,077.35, as set forth on the Company balance sheet, dated as of March 31, 2010 (JE 104) ("Financial Statement"). These loans were not disputed by Emerald. Rather, Emerald seeks to have these loans treated as equity claiming that the loans

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 00216 10
Emerald Investments, LLC ("Emerald")
and
Kriti Ripley, LLC ("Kriti")

AWARD OF ARBITRATORS CONTINUED

were disguised equity contributions as they were not arm's length loans and did not have the indicia of debt. We find the cases cited by Emerald unpersuasive to reclassify these loans as equity contributions.

Moreover, Article 5.2 of the Operating Agreement provides for members to loan money to the Company:

Notwithstanding anything herein to the contrary, the following major decisions shall require the written approval of the Member who own the Required Interest of the Voting Rights in the Company: ...

(i) The borrowing of money for Company purposes and, if security is required therefore, the granting of any security interest in all or any portion of Company Property.

(q) Entering into any loan agreement or execution and delivery any note, mortgage, deed of trust guaranty, indemnity or other instrument or agreement in connection with any borrowing, or any amendment, supplement, extension or modification thereto, whether in connection with any existing or future borrowing or debt.

(JE 52, Article 52.)

Thus, We find that loans to the Company from the Kriti affiliates and Davidson Williams should be treated as loans.

Dissolution of the Company and Dissociation

We find no basis to dissociate Kriti or Emerald from the Company or to dissolve the Company despite the fact that dissolution may be in the best interests of all parties. The Operating Agreement explicitly states the basis for dissolution:

9.1. Except as otherwise provided herein, the Company shall dissolve... only upon the happening of one or more the following events:

(a) written consent of the members who own the Required Interest of the Voting Rights in the Company;

(b) Any event occurs that makes it unlawful for all or substantially all of the business of the Company to be continued, but any cure of illegality with ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this subsection;

(c) The filing by the Secretary of State of a certificate of administratively dissolving the Company...

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 00216 10
Emerald Investments, LLC ("Emerald")
and
Kriti Ripley, LLC ("Kriti")

AWARD OF ARBITRATORS CONTINUED

(d) The expiration of the period fixed for the duration of the Company...

The Panel finds that none of these events has occurred and, thus, the parties have not provided sufficient facts for the Arbitrators to render a fact finding authorizing dissolution.

The Operating Agreement also fails to provide a basis for dissociation, as dissociation may be supported only upon the finding of three events:

"(a) Withdrawing, retiring or resigning from the Company with the consent of those Members who own the Required Voting Rights in the Company.

(b) If the Member files a voluntary petition for bankruptcy, is adjudicated a bankrupt or has a bankruptcy petition filed against him or it (sic) which is not dismissed within ninety (90) days.

(c) Any event of Wrongful Dissociation set forth in 10.5 of this Agreement."

Article 10.5 of the Operating Agreement sets forth the basis for wrongful dissociation. The parties did not present sufficient evidence to justify a finding of the extreme remedies of dissociation or forfeiture of either member's membership interests in the Company.

Article 10.5(b)(iii) provides that dissociation may be found where a member engages in "conduct relating to the Company's business that makes it not reasonably practicable to carry on the business with the Member." While the Panel observes that Kriti and Emerald cannot work together in any constructive manner, the business of the Company is the development of the waterfront property and, should the Company elect not to dissolve, Kriti may proceed with its business operations. *

Nor did the Panel hear sufficient evidence to find corporate waste by Kriti or commission of any act which would justify enjoining Kriti from violating any provision of the Operating Agreement. The decisions to construct a bulkhead, dredge the canal and construct the out building were well within the business judgment of Kriti as managing member; and the application of funds by the Company was, also, well within reasonable business efforts to manage a complex piece of waterfront property. Kriti had envisioned a luxury development and these expenditures fell within that reasonable vision. Emerald's evidence was, at best, the observations of Stuart Longman who believed that he could develop the property better; but the decisions of Kriti did not constitute waste nor 'wrongful conduct that adversely and materially affected the Company's business...' Nor did Kriti's conduct constitute "... a material breach of [the Operating Agreement] or a duty owed to the Company or the other Members under Section 22-44-409 of the Act." Operating Agreement, Article 10.5(b).

