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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2018-001180

RECEIVED
JAN 28 2019
SC Court of Appeals

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

v.

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

And

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

v.

Great American Insurance Company.....Appellant.

RECORD ON APPEAL VOLUME VII

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Community Association Solution
Insurance Policy

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**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

- (b) take reasonable measures to stop or mitigate the damage caused by such **Data Breach**;
- (c) give the **Insurer**, upon request, a detailed proof of the damage caused by such **Data Breach**;
- (d) submit, upon request of the **Insurer**, to examination under oath and give the **Insurer** a signed statement of the **Insured's** answers; and
- (e) cooperate with the **Insurer** in the investigation and settlement of any payments as a result of the **Data Breach**.

For the purposes of coverage extended by this endorsement, a **Data Breach** is "first discovered" when any **Insured** first becomes aware of facts that would cause a reasonable person to assume a **Privacy Wrongful Act** has occurred even though the exact amount or details of loss may not then be known.

Notice of the **Data Breach** shall be given to the **Insurer** at the address indicated in Section VII.D. of the Policy.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.



DISTINGUISHED
PROGRAMS



Community Association Program Quote Form D&O Liability Coverage ("Claims Made" Basis)

	Yes	No	N/A
Have there been any D&O claims made against the Association in the last 5 years?		X	
Is this the first time the Association has purchased D&O Insurance?		X	
Has the Association's current D&O policy been cancelled or non-renewed by the carrier?		X	
Does the Association anticipate any major building/renovations in the next year?		X	
Is the Developer on the Board?		X	

Association Name: Tilghman Beach & Racquet Club HOA Inc.
 Street Address: 208 North Ocean Blvd City/State/Zip: North Myrtle Beach, SC 29582
 How is association managed? Third Party Management Co
 Property Manager Name: KA Diehl
 Mailing Address: 11822 HIGHWAY 17 BYP City/State/Zip: MURRELLS INLET, SC 29576-9337

Association Type: Residential Condominium Association (COA) Number of Employees: 0
 Total Unit Count: 213 Commercial Units:
 Residential Units: 213 Units at Completion:
 Average Unit Value: \$220,000 Owners in Arrears: 0
 Limit: \$1,000,000 Retention: \$1,000
 Developer Controlled Board?: No Retail Units: 0
 Management Type: Third Party Management Co Units Sold: 213
 PPL Date: 02/10/2015

Total Assets: Total Salaries:

Agent or Broker Name: Global Risk Partners, LLC Phone: (609) 641-6677
 Broker Address: 1622 Tilton Rd City/State/Zip: Northfield, NJ 08225

KNOWN PRIOR CLAIMS: IT IS UNDERSTOOD AND AGREED THAT THIS POLICY DOES NOT APPLY TO ANY CLAIM MADE AGAINST ANY INSURED BASED UPON, ARISING OUT OF, RELATING TO, DIRECTLY OR INDIRECTLY RESULTING FROM OR IN CONSEQUENCE OF, OR IN ANY WAY INVOLVING ANY WRONGFUL ACT OR ANY FACT, MATTER, CIRCUMSTANCE, SITUATION, TRANSACTION, CASUALTY, EVENT OR DECISION, KNOWN BY ANY INSURED PRIOR TO THE INITIAL COVERAGE DATE WHICH WOULD INDICATE THE PROBABILITY OF SUCH CLAIM BEING MADE. IT IS UNDERSTOOD AND AGREED THAT COVERAGE SHALL NOT BE EXCLUDED AS A RESULT OF ANY UNTRUE STATEMENT ON THIS APPLICATION, EXCEPT AS TO THE ORGANIZATION, ITS SUBSIDIARIES AND THOSE INSURED PERSONS HAVING SUCH KNOWLEDGE. PLEASE OBTAIN A COPY OF THE POLICY THROUGH YOUR BROKER AND READ IT CAREFULLY.

"By selecting 'Yes', I agree with the above notice." ☒ Yes

FRAUD WARNING: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD AN INSURANCE COMPANY OR OTHER PERSON FILES THIS QUESTIONNAIRE CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME AND WHICH MAY RESULT IN CIVIL OR CRIMINAL FINES OR PENALTIES.

"By selecting 'Yes', I agree with the above notice." ☒ Yes

Distinguished Programs Group
 1180 Ave. of the Americas
 New York, NY 10036

Fax: 917-438-6610
 Ed. 12/2011

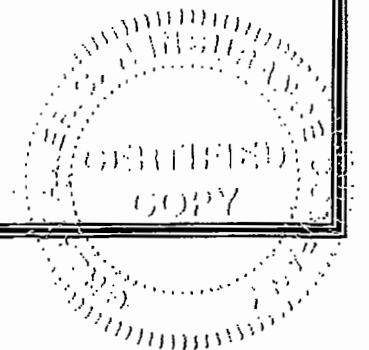
E-mail: info@distinguished.com
 Phone: 888-355-4626

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ExecPro[®]

Community Association Solution



ExecPro[®]

Community Association Solution

Great American Insurance Group – Executive Liability Division:
1515 Woodfield Road, Suite 500, Schaumburg, IL 60173

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GREAT AMERICAN INSURANCE GROUP®
Headquarters: 301 E. Fourth Street, Cincinnati, Ohio 45202

THIS IS A CLAIMS MADE POLICY. READ IT CAREFULLY.

In consideration of the payment of the premium and in reliance upon all statements made and information furnished to the company shown in the Declarations (a stock insurance company, hereinafter called the **Insurer**), including the statements made in the Proposal Form and subject to all terms, conditions and limitations of this Policy, the **Insured** and **Insurer** agree:

Section I. Insuring Agreements

- A.** If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against any **Insured Persons** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Insured Persons**, **Loss** and **Costs of Defense** resulting from such **Claim**, except for any **Loss** and **Costs of Defense** which the **Organization** or any **Subsidiary** actually pays as indemnification.
- B.** If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against any **Insured Persons** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Organization** or any **Subsidiary**, **Loss** and **Costs of Defense** resulting from such **Claim**, but only to the extent the **Organization** or any **Subsidiary** is required or permitted by law to indemnify the **Insured Persons**.
- C.** If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against the **Organization**, any **Subsidiary**, or the **Property Manager** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Organization**, any **Subsidiary**, or the **Property Manager**, **Loss** and **Costs of Defense** resulting from such **Claim**.

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

Section II. Discovery Period

- A.** If this Policy is not renewed or is cancelled by the **Insurer**, for any reason other than non-payment of premium, then without the requirement of any additional premium, the **Organization** shall receive an automatic ninety (90) day extension of the coverage granted by this Policy with respect to any **Claim** first made against any **Insured** during this extended coverage, but only with respect to **Wrongful Acts** committed prior to the end of the **Policy Period**. This extended coverage shall be referred to as the **Automatic Discovery Period**. In addition, if prior to the end of the **Automatic Discovery Period**, the **Organization** pays the **Insurer** an additional amount equal to forty (40%), seventy-five (75%), or one hundred (100%) percent of the annual premium of this Policy, the **Organization** shall receive an extension of the coverage granted by this Policy for an additional twelve (12), twenty-four (24), or thirty-six (36) months respectively from the end of the **Automatic Discovery Period** with respect to any **Claim** first made against any **Insured** during this extended coverage, but only with respect to **Wrongful Acts** committed prior to the end of the **Policy Period**. This extended coverage shall be referred to as the **Discovery Period**. The **Organization** shall have no right to purchase this **Discovery Period** at any later date or to elect more than one **Discovery Period**.

- B. If this Policy is not renewed or is cancelled by the **Organization**, and if no later than sixty (60) days after the end of the **Policy Period** the **Organization** pays the **Insurer** an additional amount equal to forty (40%), seventy-five (75%), or one hundred (100%) percent of the annual premium of this Policy, the **Organization** shall receive a **Discovery Period** for an additional twelve (12), twenty-four (24), or thirty-six (36) months respectively from the end of the **Policy Period**. The **Organization** shall have no right to purchase this **Discovery Period** at any later date or to elect more than one **Discovery Period**.
- C. The fact that this Policy may be extended by virtue of the **Automatic Discovery Period** or **Discovery Period** shall not in any way increase the Limit of Liability stated in Item 3 of the Declarations. For purposes of the Limit of Liability, the **Automatic Discovery Period** and the **Discovery Period** is considered to be part of and not in addition to the last **Policy Year**.

Section III. Definitions

A. "Claim" shall mean:

- (1) a written demand for monetary relief made against any **Insured**;
- (2) a civil proceeding, including any appeals therefrom made against any **Insured** seeking monetary or non-monetary (including injunctive) relief commenced by service of a complaint or similar pleading;
- (3) a criminal proceeding, including any appeals therefrom made against any **Insured** commenced by the return of an indictment or the filing of notice of charge or similar document; or
- (4) a formal administrative proceeding, including any proceeding before the Equal Employment Opportunity Commission (EEOC) or any similar governmental body, made against any **Insured** commenced by the receipt of charges, formal investigative order, service of summons or similar document.

B. "Claimant" shall mean:

- (1) any past, present, and future **Insured Persons** or applicants for employment with the **Organization** or any **Subsidiary**;
- (2) a government entity or agency, including but not limited to the Equal Employment Opportunity Commission (EEOC) or any similar governmental body, when acting on behalf of or for the benefit of any individual in (1) above; or
- (3) all persons who were, now are, or shall be Independent contractors, but only to the extent such individuals perform work or services for or on behalf of the **Organization** or any **Subsidiary** and only to the extent such individuals are indemnified by the **Organization** or any **Subsidiary**.

It is further understood and agreed that **Claimant** shall not include any employee of any **Property Manager**.

- C. **"Construction Defect(s)"** shall mean any actual or alleged defective, faulty or delayed construction or any other matter constituting a construction defect under applicable law regardless of whether it results from:
- (1) defective or incorrect architectural plans or other designs;
 - (2) defective or improper soil testing;
 - (3) defective, inadequate or insufficient protection from subsoil or earth movement or subsidence;
 - (4) construction, manufacture or assembly of any tangible property;
 - (5) the failure to provide or pay for any construction-related goods or services; or
 - (6) the supervision or management of any construction-related activities.
- D. **"Costs of Defense"** shall mean reasonable and necessary legal fees, costs and expenses incurred in the investigation or defense of any **Claim**, including the costs of any appeal or appeal bond, attachment bond or similar bond (but without any obligation on the part of the **Insurer** to apply for or furnish such bonds); provided, however, **Costs of Defense** shall not include: (1) salaries, wages, overhead or benefit expenses associated with any **Insured Persons**, and (2) any amounts incurred in defense of any **Claim** which any other insurer has a duty to defend, regardless of whether or not such other insurer undertakes such duty.
- E. **"Employment Practices Wrongful Act"** shall mean any of the following acts related to employment, but only if alleged by or on behalf of a **Claimant**:
- (1) wrongful dismissal, discharge or termination of employment, whether actual or constructive;
 - (2) misrepresentation;
 - (3) violation of employment laws;
 - (4) sexual or workplace harassment;
 - (5) discrimination;
 - (6) wrongful failure to employ or promote;
 - (7) wrongful discipline;
 - (8) wrongful deprivation of career opportunity including a wrongful failure to hire or promote;
 - (9) failure to grant tenure;
 - (10) negligent employee evaluation;
 - (11) retaliation;
 - (12) failure to provide adequate workplace or employment policies or procedures;
 - (13) defamation (including libel and slander);
 - (14) invasion of privacy;
 - (15) wrongful demotion;
 - (16) negligent reassignment;
 - (17) violation of any federal, state or local civil rights laws;
 - (18) negligent hiring;
 - (19) negligent supervision;
 - (20) negligent training;
 - (21) negligent retention; or
 - (22) acts described in (1) through (21) above arising from the use of the **Organization's** or **Subsidiary's** Internet, e-mail, telecommunication or similar systems, including the failure to provide and enforce adequate policies and procedures relating to such use of the **Organization's** or **Subsidiary's** Internet, e-mail, telecommunication or similar systems.
- F. **"Financial Insolvency"** shall mean the **Organization** becoming a Debtor in Possession, or the appointment of a receiver, conservator, liquidator, trustee, rehabilitator or similar official to control, supervise, manage or liquidate the **Organization**.
- G. **"Fungi"** shall mean any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents, or byproducts produced or released by fungi.

H. **"Insured"** shall mean:

- (1) the **Organization**;
- (2) any **Subsidiary**;
- (3) in the event of **Financial Insolvency**, the resulting Debtor in Possession (or foreign equivalent status), if any;
- (4) all **Insured Persons**; and
- (5) any **Property Manager**, but only if such **Property Manager** is acting pursuant to the written authority granted by the **Organization** or on behalf of and at the direction of the **Organization** or any **Subsidiary**.

I. **"Insured Persons"** shall mean all persons who were, now are, or shall be directors, trustees, officers, employees, leased employees, temporary or seasonal employees, volunteers or staff members of the **Organization** or any **Subsidiary**, including any executive board members and committee members, whether salaried or not. It shall also mean all persons who were, now are, or shall be directors, trustees, officers, employees, leased employees, temporary or seasonal employees, volunteers or staff members of any **Property Manager**, but only if such persons are acting within the scope of their employment with the **Property Manager** and on behalf of the **Organization** or any **Subsidiary**.

J. **"Loss"** shall mean settlements, judgments, pre-judgment and post-judgment interest, front and back pay, compensatory damages, punitive or exemplary damages, the multiple portion of any multiplied damage award, and subject to the provisions of Section V. and VI., **Costs of Defense** incurred by the **Insured**. **Loss** shall not include:

- (1) criminal or civil fines or penalties imposed by law (except as provided pursuant to Section X. H.), or taxes;
- (2) the value of perquisites, deferred compensation or any other type of compensation earned in the course of employment or the equivalent value thereof; and
- (3) any amounts which may be deemed uninsurable under the law pursuant to which this Policy shall be construed.

It is understood and agreed that the enforceability of the foregoing coverage shall be governed by such applicable law which most favors coverage for punitive or exemplary damages or the multiple portion of any multiplied damage award.

K. **"Organization"** shall mean the entity named in Item 1 of the Declarations.

L. **"Policy Year"** shall mean the period of one year following the effective date and hour of this Policy or the period of one year following any anniversary date thereof falling within the **Policy Period**; or if the time between the effective date or any anniversary date and the termination of this Policy is less than one year, such lesser period. Any **Discovery Period** or **Automatic Discovery Period** shall be considered part of and not in addition to the last **Policy Year**.

M. **"Policy Period"** shall mean the period from the inception of this Policy to the expiration date stated in Item 2 of the Declarations or its earlier termination, if applicable.

N. **"Property Manager"** shall mean any entity providing real estate property management services to the **Organization** or any **Subsidiary** pursuant to a written contract.

O. **"Related Wrongful Acts"** shall mean **Wrongful Acts** which are causally connected by reason of any common fact, circumstance, situation, transaction, casualty, event or decision.

P. "Subsidiary" shall mean:

- (1) any entity which qualifies as a not-for-profit organization under the Internal Revenue Code, other than a political committee organized pursuant to Section 432 of the Federal Election Campaign Act of 1971 (and amendments thereto), and for which the **Organization** has or controls the right to elect or appoint more than fifty percent (50%) of the Board of Directors or other governing body of such entity as of the inception date of this Policy;
- (2) any similar entity which was created or acquired by the **Organization** after the inception date of this Policy, if the entity's total assets do not exceed thirty-five percent (35%) of the total consolidated assets of the **Organization** as of the inception date of this Policy; or
- (3) any other entity added as a **Subsidiary** by written endorsement to this Policy.

Coverage shall apply to a **Subsidiary** only for **Wrongful Acts** allegedly committed during the time such entity qualified as a **Subsidiary**.

Q. "Wrongful Act" shall mean:

- (1) any of the following by the **Organization**, and/or any **Subsidiary**, and/or any **Insured Persons** acting in their capacity with the **Organization** or a **Subsidiary**:
 - (a) actual or alleged error, misstatement, misleading statement, act or omission, neglect or breach of duty;
 - (b) **Employment Practices Wrongful Act**;
- (2) any matter claimed against any **Insured Persons** solely by reason of their status with the **Organization** or any **Subsidiary**.

Section IV. Exclusions

This Policy does not apply to any **Claim** made against any **Insured**:

- A.** brought about or contributed to by: (1) any **Insured** gaining any profit, advantage or remuneration to which they were not legally entitled; or (2) the deliberate fraudulent or criminal acts of any **Insured**; however, this exclusion shall not apply unless it is finally adjudicated such conduct in fact occurred, nor shall it apply to coverage provided under Insuring Agreement I.B.;
- B.** to the extent it is insured in whole or in part by any other valid and collectible policy or policies, (except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies), whether such other policy or policies are stated to be primary, contributory, excess, contingent, or otherwise;
- C.** based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving:
 - (1) any **Wrongful Act** or **Related Wrongful Act** or any fact, circumstance or situation which has been the subject of any notice or **Claim** given under any other policy of which this Policy is a renewal or replacement;
 - (2) any **Wrongful Act** or any circumstance known by any **Insured Person** prior to the date stated in Item 8 of the Declarations which would indicate the probability of such **Claim** being made, provided, however, this exclusion shall only apply to the **Organization**, its **Subsidiaries** and those **Insured Persons** having such knowledge; or

- (3) any civil, criminal, administrative or investigative proceeding involving any **Insured** pending as of or prior to the date stated in Item 8 of the Declarations, or any fact, circumstance or situation underlying or alleged in such proceeding;
- D. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: (1) bodily injury, sickness, disease or death of any person, assault or battery; (2) damage to or destruction of any tangible property or the loss of use of any tangible property; or (3) humiliation, mental anguish, emotional distress, invasion of privacy, wrongful entry, trespassing, eviction, false arrest, false imprisonment, malicious prosecution, abuse of process, libel or slander; provided, however, that part (3) of this exclusion shall not apply to any **Claim** for an **Employment Practices Wrongful Act**;
- E. for any actual or alleged violation by any **Insured** of the Employee Retirement Income Security Act of 1974, the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Occupational Safety and Health Act or any rules or regulations promulgated under these acts or any similar provisions of any federal, state, local or foreign law, except a **Claim** alleging retaliation for the exercise of any rights under such laws;
- F. for any **Wrongful Act** of any **Insured Persons** in their respective capacity as a director, officer, trustee, or equivalent position of an entity other than the **Organization** or any **Subsidiary**;
- G. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged seepage, pollution, radiation, emission, contamination or irritant of any kind, including but not limited to smoke, vapor, dust, fibers, mold, spores, fungi, germs, soot, fumes, acids, alkalis, asbestos, chemicals or waste of any kind, provided, however, this exclusion shall not apply to coverage provided under Insuring Agreement 1.A.;
- H. by, or for the benefit of, or at the behest of the **Organization** or any **Subsidiary** or any entity which controls, is controlled by, or is under common control with the **Organization** or any **Subsidiary**, or any person or entity which succeeds to the interests of the **Organization** or any **Subsidiary**, provided, however, this exclusion shall not apply to any **Claim** brought by the receiver, conservator, liquidator, trustee, rehabilitator, examiner or similar official of the **Organization**, if any, in the event of **Financial Insolvency**;
- I. other than **Costs of Defense**:
- (1) for any obligation of the **Organization** or any **Subsidiary**, as a result of a **Claim**, seeking relief or redress in any form other than money damages, including but not limited to any obligations of the **Organization** or any **Subsidiary** to modify any building or property;
 - (2) for any obligation of the **Organization** or any **Subsidiary** to pay compensation earned by any **Insured Person** in the course of employment, but not paid by the **Organization** or any **Subsidiary**, including any unpaid salary, bonus, wages, severance pay, retirement benefits, vacation days or sick days, provided, however, this exclusion shall not apply to front pay and back pay;
 - (3) for any actual or alleged violation by any **Insured** of the Fair Labor Standards Act or any similar state or local law, provided, however, this exclusion shall not apply to the Equal Pay Act. **Costs of Defense** provided pursuant to this section, I.(3), shall be subject to the FLSA Defense Sublimit of Liability stated in Item 3 of the Declarations, if any; or
 - (4) for any actual or alleged liability of any **Insured** under any contract or agreement, express or implied, written or oral; provided, however this exclusion shall not apply to employment related obligations which would have attached absent such contract or agreement;

- J. for any obligations under a worker's compensation, disability benefits, insurance benefits or unemployment compensation law, or any similar law; provided, however this exclusion shall not apply to a **Claim** for an **Employment Practices Wrongful Act** involving retaliation with regard to benefits paid or payable;
- K. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving:
 - (1) actual, alleged or threatened:
 - (a) inhalation of, ingestion of, contact with, or exposure to any **Fungi** or bacteria; or
 - (b) existence of or presence of any **Fungi** or bacteria on or within a building or structure including its contents, regardless of whether any other cause, event, material, or product contributed concurrently or in any sequence to any injury or damage; or
 - (2) any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating, disposing of, or in any way responding to, or assessing the effects of **Fungi** or bacteria by any **Insured** or by any other person or entity;
- L. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged **Construction Defect(s)**;
- M. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving any actual or alleged liability of an **Insured**, in whole or in part, in the capacity as a builder or developer, or in the capacity of a sponsor of the **Organization**, or of an **Insured** affiliated with such a builder, developer or sponsor, and which is related to actual or alleged misconduct on the part of such builder, developer or sponsor, including but not limited to actual or alleged conflict of interest, self-dealing, or disputes concerning conversion, construction or development;
- N. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged noise.