Accordingly, the Panel Awards as follows:

1. Emerald is found to continue to own 70% of the membership interests in the Company and Kriti continues to own 30% of the membership interests.

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 00216 10
Emerald Investments, LLC ("Emerald")
and
Kriti Ripley, LLC ("Kriti")

AWARD OF ARBITRATORS CONTINUED

2. The loans by Kriti's affiliates to the Company shall be treated as loans to the Company and shall not be recast as equity. The amount of the loans are found to be those set forth in the Financial Statement, as the amounts of the loans were not disputed by the parties.
3. Neither Kriti nor the Company committed corporate waste or engaged in any misconduct which would support a finding of fact requiring dissociation, dissolution or an award to Emerald of damages; and, thus, to the extent that the Panel is empowered to opine on the request for dissociation, dissolution or damages against Kriti, such request is denied.
4. Emerald did not commit sufficient acts to support a finding of dissociation, and, to the extent that the Panel is empowered to opine on the request for dissociation of Emerald, such request for relief is denied.
5. Neither Emerald nor Kriti committed sufficient acts to support a finding of forfeiture.
6. Neither Emerald nor Kriti committed sufficient acts to warrant the issuance of an injunction against either party and such request for relief is denied.
7. Each of the parties hereto shall bear its own costs and expenses incurred in connection with this proceeding, subject to the payments set forth below; and, to the extent that each party hereto seeks an award of legal fees or costs and disbursements of this proceeding from the other party to this proceeding, such request is denied.
8. The administrative fees and expenses of the American Arbitration Association totaling \$18,800.00 and the compensation and expenses of the arbitrators totaling \$111,183.98 shall be borne equally. Therefore, Kriti shall reimburse Emerald the sum of \$59,527.74, representing that portion of said fees in excess of the apportioned costs previously incurred by Emerald.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Date
10/28/2010
Date
10/28/2010
Date

E. Leo Millonas
Peter L. Altieri
David M. Rubin

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 00216 10
Emerald Investments, LLC ("Emerald")
and
Kriti Ripley, LLC ("Kriti")

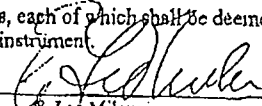
AWARD OF ARBITRATORS CONTINUED

2. The loans by Kriti's affiliates to the Company shall be treated as loans to the Company and shall not be recast as equity. The amount of the loans are found to be those set forth in the Financial Statement, as the amounts of the loans were not disputed by the parties.
3. Neither Kriti nor the Company committed corporate waste or engaged in any misconduct which would support a finding of fact requiring dissociation, dissolution or an award to Emerald of damages; and, thus, to the extent that the Panel is empowered to opine on the request for dissociation, dissolution or damages against Kriti, such request is denied.
4. Emerald did not commit sufficient acts to support a finding of dissociation, and, to the extent that the Panel is empowered to opine on the request for dissociation of Emerald, such request for relief is denied.
5. Neither Emerald nor Kriti committed sufficient acts to support a finding of forfeiture.
6. Neither Emerald nor Kriti committed sufficient acts to warrant the issuance of an injunction against either party and such request for relief is denied.
7. Each of the parties hereto shall bear its own costs and expenses incurred in connection with this proceeding, subject to the payments set forth below; and, to the extent that each party hereto seeks an award of legal fees or costs and disbursements of this proceeding from the other party to this proceeding, such request is denied.
8. The administrative fees and expenses of the American Arbitration Association totaling \$18,800.00 and the compensation and expenses of the arbitrators totaling \$111,183.98 shall be borne equally. Therefore, Kriti shall reimburse Emerald the sum of \$59,527.74, representing that portion of said fees in excess of the apportioned costs previously incurred by Emerald.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

10/28/10
Date


E. Leo Milonas

Date

Peter L. Altieri

Date

David M. Rubin

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 00216 10
Emerald Investments, LLC ("Emerald")
and
Kriti Ripley, LLC ("Kriti")