With respect to this section of the Policy, no fact pertaining to or conduct by any **Insured Person** shall be imputed to any other **Insured Person**; and only facts pertaining to or conduct by any past, present, or future Executive Director, President, or Chairman of the **Organization** shall be imputed to the **Organization** or any **Subsidiary** to determine if coverage is available.

Section V. Limits of Liability and Retention

- A. The **Insurer** shall be liable to pay one hundred percent (100%) of **Loss** in excess of the Retention stated in Item 4 of the Declarations. The **Insurer's** maximum Limit of Liability for the aggregate amount of **Loss** resulting from all **Claims** deemed to have been made in a **Policy Year** shall be shown in Item 3 of the Declarations.
- B. One Retention shall apply to each and every **Claim**. More than one **Claim** involving the same **Wrongful Act** or **Related Wrongful Acts** of one or more **Insureds** shall be considered a single **Claim**, and only one Retention shall be applicable to such single **Claim**. All such **Claims**, constituting a single **Claim**, shall be deemed to have been made on the earlier of the following dates: (1) the earliest date on which any such **Claim** was first made; or (2) the earliest date on which any such **Wrongful Act** or **Related Wrongful Act** was reported under this Policy or any other policy providing similar coverage.

- C. **Costs of Defense** incurred by the **Insurer** shall be in addition to the Limit of Liability, and such **Costs of Defense** shall not be subject to the Retention amount. If **Costs of Defense** are incurred by the **Insured** with the **Insurer's** consent, such **Costs of Defense** shall be considered **Loss** and thus subject to the Limit of Liability and Retention.
- D. With respect to all **Claims** deemed to have been made in a **Policy Year**, should the Limit of Liability be exhausted by payment of **Loss** resulting from one or more such **Claims**, the **Insurer's** duty to defend shall cease and any and all obligations of the **Insurer** hereunder shall be deemed to be completely fulfilled and extinguished and the **Insurer** shall have no further obligations.
- E. For the purpose of applying the Retention, **Loss** applicable to Insuring Agreement I.B. includes that for which indemnification is legally permissible, regardless of whether actual indemnification is granted. The certificate of incorporation, charter or other organizational document of the **Organization**, including by-laws and resolutions, shall be deemed to require indemnification and advancement of **Loss** to the **Insured Persons** to the fullest extent permitted by law.

Section VI. Costs of Defense and Settlements

- A. The **Insureds** shall not incur **Costs of Defense**, or admit liability, offer to settle, or agree to any settlement in connection with any **Claim** without the express written consent of the **Insurer**, which consent shall not be unreasonably withheld. The **Insureds** shall provide the **Insurer** with full cooperation and all information and particulars it may reasonably request in order to reach a decision as to such consent. Any **Loss** resulting from any admission of liability, agreement to settle, or **Costs of Defense** incurred prior to the **Insurer's** consent shall not be covered hereunder.
- B. The **Insurer** has the right to investigate and settle any **Claim** as it deems expedient. If the **Insurer** recommends a settlement and the **Insured** refuses to consent thereto, the **Insurer's** liability for such **Claim** is limited to the amount in excess of the Retention, which the **Insurer** would have contributed had the **Insured** consented to the settlement, the **Costs of Defense** covered by the Policy and incurred prior to the date of such refusal to settle, and fifty percent (50%) of any additional covered **Loss**, including **Costs of Defense**, incurred subsequent to such refusal and subject to the Limit of Liability.

If the **Insured** refuses to consent to a settlement as contemplated above, **Costs of Defense** shall be subject to the Retention.

Section VII. Notice of Claim

- A. The **Insureds** shall, as a condition precedent to their rights under this Policy, give the **Insurer** notice in writing of any **Claim** made during the **Policy Period**. Such notice shall be given as soon as practicable after the date a Board Member or an employee of the **Property Manager** has knowledge of the **Claim**, and in no event later than ninety (90) days after the end of the **Policy Period**.
- B. If during the **Policy Period** or **Discovery Period**, any **Insured** first becomes aware of a specific **Wrongful Act** and gives notice to the **Insurer** of: (1) the specific **Wrongful Act**; (2) the injury or damage which has or may result therefrom; and (3) the circumstances by which the **Insured** first became aware thereof; then any **Claim** arising out of such **Wrongful Act** which is subsequently made against the **Insured** shall be deemed to have been made at the time the **Insurer** received such written notice from the **Insured**.

- C. In addition to furnishing the notice as provided in Section VII A or B, the **Insured** shall, as soon as practicable, provide the **Insurer** with copies of reports, investigations, pleadings and other documents in connection therewith, and shall provide all information, assistance and cooperation which the **Insurer** reasonably requests and do nothing to prejudice the **Insurer's** position or its potential or actual rights of recovery.
- D. Notice to the **Insurer** as provided in Section VII A or B shall be emailed to **ELDCIaims@galc.com** or mailed to **GREAT AMERICAN INSURANCE GROUP, EXECUTIVE LIABILITY DIVISION, CLAIMS DEPARTMENT, P.O. BOX 66943, CHICAGO, IL 60666.**

Section VIII. Coverage Extensions

A. Spousal/Domestic Partner Provision

The coverage provided by this Policy shall also apply to the lawful spouse or "Domestic Partner" of any **Insured Person**, but only for **Claims** arising out of any actual or alleged **Wrongful Acts** of any **Insured Person**. The term "Domestic Partner" shall mean any natural person qualifying as a domestic partner under the provisions of any applicable federal, state or local law.

B. Worldwide Provision

The coverage provided under this Policy shall apply worldwide. The term **Insured Persons** is deemed to include individuals who serve in equivalent positions in foreign **Subsidiaries**.

C. Estates and Legal Representatives

The coverage provided by this Policy shall also apply to the estates, heirs, legal representatives, or assigns of any **Insured Persons** in the event of their death, incapacity or bankruptcy, but only for **Claims** arising out of any actual or alleged **Wrongful Acts** of any **Insured Persons**.

Section IX. General Conditions

A. Cancellation or Non-Renewal

- (1) This Policy may be cancelled by the **Organization** at any time by written notice to the **Insurer**. In the event the **Organization** cancels this Policy for reasons other than the downgrade of the **Insurer's** rating by A.M. Best, the **Insurer** shall retain the customary short rate portion of the premium. However, if the **Organization** cancels the Policy due to a downgrade of the **Insurer's** rating to below [A-] by A.M. Best, the **Insurer** shall refund any unearned premium on a pro rata basis. Payment of any unearned premium by the **Insurer** shall not be a condition precedent of the effectiveness of cancellation but such payment shall be made as soon as practicable.
- (2) This Policy will only be cancelled by the **Insurer** if the **Organization** does not pay the premium when due.
- (3) If the **Insurer** elects not to renew this Policy, the **Insurer** shall provide the **Organization** with at least sixty (60) days advance notice thereof.

B. Proposal Form

It is agreed the particulars and statements contained in Proposal Forms submitted to the **Insurer** (and any material submitted therewith) are the representations of the **Insured** and are to be considered as incorporated in and constituting part of this Policy. It is also agreed this Policy is issued in reliance upon the truth of such representations. However, coverage shall not be excluded as a result of any untrue statement in the Proposal Form, except as to the **Organization**, its **Subsidiaries**, and any **Insured Person** making such untrue statement or having knowledge of its falsity.

In no event shall Insuring Agreement I.A. of this Policy be rescinded by the **Insurer**.

C. Order of Payments

In the event of **Loss** arising from a covered **Claim** for which payment is due under the provisions of this Policy, the **Insurer** shall first, pay **Loss** for which coverage is provided under Insuring Agreement I.A. of this Policy; and thereafter with respect to whatever remaining amount of the Limit of Liability is available after such payment, pay such other **Loss** for which coverage is provided under any other applicable Insuring Agreements in Section I of this Policy.

D. Merger or Acquisition

If, during the **Policy Period**, the **Organization** acquires the assets of another entity, by merger or otherwise, and the acquired assets of such other entity exceed thirty-five percent (35%) of the assets of the **Organization** as of the inception date of the Policy, written notice thereof shall be given to the **Insurer** as soon as practicable, but in no event later than ninety (90) days from the effective date of the transaction, together with such information as the **Insurer** may request. Premium adjustment and coverage revisions shall be effected as may be required by the **Insurer**.

E. Conversion to Run-Off Coverage

If prior to the end of the **Policy Period**, the **Organization** merges into another organization and the **Organization** is not the surviving entity, another organization or person acquires the right to elect or appoint more than fifty percent (50%) of the Board of Directors or other governing body of the **Organization**, or the **Organization** ceases to qualify as a not-for-profit organization under any federal, provincial and territorial legislation and/or the Internal Revenue Code (such events hereinafter referred to as **Transaction**), then:

- (1) the **Organization** must give written notice of such **Transaction** to the **Insurer** within thirty (30) days after the effective date of such **Transaction**, and provide the **Insurer** with such information as the **Insurer** may deem necessary; and
- (2) this Policy, including the **Discovery Period** if elected, shall apply, but only with respect to any **Wrongful Act** committed prior to the effective date of such **Transaction**.

F. Action Against the Insurer

- (1) No action shall be taken against the **Insurer** unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this Policy, and until the **Insured's** obligation to pay shall have been finally determined by an adjudication against the **Insured** or by written agreement of the **Insured**, those filing the claim, and the **Insurer**.
- (2) No person or organization shall have any right under this Policy to join the **Insurer** as a party to any **Claim** against any **Insured** nor shall the **Insurer** be impleaded by any **Insured** or their legal representative in any such **Claim**.

G. Subrogation

In the event of payment under this Policy, the **Insurer** shall be subrogated to all the **Insureds'** rights of recovery. The **Insureds** shall do everything necessary to secure such rights, including the execution of such documents necessary to enable the **Insurer** to effectively bring suit in the name of any **Insured**. In no event, however, shall the **Insurer** exercise its rights to subrogation against an **Insured Person** under this Policy unless, such **Insured Person**:

- (1) has been convicted of a deliberate criminal act, or
- (2) has been determined by a final adjudication adverse to the **Insured Person** to have committed a deliberate fraudulent act, or to have obtained any profit, advantage or remuneration to which such **Insured Person** was not legally entitled.

In the event the **Insurer** shall for any reason pay indemnifiable **Loss** on behalf of an **Insured Person**, the **Insurer** shall have the contractual right hereunder to recover from the **Organization** or any **Subsidiary** the amount of such **Loss** equal to the amount of the Retention not satisfied by the **Organization** or any **Subsidiary** and shall be subrogated to rights of the **Insured Persons** hereunder.

H. Conformity to Law

Any terms of this Policy which are in conflict with the terms of any applicable laws are hereby amended to conform to such laws.

I. Assignment

Assignment of interest under this Policy shall not bind the **Insurer** until its consent is endorsed hereon.

J. Representative of the Insurer

Great American Insurance Group, Executive Liability Division, Post Office Box 66943, Chicago, Illinois, 60666 shall act on behalf of the **Insurer** for all purposes including, but not limited to, the giving and receiving of all notices and correspondence.

K. Organization Represents Insured

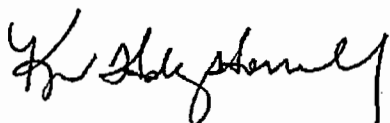
By acceptance of this Policy, the **Organization** shall be designated to act on behalf of the **Insureds** for all purposes including, but not limited to, giving and receiving of all notices and correspondence, the cancellation or non-renewal of this Policy, the payment of premiums, and the receipt of any return premiums that may be due under this Policy.

L. Entire Agreement

By acceptance of this Policy, the **Insured** and the **Insurer** agree that this Policy (including the Proposal Forms submitted to the **Insurer** and any materials submitted therewith) and any written endorsements attached hereto constitute the entire agreement between the parties.

In witness whereof the **Insurer** has caused this Policy to be signed by its President and Secretary and countersigned, if required, on the Declarations page by a duly authorized agent of the **Insurer**.

GREAT AMERICAN INSURANCE COMPANY®



Secretary



President



ExecProsm
DECLARATIONS
for
Community Association
Solution
Insurance Policy

Insurance is afforded by the company indicated below: (Each a capital stock corporation)

☒ Great American Insurance Company
Policy Number: **EPP3654704-01**

Policy Form Number: **D26100-2610**

Item 1. Name of Organization: **Tilghman Beach & Racquet Club HOA Inc.**
Mailing Address: **11822 HIGHWAY 17 BYP**

City, State, Zip Code: **MURRELLS INLET, SC, 29576-9337**

Item 2. Policy Period: **FROM 02-10-2016 To 02-10-2017**
(Month, Day, Year) (Month, Day, Year)
(Both dates at 12:01 a.m. Standard Time at the address of the Organization as stated in Item 1.)

Item 3. (a) Limit of Liability for each Policy Year: **\$1,000,000**
(b) FLSA Defense Sublimit of Liability: **\$150,000** - This limit is part of and not in addition to the Limit of Liability provided for in 3(a).

Item 4. Retentions:
Insuring Agreement A: **\$0** Each Claim
Insuring Agreement B and/or C: **\$1,000** Each Claim

Item 5. Premium: **\$2,559.00** Annual Taxes/Surcharges: **\$0.00** Annual Fees: **\$0.00**

Item 6. Endorsements Attached:
ExecPro - Community Association Solution D 26100 (2/10)
Terrorism Coverage Endorsement DTCV_09P (11/09)
Terrorism Coverage Premium Disclosure DTDP_09P (11/09)
Deletion of Noise Exclusion D 26714-2 (11/12)
Terrorism Coverage Policyholder Disclosure NTDN_08P (1/08)
Data Security Wrongful Acts and Privacy Wrongful Acts Coverage Endorsement D26740 (10/14)

Item 7. Notices: All notices required to be given to the Insurer under this policy shall be addressed to:
Great American Insurance Companies
Executive Liability Division
P.O. Box 66943
Chicago, Illinois 60666

Item 8. Prior & Pending Litigation Date: **02-10-2015**

These Declarations along with the completed and signed Proposal Form and community Associations Solution Insurance Policy shall constitute the contract between the Insureds and the Insurer.

THIS IS A CLAIMS MADE POLICY. READ IT CAREFULLY.

COVERAGE FOR ACTS OF TERRORISM

It is understood and agreed that the General Conditions of the Policy are amended by the addition of the following:

Act of Terrorism Coverage

Subject to all other terms and conditions of this Policy, coverage is available for Loss caused by an Act of Terrorism as defined below.

"Act of Terrorism" means any act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States -

- (i) to be an act of terrorism;
- (ii) to be a violent act or an act that is dangerous to -
 - (a) human life;
 - (b) property; or
 - (c) infrastructure;
- (iii) to have resulted in damage within the United States, or outside of the United States in the case of -
 - (a) an air carrier or vessel described in Section (5)(B) of the Terrorism Risk Insurance Act; or
 - (b) the premises of a United States mission; and
- (iv) to have been committed by an individual or individuals, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

With respect to any one or more Acts of Terrorism under the Terrorism Risk Insurance Act, as amended in 2007, we will not pay any amounts for which we are not responsible under the terms of that Act (including subsequent action of Congress pursuant to the Act) due to the application of any clause which results in a cap on our liability for payments for terrorism losses.

No act shall be certified by the Secretary as an Act of Terrorism if (i) the act is committed as part of the course of a war declared by Congress, except that this clause shall not apply with respect to any coverage for workers compensation; or (ii) property and casualty insurance losses resulting from the act, in the aggregate, do not exceed \$5,000,000.

Other than as stated above, nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the Policy to which this endorsement is attached.

Insured: **Tilghman Beach & Racquet Club HOA Inc.**

Policy Period **02-10-2016 - 02-10-2017**

Policy Number: **EPP3654704-01**

Countersigned by: **Not Required**
Authorized Representative

Endorsement Effective Date: **02-10-2016**

AMENDMENT TO DECLARATIONS PAGE

It is understood and agreed that the Declarations is amended by the addition of the following:

Act of Terrorism Premium: \$0.00

It is further understood and agreed the Policyholder Disclosure of Terrorism Coverage is attached to and is to be considered as incorporated and constituting a part of this Policy.

Other than as stated above, nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the Policy to which this endorsement is attached.

Insured: **Tilghman Beach & Racquet Club HOA Inc.**

Policy Period **02-10-2016 - 02-10-2017**

Policy Number: **EPP3654704-01**

Countersigned by: **Not Required**
Authorized Representative

Endorsement Effective Date: **02-10-2016**



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DELETION OF NOISE EXCLUSION

It is understood and agreed that Section IV.N. of the policy is deleted in its entirety.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.

Insured:

Policy Period

Policy Number:

Countersigned by: _____

Endorsement Effective Date:

Authorized Representative



POLICYHOLDER DISCLOSURE OF TERRORISM COVERAGE

The Terrorism Risk Insurance Act establishes a program within the Department of the Treasury, under which the federal government shares, with the insurance industry, the risk of loss from future terrorist attacks. The Act applies when the Secretary of the Treasury certifies that an event meets the definition of an Act of Terrorism. The Act provides that, to be certified, an Act of Terrorism must cause losses of at least five million dollars and must have been committed by an individual or individuals as part of an effort to coerce the government or population of the United States.

The United States Government, Department of the Treasury, will pay a share of terrorism losses insured under the federal program. The federal share equals 85% of that portion of the amount of such insured losses that exceeds the applicable insurer retention.

The Terrorism Risk Insurance Act, as amended in 2007, contains a \$100 billion cap that limits U.S. Government reimbursement as well as insurers' liability for losses resulting from certified acts of terrorism when the amount of such losses in any one calendar year exceeds \$100 billion. If the aggregate insured losses for all insurers exceed \$100 billion, your coverage may be reduced.

In accordance with the Terrorism Risk Insurance Act, we are required to offer you coverage for losses resulting from an act of terrorism that is **certified under the federal program** as an Act of Terrorism. All other provisions of this policy will still apply to such an act. That is, an act will not be excluded or covered just because it was caused by an Act of Terrorism.

The portion of the annual premium that is attributable to coverage for Acts of Terrorism that are certified under the Terrorism Risk Insurance Act is \$0.00.

All other terms and conditions of the policy remain unchanged.

If you would like to reject the coverage for "certified" Acts of Terrorism, please provide Great American written confirmation of such, and an exclusion will be attached to your policy.



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**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

Solely for purposes of coverage provided by this endorsement, it is understood and agreed that the following changes are made to the Policy:

THIRD PARTY COVERAGE

Section I. is deleted and replaced with the following:

Section I. Insuring Agreements

- A. If during the **Policy Period** or the **Discovery Period** any **Claim**, including a **Regulatory Action**, is first made against any **Insured Persons** for a **Data Security Wrongful Act** or a **Privacy Wrongful Act**, the **Insurer** shall pay on behalf of the **Insured Persons**, **Loss and Costs of Defense** resulting from such **Claim**, except for any **Loss and Costs of Defense** which the **Organization** or any **Subsidiary** actually pays as indemnification.
- B. If during the **Policy Period** or the **Discovery Period** any **Claim**, including a **Regulatory Action**, is first made against any **Insured Persons** for a **Data Security Wrongful Act** or a **Privacy Wrongful Act** the **Insurer** shall pay on behalf of the **Organization**, **Subsidiary** or **Property Manager**, **Loss and Costs of Defense** resulting from such **Claim**, but only to the extent the **Organization** or any **Subsidiary** is required or permitted by law to indemnify the **Insured Persons**.
- C. If during the **Policy Period** or the **Discovery Period** any **Claim**, including a **Regulatory Action**, is first made against the **Organization**, **Subsidiary** or **Property Manager** for a **Data Security Wrongful Act** or a **Privacy Wrongful Act**, the **Insurer** shall pay on behalf of the **Organization** or any **Subsidiary**, **Loss and Costs of Defense** resulting from such **Claim**.

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

FIRST PARTY COVERAGE FOR ORGANIZATION AND SUBSIDIARIES

Section VIII. is amended by the addition of the following:

D. Privacy Event Expenses Provision

The **Insurer** shall reimburse or pay on behalf of the **Organization** or any **Subsidiary** all **Privacy Event Expenses** in excess of the applicable **Retention** stated in Item 4. of the **Declarations** and up to the applicable **Limits of Liability** stated in Item 3. of the **Declarations** that the **Organization** or any **Subsidiary** incurs as a direct result of a **Data Breach** provided:

Insured: Tilghman Beach & Racquet Club HOA Inc.

Policy Period: 02-10-2016 - 02-10-2017

Policy Number: EPP3654704-01

Countersigned by: _____
Authorized Representative

Endorsement Effective Date: 02-10-2016



**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

- (1) such **Data Breach** is first discovered during the **Policy Period**;
- (2) prior to the inception date of the first policy issued by the **Insurer** to the **Organization** and continuously renewed, no **Insured** had a basis to believe that any such **Data Breach** might reasonably be expected;
- (3) the **Insured** reports such **Data Breach** in accordance with the Reporting Obligations for a **Data Breach** section below; and
- (4) the **Insured** obtains the **Insurer's** advance written consent to incur such **Privacy Event Expenses**.

AMENDMENT TO DEFINITIONS

1. Section III.A. is amended by the addition of the following:

Claim shall also mean a **Regulatory Action**.

2. Section III.J. is amended by the addition of the following:

Loss shall also mean **Privacy Regulatory Fines and Penalties**, **Privacy Event Expenses** and **Regulatory Restitution Funds**.

3. Section III. is amended by the addition of the following:

"Computer Systems" shall mean any computer, network of computers, mobile device, or internet-enabled or networked telephone, printer, copier or other device, if owned, leased or operated by or on behalf of the **Organization** or any **Subsidiary** in connection with the **Insured's** ordinary business activities, including if operated by a cloud computer provider on behalf of the **Organization** or any **Subsidiary**.

"Data Asset" shall mean software and electronic data, including but not limited to databases, audio files, video files or other image files, maintained by or on behalf of the **Organization** or any **Subsidiary** in connection with the **Organization** or any **Subsidiary's** business operations.

"Data Breach" shall mean the unauthorized access to, loss of control over or disclosure of **Protected Information** maintained by the **Insured** or by those acting on behalf of the **Insured**.

"Data Security Wrongful Act" shall mean an actual or alleged negligent act, error or omission by or on behalf of the **Insured** in the performance of the **Organization** or any **Subsidiary's** business that causes or fails to prevent:



**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

- (1) the theft of, or unauthorized access to, or disclosure or use of, the **Data Asset** of a client or customer of the **Organization** or any **Subsidiary** stored on the **Computer Systems**;
- (2) unauthorized access to or use of the **Computer Systems** that results in the alteration, corruption, destruction, deletion or damage to **Data Asset** of a client or customer of the **Organization** or any **Subsidiary** stored on the **Computer Systems**;
- (3) the transmission of any virus, worm, trojan horse, backdoor or similar malicious software program or code from the **Computer Systems** to a third party's computer systems;
- (4) unauthorized access to or use of the **Computer Systems** that results in damage or disruption to computer systems of any third party or any **Data Asset** on such third party computer systems, including through a denial-of-service attack or similar action by an unauthorized person; or
- (5) a denial-of-service attack or similar action by any unauthorized person that makes the **Computer Systems** unavailable to authorized clients or customers of the **Organization** or any **Subsidiary**.

"Privacy Event Expenses" shall mean the reasonable and necessary:

- (1) legal and forensic fees and costs to investigate the cause of the **Data Breach**, identify persons affected or potentially affected and determine the extent that any law, regulation, statute or contract requires notification of the **Data Breach**;
- (2) costs of notification of the **Data Breach**, if required by law, regulation, statute or contract or voluntarily incurred with the **Insurer's** prior written consent; and
- (3) costs to monitor, freeze or thaw credit or provide credit restoration services for persons affected by the **Data Breach**.

"Privacy Wrongful Act" shall mean an actual or alleged negligent act, error or omission by or on behalf of the **Insured** in the performance of the **Organization** or any **Subsidiary's** business that causes or fails to prevent:

- (1) the theft of, or unauthorized access to, or disclosure or use of, **Protected Information** held or maintained by or on behalf of the **Organization** or any **Subsidiary**, including by a cloud service provider or other vendor for the **Organization** or any **Subsidiary**, if such theft, access, disclosure or use:
 - a) results in identity theft or other misuse of such **Protected Information**;
 - or



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Insurance Policy

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**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

- b) violates any federal, state, local or foreign law or regulation, or the **Organization** or any **Subsidiary's** published policies, regarding the maintenance, protection, use or disclosure of **Protected Information**;
- (2) violation of any federal, state, local or foreign law or regulation, or any publicly stated policy of the **Organization** or any **Subsidiary**, relating to **Protected Information** that:
 - a) prohibits or restricts the **Insured's** collection, sharing or selling of **Protected Information**; or
 - b) requires the **Insured** to provide access to **Protected Information** or upon request, correct incomplete or inaccurate **Protected Information**; or
- (3) any fraudulent website or electronic communication, including a phishing email, from impersonating the **Insured** and causing financial loss to any customer or client of the **Organization** or any **Subsidiary**.

"Privacy Regulatory Fines and Penalties" shall mean the sums the **Organization** or any **Subsidiary** is required to pay as part of the settlement or judgment of a covered **Regulatory Action**.

"Protected Information" shall mean:

- (1) any non-public personally identifiable information, including financial, medical or health care information, held or maintained by or on behalf of the **Insured** in connection with the **Organization's** or any **Subsidiary's** business operations, whether in electronic form or otherwise, which is protected from unauthorized access or disclosure by any federal, state, local or foreign law or regulation or by any publicly stated policy of the **Insured**; and
- (2) confidential, non-public business information of a third party that is in the care or custody of the **Organization** or any **Subsidiary** pursuant to a confidentiality agreement between the **Organization** or any **Subsidiary** and such third party.

"Regulatory Action" shall mean a written request for information, civil investigation or administrative proceeding or civil proceeding brought by any local, state, federal or regulatory agency for any **Privacy Wrongful Act** in connection with a **Data Breach**. However, **Regulatory Action** shall not include any written request, investigation or proceeding brought by or on behalf of the Securities and Exchange Commission.



DATA SECURITY WRONGFUL ACTS AND PRIVACY WRONGFUL ACTS COVERAGE ENDORSEMENT

"Regulatory Restitution Fund" shall mean any sums deposited into a fund and used to provide compensation to individuals affected by a **Privacy Wrongful Act** as part of the settlement or judgment of a **Regulatory Action**.

4. Section III.Q. is amended by the addition of the following:

Wrongful Act shall also mean a **Data Security Wrongful Act** and a **Privacy Wrongful Act**.

AMENDMENT TO EXCLUSIONS

1. Section IV.B. is deleted and replaced with the following:
 - B. to the extent it is insured in whole or in part by any other valid and collectible policy or policies, (except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies), whether such other policy or policies are stated to be primary, contributory, excess, contingent, or otherwise; provided, however, that coverage for all **Data Breaches and Claims for Personal Injury Wrongful Acts, Data Security Wrongful Acts and/or Privacy Wrongful Acts** shall be specifically excess of any similar coverage provided pursuant to terms and conditions of any general liability policy, business owner policy or cyber liability policy issued to the **Organization** or any **Subsidiary**.
2. Section IV.D. is deleted and replaced with the following:
 - D. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: (1) bodily injury, sickness, disease or death of any person, assault or battery; (2) damage to or destruction of any tangible property; or (3) humiliation, mental anguish, or emotional distress; provided, however, that part (3) of this exclusion shall not apply to any **Claim** for a **Privacy Wrongful Act**;
3. The **Insurer** shall not be liable for **Loss, Costs of Defense** or any other payment for any **Claim** made against any **Insured** or any **Data Breach** based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged:



DATA SECURITY WRONGFUL ACTS AND PRIVACY WRONGFUL ACTS COVERAGE ENDORSEMENT

- (1) mechanical or electrical failure or outage, routine wear and tear, or a disruption or failure of any infrastructure service or utility supplied by a third-party, including but not limited to power, water, gas, communications or connectivity; provided, however, this exclusion shall not apply to a **Claim** for a **Privacy Wrongful Act**;
- (2) fire, smoke, explosion, lightning, wind, flood, earthquake, volcanic eruption, tidal wave, landslide, hail or act of God or any other physical event, however caused;
- (3) price-fixing, restraint of trade or monopolization;
- (4) violation of any federal, provincial, state, local or foreign statute or regulation prohibiting or restricting unsolicited communications, regardless of whether such communication was transmitted via facsimile, email, text, telephone or otherwise, including but not limited to the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, the Canadian Anti-Spam Law (CASL) and the Telephone Consumer Protection Act (TCPA);
- (5) misappropriation, infringement or theft, or inducement of misappropriation, infringement or theft of trade secrets;
- (6) war including undeclared or civil war, or seizure, confiscation, expropriation, nationalization, or destruction of a **Computer System** by order of any governmental authority;
- (7) potential violation of any federal, state, foreign or local law or regulation and investigated or pursued by a federal, state, foreign or local regulatory agency or other governmental body, provided, however, this exclusion shall not apply to a **Regulatory Action**;
- (8) act, error, omission or circumstance, which was known by the President, Executive Director, Chairman of the Board, Chief Information Officer, Chief Technology Officer, Chief Security Officer, Risk Manager, General Counsel (or the functional equivalent of any of the foregoing) prior to the inception date of the first policy issued by the **Insurer** to the **Organization** and continuously renewed and which could have been reasonably foreseen to be the basis for a **Claim** or **Data Breach**, including, but not limited to, knowledge of security weaknesses, or vulnerabilities in software, hardware or firmware; or
- (9) breach of any express or implied contract, agreement, warranty or guarantee, including, but not limited to, any express or implied contract or agreement to pay royalties or to account for same; provided, however, this exclusion shall not apply to:



Community Association Solution
Insurance Policy

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**DATA SECURITY WRONGFUL ACTS AND PRIVACY
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- a) any liability that an **Insured** would have incurred in the absence of such contract, agreement, warranty or guarantee; or
 - b) a **Privacy Wrongful Act** when the actual or alleged breach of contract or agreement is to secure or maintain **Protected Information**.
4. The **Insurer** shall not be liable for **Loss, Costs of Defense** or any other payment for any **Claim** made against any **Insured** or any **Data Breach** for:
- (1) any fees or costs to update or improve a **Data Asset** to a level beyond that which existed prior to any **Data Breach** or **Data Security Wrongful Act**;
 - (2) any fees or costs to correct or remediate software program errors or vulnerabilities or deficiencies or problems with any **Computer System** not directly resulting from a **Data Security Wrongful Act**;
 - (3) any amounts incurred by any **Insured** prior to the date a **Claim** is reported to the **Insurer** pursuant to Section VII. or a **Data Breach** is reported pursuant to the Reporting Obligations set below;
 - (4) any overhead expenses of the **Organization** or any **Subsidiary**, including but not limited to compensation or benefits; or
 - (5) the economic or market value of any **Data Asset**.

AMENDMENTS TO LIMITS OF LIABILITY AND RETENTIONS

1. Item 3. of the Declarations is amended by the addition of the following:
- (c) \$50,000 Sublimit of Liability for all **Privacy Event Expenses** from all **Data Breaches**. This Sublimit is part of and not in addition to the Limit of Liability provided for in 3(a).
 - (d) \$250,000 Limit of Liability for all **Loss** from all **Claims**, including **Regulatory Actions**, for **Data Security Wrongful Acts** or **Privacy Wrongful Acts**. This limit is part of and not in addition to the Limit of Liability provided for in 3(a).



DATA SECURITY WRONGFUL ACTS AND PRIVACY WRONGFUL ACTS COVERAGE ENDORSEMENT

2. Item 4. of the Declarations is deleted and replaced with the following:

Item 4. Retentions

Insuring Agreement A:	\$ <u>0</u>	Each Claim for Privacy Wrongful Acts
Insuring Agreement B and/or C:	<u>\$1,000</u>	Each Claim for Privacy Wrongful Acts
	<u>\$1,000</u>	Each Reimbursement for Privacy Event Expenses pursuant to Section VIII.D. of the Policy

3. Section V. of the Policy is amended by the addition of the following:

The "Each Reimbursement for Privacy Event Expenses" Retention amount stated in Item 4. of the Declarations is the **Organization's** obligation for all **Privacy Event Expenses** from each **Data Breach**.

The "Each Claim for Data Security Wrongful Acts or Privacy Wrongful Acts" Retention stated in Item 4. of the Declarations is the **Organization's** obligation for each **Claim**, including any **Regulatory Action**. If a **Claim** and **Privacy Event Expenses** arise out of the same **Privacy Wrongful Act** or **Data Breach**, any amounts paid by the **Organization** in satisfaction of the "Each Reimbursement Privacy Event Expenses" Retention will also erode the "Each Claim for Data Security Wrongful Acts or Privacy Wrongful Acts" Retention with respect to such **Claim**.

4. Section V.C. is deleted and replaced with the following:

C. **Costs of Defense** incurred by either the **Insurer** or **Insured** shall be subject to applicable Retention and the Limit of Liability for all **Claims**, including **Regulatory Actions**, for **Data Security Wrongful Acts** or **Privacy Wrongful Acts**.

REPORTING OBLIGATIONS FOR A DATA BREACH

After a **Data Breach** is first discovered by an **Insured**, the **Insured** shall, as a condition precedent to coverage pursuant to this endorsement:

- (a) notify the **Insurer** of the **Data Breach** as soon as practicable but in no event later than thirty (30) days after the **Data Breach** is first discovered;



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- (b) take reasonable measures to stop or mitigate the damage caused by such **Data Breach**;
- (c) give the **Insurer**, upon request, a detailed proof of the damage caused by such **Data Breach**;
- (d) submit, upon request of the **Insurer**, to examination under oath and give the **Insurer** a signed statement of the **Insured's** answers; and
- (e) cooperate with the **Insurer** in the investigation and settlement of any payments as a result of the **Data Breach**.

For the purposes of coverage extended by this endorsement, a **Data Breach** is "first discovered" when any **Insured** first becomes aware of facts that would cause a reasonable person to assume a **Privacy Wrongful Act** has occurred even though the exact amount or details of loss may not then be known.

Notice of the **Data Breach** shall be given to the **Insurer** at the address indicated in Section VII.D. of the Policy.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.

1

2 State of South Carolina) Court of Common Pleas
3 County of Horry) 2016-CP-26-04464

4

5

6 Jill Keck Humphries,)
7 vs.) Transcript of Record
8 Tilghman Beach and)
9 Racquet Club Condominium)
Association, Inc., et al)

10

11

March 27, 2018
Conway, South Carolina

12

13 BEFORE:

14 Honorable Larry B. Hyman, Jr., Judge.

15

16 APPEARANCES:

17

Howell V. Bellamy, III, Esq.
Attorney for the Plaintiff

18

19 Charles B. Jordan, Jr., Esq.
Bonnie A. Lynch, Esq.
H. Sam Mabry, III, Esq.
20 Kirby D. Shealy, III, Esq.
Joshua D. Spencer, Esq.
21 Attorney for the Defendants

22

23

24

Teresa J. F. Bautz, RPR
Official Court Reporter

25

1 E X H I B I T S

2

3 NO. DESCRIPTION ID EV

4 No exhibits submitted.

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24 Exhibits retained by Clerk of Court.

25

1 (WHEREUPON, the hearing commenced at approximately
2 9:36 a.m.)

3 THE COURT: Humphries versus Tilghman Beach and
4 Racquet Club, Mr. Bellamy and Mr. Jordon and others.
5 Looks like this is Mr. Vaught and...

6 MR. VAUGHT: That's the HOA, Your Honor, he's on
7 the board.

8 THE COURT: Motion with judgment on the pleadings.

9 MR. MABRY: Your Honor, Sam Mabry. I represent
10 Tilghman Beach Racquet Club.

11 THE COURT: How you doing, Mr. Mabry? It's been a
12 while.

13 MR. MABRY: Yes, it has. Good to be back in Horry
14 County.

15 THE COURT: Good to see you.

16 MR. MABRY: The motion is actually made by all of
17 the Third-Party Defendants.

18 THE COURT: Okay.

19 MR. MABRY: I'm sorry, all of the Defendants,
20 Third-Party Plaintiffs, against Great American, who is
21 the D and O carrier for the Tilghman Beach Racquet
22 Association --

23 THE COURT: Okay.

24 MR. MABRY: -- and the individual members of the
25 board.

1 THE COURT: Right. I read the -- I got a brief on
2 this day before Friday. Anyway, I read it yesterday.
3 And I think the issue is whether or not, first of all,
4 the policy should be determined at this point in the
5 litigation, that is whether or not the directors and
6 officers policy owed a defense, I think; isn't that
7 correct?

8 MR. MABRY: Yes, sir, it is.

9 THE COURT: And, secondly, whether or not the
10 policy has exclusions, which I'm not sure would be
11 appropriate on a motion, a 12(b)(6) motion; would it?

12 MR. MABRY: Well, Your Honor --

13 THE COURT: That would be more in the form of a
14 summary judgment?

15 MR. MABRY: The motion is actually made under 12,
16 I think, (c).

17 THE COURT: Okay.

18 MR. MABRY: And our argument is that admissions
19 made by Great American in its answer, or actually its
20 amended answer to the third-party complaint essentially
21 admits all of the facts that the Court needs in which
22 to determine the duty to defend.

23 THE COURT: Okay.

24 MR. MABRY: The duty to defend is based on the
25 allegations in the underlying complaint.

1 THE COURT: But let me just ask you guys for some
2 help here. The primary carrier, the general liability
3 carrier, is providing a defense; are they not?

4 MR. MABRY: There is a -- well, let me say first,
5 Your Honor, it is our position that this claim more
6 correctly falls under the officers and directors policy
7 which was issued by Great American. There is no
8 question that the CGL carrier or one of them,
9 Lexington, is providing us with a defense.

10 Our position --

11 THE COURT: With a reservation?

12 MR. MABRY: With -- yeah, with a substantial
13 reservation.

14 THE COURT: Okay.

15 MR. MABRY: Our position is --

16 THE COURT: And isn't that exactly what you want
17 the directors and officers policy to do?

18 MR. MABRY: Our position is, Your Honor, that both
19 carriers have a duty to defend us, that we paid a
20 premium to both carriers --

21 THE COURT: Okay.

22 MR. MABRY: -- that requires them to defend us and
23 that both of them should be equally defending us in
24 this case. And there is a case called Sloan
25 Construction Company that the South Carolina Supreme

1 Court decided that basically says we, the insurer, and
2 right now we are in the situation where the insured,
3 Tilghman Beach, is paying all of the defense costs. We
4 haven't been reimbursed one penny by the CGL carrier,
5 so we're paying them all at this point in time. We're
6 having to assess our members for the defense costs,
7 including the Plaintiffs, Mr. Bellamy's client, because
8 neither one of the carriers have paid us.

9 But our position is --

10 THE COURT: But isn't this...

11 MR. MABRY: We've got coverage under both
12 policies, and they should be defending us equally, they
13 should each be paying --

14 THE COURT: But you have one that is for sure;
15 right?

16 MR. MABRY: We have one that has written a letter
17 that says, we will defend you. They have not paid us a
18 penny yet. But our position is that under the language
19 of the policies, both of them owe us a duty to defend,
20 and both of them should be defending us and paying half
21 our defense costs.