AWARD OF ARBITRATORS CONTINUED

I, E. Leo Milonas, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

10/28/10
Date


E. Leo Milonas

I, Peter L. Altieri, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

Peter L. Altieri

I, David M. Rubin, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

David M. Rubin

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 00216 10
Emerald Investments, LLC ("Emerald")
and
Kriti Ripley, LLC ("Kriti")

AWARD OF ARBITRATORS CONTINUED

I, E. Leo Milonas, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Date

E. Leo Milonas

I, Peter L. Allieri, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

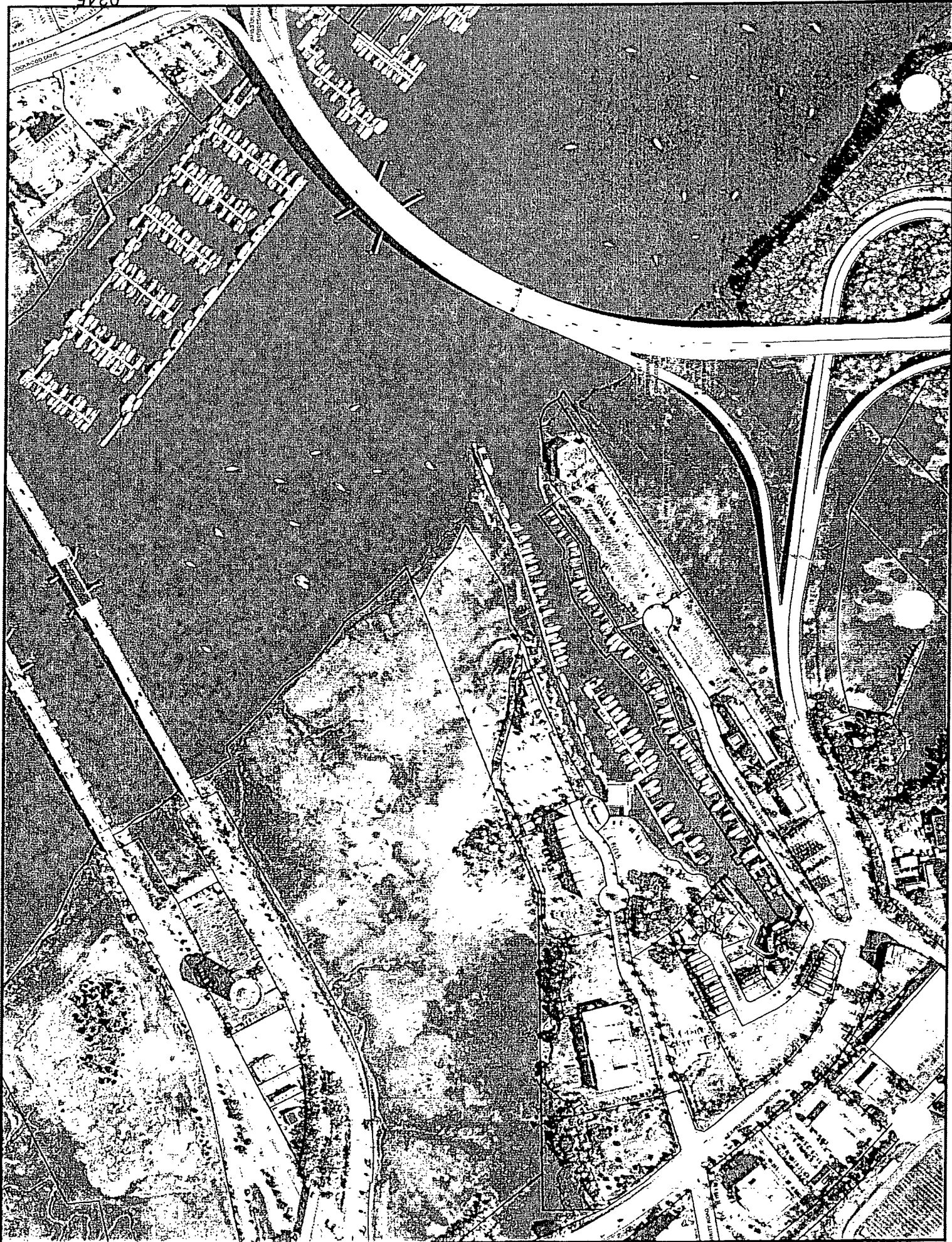
10/20/2010
Date

Peter L. Allieri
Peter L. Allieri

I, David M. Rubin, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

10/29/2010
Date

David M. Rubin
David M. Rubin



**DEFENDANT'S
EXHIBIT**

APP-1

13

09/557

FINAL SETTLEMENT AGREEMENT
AND
FULL, FINAL AND COMPLETE RELEASE

THIS FINAL SETTLEMENT AGREEMENT AND FULL, FINAL AND COMPLETE RELEASE (the "Agreement") is entered into this 24th day of September 2007 by and between LUNAR SYSTEMS, LTD., an Ohio limited liability company ("Lunar") and ASHLEY RIVER PROPERTIES II, LLC, a South Carolina limited liability company ("ARP II").

RECITALS

WHEREAS, Lunar filed a Complaint in the Charleston County Court of Common Pleas on June 3, 2005 alleging claims against ARP II and bearing Case Number 05-CP-10-2434 (the "Complaint"); and

WHEREAS, BUIST MOORE SMYTHE MCGEE P.A., acting as an escrow agent ("Escrow Agent"), is holding Three Hundred Twenty-Five Thousand and No/100ths Dollars (\$325,000.00) in escrow; and

WHEREAS, Lunar and ARP II desire to settle, resolve and release any and all claims set forth in the Complaint, and settle, resolve and release any and all actual, potential, and/or future claims; and

WHEREAS, the purpose of this Agreement is to settle, resolve and release all actual, potential and/or future claims between the parties.

NOW, THEREFORE, in consideration of the promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which being hereby acknowledged, the parties agree as follows:

1. ARP II shall authorize Escrow Agent to release Three Hundred Twenty-Five Thousand and No/100ths Dollars (\$325,000.00) from escrow to Lunar ("Payment").