22 THE COURT: What's the position between the two
23 carriers? I mean, just out of curiosity, I just
24 wonder, you got one carrier that says, we'll -- I'm
25 going to defend under a reservation. You got another

1 carrier that says, you know, this doesn't come under
2 directors and officers, we don't have any coverage,
3 we're not even going to provide a defense; right?

4 MR. MABRY: That's the position they are taking
5 right now.

6 THE COURT: Okay, all right.

7 MR. MABRY: Well, they are taking the position
8 it's not covered. But then they are taking the
9 position even if it is covered, because the CGL carrier
10 is defending you we don't have to defend you.

11 THE COURT: Okay. And has there been any exchange
12 between the two carriers? I mean, the carriers, I'm
13 sure, are kind of aware of this. And who's going to
14 lead the charge, so to speak?

15 If I were to say that both of them owed you a duty
16 to defend, an equal duty, I'm a little -- and I can see
17 the point that the D and O carrier is making. D and O
18 carrier says, we have an exclusion for property damage
19 and that sort of stuff. And there has been some cases
20 brought in some jurisdictions that say, no, the action
21 involves failure of the board to perform under its
22 fiduciary duties, it's supposed to do inspections. And
23 that ultimately led to a decline in the property, that
24 sort of thinking.

25 So who among them if I were to say, okay, you're

1 going to have to defend, is going to be responsible for
2 the defense in this case?

3 MR. MABRY: Well, Sloan Construction Company says
4 that, first of all, they would reimburse -- if you said
5 both had the duty to defend, Sloan Construction says
6 that they each have an equal obligation to pay the
7 defense costs to date. And then they would have an
8 obligation to equally pay the defense costs going
9 forward.

10 So that those defense costs are not borne by the
11 homeowners association itself which, again, we paid a
12 premium to both carriers. That premium included a
13 provision in each policy that says we have the right
14 and the duty to defend you.

15 THE COURT: Isn't the --

16 MR. MABRY: So --

17 THE COURT: -- D and O carrier now a party under
18 third party?

19 MR. MABRY: Yes, sir, they are.

20 THE COURT: So they are sued. And if I, at this
21 point, ruled they owe a duty to defend, have I not then
22 essentially granted declaratory judgment on the claim,
23 third-party claim; I mean, isn't that what I've done?
24 I said, okay --

25 MR. MABRY: You would have granted a declaratory

1 judgment on the issue of whether there is a duty to
2 defend, which under the Declaratory Judgment Act you
3 have a right to do. The Declaratory Judgment Act says
4 that if there is a dispute over the interpretation of a
5 contract, the parties can bring it before the Court,
6 and the Declaratory Judgment Act says you can grant the
7 declaratory judgment, even if there is other relief
8 that might be sought or granted.

9 So I agree that's what you would be doing. But
10 our position is the information that you need to rule
11 on this issue is before the Court and is admitted by
12 Great American in their answer. They've admitted the
13 authenticity of the pleadings which determines the duty
14 to defend. They admitted the authenticity of the
15 policies, which is what you look at to determine the
16 duty to defend.

17 THE COURT: Okay. What are the significant
18 elements of your pleading that create a duty to defend
19 under the D and O policy?

20 MR. MABRY: Well --

21 THE COURT: I mean, what do you allege that puts
22 us squarely under a claim made under a D and O policy?

23 MR. MABRY: Well, first of all, Your Honor, the
24 controlling document is not my third-party complaint,
25 but it is Mr. Bellamy's complaint.

1 THE COURT: And, I'm sorry, I misspoke. But
2 that's what I'm talking about, the initial complaint --

3 MR. MABRY: Yes, sir.

4 THE COURT: -- establishes the duty, okay.

5 MR. MABRY: Okay. First, Great American admits in
6 their answer, and I believe essentially in their
7 opposition memo, that Mr. Bellamy's complaint alleges
8 claims under their policy. They don't argue that it
9 doesn't allege claims, they argue --

10 THE COURT: The D and O carrier?

11 MR. MABRY: That's correct, Great American. Great
12 American's amended answer admits that the claims in
13 Mr. Bellamy's complaint or subsequent complaints allege
14 a claim --

15 THE COURT: Okay, hold that thought for me. Is
16 that correct?

17 MR. BELLAMY: Your Honor, we admit that the --
18 that the allegations in the third amended complaint
19 meet the definition of wrongful acts under the policy.

20 THE COURT: Well?

21 MR. BELLAMY: But -- but no more than that. It
22 just meets that definition.

23 THE COURT: Well, doesn't that create, then, the
24 duty to defend?

25 MR. BELLAMY: No, Your Honor.

1 THE COURT: I mean, I've -- we can go down and
2 look at every lawsuit filed in this county where there
3 is a carrier. And the first thing we look at, is it a
4 claim that the carrier's -- that's going to trigger the
5 carrier's defense. I mean, that's just how it works.
6 And if they trigger it, doesn't that -- whether it can
7 be proven or not, whether it's a valid claim or not,
8 that's something that's shown in trial. But does it
9 not trigger the duty to defend; is that your position,
10 counsel?

11 MR. MABRY: Yes, sir. But our position is much --
12 a little bit different than his concession. Because
13 our position is that there's an original complaint and
14 a second amended complaint and a third amended
15 complaint.

16 THE COURT: Well, I wouldn't expect any less of
17 Mr. Bellamy back there. I mean, I'm surprised that
18 he's not up here on the front row, you must have him
19 chained to the floor back there.

20 MR. MABRY: Well, I think he wants to speak at
21 some point.

22 THE COURT: We're not going to let him.

23 MR. MABRY: But they have admitted all of their --
24 all of Mr. Bellamy's complaints allege a claim under
25 the Great American D and O policy. So it's not the

1 third amended complaint, they've alleged all of the
2 complaints -- they've admitted that all of the
3 complaints allege a claim and allege wrongful acts.

4 THE COURT: That's what I'm want to hear. Why
5 then does that not trigger a duty to defend? Is it
6 simply because you have another policy or another
7 carrier that has stepped in and is providing the
8 defense?

9 MR. BELLAMY: That is a reason, Your Honor. But
10 all of the causes of action are contained within
11 complaints, the three complaints Mr. Mabry has outlined
12 constitute claims that are excluded under the property
13 damage exclusion of the policy.

14 THE COURT: And I read it. I've read it.

15 MR. BELLAMY: Secondarily or the --

16 THE COURT: But would you agree that there is some
17 authority that says that although ultimately there was
18 damage -- and I think your policy says tangible items
19 or something, it's a little --

20 MR. BELLAMY: It says -- the exclusion he's
21 talking about says, damage to or destruction of any
22 tangible property or loss of any tangible property.

23 THE COURT: And counsel, it's very broad. And the
24 policy language is extremely broad in Great American
25 and says, you know, any claim arising otherwise or

1 indirectly, just every kind of exclusion you could
2 think of to make it very broad. The cases where the
3 Courts have said just saying we exclude property
4 damages are much narrower than the language of this
5 policy.

6 MR. MABRY: Your Honor.

7 THE COURT: What do you say about that?

8 MR. MABRY: I disagree with that for several
9 reasons. I have a bench notebook that I think would be
10 helpful to the Court, if I could approach.

11 THE COURT: Okay, sure.

12 MR. MABRY: I've got a copy for your clerk and for
13 you.

14 THE COURT: Thank you.

15 MR. MABRY: If you look, Your Honor, at tab eight.

16 THE COURT: All right.

17 MR. MABRY: Which is the Great American property
18 damage exclusion that we talked about.

19 THE COURT: Um-hum.

20 MR. MABRY: The exclusion in question talks about
21 damage to or destruction of tangible property.

22 THE COURT: Right.

23 MR. MABRY: It does not define, the policy doesn't
24 define the term damage or destruction in the actual
25 policy. Under the law in South Carolina, that means

1 you use the common dictionary definition for those
2 terms.

3 THE COURT: Um-hum.

4 MR. MABRY: If you look at the American Heritage
5 Dictionary, which is the dictionary the United States
6 Supreme Court prefers, it's the most recent edited
7 dictionary, it defines damage as destruction or loss in
8 value, usefulness or ability resulting from an action
9 or event. It talks about destruction as caused by an
10 action or an event. Deterioration --

11 THE COURT: Is this your typical case, water
12 intrusion, EIFS type?

13 MR. MABRY: It alleges water intrusion, but Your
14 Honor, it alleges other things that are consistent with
15 not damage to or destruction but deterioration. If you
16 look at tab nine of the bench notebook, these are
17 excerpts from Mr. Bellamy's original complaint that
18 talk about --

19 THE COURT: I'm sorry, my tab nine is blank.

20 MR. MABRY: I'm sorry, let me hand you...

21 THE COURT: Nine and ten are just plain.

22 MR. MABRY: It should be in your clerk's, I'm
23 sorry.

24 THE COURT: Wait, I have it.

25 MR. MABRY: If you look at tab nine, these are

1 excerpts from Mr. Bellamy's complaint that talk about
2 various conditions at the property that have
3 deteriorated. He's not talking about some event like a
4 hurricane or a flood or water intrusion, but simple
5 deterioration over time which is not covered by the
6 definition, D-2, in the Great American policy.

7 In fact, the East Point Condominium case that they
8 cite in their brief, in that policy it excluded damage
9 to, destruction or deterioration of tangible property.
10 But the Great American policy does not cover or exclude
11 deterioration. And, of course, it's an exclusion if
12 strictly construed against the insurance company. And
13 if there is any allegation in the complaint that
14 doesn't fall within that exclusion, they've got a duty
15 to defend.

16 Well, here's probably 10 to 12 allegations in
17 Mr. Bellamy's complaint that talk about deterioration,
18 not damage to or destruction. If you go to the second
19 page of tab nine, there is a complaint, an allegation
20 in the original complaint that the sliding glass doors
21 at the project need to be replaced because they are
22 over 20 years old. There's no allegation those
23 doors --

24 THE COURT: Are those common areas?

25 MR. MABRY: No. That's individual. But they

1 allege in the complaint the board has a duty to replace
2 those doors.

3 THE COURT: That was my question. In many master
4 deeds exterior sliding doors, things of that nature,
5 are considered common elements of common areas, and
6 they have a duty.

7 MR. MABRY: In the master deed --

8 THE COURT: Under those policies -- I mean, under
9 this master deed, is that property of the individual
10 homeowners?

11 MR. MABRY: Under the master deed at Tilghman
12 Beach and the bylaws, the sliding glass doors would be
13 individual elements. But they allege in the complaint,
14 which is the controlling document, that the board has a
15 duty to replace these doors. And, of course, the duty
16 to defend is determined by the allegations in the
17 complaint and by their policy which says, we will
18 defend you even if the claims are meritless, groundless
19 or false.

20 But this allegation alleges the doors need to be
21 replaced just because they are over 20 years old. It
22 doesn't allege they are damaged.

23 THE COURT: Well, as a practical matter, Great
24 American is now a third-party defendant; right?

25 MR. MABRY: Yes, sir.

1 THE COURT: Okay. Has there been any movement by
2 any party to sever that claim?

3 MR. MABRY: They made a motion to dismiss and
4 sever the claim which Your Honor denied, and --

5 THE COURT: Well, why did I do that?

6 MR. MABRY: Because it was the right thing to do,
7 judge.

8 THE COURT: I just see -- so, okay, if I grant
9 your motion and I find that there -- I make a limited
10 finding there is a duty to defend but make no further
11 finding as to coverage, then we've got Great American
12 as a Defendant, and we've got -- on the third-party
13 claim. And then we've got Great American that's going
14 to have to be defending Mr. Bellamy's claim along with
15 the general carrier. I mean, that --

16 MR. MABRY: But your order provided for separate
17 trials. We're not going to try them together.

18 THE COURT: That's what I was talking about; did I
19 do that?

20 MR. MABRY: Yes, sir. You provided -- they
21 tried --

22 THE COURT: I did an intelligent thing there,
23 didn't I.

24 MR. MABRY: Yes, sir, you did.

25 THE COURT: Counsel, let me hear from you, I mean.

1 MR. MABRY: Judge, can I --

2 THE COURT: Yeah.

3 MR. MABRY: -- on the exclusion, just a couple
4 more things. Tab ten of the bench notebook has
5 allegations related to the diminution in value of
6 individual units. That is not property damage under
7 South Carolina law. And then tab 11, the complaint has
8 a number of allegations about the board not having
9 adequate repair reserves over the years. That under
10 South Carolina law is not damage to tangible property.

11 Again, all we have to do is show -- all there has
12 to be is one allegation outside the exclusion.

13 THE COURT: Right, I understand.

14 MR. MABRY: Thank you.

15 THE COURT: I understand. Counsel, what about it,
16 I mean, aren't we -- has anybody whispered things like
17 bad faith, things like that?

18 MR. MABRY: It's not whispered, it's in our
19 third-party complaint. It's shouted from the
20 courthouse steps.

21 THE COURT: I was dropping hints. I mean, you're
22 in it.

23 MR. SHEALY: May it please the Court, Your Honor.

24 THE COURT: Okay.

25 MR. SHEALY: Kirby Shealy here for Great American.

1 THE COURT: And it's good to see you again.

2 MR. SHEALY: It's good to see you, Your Honor.

3 Your Honor, you seized upon sort of one of the
4 threshold problems with this motion, is this is a
5 motion for judgment on the pleadings. And our answer
6 to the third-party complaint includes a counterclaim
7 for rescission. And the case law indicates that it is --

8 THE COURT: I saw that.

9 MR. SHEALY: -- it's particularly --

10 THE COURT: And I was hoping you wouldn't mention
11 it.

12 MR. SHEALY: So I won't go any further with it.
13 That's a major procedural problem with this motion.
14 Your Honor, the -- but the duty to defend issue, for
15 you to rule that we have a duty to defend at this
16 stage, then sort of really it grants relief that is
17 unnecessary, for one thing, because as you've seized
18 upon, Defendants are being defended.

19 The Sloan case that's cited by the Defendants
20 doesn't stand for this proposition that they can make
21 us defend when they are being defended by another
22 carrier. The --

23 THE COURT: Who sets the priorities?

24 MR. SHEALY: Well, the policies set the
25 priorities, and there's no -- at this stage there's no

1 argument as between the carriers that our exclusion
2 applies and Lexington -- Lexington's other insurance
3 clause has no application here. There's -- it's clear
4 if you read them together, this is not one of those
5 situations where --

6 THE COURT: Well, why isn't Lexington paying them?

7 MR. SHEALY: I don't know why they haven't paid,
8 them, but they have expressed to them that they owe the
9 defense. They've expressed to Great American that they
10 are providing a defense going all the way back to the
11 beginning of the lawsuit.

12 THE COURT: Well, it really wouldn't make any
13 difference to you, then, if they are going to pay all
14 the costs anyway, if you're kind of coattailing them
15 anyway; would it?

16 MR. SHEALY: Well, it does make a difference,
17 again, going back to the fact that this policy may be
18 void ab initio. For you to grant judgment that we owe
19 a duty to defend on a policy that might be void from
20 the beginning is logically inconsistent.

21 THE COURT: You know, counsel, what if they were
22 to prevail on their rescission claim, and I have required
23 them to delve moneys into this defense; would they not
24 be able then to bring an action either with quantum
25 merit or otherwise to recover those sums?

1 MR. MABRY: Yes, sir, they would. I agree. But,
2 but they should not be allowed to put up a theoretical
3 recision claim and avoid their contractual duty to
4 defend. We've cited a number of cases in our brief
5 from other states which say a recision counterclaim
6 doesn't excuse the duty to defend until the Court
7 actually voids the policy.

8 THE COURT: All right. What else do I have
9 involving this? Wasn't there several motions or was
10 this it?

11 MR. MABRY: Well, there's two other motions today,
12 Your Honor. There's a motion related to the discovery.

13 THE COURT: Um-hum.

14 MR. MABRY: And then Great American wants to amend
15 its answer which we oppose that's also scheduled for
16 today.

17 THE COURT: And why would you oppose their
18 amendment?

19 MR. MABRY: We oppose the amendment for
20 essentially two reasons, well, three reasons. The
21 first, Your Honor, they want to in this new answer
22 change the controlling policy, the policy that they say
23 controls. That there were two policies issued by Great
24 American, one, a policy number that ends in 00 to cover
25 policy period February 2015 to February 2016, and then

1 a second policy 01 that covered the period
2 February 2016 to 2017.

3 They have said since August 1 of 2016 in letters
4 and in pleadings with this Court that it's the 01
5 policy that controls, the one that's the policy period
6 February 2016 to 2017. They now want to change that
7 and say it is the 00 policy, the 2015 policy.

8 THE COURT: Was there a significant change in
9 coverage?

10 MR. MABRY: Do what?

11 THE COURT: Was there any significant change in
12 coverage?

13 MR. MABRY: No.

14 THE COURT: Well, why do you want to do that,
15 counsel?

16 MR. SHEALY: Your Honor --

17 THE COURT: I mean, it's continuing coverage
18 usually in these situations, aren't they; I mean, just,
19 you know, one policy follows the other?

20 MR. SHEALY: Your Honor, that's really not the
21 major thrust of our amendment. Our amendment really is
22 to add this other insurance exclusion because that has
23 only arisen since we filed our last amended answer.
24 With respect to this particular issue --

25 THE COURT: And that's only in the second policy?

1 MR. SHEALY: No. It's in both. I mean, the
2 policies are identical in their language. We've -- we
3 have changed the position just because this -- we
4 believe that all of this goes back to a notice of claim
5 or notice of circumstances that arose in 2015 that
6 then...

7 THE COURT: And you're talking about a time to
8 give notice under the policy; is that what we're
9 talking about?

10 MR. SHEALY: That really doesn't give rise to any
11 new defense, Your Honor.

12 THE COURT: Well, why do you want to change it?

13 MR. SHEALY: Well...

14 MR. MABRY: We believe they want to change it
15 because if it's the 2016 policy, it destroys their
16 recision argument. Their recision argument is based on
17 the fact that in the application for the 2015 policy
18 there was a question, are there any major building
19 plans at the project, and that was answered no.

20 This notice of claim which they admit getting on
21 May 8th of 2015 describes a huge building plan for the
22 project. They didn't rescind the 2015 policy, didn't
23 try to, and then they issued the new 2016 policy. And
24 if it's the 2016 policy that controls, we believe
25 that's fatal to their recision claim because they

1 issued a new policy knowing about the building at
2 Tilghman Beach, knowing that that question on the
3 application --

4 THE COURT: Sort of an estoppel.

5 MR. MABRY: It's waiver or estoppel. And the case
6 law in South Carolina is that Courts look for a way
7 to -- when an insurance company is trying to void a
8 policy, they look for a way to find waiver or estoppel.

9 THE COURT: Well, didn't the damages occur in '15?

10 MR. MABRY: But it's not a -- the policy in
11 question is a claims made policy, Your Honor. It's not
12 an occurrence policy.

13 THE COURT: Okay, all right. So you're saying the
14 later policy controls, and that's what has been --

15 MR. MABRY: If you look at --

16 THE COURT: That's what's been the object of the
17 litigation since its inception?

18 MR. MABRY: Yes, sir. If you look at tab two of
19 the bench notebook, this is their first letter denying
20 coverage, first letter. This was August 1, 2016.

21 THE COURT: Okay.

22 MR. MABRY: If you look, if you look highlighted
23 in the re part is policy period, February 10, 2016 to
24 February 10, 2017, that's --

25 THE COURT: That's when your claim was made?

1 MR. MABRY: That's when the claim was made. If
2 you go over to page three of that tab, coverage,
3 policy, the policy period is February 16th -- or
4 February 10, 2016 to February 10, 2017. That is the
5 2016 policy, that's when the lawsuit was brought.
6 There are two other letters in this tab where they have
7 said it is the 2016 policy.

8 THE COURT: Won't that become an issue in trial as
9 to what the policy period is and what policy --

10 MR. MABRY: Well, I would say --

11 THE COURT: -- rules the claim?

12 MR. MABRY: -- it's not, Your Honor. Because in
13 tab three they have answered in this case in two
14 different answers. You notice here the highlighted,
15 they use the policy number ending 01.

16 THE COURT: Right, I see that.

17 MR. MABRY: That is the 2016 policy. They've
18 admitted in their answer and their amended answer that
19 it's the 2016 policy. Now they want to totally change
20 from letters that were written and their answer and
21 amended answer to a different policy.

22 THE COURT: How long -- where does this case stand
23 right now, where is it now? When is it going -- how
24 far out from trial are we?

25 MR. MABRY: Well, my understanding is the parties

1 were going to ask for a special order trial sometime in
2 the fall of this year for the main claim.

3 THE COURT: All right, sir. Let me hear from you.

4 MR. SHEALY: Your Honor, with respect to this
5 motion, it's important to understand that our -- the
6 current answer we have on file seeks to rescind both
7 the 2015 and 2016 policy periods.

8 THE COURT: Well, then, it doesn't make any
9 difference, then; does it?

10 MR. SHEALY: Well, I mean, that's -- this change
11 doesn't add a new defense or add -- and to say that we
12 have shifted the focus on this is overstating things a
13 bit. Because we have -- we seek to rescind both policy
14 periods in the current amended answer.

15 The thing that we're seeking to add in the -- in
16 this latest amended answer that we're seeking the
17 Court's permission to file is the defense that is --
18 has been -- has arisen because of we found out about
19 Lexington -- we found out that Lexington's policy
20 exists and that Lexington has said it is providing a
21 defense. That gives rise to this other insurance
22 exclusion in our policy.

23 Your Honor, the South --

24 THE COURT: Well, tell me exactly now, what do you
25 want to say in your amended answer? Tell me exactly

1 what you want to say, how you want to change it.

2 MR. SHEALY: Well --

3 THE COURT: It's entirely different from what
4 counsel tells me. We're talking about two different
5 things. You know, I need to know how are we changing
6 it. Counsel obviously is mistaken, you've just made --
7 you've misinterpreted their -- what they want to do.

8 MR. MABRY: Well, my argument, Your Honor, and our
9 memo is based on the proposed amended answer that they
10 attached to their motion. And --

11 THE COURT: And I understand that. So I want to
12 know exactly where are we going with the change and
13 what's the purpose of the change. That's what I want
14 to know. Counsel told me what he thinks, but from what
15 I hear from you, it may be something entirely
16 different.

17 MR. SHEALY: Well, I'm just talking about what I
18 think is significant because the -- we are focusing on
19 the 2015 policy in this proposed amended answer.

20 THE COURT: Okay. And you've asked to rescind it.

21 MR. SHEALY: We asked to rescind it. We've asked
22 for that already.

23 THE COURT: Okay.

24 MR. SHEALY: So, I mean, what I'm saying is it's
25 -- that doesn't give rise to a new defense or new

1 counterclaim in any respect, this proposed amendment.

2 THE COURT: Okay, all right. Now, where are we
3 going now with the amendment?

4 MR. SHEALY: So where we are --

5 THE COURT: So you don't have to amend it to to do
6 what -- under your view, you don't have to amend it to
7 challenge it, to rescind either policy.

8 MR. SHEALY: Well, I mean, the only change there
9 is that we are saying in the proposed amended complaint
10 that the controlling policy is the original, is the
11 2015 policy, not the 2016 policy. But in the answer
12 that's on file now we seek to rescind both, going all
13 the way back to the original application.

14 THE COURT: Okay, all right. So you're safe on
15 that, those grounds, according to your interpretation
16 of your answer, okay. But what do we want to change?

17 MR. SHEALY: What we want to add is a reference to
18 the other insurance exclusion that we've talked about
19 in the context of the other motion.

20 THE COURT: Okay.

21 MR. SHEALY: Our exclusion that if another carrier
22 is involved and provides coverage, that means we don't
23 owe coverage. And that has only come up.

24 THE COURT: I mean, if that's what he wants to, I
25 don't have a real problem with it. But if we're

1 changing the ball game and moving the bases, I do have
2 a problem. Now --

3 MR. MABRY: Well, Your Honor, our position on
4 pleading the other insurance exclusion is you may deny
5 a motion to amend where the amendment is futile, okay.
6 There's case law on that that's cited in our brief.

7 If you look at tab 14 of our bench notebook, in
8 South Carolina, other insurance provisions, other
9 insurance is relevant only where the insurance covers
10 the same interest and the same risk, okay. There's a
11 South Carolina case which they dodge in their briefing,
12 South Carolina Insurance versus Fidelity and Guaranty.

13 All right, if you look at tab 615, the Lexington
14 policies that they are talking about are CGL occurrence
15 policies that cover property damage, bodily injury and
16 advertising injury. The Great American policy is a
17 claims made policy that they contend doesn't cover
18 property damage, it covers economic loss.

19 THE COURT: Right.

20 MR. MABRY: These policies don't cover the same
21 risk or the same interest. The other insurance is
22 irrelevant under the law in South Carolina.

23 THE COURT: I tell you what I'm going to do. I'm
24 going to let him amend to that extent. Of course,
25 then, you can move for summary judgment if you want.

1 But I'm going to let him plead it, okay, to that
2 extent. I don't want any significant changes now that
3 the policy period has been admitted or the policy in
4 effect is given. We're not going to change that, we're
5 not going to go there at this stage of the game.

6 He says he's pled recision of both policies, I'm
7 taking him at his word. Let the trial judge or at
8 trial we'll decide that. I'm going to let him plead
9 other policies. He can plead it, y'all can explore it.
10 You can move for summary judgment on that, partial
11 summary judgment on that if you wish. We're going to
12 do it that way, okay. I'll let you plead it; okay?

13 MR. SHEALY: Yes, Your Honor.

14 THE COURT: But I'm just relying on your
15 representation as to how this pleading is going to
16 change, okay. All right.

17 MR. SHEALY: Understood.

18 THE COURT: All right, that's where we are. As to
19 whether or not I'm going -- I'm going to make a limited
20 finding of a duty to defend, a limited finding of a
21 duty to defend. Understanding I have already
22 essentially severed the third-party claim against Great
23 American, that's not going to be tried with this case,
24 all right, it's separate. And that should simplify the
25 defense.

1 And I want this order to be very clear that I make
2 no finding as to the applicability of the policy to any
3 claim for damages. I'm just making an initial finding
4 of a duty to defend in spite of a claim for recision,
5 okay. All right. What else do we have in this?

6 MR. JORDAN: Your Honor, we still have our motion
7 to compel in this matter.

8 THE COURT: Also, I want to make no finding as to
9 how the Defense will be provided between the two
10 carriers or the appropriation or division of funding,
11 that's up to those carriers. I'm not at this point
12 making that decision, all right. Okay.

13 All right, Mr.?

14 MR. JORDAN: Jordan.

15 THE COURT: Mr. Jordan, what did you have?

16 MR. JORDAN: Your Honor, this is -- and Mr. Mabry
17 and I are on the same side as we're working together on
18 these three motions, Your Honor -- this is our motion
19 to compel. These are discovery responses we sent out
20 in November of '17. Mr. Shealy asked for an extension
21 January 18th. The discovery didn't come in, we went to
22 mediation, Your Honor, on January 25th, still didn't
23 have the discovery despite promises we would get it.

24 We did get the discovery Friday afternoon about
25 4:30, Your Honor. I've looked through some of it, but

1 there are five issues that remain unresolved in this
2 discovery, five broad issues dealing with the lack of
3 verification. Mr. Shealy cites a privilege log that we
4 do not have. He objects to certain discovery on the
5 attorney/client privilege issue. Various questions are
6 answered by "will supplement later." And he also
7 objects to various requests to produce on the grounds
8 they are irrelevant.

9 And those are kind of my five broad issues. I can
10 take the questions with Your Honor one by one. We
11 could just look at the attorney/client issue, however
12 Your Honor wants to look at these motions to compel,
13 I'm happy to go with that.

14 THE COURT: Y'all are getting to the point you're
15 going to bring me six big boxes that say spend two
16 weekends reading it; right? Is that where we're going
17 again?

18 MR. JORDAN: Well, it --

19 THE COURT: We ain't going to get there, that's
20 for sure. I've been there and done that, that doesn't
21 work. I can't read them, I don't know who they're
22 talking about in these e-mails and stuff. I don't know
23 who Clyde or Jim or Bobo is. I don't have any way of
24 knowing.

25 MR. JORDAN: I am not going to show, Your Honor, I

1 promise, I will not show the Court any document
2 whatsoever except for the actual document that
3 Mr. Shealy signed that says, we object to this request.

4 THE COURT: Okay. Well, is that what you're going
5 to do?

6 MR. JORDAN: That's what I think I need to do,
7 Your Honor, because I would like an order. If Your
8 Honor wants to just generally compel him to answer all
9 of my discovery, that's fine, we can be back here on a
10 motion, I guess, for sanctions when he objects to it
11 later. But I would like to take the objections up with
12 the Court, if I could at this time.

13 THE COURT: I don't want to see anything, I don't
14 want to see anything but the document that's objected
15 to. I want to see the privilege log, and I want to
16 know why, in detail, that particular correspondence,
17 document is not being provided, who the parties are and
18 who it was to and under what context -- what the
19 context of the communication was. I can't tell
20 otherwise what I'm even looking at.

21 MR. JORDAN: Well, Your Honor, that's the first
22 problem I have. I don't have a privilege log to show.

23 THE COURT: No, he's going to give them to me.

24 MR. JORDAN: Okay.

25 THE COURT: I want them first. Anything he's not

1 going to give you, that makes him have to write out an
2 epistle about everything he's withholding. I want to
3 see it. And then, I'm going to tell him -- I'm going
4 to make the decision as to what's not going back, what
5 you're not going to get. And the rest of it goes to
6 you.

7 MR. JORDAN: Okay.

8 THE COURT: What else do you want?

9 MR. JORDAN: That's what I want, Your Honor. I do
10 have -- there's one other issue I do want, Your Honor,
11 is he did object to certain issues on the grounds that
12 they are irrelevant.

13 THE COURT: Okay, I want to hear that now. What's
14 irrelevant?

15 MR. JORDAN: Okay.

16 THE COURT: I've never seen anything that was
17 irrelevant.

18 MR. JORDAN: I haven't either, Your Honor, except
19 when I'm defending, but sometimes I do. But in the
20 Plaintiff's case, I think every document we have is
21 irrelevant. Let me make sure I got the right ones
22 here.

23 THE COURT: The master of irrelevancy was -- I see
24 Mr. Bellamy back there -- but our friend Mr. Paul
25 Huggins. He could come up with some pretty irrelevant

1 stuff. In fact, you wonder where it even came from.

2 MR. JORDAN: Let me hand this up, Your Honor.

3 These are the requests for production of documents.

4 These are Mr. Shealy's answers. Let me get my copy

5 out. But, Your Honor, we are looking at really the end

6 of these --

7 THE COURT: All right. Which --

8 MR. JORDAN: Look at, for example, Your Honor,

9 number 30 and 32, they object that they are overly
10 broad.

11 THE COURT: All right. Why would that be overly
12 broad? He's asking for documents pertaining to an
13 application for D and O policy. Why -- I mean, he's
14 not asking for everybody's, he's asking for the
15 Plaintiff's, I mean.

16 MR. SHEALY: In 32 he's asking for every instance,
17 not just this case, every instance.

18 MR. JORDAN: We're asking for all of the policies,
19 Your Honor. They are making a claim here that we
20 checked a wrong box, and as a result of checking that
21 box wrong they can deny coverage. It is our contention
22 and our understanding that is an excuse they are using
23 to not cover us. We believe, we think there may be
24 other policies out there where other HOAs have checked
25 that exact box and they have issued policies.

1 THE COURT: Whoa, whoa, whoa, whoa, whoa, you want
2 every HOA policy they've issued?

3 MR. JORDAN: That they have checked that box. We
4 limited it to time, Your Honor, just from -- just the
5 time period that was relevant to our policy, not in the
6 whole universe.

7 THE COURT: Do you know how many there would --

8 MR. JORDAN: Just from February 2015.

9 THE COURT: -- how many HOAs they insure?

10 MR. JORDAN: I don't know, Your Honor. They
11 haven't told us.

12 THE COURT: How many do you insure?

13 MR. SHEALY: Your Honor, I don't know, but it's
14 significant.

15 THE COURT: I mean, you're talking about
16 worldwide, and they all have continuing coverages. No,
17 no, no, no no, no, we're not going to do that. I'm not
18 going to require that. That is overly broad and unduly
19 burdensome. Now, if you will narrow it down and say
20 all instances where you have denied a claim for the
21 exact same reason, now we're getting close to home.

22 MR. JORDAN: Okay. That may already be asked in
23 another interrogatory, in another question.

24 MR. SHEALY: I believe it is.

25 THE COURT: That's all you need to ask. That's

1 all you need to ask. It's irrelevant as to whether or
2 not they had a policy where it never came up.

3 MR. JORDAN: All right. 30 and -- 31 and 32, I
4 believe, Your Honor, are very similar to that where we
5 ask for all policies during the time period which were
6 rejected and not issued by Great American where that
7 box was checked.

8 So what we're looking for is not -- so what we're
9 looking for, Your Honor, are rejected policies, not
10 policies they accepted. But when they were looking for
11 applications, someone made an application, they checked
12 the box that said there are major repairs going on at
13 our project, and they rejected that application. So
14 these aren't all policies, they are just rejected
15 policies.

16 THE COURT: Why don't you ask for their policy on
17 that. Did you ask specifically for their policy on
18 that particular question?

19 MR. JORDAN: Yes, Your Honor, we did ask for their
20 policy on that.

21 THE COURT: What was their response?

22 MR. JORDAN: I believe their response was, if I'm
23 in here, I don't believe they gave it to us and they
24 objected on -- trying to -- Your Honor, we do have
25 about 40 of these. Let me look real quick. And I

1 apologize, Your Honor, I don't have these memorized.

2 MR. MABRY: I mean, Your Honor, if you think a
3 question, what are your written policies on this
4 particular answer to this question is appropriate, then
5 we can rephrase them to the extent we haven't already
6 done that.

7 THE COURT: Well, let's do it that way. Look, the
8 issuance of a policy is a subjective matter in most
9 cases that you get an agent somewhere, and he's looking
10 at it and he's making a call. And you don't know why
11 it was denied. And whether that's checked or not is
12 not going to tell you anything. Let's see if they got
13 a policy. Let's see if the company says, we don't
14 issue policies if there's major work going on. I mean,
15 that's --

16 MR. JORDAN: So we're looking at their
17 underwriting policies if that box is checked.

18 THE COURT: There you go.

19 MR. JORDAN: That's what we're looking at.

20 THE COURT: And they are going to have that, they
21 can answer that.

22 MR. JORDAN: All right. We will make sure that
23 question is directly asked for that issue, Your Honor.

24 THE COURT: All right. All right.

25 MR. JORDAN: And look at, as we go through these a

1 little bit more, on 36 and 38, Your Honor, what we ask
2 for, Your Honor, we do have a bad faith cause of
3 action. We ask for documents related to the net worth
4 of Great American.

5 Once again, Your Honor, these are discovery
6 responses we've had outstanding for several months
7 through mediation. We would believe --

8 THE COURT: We ought to be able to provide that,
9 counsel. I mean, it's a fair question if they are
10 seeking punitive damages, it's a fair question, you
11 know. There should be something in there. It's
12 traded; isn't it, isn't the company traded?

13 MR. SHEALY: I don't know if Great American is
14 publicly traded or not, Your Honor.

15 THE COURT: Well, I guarantee you, even if it's
16 closely held, somebody does a financial on it. Let
17 them know what.

18 MR. SHEALY: Your Honor, if it is not publicly
19 traded, would the Court be willing to have us produce
20 that under a --

21 THE COURT: Absolutely.

22 MR. SHEALY: -- an order, a protective order?

23 THE COURT: If it's not public information, we'll
24 do it under a protective order.

25 MR. JORDAN: Absolutely no objection to that, Your

1 Honor.

2 THE COURT: Okay.

3 MR. JORDAN: If Mr. Shealy would just indicate --

4 THE COURT: All right.

5 MR. JORDAN: If he would please indicate on the
6 face that it's confidential, so we don't accidentally
7 produce it --

8 THE COURT: Okay.

9 MR. JORDAN: -- and we can make sure it gets
10 destroyed at the end of litigation, we're more than
11 happy to have that occur.

12 THE COURT: All right, okay.

13 MR. JORDAN: And, again, Your Honor, there are
14 several of these dealing with 36, 37 and 38 dealing
15 with their net worth and their profits. I imagine that
16 would all fall under what the Court just ruled --

17 THE COURT: Right.

18 MR. JORDAN: -- that we are entitled to that. 48
19 and 53, Your Honor, and then I want to go back and
20 bring up one or two other issues. Your Honor, these
21 questions -- and I do have all of the documents for
22 Mr. Kirby, or at least he gave me some documents.

23 Your Honor, these questions concern to the extent
24 not already provided, looking at 49, all documents or
25 electronically stored information supporting relating

1 to, concerning, otherwise showing any communication
2 between Great American employees and/or agents related
3 to this litigation.

4 Your Honor, when he produced the documents to us,
5 there are no e-mails, there are no policy statements.
6 There's a very -- there is almost no internal
7 communication whatsoever.

8 THE COURT: Sounds like you got some smart people
9 running that business.

10 MR. JORDAN: And I don't know if it exists or not
11 or if he objects to it. So we would just do -- just
12 make sure there is an order in place, Your Honor,
13 compelling them to give us whatever internal
14 communication there is dealing with their evaluation of
15 this claim.

16 THE COURT: They say that they've answered it, and
17 they are bound by that. They know the rules. That's
18 not necessary, these are honorable attorneys.

19 MR. JORDAN: And I have no objection to
20 Mr. Shealy, Your Honor, he is an honorable attorney.
21 I'm not raising any objection to what he has told us.
22 I believe he has given us everything. I do question
23 his client, but I don't question him, Your Honor.

24 THE COURT: All right.

25 MR. JORDAN: And that goes on with the remaining

1 documents, I believe. I do want to look at, Your
2 Honor, two attorney/client privilege matters that he
3 does raise in the interrogatories, which I believe
4 would be good to go ahead and look at.

5 And, again, Your Honor, he didn't give us a
6 privilege log, which those may -- it may answer a lot
7 of those questions, but he does raise some issues that
8 are specific to the attorney/client issue on here. Let
9 me make sure I got those. Let me hand up, this is
10 second set of interrogatories, Your Honor.

11 Your Honor, this deals with the second set of
12 interrogatories. If we look at interrogatory number
13 three and number four, we ask two things, Your Honor.
14 We ask, state whether Great American sought the advice
15 of a lawyer licensed to practice in South Carolina
16 after receiving my demand letter August 10, and if yes,
17 the date they contacted the attorney.

18 Now, my understanding in South Carolina,
19 attorney/client communications are privileged. But
20 whether or not you consulted an attorney and the day
21 that consultation occurred are not privileged
22 information. I've provided this in the past.

23 THE COURT: Well, they --

24 MR. JORDAN: And I believe he's -- that we are --

25 THE COURT: The only way that would have any

1 relevance at all to this litigation is when the
2 relationship was established as far as determining what
3 may be privileged or not.

4 MR. JORDAN: It goes to bad faith, Your Honor.
5 Because the question is, did someone who's practicing
6 law in Delaware deny my claim, or they actually consult
7 with an attorney who knows South Carolina law before
8 they deny my claim. And we will argue at the bad faith
9 trial that if all they did was consult a New York
10 lawyer or a Delaware lawyer to make that determination,
11 that shows their bad faith.

12 If they called Mr. Shealy up on August 10 and
13 said, Kirby, you know, I know you're our South Carolina
14 attorney, take a look at this, what's your opinion, I'm
15 not entitled to his opinion. But if they did that,
16 that goes to whether or not they acted in good faith or
17 not.

18 So that does become important to us, Your Honor in
19 our bad faith cause of action whether or not they
20 actually sought out South Carolina attorneys' advice in
21 denying a South Carolina claim on a South Carolina
22 policy.

23 THE COURT: Let me hear on you that.

24 MR. SHEALY: Your Honor, what this gets into,
25 what's dangerous about this, is where we could

1 unwittingly waive the attorney/client privilege as if
2 we asserted the advice of counsel as a defense, which
3 we're not. And so anything that touches that, we think
4 it is --

5 THE COURT: And I agree with you, I agree with
6 you. And until you raise that issue, I'm not going to
7 require that you answer that interrogatory.