2. ARP II shall execute a promissory note, in the form attached hereto as Exhibit A, in the amount of One Hundred Seventy Five Thousand and No/100ths Dollars (\$175,000.00) in favor of Lunar (the "Note"). The Note shall be interest free and be due and payable in full on December 31, 2007.

3. For and in consideration of the Payment and Note, Lunar, for itself, its representatives, successors and assigns, and all other persons and entities that can or may claim through Lunar, hereby fully releases, acquits and forever discharges ARP II, its members, affiliates, employees, officers, directors, officials, successors and assigns, and any other persons and/or entities that can or may be liable, of and from, any and all past, present and future manner of actions, causes of action, claims, charges, damages and demands of every kind or nature, liability of any kind, whether known or unknown, whether at law or in equity.

4. This Agreement is expressly intended to extend to and include all claims, counterclaims, defenses, and causes of action, whether known or unknown, which were asserted or which could have been asserted between Lunar and ARP II regarding the lawsuit filed by Lunar in the Charleston County Court of Common Pleas bearing Case Number 05-CP-10-2434.

5. In exchange for the Payment and Note, Lunar agrees to dismiss with prejudice the lawsuit pending before the Charleston County Court of Common Pleas entitled Lunar Systems, Ltd. v. Ashley River Properties One, LLC and Ashley River Properties Two, LLC successors in interest of Ripley Light Yacht Club, LLC, Ripley Light Development, LLC, and Robert C. Cunningham and bearing Case Number 05-CP-10-2434.

6. Lunar and ARP II hereby agree that the consideration expressed above is not an express or implied admission of negligence, misconduct, responsibility or liability on the part of any party and that all parties expressly and specifically deny all such claims.

7. The parties hereby agree that this Agreement may be asserted and introduced as evidence for the parties hereby released as an absolute and final defense and bar to any claim released herein in any present or future suit or proceeding of any nature.