8 MR. SHEALY: Thank you, Your Honor.

9 THE COURT: All right. What else do we have?

10 MR. JORDAN: So unless and until they raise that
11 issue?

12 THE COURT: Right. It's preserved.

13 MR. JORDAN: All right. Your Honor, and there are
14 several interrogatories, and I imagine this won't be
15 difficult. But, for example, interrogatory number
16 seven, Your Honor, they simply tell me they'll
17 supplement it, interrogatory 9, 12, 13, 14, 15 are they
18 will supplement. Your Honor, they've had since
19 December, January to supplement, Your Honor. It's been
20 over six months.

21 THE COURT: Why can't we just go ahead and get
22 these answers in. You know, we're moving on with this
23 case, and it needs to be heard.

24 MR. SHEALY: I totally understand. He's entitled
25 to the responses, and --

1 THE COURT: What are we talking about time wise?

2 MR. SHEALY: Your Honor, if I could have 15 days.

3 THE COURT: All right, there you go, you got it.

4 MR. JORDAN: Absolutely, that's fine, Your Honor.

5 THE COURT: All right.

6 MR. JORDAN: Your Honor, at this time I think that
7 covers the major issues that we're looking at. Until I
8 see the privilege log or until this Court does with
9 Mr. Shealy, I don't think there's anything we can argue
10 about right now. And until we have the
11 supplementations, --

12 THE COURT: All right, Mr. Shealy --

13 MR. JORDAN: -- we'll figure that out.

14 THE COURT: -- when you submit your privilege log,
15 you submit each document. And I want not a chart that
16 says, this is A and this is B, I want to know -- if you
17 got a document that you want protected, I want to know
18 who it's from, who it's to, what depositions are and
19 why it's privileged.

20 MR. SHEALY: Will do, Your Honor.

21 THE COURT: Okay, all right.

22 MR. SHEALY: I will tell you that there are not
23 that many.

24 THE COURT: Okay. Well, I'm going to hold you to
25 that.

1 MR. SHEALY: It is a very small number that we
2 withheld. And my apologies to Mr. Jordan for not
3 giving him the privilege log, because I thought it had
4 been sent. These were sent on my behalf. And so I
5 will submit that.

6 MR. JORDAN: Those are oversights, I'm fine with
7 that. Your Honor, the last thing, Your Honor, we do
8 ask that under the rules, discovery is intended to be
9 verified. And we ask that Mr. Shealy verify these
10 interrogatories within 15 days when he supplements it.

11 THE COURT: All right. And they should be, he
12 knows that. He will do it. Okay, is that it?

13 MR. MABRY: Your Honor, on your ruling on the duty
14 to defend, I'm assuming based on what you say, you want
15 me to prepare a proposed order?

16 THE COURT: Yes, I do. I want Mr. Shealy to look
17 at it first.

18 MR. MABRY: Yes, sir, I understand.

19 THE COURT: Okay.

20 MR. MABRY: Would ten business days be okay with
21 the Court?

22 THE COURT: Fine.

23 MR. MABRY: Because we've got some depositions.

24 THE COURT: If you need more than that, that's
25 fine. You know, he's going to do some stuff. 15 days,

1 two weeks; okay?

2 MR. MABRY: All right. We'll do that.

3 THE COURT: All right, good.

4 MR. SHEALY: And, Your Honor, I'll do a proposed
5 order on the motion to amend as well.

6 THE COURT: 15 days; all right?

7 MR. MABRY: Good to see you, judge.

8 MR. JORDAN: Thank you, Your Honor.

9 (WHEREUPON, the hearing concluded at approximately
10 10:34 a.m.)

11 (End of Transcript of Record)

12

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1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)
4 COUNTY OF HORRY)

5

6 I, TERESA J.F. BAUTZ, Official Court
7 Reporter for the Fifteenth Judicial Circuit of the
8 State of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete Transcript
10 of Record of the proceedings had and evidence
11 introduced in the trial of the captioned case, relative
12 to appeal, in the Court of Common Pleas for Horry
13 County, South Carolina, on the 3rd day of July, 2018.

14

15 I FURTHER CERTIFY that I am neither of
16 kin, counsel nor interest to any party hereto.

17

18

19 S/Teresa J. F. Bautz

20

TERESA J.F. BAUTZ, RPR
Official Court Reporter

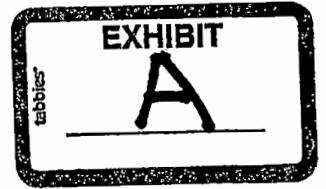
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Jill Keck Humphries, Dennis L. Johnson,)
Delona Penny Rice, and Whitmel L.)
Brown, Individually and in a)
Representative Capacity on Behalf of All)
Persons Similarly Situated Who Own)
Units in Buildings I, II, III, IV, V, VI, VII,)
VIII, IX, X, XI and XII of the Tilghman)
Beach and Racquet Club Horizontal)
Property Regime; Gary Steven Robinson)
and Elizabeth Erin Humphries; Dennis L.)
Johnson, Jr. and Nancy H. Johnson,)

Plaintiffs,)

vs.)

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

Defendants.)

Case Number: 4:16-cv-02880-RBH

STIPULATION

In consideration of the promises contained in this Stipulation, the Plaintiffs and Defendants in the above-referenced matter stipulate and agree as follows:

1. Plaintiffs will seek to maintain this lawsuit, whether in state or federal court, solely and only in their individual capacities and will not seek to maintain this case as a class action or derivative action. Plaintiffs will drop all class allegations from the Complaint in this matter and, upon remand of this matter to South Carolina State Court, will file an Amended Complaint containing no class or derivative allegations. Plaintiffs will never, under any circumstance, seek to maintain this case as a class action or derivative action (or in any other

representative capacity) in South Carolina State Court and will not seek certification of a Plaintiff Class at any time after remand. If Plaintiffs ever seek to maintain this case as a class action or derivative action (or any other type of representative action) in South Carolina State Court, the case will be immediately subject to removal to federal court.

2. Plaintiffs will not seek, under any circumstance, to hold the current members of the Board of the Tilghman Beach and Racquet Club Condominium Association, Inc. (hereinafter the "Association") individually or personally liable for any acts or omissions of the Board of the Association which occurred before the individual Board Member Defendants began serving on the Board. For the purposes of this Stipulation, Plaintiffs agree that each individual Board Member Defendant began serving on the Board of the Association no earlier than the date listed below:

James H. Austin, III – March 5, 2016

Daniel G. Coe – February 4, 2015

C. Doug Madison – March 2, 2013

George P. White – March 5, 2016

Steele Brice Windle, III – March 5, 2016

Plaintiffs release each of these persons, who are also the individual Defendants in this action, from any individual or personal liability for any act or omission of the Board which occurred before the date listed above for each individual Board Member Defendant. The provisions in this Paragraph 2 do not bar or, in any way, prevent the Plaintiffs from making individual claims against Tilghman Beach and Racquet Club Condominium Association, Inc. for acts or omissions of the Tilghman Beach and Racquet Club Condominium Association Board which allegedly occurred from 1982 to the present. Plaintiffs understand and agree that Tilghman Beach and

Racquet Club Condominium Association, Inc. reserves all rights, arguments and defenses it has with respect to any such claims.

3. Defendants will not seek, under any circumstance, to hold Jill Keck Humphries or Dennis L. Johnson, Jr. individually or personally liable for acts or omissions of the Board of the Association which occurred either before Plaintiff Humphries or Plaintiff Johnson began serving on the Board or which occurred after Plaintiff Humphries or Plaintiff Johnson left the Board of the Association. Defendants agree that Plaintiff Humphries and Plaintiff Johnson served on the Board between the dates listed below:

Jill Keck Humphries – March 2, 2013 to February 6, 2016

Dennis L. Johnson, Jr. – March 7, 2015 to February 6, 2016

Defendants release each of these persons from any individual or personal liability for any act or omission of the Board which occurred before or after the dates listed above for each individual Plaintiff. The provisions in this Paragraph 3 do not bar, in any way, or prevent the Defendants from making claims against Plaintiff Humphries and Plaintiff Johnson for acts or omissions of the Tilghman Beach and Racquet Club Condominium Association Board which occurred while Plaintiff Humphries or Plaintiff Johnson were on such Board. Defendants understand and agree that Plaintiff Humphries and Plaintiff Johnson reserve all rights, arguments or defenses they may have to any such claims.

4. Upon complete execution of this Stipulation, Tilghman Beach and Racquet Club Condominium Association, Inc. will consent to the Motion to remand filed by Plaintiffs in this Action (ECF No. 9).

5. The Amended Complaint Plaintiffs attempted to file in South Carolina State Court on August 24, 2016, is a nullity because, at the time of filing, this case was pending in United States District Court for the District of South Carolina. Within five (5) business days of the

remand to South Carolina State Court, Plaintiffs shall file an Amended Complaint in South Carolina State Court reflecting the agreements contained in this Stipulation, including that Plaintiffs are not seeking to pursue this matter as a class action or derivative action (or in any other representative capacity), and modifying the allegations against the individual Board Member Defendants to make clear that the Plaintiffs are not seeking to impose any liability upon the individual Board Member Defendants personally or individually for any acts or omissions of the Board prior to each individual Board Member Defendant beginning service on the Board of the Association. Plaintiffs understand that Defendants reserve all rights with regard to the sufficiency of the allegations of any Amended Complaint Plaintiffs file in State Court after remand. Tilghman Beach and Racquet Club Condominium Association, Inc. will consent to the Motion to Remand filed by Plaintiffs in the above-referenced matter on September 2, 2016 (ECF No. 9).

6. With respect to the Counterclaims filed by Defendant Tilghman Beach and Racquet Club Condominium Association, Inc. in federal court, Defendants agree Plaintiffs do not need to respond to those Counterclaims since, pursuant to Paragraph 5 of this Stipulation, Plaintiffs will be filing an Amended Complaint in South Carolina State Court within five (5) business days of remand. The Parties reserve their respective positions on those Counterclaims until Plaintiffs file their Amended Complaint in South Carolina State Court and Defendants answer or otherwise respond to that Amended Complaint in South Carolina State Court. The time period(s) for responsive pleadings, once the Amended Complaint is filed in South Carolina State Court, will be governed by the South Carolina Rules of Civil Procedure, and such extensions as counsel may grant each other under those Rules.

7. By entering into this Stipulation, each Party acknowledges, represents and warrants that the other Parties have given something of value and have given adequate consideration to support the promises contained in this Agreement.

8. This Agreement may be executed in counterparts or duplicate originals, both of which shall be regarded as one in the same instrument. Each Plaintiff or each Defendant may execute a separate and independent signature page to this Stipulation which, when all Parties have signed, may be attached to this Stipulation as the executed document. This Agreement may be executed by facsimile signatures or a signature on a document forwarded by electronic means and such signatures shall be deemed to bind each Party as if they were original signatures.

9. This Stipulation shall not be effective until it is signed by all Plaintiffs and their counsel and all Defendants and their counsel.

10. No modification or amendment to this Stipulation, nor any waiver of any rights under the Stipulation, will be effective until consented to in writing by all Plaintiffs and all Defendants.

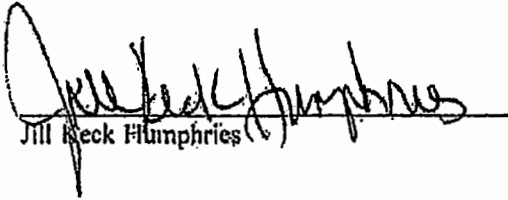
11. By signing this Stipulation, the Association and the individual Defendants agree to waive formal service of process of the Summons and Amended Complaint to be filed in South Carolina State Court in this matter. The Amended Complaint to be filed in South Carolina State Court pursuant to Paragraph 6 of this Stipulation shall be deemed served on the Defendants when it is received by their counsel, Haynsworth Sinkler Boyd, P.A. Defendants also admit, for the purposes of this lawsuit only, that the South Carolina State Circuit Court in Horry County has specific personal jurisdiction over them at the time this Stipulation is executed. By entering into and/or signing this Stipulation, no party hereto is admitting that the South Carolina Courts have general personal jurisdiction over them.

WE SO STIPULATE AND AGREE.


Howell V. Bellamy, III, Fed. I.D. No. 7736
hbellamyiii@bellamylaw.com
Howell V. Bellamy, Jr., Fed. I.D. No. 1290
nrichardson@bellamylaw.com

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EPPS, GRAVELY & BOWERS, P.A.**
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Attorneys for Plaintiffs


Jill Beck Humphries

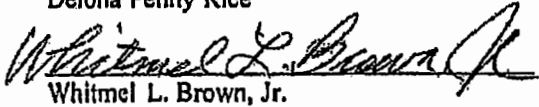
Dennis L. Johnson, Jr.

Date: 10.4.16

Date: _____

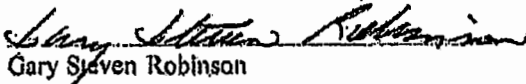
Date: _____

Delona Penny Rice


Whitmel L. Brown, Jr.

Date: 10/4/16

Date: 10.4.16


Gary Steven Robinson

Date: _____

Elizabeth Erin Humphries

Date: _____

Dennis L. Johnson, Jr.

Date: _____

Nancy H. Johnson

WE SO STIPULATE AND AGREE.

Howell V. Bellamy III
Howell V. Bellamy, III, Fed. I.D. No. 7736
hbellamyiii@bellamylaw.com
Howell V. Bellamy, Jr., Fed. I.D. No. 1290
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Fax: (843) 448-3022

Attorneys for Plaintiffs

Jill Keck Humphries

Dennis L. Johnson, Jr.
Dennis L. Johnson, Jr.

Date: _____

Date: 10/4/2016

Delona Penny Rice

Date: _____

Whitmel L. Brown, Jr.

Date: _____

Gary Steven Robinson

Date: _____

Elizabeth Erin Humphries

Dennis L. Johnson, Jr.
Dennis L. Johnson, Jr.

Date: _____

Date: 10/4/2016

Nancy H. Johnson
Nancy H. Johnson

Date: 10-4-16

WE SO stipulate AND AGREE.


Howell V. Bellamy, III, Fed. I.D. No. 7736
~~Howell V. Bellamy, III, Fed. I.D. No. 7736~~
Howell V. Bellamy, Jr., Fed. I.D. No. 1290
~~Howell V. Bellamy, Jr., Fed. I.D. No. 1290~~
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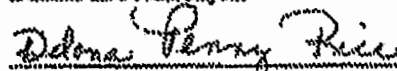
Attorneys for Plaintiffs

Jill Kack Humphries

Date: _____

Dennis L. Johnson, Jr.

Date: _____


Delona Penny Rice

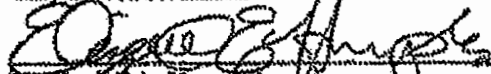
Date: 10/4/2016

Whitney L. Brown, Jr.

Date: _____

Gary Steven Robinson

Date: _____


Elizabeth Erin Humphries

Date: 10/4/2016

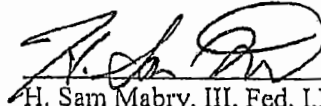
Dennis L. Johnson, Jr.

Date: _____

Nancy H. Johnson

Date: _____

WE SO STIPULATE AND AGREE.



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Joshua D. Spencer, Fed. I.D. No. 9845

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Facsimile: (864) 240-3300

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Racquet Club Condominium Association, Inc. and
the individual Board Member Defendants, James H.
Austin, III; Daniel G. Coe; C. Doug Madison;
George P. White; and Steele Brice Windle, III*

James H. Austin, III

Date: _____

Daniel G. Coe

Date: _____

C. Doug Madison

Date: _____

George P. White

Date: _____

Steele Brice Windle, III

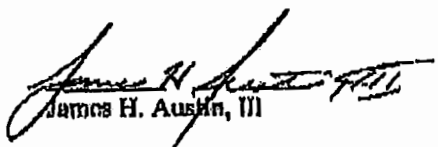
Date: _____

WE SO STIPULATE AND AGREE.

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the individual Board Member Defendants, James H.
Austin, III, Daniel G. Coe; C. Doug Madison
George P. White; and Steele Brice Windle, III*


James H. Austin, III

Date: 9/29/16

Daniel G. Coe

Date: _____

C. Doug Madison

Date: _____

George P. White

Date: _____

Steele Brice Windle, III

Date: _____

WE SO STIPULATE AND AGREE.

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Racquet Club Condominium Association, Inc. and
the individual Board Member Defendants, James H.
Austin, III; Daniel G. Coe; C. Doug Madison;
George P. White; and Steele Brice Windle, III*

James H. Austin, III
Daniel G. Coe

Date: _____

Date: 9-30-16

C. Doug Madison

Date: _____

George P. White

Date: _____

Steele Brice Windle, III

Date: _____

WE SO STIPULATE AND AGREE.

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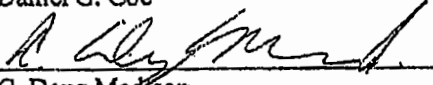
*Attorneys for Defendant, Tilghman Beach and
Racquet Club Condominium Association, Inc. and
the individual Board Member Defendants, James H.
Austin, III; Daniel G. Coe; C. Doug Madison;
George P. White; and Steele Brice Windle, III*

James H. Austin, III

Date: _____

Daniel G. Coe

Date: _____



C. Doug Madison

Date: _____

George P. White

Date: _____

Steele Brice Windle, III

Date: _____

WE SO STIPULATE AND AGREE.

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Racquet Club Condominium Association, Inc. and
the individual Board Member Defendants, James H.
Austin, III; Daniel G. Coe; C. Doug Madison;
George P. White; and Steele Brice Windle, III*

James H. Austin, III

Date: _____

Daniel G. Coe

Date: _____

C. Doug Madison

Date: _____

George P. White

George P. White

Date: *28 Sept 2016*

Steele Brice Windle, III

Date: _____

WE SO STIPULATE AND AGREE.

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Bonnie A. Lynch, Fed. I.D. No. 10402
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Racquet Club Condominium Association, Inc. and
the Individual Board Member Defendants, James H.
Austin, III; Daniel G. Coe; C. Doug Madison;
George P. White; and Steele Brice Windle, III*

James H. Austin, III

Date: _____

Daniel G. Coe

Date: _____

C. Doug Madison

Date: _____

George P. White

Date: _____



Steele Brice Windle, III

Date: 9/28/16

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 2016-CP-26-4464

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

Plaintiffs,)

**CONSENT MOTION FOR LEAVE TO FILE
THIRD-PARTY COMPLAINT**

vs.)

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

Defendants.)

Defendants, with the consent of Plaintiffs, hereby move this Court for leave to file a Third-Party Complaint against Great American Insurance Company, attached hereto as **Exhibit A**, pursuant to Rule 14(a) of the South Carolina Rules of Civil Procedure.

Plaintiffs filed their original Complaint in this action in state court on July 7, 2016. On August 19, 2016, Defendants removed the case to the United States District Court for the District of South Carolina pursuant to the provisions of the Federal Class Action Fairness Act. As a result of a Motion to Remand filed by Plaintiffs in federal court, Plaintiffs and Defendants entered into a Stipulation in which Defendants agreed to consent to a remand of the case to state court in exchange for Plaintiffs agreeing, among other things, to file an Amended Complaint in

state court. The case was remanded to state court and Plaintiffs filed their Amended Complaint on October 18, 2016. Plaintiffs filed a Second Amended Complaint on October 28, 2016.

On November 28, 2016, Defendant, Tilghman Beach and Racquet Club Condominium Association, Inc., filed its Answer to Plaintiffs' Second Amended Complaint and Counterclaims. Additionally, Defendants, James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White, and Steele Brice Windle, III (collectively referred to as "Individual Defendants"), filed a Motion to Dismiss the same day. On January 10, 2017, Plaintiffs filed their Memorandum in Opposition, and, on January 11, 2017, filed their Motion to Amend Complaint. On January 24, 2017, the Individual Defendants filed their Reply to Plaintiffs' Memorandum in Opposition to the Individual Defendants' Motion to Dismiss, and on January 27, 2017, Plaintiffs filed their Motion to Amend Amended Complaint.

By Consent Order dated February 28, 2017, the Individual Defendants' Motion to Dismiss was granted, and Plaintiffs' Motions to Amend Complaint and Amend Amended Complaint were granted with leave to file a Third Amended Complaint. Plaintiffs' Third Amended Complaint was filed on March 8, 2017.

Great American Insurance Company issued to Defendant, Tilghman Beach and Racquet Club Condominium Association, Inc., an "Exec Pro Community Association Solution Insurance Policy." As alleged in the Third-Party Complaint against Great American Insurance Company, Defendants contend that Great American Insurance Company, who is not a party to the current litigation, is or may be liable to Defendants for all or part of Plaintiffs' claims against them under the "Exec Pro Community Association Solution Insurance Policy." Therefore, with the consent of Plaintiffs, Defendants now seek leave to file a Third-Party Complaint against Great American Insurance Company, attached hereto as **Exhibit A**.

WE SO MOVE:

Respectfully submitted,

/s/ Charles B. Jordan, Jr.
Charles B. Jordan, Jr., SC Bar No 11708
cjordan@myrlaw.com

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Post Office Box 1290 (29578)
1314 Professional Drive
Myrtle Beach, South Carolina 29577
Telephone: (843) 692-2628
Facsimile: (843) 692-0928

Attorneys for Defendants

March 27, 2017
Myrtle Beach, South Carolina

WE CONSENT:

Respectfully submitted,

/s/ Howell V. Bellamy, III
Howell V. Bellamy, III, SC Bar No 66575
hbellamyiii@bellamylaw.com
Howell V. Bellamy, Jr., SC Bar No 68543
nrichardson@bellamylaw.com

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EPPS, GRAVELY & BOWERS, P.A.**
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Facsimile: (843) 448-3022

Attorneys for Plaintiffs

March 27, 2017
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

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

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

Plaintiffs,)

vs.)

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

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

Defendants.)

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

Third-Party Plaintiffs,)

vs.)

Great American Insurance Company,)

Third-Party Defendant.)

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

GENERAL ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

The Great American Policy further provides:

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

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

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

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

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

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

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

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

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

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

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

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

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

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

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

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

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

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

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

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

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

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

FOR A THIRD CAUSE OF ACTION
(Bad Faith)

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

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

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

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment)

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

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

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

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

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

WHEREFORE, Third-Party Plaintiffs demand judgment against Third-Party Defendant as follows:

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

Respectfully submitted,

/s/Charles B. Jordan, Jr.

Charles B. Jordan, Jr., SC Bar No 11708
cjordan@myrlaw.com

THOMAS & BRITTAIN, P.A.

Post Office Box 1290 (29578)
1314 Professional Drive
Myrtle Beach, South Carolina 29577
Telephone: (843) 692-2628
Facsimile: (843) 692-0928

Attorneys for Defendants / Third-Party Plaintiffs

March 27, 2017
Myrtle Beach, South Carolina



ExecProsm
DECLARATIONS
for
Community Association
Solution
Insurance Policy

Insurance is afforded by the company indicated below: (Each a capital stock corporation)

☒ Great American Insurance Company
Policy Number: **EPP3654704-01**

Policy Form Number: **D26100 (2/10)**

- Item 1. Name of Organization: **Tilghman Beach & Racquet Club HOA Inc.**
Mailing Address: **11822 HIGHWAY 17 BYP**

City, State, Zip Code: **MURRELLS INLET, SC, 29576-9337**
- Item 2. Policy Period: From **02-10-2016** To **02-10-2017**
(Month, Day, Year) (Month, Day, Year)
(Both dates at 12:01 a.m. Standard Time at the address of the Organization as stated in Item 1.)
- Item 3. (a) Limit of Liability for each Policy Year: **\$1,000,000**
(b) FLSA Defense Sublimit of Liability: **\$150,000** – This limit is part of and not in addition to the Limit of Liability provided for in 3(a).
- Item 4. Retentions:
Insuring Agreement A: **\$0** Each Claim
Insuring Agreement B and/or C: **\$1,000** Each Claim
- Item 5. Premium: **\$2,559.00** Annual Taxes/Surcharges: **\$0.00** Annual Fees: **\$0.00**
- Item 6. Endorsements Attached:
ExecPro - Community Association Solution D 26100 (2/10)
Terrorism Coverage Endorsement DTCV_09P (11/09)
Terrorism Coverage Premium Disclosure DTDP_09P (11/09)
Deletion of Noise Exclusion D 26714-2 (11/12)
Terrorism Coverage Policyholder Disclosure NTDN_08P (1/08)
Data Security Wrongful Acts and Privacy Wrongful Acts Coverage Endorsement D26740 (10/14)
- Item 7. Notices: All notices required to be given to the Insurer under this policy shall be addressed to:
Great American Insurance Companies
Executive Liability Division
P.O. Box 66943
Chicago, Illinois 60666
- Item 8. Prior & Pending Litigation Date: **02-10-2015**

These Declarations along with the completed and signed Proposal Form and community Associations Solution Insurance Policy shall constitute the contract between the Insureds and the Insurer.

THIS IS A CLAIMS MADE POLICY. READ IT CAREFULLY.

D 26102 (2/10)

Page 1 of 1

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ExecPro®

Community Association Solution

ExecPro®**Community Association Solution**

Great American Insurance Group – Executive Liability Division:
1515 Woodfield Road, Suite 500, Schaumburg, IL 60173

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GREAT AMERICAN INSURANCE GROUP®
Headquarters: 301 E. Fourth Street, Cincinnati, Ohio 45202

THIS IS A CLAIMS MADE POLICY. READ IT CAREFULLY.

In consideration of the payment of the premium and in reliance upon all statements made and information furnished to the company shown in the Declarations (a stock insurance company, hereinafter called the **Insurer**), including the statements made in the Proposal Form and subject to all terms, conditions and limitations of this Policy, the **Insured** and **Insurer** agree:

Section I. Insuring Agreements

- A.** If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against any **Insured Persons** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Insured Persons**, **Loss** and **Costs of Defense** resulting from such **Claim**, except for any **Loss** and **Costs of Defense** which the **Organization** or any **Subsidiary** actually pays as indemnification.
- B.** If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against any **Insured Persons** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Organization** or any **Subsidiary**, **Loss** and **Costs of Defense** resulting from such **Claim**, but only to the extent the **Organization** or any **Subsidiary** is required or permitted by law to indemnify the **Insured Persons**.
- C.** If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against the **Organization**, any **Subsidiary**, or the **Property Manager** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Organization**, any **Subsidiary**, or the **Property Manager**, **Loss** and **Costs of Defense** resulting from such **Claim**.

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

Section II. Discovery Period

- A.** If this Policy is not renewed or is cancelled by the **Insurer**, for any reason other than non-payment of premium, then without the requirement of any additional premium, the **Organization** shall receive an automatic ninety (90) day extension of the coverage granted by this Policy with respect to any **Claim** first made against any **Insured** during this extended coverage, but only with respect to **Wrongful Acts** committed prior to the end of the **Policy Period**. This extended coverage shall be referred to as the **Automatic Discovery Period**. In addition, if prior to the end of the **Automatic Discovery Period**, the **Organization** pays the **Insurer** an additional amount equal to forty (40%), seventy-five (75%), or one hundred (100%) percent of the annual premium of this Policy, the **Organization** shall receive an extension of the coverage granted by this Policy for an additional twelve (12), twenty-four (24), or thirty-six (36) months respectively from the end of the **Automatic Discovery Period** with respect to any **Claim** first made against any **Insured** during this extended coverage, but only with respect to **Wrongful Acts** committed prior to the end of the **Policy Period**. This extended coverage shall be referred to as the **Discovery Period**. The **Organization** shall have no right to purchase this **Discovery Period** at any later date or to elect more than one **Discovery Period**.

- B. If this Policy is not renewed or is cancelled by the **Organization**, and if no later than sixty (60) days after the end of the **Policy Period** the **Organization** pays the **Insurer** an additional amount equal to forty (40%), seventy-five (75%), or one hundred (100%) percent of the annual premium of this Policy, the **Organization** shall receive a **Discovery Period** for an additional twelve (12), twenty-four (24), or thirty-six (36) months respectively from the end of the **Policy Period**. The **Organization** shall have no right to purchase this **Discovery Period** at any later date or to elect more than one **Discovery Period**.
- C. The fact that this Policy may be extended by virtue of the **Automatic Discovery Period** or **Discovery Period** shall not in any way increase the Limit of Liability stated in Item 3 of the Declarations. For purposes of the Limit of Liability, the **Automatic Discovery Period** and the **Discovery Period** is considered to be part of and not in addition to the last **Policy Year**.

Section III. Definitions

A. "Claim" shall mean:

- (1) a written demand for monetary relief made against any **Insured**;
- (2) a civil proceeding, including any appeals therefrom made against any **Insured** seeking monetary or non-monetary (including injunctive) relief commenced by service of a complaint or similar pleading;
- (3) a criminal proceeding, including any appeals therefrom made against any **Insured** commenced by the return of an indictment or the filing of notice of charge or similar document; or
- (4) a formal administrative proceeding, including any proceeding before the Equal Employment Opportunity Commission (EEOC) or any similar governmental body, made against any **Insured** commenced by the receipt of charges, formal investigative order, service of summons or similar document.

B. "Claimant" shall mean:

- (1) any past, present, and future **Insured Persons** or applicants for employment with the **Organization** or any **Subsidiary**;
- (2) a government entity or agency, including but not limited to the Equal Employment Opportunity Commission (EEOC) or any similar governmental body, when acting on behalf of or for the benefit of any individual in (1) above; or
- (3) all persons who were, now are, or shall be independent contractors, but only to the extent such individuals perform work or services for or on behalf of the **Organization** or any **Subsidiary** and only to the extent such individuals are indemnified by the **Organization** or any **Subsidiary**.

It is further understood and agreed that **Claimant** shall not include any employee of any **Property Manager**.

- C. **"Construction Defect(s)"** shall mean any actual or alleged defective, faulty or delayed construction or any other matter constituting a construction defect under applicable law regardless of whether it results from:
- (1) defective or incorrect architectural plans or other designs;
 - (2) defective or improper soil testing;
 - (3) defective, inadequate or insufficient protection from subsoil or earth movement or subsidence;
 - (4) construction, manufacture or assembly of any tangible property;
 - (5) the failure to provide or pay for any construction-related goods or services; or
 - (6) the supervision or management of any construction-related activities.
- D. **"Costs of Defense"** shall mean reasonable and necessary legal fees, costs and expenses incurred in the investigation or defense of any **Claim**, including the costs of any appeal or appeal bond, attachment bond or similar bond (but without any obligation on the part of the **Insurer** to apply for or furnish such bonds); provided, however, **Costs of Defense** shall not include: (1) salaries, wages, overhead or benefit expenses associated with any **Insured Persons**, and (2) any amounts incurred in defense of any **Claim** which any other insurer has a duty to defend, regardless of whether or not such other insurer undertakes such duty.
- E. **"Employment Practices Wrongful Act"** shall mean any of the following acts related to employment, but only if alleged by or on behalf of a **Claimant**:
- (1) wrongful dismissal, discharge or termination of employment, whether actual or constructive;
 - (2) misrepresentation;
 - (3) violation of employment laws;
 - (4) sexual or workplace harassment;
 - (5) discrimination;
 - (6) wrongful failure to employ or promote;
 - (7) wrongful discipline;
 - (8) wrongful deprivation of career opportunity including a wrongful failure to hire or promote;
 - (9) failure to grant tenure;
 - (10) negligent employee evaluation;
 - (11) retaliation;
 - (12) failure to provide adequate workplace or employment policies or procedures;
 - (13) defamation (including libel and slander);
 - (14) invasion of privacy;
 - (15) wrongful demotion;
 - (16) negligent reassignment;
 - (17) violation of any federal, state or local civil rights laws;
 - (18) negligent hiring;
 - (19) negligent supervision;
 - (20) negligent training;
 - (21) negligent retention; or
 - (22) acts described in (1) through (21) above arising from the use of the **Organization's** or **Subsidiary's** Internet, e-mail, telecommunication or similar systems, including the failure to provide and enforce adequate policies and procedures relating to such use of the **Organization's** or **Subsidiary's** Internet, e-mail, telecommunication or similar systems.
- F. **"Financial Insolvency"** shall mean the **Organization** becoming a Debtor in Possession, or the appointment of a receiver, conservator, liquidator, trustee, rehabilitator or similar official to control, supervise, manage or liquidate the **Organization**.
- G. **"Fungi"** shall mean any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents, or byproducts produced or released by fungi.

H. **"Insured"** shall mean:

- (1) the **Organization**;
- (2) any **Subsidiary**;
- (3) in the event of **Financial Insolvency**, the resulting Debtor in Possession (or foreign equivalent status), if any;
- (4) all **Insured Persons**; and
- (5) any **Property Manager**, but only if such **Property Manager** is acting pursuant to the written authority granted by the **Organization** or on behalf of and at the direction of the **Organization** or any **Subsidiary**.

I. **"Insured Persons"** shall mean all persons who were, now are, or shall be directors, trustees, officers, employees, leased employees, temporary or seasonal employees, volunteers or staff members of the **Organization** or any **Subsidiary**, including any executive board members and committee members, whether salaried or not. It shall also mean all persons who were, now are, or shall be directors, trustees, officers, employees, leased employees, temporary or seasonal employees, volunteers or staff members of any **Property Manager**, but only if such persons are acting within the scope of their employment with the **Property Manager** and on behalf of the **Organization** or any **Subsidiary**.

J. **"Loss"** shall mean settlements, judgments, pre-judgment and post-judgment interest, front and back pay, compensatory damages, punitive or exemplary damages, the multiple portion of any multiplied damage award, and subject to the provisions of Section V. and VI., **Costs of Defense** incurred by the **Insured**. **Loss** shall not include:

- (1) criminal or civil fines or penalties imposed by law (except as provided pursuant to Section X. H.), or taxes;
- (2) the value of perquisites, deferred compensation or any other type of compensation earned in the course of employment or the equivalent value thereof; and
- (3) any amounts which may be deemed uninsurable under the law pursuant to which this Policy shall be construed.

It is understood and agreed that the enforceability of the foregoing coverage shall be governed by such applicable law which most favors coverage for punitive or exemplary damages or the multiple portion of any multiplied damage award.

K. **"Organization"** shall mean the entity named in Item 1 of the Declarations.

L. **"Policy Year"** shall mean the period of one year following the effective date and hour of this Policy or the period of one year following any anniversary date thereof falling within the **Policy Period**; or if the time between the effective date or any anniversary date and the termination of this Policy is less than one year, such lesser period. Any **Discovery Period** or **Automatic Discovery Period** shall be considered part of and not in addition to the last **Policy Year**.

M. **"Policy Period"** shall mean the period from the inception of this Policy to the expiration date stated in Item 2 of the Declarations or its earlier termination, if applicable.

N. **"Property Manager"** shall mean any entity providing real estate property management services to the **Organization** or any **Subsidiary** pursuant to a written contract.

O. **"Related Wrongful Acts"** shall mean **Wrongful Acts** which are causally connected by reason of any common fact, circumstance, situation, transaction, casualty, event or decision.

P. "Subsidiary" shall mean:

- (1) any entity which qualifies as a not-for-profit organization under the Internal Revenue Code, other than a political committee organized pursuant to Section 432 of the Federal Election Campaign Act of 1971 (and amendments thereto), and for which the **Organization** has or controls the right to elect or appoint more than fifty percent (50%) of the Board of Directors or other governing body of such entity as of the inception date of this Policy;
- (2) any similar entity which was created or acquired by the **Organization** after the inception date of this Policy, if the entity's total assets do not exceed thirty-five percent (35%) of the total consolidated assets of the **Organization** as of the inception date of this Policy; or
- (3) any other entity added as a **Subsidiary** by written endorsement to this Policy.

Coverage shall apply to a **Subsidiary** only for **Wrongful Acts** allegedly committed during the time such entity qualified as a **Subsidiary**.

Q. "Wrongful Act" shall mean:

- (1) any of the following by the **Organization**, and/or any **Subsidiary**, and/or any **Insured Persons** acting in their capacity with the **Organization** or a **Subsidiary**:
 - (a) actual or alleged error, misstatement, misleading statement, act or omission, neglect or breach of duty;
 - (b) **Employment Practices Wrongful Act**;
- (2) any matter claimed against any **Insured Persons** solely by reason of their status with the **Organization** or any **Subsidiary**.

Section IV. Exclusions

This Policy does not apply to any **Claim** made against any **Insured**:

- A. brought about or contributed to by: (1) any **Insured** gaining any profit, advantage or remuneration to which they were not legally entitled; or (2) the deliberate fraudulent or criminal acts of any **Insured**; however, this exclusion shall not apply unless it is finally adjudicated such conduct in fact occurred, nor shall it apply to coverage provided under Insuring Agreement I.B.;
- B. to the extent it is insured in whole or in part by any other valid and collectible policy or policies, (except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies), whether such other policy or policies are stated to be primary, contributory, excess, contingent, or otherwise;
- C. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving:
 - (1) any **Wrongful Act** or **Related Wrongful Act** or any fact, circumstance or situation which has been the subject of any notice or **Claim** given under any other policy of which this Policy is a renewal or replacement;
 - (2) any **Wrongful Act** or any circumstance known by any **Insured Person** prior to the date stated in Item 8 of the Declarations which would indicate the probability of such **Claim** being made, provided, however, this exclusion shall only apply to the **Organization**, its **Subsidiaries** and those **Insured Persons** having such knowledge; or

- (3) any civil, criminal, administrative or investigative proceeding involving any **Insured** pending as of or prior to the date stated in Item 8 of the Declarations, or any fact, circumstance or situation underlying or alleged in such proceeding;
- D. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: (1) bodily injury, sickness, disease or death of any person, assault or battery; (2) damage to or destruction of any tangible property or the loss of use of any tangible property; or (3) humiliation, mental anguish, emotional distress, invasion of privacy, wrongful entry, trespassing, eviction, false arrest, false imprisonment, malicious prosecution, abuse of process, libel or slander; provided, however, that part (3) of this exclusion shall not apply to any **Claim** for an **Employment Practices Wrongful Act**;
- E. for any actual or alleged violation by any **Insured** of the Employee Retirement Income Security Act of 1974, the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Occupational Safety and Health Act or any rules or regulations promulgated under these acts or any similar provisions of any federal, state, local or foreign law, except a **Claim** alleging retaliation for the exercise of any rights under such laws;
- F. for any **Wrongful Act** of any **Insured Persons** in their respective capacity as a director, officer, trustee, or equivalent position of an entity other than the **Organization** or any **Subsidiary**;
- G. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged seepage, pollution, radiation, emission, contamination or irritant of any kind, including but not limited to smoke, vapor, dust, fibers, mold, spores, fungi, germs, soot, fumes, acids, alkalis, asbestos, chemicals or waste of any kind, provided, however, this exclusion shall not apply to coverage provided under Insuring Agreement 1.A.;
- H. by, or for the benefit of, or at the behest of the **Organization** or any **Subsidiary** or any entity which controls, is controlled by, or is under common control with the **Organization** or any **Subsidiary**, or any person or entity which succeeds to the interests of the **Organization** or any **Subsidiary**, provided, however, this exclusion shall not apply to any **Claim** brought by the receiver, conservator, liquidator, trustee, rehabilitator, examiner or similar official of the **Organization**, if any, in the event of **Financial Insolvency**;
- I. other than **Costs of Defense**:
- (1) for any obligation of the **Organization** or any **Subsidiary**, as a result of a **Claim**, seeking relief or redress in any form other than money damages, including but not limited to any obligations of the **Organization** or any **Subsidiary** to modify any building or property;
 - (2) for any obligation of the **Organization** or any **Subsidiary** to pay compensation earned by any **Insured Person** in the course of employment, but not paid by the **Organization** or any **Subsidiary**, including any unpaid salary, bonus, wages, severance pay, retirement benefits, vacation days or sick days, provided, however, this exclusion shall not apply to front pay and back pay;
 - (3) for any actual or alleged violation by any **Insured** of the Fair Labor Standards Act or any similar state or local law, provided, however, this exclusion shall not apply to the Equal Pay Act. **Costs of Defense** provided pursuant to this section, I.(3), shall be subject to the FLSA Defense Sublimit of Liability stated in Item 3 of the Declarations, if any; or
 - (4) for any actual or alleged liability of any **Insured** under any contract or agreement, express or implied, written or oral; provided, however this exclusion shall not apply to employment related obligations which would have attached absent such contract or agreement;

- J. for any obligations under a worker's compensation, disability benefits, insurance benefits or unemployment compensation law, or any similar law; provided, however this exclusion shall not apply to a **Claim** for an **Employment Practices Wrongful Act** involving retaliation with regard to benefits paid or payable;
- K. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving:
 - (1) actual, alleged or threatened:
 - (a) inhalation of, ingestion of, contact with, or exposure to any **Fungl** or bacteria; or
 - (b) existence of or presence of any **Fungl** or bacteria on or within a building or structure including its contents, regardless of whether any other cause, event, material, or product contributed concurrently or in any sequence to any injury or damage; or
 - (2) any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating, disposing of, or in any way responding to, or assessing the effects of **Fungl** or bacteria by any **Insured** or by any other person or entity;
- L. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged **Construction Defect(s)**;
- M. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving any actual or alleged liability of an **Insured**, in whole or in part, in the capacity as a builder or developer, or in the capacity of a sponsor of the **Organization**, or of an **Insured** affiliated with such a builder, developer or sponsor, and which is related to actual or alleged misconduct on the part of such builder, developer or sponsor, including but not limited to actual or alleged conflict of interest, self-dealing, or disputes concerning conversion, construction or development;
- N. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged noise.