8. The determination that any provision of this Agreement is unenforceable, invalid, or illegal shall not affect the enforceability, validity, or legality of any other provision. A determination that the application of any provision of this Agreement to any person or circumstance is unenforceable, invalid or illegal shall not affect the enforceability, validity, or legality of such provision as it may apply to other persons or circumstances.

9. This Agreement is a complete statement of the entire Settlement Agreement and Full, Final and Complete Release between the parties hereto, and that no agreement may be effective to change, modify, or terminate this Agreement, in whole or in part, unless such agreement is in writing and duly signed after the date of execution of this Agreement by the person against whom enforcement of such change, modification, or termination is sought.

10. This Agreement shall become effective immediately following execution by all parties.

11. This Agreement and the relations between the parties under it shall be construed and governed in accordance with the laws of the State of South Carolina.

12. The Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original, and all of which counterparts taken together shall constitute one and the same instrument.

[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK.]

IN WITNESS WHEREOF, Lunar and ARP II have duly executed this Agreement as of the day and year first above written.

WITNESSES:

x Robert J. O'Leary
Karen J. McManis

WITNESSES:

LUNAR SYSTEMS, LTD., an Ohio
limited liability company

Thomas Lussier
By: Thomas Lussier
Its: President

ASHLEY RIVER PROPERTIES II,
LLC, a South Carolina limited liability
company

By: _____
Its: _____

EXHIBIT A

Promissory Note

See Attached

PROMISSORY NOTE

\$175,000.00

Charleston, South Carolina
September 24, 2007

FOR VALUE RECEIVED, ASHLEY RIVER PROPERTIES II, LLC, a South Carolina limited liability company (hereinafter "Maker") promises to pay to the order of LUNAR SYSTEMS, LTD., an Ohio limited liability company (hereinafter "Holder") the principal sum of ONE HUNDRED SEVENTY-FIVE THOUSAND AND NO/100THS DOLLARS (\$175,000.00) together with interest, if any, thereon as specified herein ("Balance"), in coins or currency, which, at the time or times of payment, is legal tender for the payment of public or private debts in the United States of America, all in accordance with the terms hereinafter set forth.

The entire unpaid and outstanding principal amount hereof shall become due and payable to Holder on December 31, 2007 (the "Maturity Date").

Payment of this Promissory Note (the "Note") shall be made at the following address:

Lunar Systems, Ltd.
Attn: Thomas Lussier
766 N River Rd NW
Warren, OH 44483

This Note shall bear no interest on the Balance from the date first above written until December 31, 2007.

This Note may be prepaid in whole or in part at any time without penalty.

In the event of Maker's failure to pay this Note in full on the Maturity Date and failure to cure such non-payment within fourteen (14) days after written notice of non-payment by Holder to Maker's counsel, William C. Cleveland, III, Buist Moore Smythe McGee P.A., 5 Exchange Street, P.O. Box 999 (29402), Charleston, South Carolina 29401, then the entire Balance remaining unpaid hereunder shall accrue interest commencing January 1, 2008 at the legal rate applicable to judgments in the State of South Carolina. Interest shall be calculated on the basis of a 365-day year and paid for the actual number of days elapsed.

In the event this Note is placed in the hands of an attorney for collection or is collected through any legal proceedings, Maker promises to pay all expenses of collection and reasonable attorneys' fees incurred by Holder.

This Note shall be governed as to validity, interpretation, construction, effect and in all other respects by the laws and decisions of the State of South Carolina.

Wherever possible each provision of this Note shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Note or portion thereof shall be prohibited or be invalid under such law, such provision shall be ineffective to the extent

of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Note.

This Note may be altered, amended or modified only by a writing signed by Maker and Holder.

This Note shall inure to the benefit of Holder. Maker may not assign its obligations under this Note (by operation of law or otherwise) without the prior written consent of Holder, and any attempted assignment without consent where required shall be void.

The Maker hereby waives presentment, demand, protest, notice of dishonor, diligence and all other notices, any release or discharge arising from any extension of time, discharge of a prior party, or other cause of release or discharge other than actual payment in full hereof.

Holder shall not be deemed, by any act or omission, to have waived any of its rights or remedies hereunder unless such waiver is in writing and signed by Holder and then only to the extent specifically set forth in such writing. A waiver with reference to one event shall not be construed as continuing or acting as a bar to or waiver of any right or remedy as to a subsequent event. No delay or omission of Holder to exercise any right, whether before or after an Event of Default hereunder, shall impair any such right or shall be construed to be a waiver of any right or Event of Default, and the acceptance at any time by Holder of any past-due amount shall not be deemed to be a waiver of the right to require prompt payment when due of any other amount then or thereafter due and payable.

WAIVER OF JURY TRIAL. BY THE EXECUTION HEREOF, MAKER KNOWINGLY, VOLUNTARILY AND INTENTIONALLY HEREBY AGREES THAT NEITHER MAKER NOR HOLDER, NOR ANY ASSIGNEE, SUCCESSOR, HEIR, OR LEGAL REPRESENTATIVE OF MAKER OR HOLDER, SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THIS NOTE OR ANY OTHER LOAN DOCUMENTS EVIDENCING, SECURING, OR RELATING TO THE LOAN EVIDENCED HEREBY, OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE PARTIES HERETO.

IN WITNESS WHEREOF, Maker has caused this Note to be executed and delivered as of the day and year first above written.

WITNESSES:

MAKER:

ASHLEY RIVER PROPERTIES II, LLC
a South Carolina limited liability company

By: _____
Its: _____

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

Deadra L. Jefferson, Circuit Court Judge

Case No. 2005-CP-10-2434

**Ashley River Properties II, LLC, as assignee of Lunar
Systems, LTD and Ashley River Properties II, LLC.....Respondents**

v.

**Ashley River Properties One, LLC, successor in the
interest to Ripley Light Yacht Club, LLC and Ripley
Light Development, LLC.....Appellant**

**Ashley River Properties One, LLC, Third-Party
Plaintiffs.....Appellant**

v.

**Lunar Systems, LTD and Thomas J. Lussier, Third-
Party Defendants.....Respondents**

CERTIFICATE OF COUNSEL

Appellant hereby certifies that this Record on Appeal contains all of the material proposed to be included by any other parties, all that Appellant deems needed, and not any other material.

April 17, 2014

Respectfully submitted,

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
APR 21 2014
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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Ashley River Properties II, LLC, as assignee of Lunar
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v.

Ashley River Properties One, LLC, successor in the
interest to Ripley Light Yacht Club, LLC and Ripley
Light Development, LLC.....Appellant

Ashley River Properties One, LLC, Third-Party
Plaintiffs.....Appellant

v.

Lunar Systems, LTD and Thomas J. Lussier, Third-
Party Defendants.....Respondents

PROOF OF SERVICE

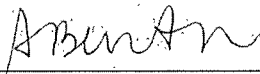
I, the undersigned Paralegal of the law firm of McCullough Khan, LLC, attorneys
for Appellant, do hereby certify that I have served all counsel in this action with a copy of
the **Record on Appeal** by mailing a copy of same by United States Mail, postage
prepaid, to the following addresses:

William C. Cleveland, Esq.
P.O. Box 999
Charleston, SC 29402

Frank M. Cisa, Esq.
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464

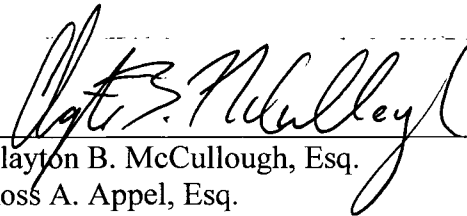
and fifteen copies to the Clerk of the Court of Appeals at the following address:

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



Alicia M. Benton
Paralegal

April 18th, 2014



Clayton B. McCullough, Esq.
Ross A. Appel, Esq.
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Charleston, SC 29401
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(843) 937-0706
clay@mklawsc.com
ross@mklawsc.com

ATTORNEYS FOR APPELLANT