With respect to this section of the Policy, no fact pertaining to or conduct by any **Insured Person** shall be imputed to any other **Insured Person**; and only facts pertaining to or conduct by any past, present, or future Executive Director, President, or Chairman of the **Organization** shall be imputed to the **Organization** or any **Subsidiary** to determine if coverage is available.

Section V. Limits of Liability and Retention

- A. The **Insurer** shall be liable to pay one hundred percent (100%) of **Loss** in excess of the Retention stated in Item 4 of the Declarations. The **Insurer's** maximum Limit of Liability for the aggregate amount of **Loss** resulting from all **Claims** deemed to have been made in a **Policy Year** shall be shown in Item 3 of the Declarations.
- B. One Retention shall apply to each and every **Claim**. More than one **Claim** involving the same **Wrongful Act** or **Related Wrongful Acts** of one or more **Insureds** shall be considered a single **Claim**, and only one Retention shall be applicable to such single **Claim**. All such **Claims**, constituting a single **Claim**, shall be deemed to have been made on the earlier of the following dates: (1) the earliest date on which any such **Claim** was first made; or (2) the earliest date on which any such **Wrongful Act** or **Related Wrongful Act** was reported under this Policy or any other policy providing similar coverage.

- C. **Costs of Defense** incurred by the **Insurer** shall be in addition to the Limit of Liability, and such **Costs of Defense** shall not be subject to the Retention amount. If **Costs of Defense** are incurred by the **Insured** with the **Insurer's** consent, such **Costs of Defense** shall be considered **Loss** and thus subject to the Limit of Liability and Retention.
- D. With respect to all **Claims** deemed to have been made in a **Policy Year**, should the Limit of Liability be exhausted by payment of **Loss** resulting from one or more such **Claims**, the **Insurer's** duty to defend shall cease and any and all obligations of the **Insurer** hereunder shall be deemed to be completely fulfilled and extinguished and the **Insurer** shall have no further obligations.
- E. For the purpose of applying the Retention, **Loss** applicable to Insuring Agreement I.B. includes that for which indemnification is legally permissible, regardless of whether actual indemnification is granted. The certificate of incorporation, charter or other organizational document of the **Organization**, including by-laws and resolutions, shall be deemed to require indemnification and advancement of **Loss** to the **Insured Persons** to the fullest extent permitted by law.

Section VI. Costs of Defense and Settlements

- A. The **Insureds** shall not incur **Costs of Defense**, or admit liability, offer to settle, or agree to any settlement in connection with any **Claim** without the express written consent of the **Insurer**, which consent shall not be unreasonably withheld. The **Insureds** shall provide the **Insurer** with full cooperation and all information and particulars it may reasonably request in order to reach a decision as to such consent. Any **Loss** resulting from any admission of liability, agreement to settle, or **Costs of Defense** incurred prior to the **Insurer's** consent shall not be covered hereunder.
- B. The **Insurer** has the right to investigate and settle any **Claim** as it deems expedient. If the **Insurer** recommends a settlement and the **Insured** refuses to consent thereto, the **Insurer's** liability for such **Claim** is limited to the amount in excess of the Retention, which the **Insurer** would have contributed had the **Insured** consented to the settlement, the **Costs of Defense** covered by the Policy and incurred prior to the date of such refusal to settle, and fifty percent (50%) of any additional covered **Loss**, including **Costs of Defense**, incurred subsequent to such refusal and subject to the Limit of Liability.

If the **Insured** refuses to consent to a settlement as contemplated above, **Costs of Defense** shall be subject to the Retention.

Section VII. Notice of Claim

- A. The **Insureds** shall, as a condition precedent to their rights under this Policy, give the **Insurer** notice in writing of any **Claim** made during the **Policy Period**. Such notice shall be given as soon as practicable after the date a Board Member or an employee of the **Property Manager** has knowledge of the **Claim**, and in no event later than ninety (90) days after the end of the **Policy Period**.
- B. If during the **Policy Period** or **Discovery Period**, any **Insured** first becomes aware of a specific **Wrongful Act** and gives notice to the **Insurer** of: (1) the specific **Wrongful Act**; (2) the injury or damage which has or may result therefrom; and (3) the circumstances by which the **Insured** first became aware thereof; then any **Claim** arising out of such **Wrongful Act** which is subsequently made against the **Insured** shall be deemed to have been made at the time the **Insurer** received such written notice from the **Insured**.

- C. In addition to furnishing the notice as provided in Section VII A or B, the **Insured** shall, as soon as practicable, provide the **Insurer** with copies of reports, investigations, pleadings and other documents in connection therewith, and shall provide all information, assistance and cooperation which the **Insurer** reasonably requests and do nothing to prejudice the **Insurer's** position or its potential or actual rights of recovery.
- D. Notice to the **Insurer** as provided in Section VII A or B shall be emailed to **ELDClaims@gaig.com** or mailed to **GREAT AMERICAN INSURANCE GROUP, EXECUTIVE LIABILITY DIVISION, CLAIMS DEPARTMENT, P.O. BOX 66943, CHICAGO, IL 60666.**

Section VIII. Coverage Extensions

A. Spousal/Domestic Partner Provision

The coverage provided by this Policy shall also apply to the lawful spouse or "Domestic Partner" of any **Insured Person**, but only for **Claims** arising out of any actual or alleged **Wrongful Acts** of any **Insured Person**. The term "Domestic Partner" shall mean any natural person qualifying as a domestic partner under the provisions of any applicable federal, state or local law.

B. Worldwide Provision

The coverage provided under this Policy shall apply worldwide. The term **Insured Persons** is deemed to include individuals who serve in equivalent positions in foreign **Subsidiaries**.

C. Estates and Legal Representatives

The coverage provided by this Policy shall also apply to the estates, heirs, legal representatives, or assigns of any **Insured Persons** in the event of their death, incapacity or bankruptcy, but only for **Claims** arising out of any actual or alleged **Wrongful Acts** of any **Insured Persons**.

Section IX. General Conditions

A. Cancellation or Non-Renewal

- (1) This Policy may be cancelled by the **Organization** at any time by written notice to the **Insurer**. In the event the **Organization** cancels this Policy for reasons other than the downgrade of the **Insurer's** rating by A.M. Best, the **Insurer** shall retain the customary short rate portion of the premium. However, if the **Organization** cancels the Policy due to a downgrade of the **Insurer's** rating to below [A-] by A.M. Best, the **Insurer** shall refund any unearned premium on a pro rata basis. Payment of any unearned premium by the **Insurer** shall not be a condition precedent of the effectiveness of cancellation but such payment shall be made as soon as practicable.
- (2) This Policy will only be cancelled by the **Insurer** if the **Organization** does not pay the premium when due.
- (3) If the **Insurer** elects not to renew this Policy, the **Insurer** shall provide the **Organization** with at least sixty (60) days advance notice thereof.

B. Proposal Form

It is agreed the particulars and statements contained in Proposal Forms submitted to the **Insurer** (and any material submitted therewith) are the representations of the **Insured** and are to be considered as incorporated in and constituting part of this Policy. It is also agreed this Policy is issued in reliance upon the truth of such representations. However, coverage shall not be excluded as a result of any untrue statement in the Proposal Form, except as to the **Organization**, its **Subsidiaries**, and any **Insured Person** making such untrue statement or having knowledge of its falsity.

In no event shall Insuring Agreement I.A. of this Policy be rescinded by the **Insurer**.

C. Order of Payments

In the event of **Loss** arising from a covered **Claim** for which payment is due under the provisions of this Policy, the **Insurer** shall first, pay **Loss** for which coverage is provided under Insuring Agreement I.A. of this Policy; and thereafter with respect to whatever remaining amount of the Limit of Liability is available after such payment, pay such other **Loss** for which coverage is provided under any other applicable Insuring Agreements in Section I of this Policy.

D. Merger or Acquisition

If, during the **Policy Period**, the **Organization** acquires the assets of another entity, by merger or otherwise, and the acquired assets of such other entity exceed thirty-five percent (35%) of the assets of the **Organization** as of the inception date of the Policy, written notice thereof shall be given to the **Insurer** as soon as practicable, but in no event later than ninety (90) days from the effective date of the transaction, together with such information as the **Insurer** may request. Premium adjustment and coverage revisions shall be effected as may be required by the **Insurer**.

E. Conversion to Run-Off Coverage

If prior to the end of the **Policy Period**, the **Organization** merges into another organization and the **Organization** is not the surviving entity, another organization or person acquires the right to elect or appoint more than fifty percent (50%) of the Board of Directors or other governing body of the **Organization**, or the **Organization** ceases to qualify as a not-for-profit organization under any federal, provincial and territorial legislation and/or the Internal Revenue Code (such events hereinafter referred to as **Transaction**), then:

- (1) the **Organization** must give written notice of such **Transaction** to the **Insurer** within thirty (30) days after the effective date of such **Transaction**, and provide the **Insurer** with such information as the **Insurer** may deem necessary; and
- (2) this Policy, including the **Discovery Period** if elected, shall apply, but only with respect to any **Wrongful Act** committed prior to the effective date of such **Transaction**.

F. Action Against the Insurer

- (1) No action shall be taken against the **Insurer** unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this Policy, and until the **Insured's** obligation to pay shall have been finally determined by an adjudication against the **Insured** or by written agreement of the **Insured**, those filing the claim, and the **Insurer**.
- (2) No person or organization shall have any right under this Policy to join the **Insurer** as a party to any **Claim** against any **Insured** nor shall the **Insurer** be impleaded by any **Insured** or their legal representative in any such **Claim**.

G. Subrogation

In the event of payment under this Policy, the **Insurer** shall be subrogated to all the **Insureds'** rights of recovery. The **Insureds** shall do everything necessary to secure such rights, including the execution of such documents necessary to enable the **Insurer** to effectively bring suit in the name of any **Insured**. In no event, however, shall the **Insurer** exercise its rights to subrogation against an **Insured Person** under this Policy unless, such **Insured Person**:

- (1) has been convicted of a deliberate criminal act, or
- (2) has been determined by a final adjudication adverse to the **Insured Person** to have committed a deliberate fraudulent act, or to have obtained any profit, advantage or remuneration to which such **Insured Person** was not legally entitled.

In the event the **Insurer** shall for any reason pay indemnifiable **Loss** on behalf of an **Insured Person**, the **Insurer** shall have the contractual right hereunder to recover from the **Organization** or any **Subsidiary** the amount of such **Loss** equal to the amount of the Retention not satisfied by the **Organization** or any **Subsidiary** and shall be subrogated to rights of the **Insured Persons** hereunder.

H. Conformity to Law

Any terms of this Policy which are in conflict with the terms of any applicable laws are hereby amended to conform to such laws.

I. Assignment

Assignment of interest under this Policy shall not bind the **Insurer** until its consent is endorsed hereon.

J. Representative of the Insurer

Great American Insurance Group, Executive Liability Division, Post Office Box 66943, Chicago, Illinois, 60666 shall act on behalf of the **Insurer** for all purposes including, but not limited to, the giving and receiving of all notices and correspondence.

K. Organization Represents Insured

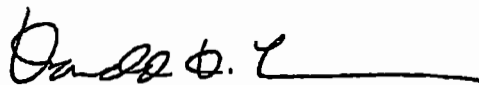
By acceptance of this Policy, the **Organization** shall be designated to act on behalf of the **Insureds** for all purposes including, but not limited to, giving and receiving of all notices and correspondence, the cancellation or non-renewal of this Policy, the payment of premiums, and the receipt of any return premiums that may be due under this Policy.

L. Entire Agreement

By acceptance of this Policy, the **Insured** and the **Insurer** agree that this Policy (including the Proposal Forms submitted to the **Insurer** and any materials submitted therewith) and any written endorsements attached hereto constitute the entire agreement between the parties.

In witness whereof the **Insurer** has caused this Policy to be signed by its President and Secretary and countersigned, if required, on the Declarations page by a duly authorized agent of the **Insurer**.

GREAT AMERICAN INSURANCE COMPANY®



President



Secretary



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AMENDMENT TO DECLARATIONS PAGE

It is understood and agreed that the Declarations is amended by the addition of the following:

Act of Terrorism Premium: \$0.00

It is further understood and agreed the Policyholder Disclosure of Terrorism Coverage is attached to and is to be considered as incorporated in and constituting a part of this Policy.

Other than as stated above, nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the Policy to which this endorsement is attached.

Insured: **Tilghman Beach & Racquet Club HOA Inc.**

Policy Period **02-10-2016 - 02-10-2017**

Policy Number: **EPP3654704-01**

Countersigned by: **Not Required**
Authorized Representative

Endorsement Effective Date: **02-10-2016**



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COVERAGE FOR ACTS OF TERRORISM

It is understood and agreed that the General Conditions of the Policy are amended by the addition of the following:

Act of Terrorism Coverage

Subject to all other terms and conditions of this Policy, coverage is available for Loss caused by an Act of Terrorism as defined below.

"Act of Terrorism" means any act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States –

- (i) to be an act of terrorism;
- (ii) to be a violent act or an act that is dangerous to –
 - (a) human life;
 - (b) property; or
 - (c) infrastructure;
- (iii) to have resulted in damage within the United States, or outside of the United States in the case of –
 - (a) an air carrier or vessel described in Section (5)(B) of the Terrorism Risk Insurance Act; or
 - (b) the premises of a United States mission; and
- (iv) to have been committed by an individual or individuals, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

With respect to any one or more Acts of Terrorism under the Terrorism Risk Insurance Act, as amended in 2007, we will not pay any amounts for which we are not responsible under the terms of that Act (including subsequent action of Congress pursuant to the Act) due to the application of any clause which results in a cap on our liability for payments for terrorism losses.

No act shall be certified by the Secretary as an Act of Terrorism if (i) the act is committed as part of the course of a war declared by the Congress, except that this clause shall not apply with respect to any coverage for workers compensation; or (ii) property and casualty insurance losses resulting from the act, in the aggregate, do not exceed \$5,000,000.

Other than as stated above, nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the Policy to which this endorsement is attached.

Insured: **Tilghman Beach & Racquet Club HOA Inc.**

Policy Period **02-10-2016 - 02-10-2017**

Policy Number: **EPP3654704-01**

Countersigned by: **Not Required**
Authorized Representative

Endorsement Effective Date: **02-10-2016**



POLICYHOLDER DISCLOSURE OF TERRORISM COVERAGE

The Terrorism Risk Insurance Act establishes a program within the Department of the Treasury, under which the federal government shares, with the insurance industry, the risk of loss from future terrorist attacks. The Act applies when the Secretary of the Treasury certifies that an event meets the definition of an Act of Terrorism. The Act provides that, to be certified, an Act of Terrorism must cause losses of at least five million dollars and must have been committed by an individual or individuals as part of an effort to coerce the government or population of the United States.

The United States Government, Department of the Treasury, will pay a share of terrorism losses insured under the federal program. The federal share equals 85% of that portion of the amount of such insured losses that exceeds the applicable insurer retention.

The Terrorism Risk Insurance Act, as amended in 2007, contains a \$100 billion cap that limits U.S. Government reimbursement as well as insurers' liability for losses resulting from certified acts of terrorism when the amount of such losses in any one calendar year exceeds \$100 billion. If the aggregate insured losses for all insurers exceed \$100 billion, your coverage may be reduced.

In accordance with the Terrorism Risk Insurance Act, we are required to offer you coverage for losses resulting from an act of terrorism that is **certified under the federal program** as an Act of Terrorism. All other provisions of this policy will still apply to such an act. That is, a loss will not be excluded or covered just because it was caused by an Act of Terrorism.

The portion of the annual premium that is attributable to coverage for Acts of Terrorism that are certified under the Terrorism Risk Insurance Act is \$0.00.

All other terms and conditions of the policy remain unchanged.

If you would like to reject the coverage for "certified" Acts of Terrorism, please provide Great American written confirmation of such, and an exclusion will be attached to your policy.



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DELETION OF NOISE EXCLUSION

It is understood and agreed that Section IV.N. of the policy is deleted in its entirety.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.

Insured:

Policy Period

Policy Number:

Countersigned by:

Endorsement Effective Date:

Authorized Representative



Community Association Solution
Insurance Policy

**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

Solely for purposes of coverage provided by this endorsement, it is understood and agreed that the following changes are made to the Policy:

THIRD PARTY COVERAGE

Section I. is deleted and replaced with the following:

Section I. Insuring Agreements

- A. If during the Policy Period or the Discovery Period any Claim, including a Regulatory Action, is first made against any Insured Persons for a Data Security Wrongful Act or a Privacy Wrongful Act, the Insurer shall pay on behalf of the Insured Persons, Loss and Costs of Defense resulting from such Claim, except for any Loss and Costs of Defense which the Organization or any Subsidiary actually pays as indemnification.
- B. If during the Policy Period or the Discovery Period any Claim, including a Regulatory Action, is first made against any Insured Persons for a Data Security Wrongful Act or a Privacy Wrongful Act the Insurer shall pay on behalf of the Organization, Subsidiary or Property Manager, Loss and Costs of Defense resulting from such Claim, but only to the extent the Organization or any Subsidiary is required or permitted by law to indemnify the Insured Persons.
- C. If during the Policy Period or the Discovery Period any Claim, including a Regulatory Action, is first made against the Organization, Subsidiary or Property Manager for a Data Security Wrongful Act or a Privacy Wrongful Act, the Insurer shall pay on behalf of the Organization or any Subsidiary, Loss and Costs of Defense resulting from such Claim.

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

FIRST PARTY COVERAGE FOR ORGANIZATION AND SUBSIDIARIES

Section VIII. is amended by the addition of the following:

D. Privacy Event Expenses Provision

The Insurer shall reimburse or pay on behalf of the Organization or any Subsidiary all Privacy Event Expenses in excess of the applicable Retention stated in Item 4. of the Declarations and up to the applicable Limits of Liability stated in Item 3. of the Declarations that the Organization or any Subsidiary incurs as a direct result of a Data Breach provided:

Insured: Tilghman Beach & Racquet Club HOA Inc.

Policy Period: 02-10-2016 - 02-10-2017

Policy Number: EPP3654704-01

Countersigned by: _____
Authorized Representative

Endorsement Effective Date: 02-10-2016



Community Association Solution
Insurance Policy

**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

- (1) such **Data Breach** is first discovered during the **Policy Period**;
- (2) prior to the inception date of the first policy issued by the **Insurer** to the **Organization** and continuously renewed, no **Insured** had a basis to believe that any such **Data Breach** might reasonably be expected;
- (3) the **Insured** reports such **Data Breach** in accordance with the Reporting Obligations for a **Data Breach** section below; and
- (4) the **Insured** obtains the **Insurer's** advance written consent to incur such **Privacy Event Expenses**.

AMENDMENT TO DEFINITIONS

1. Section III.A. is amended by the addition of the following:

Claim shall also mean a **Regulatory Action**.

2. Section III.J. is amended by the addition of the following:

Loss shall also mean **Privacy Regulatory Fines and Penalties, Privacy Event Expenses and Regulatory Restitution Funds**.

3. Section III. is amended by the addition of the following:

"Computer Systems" shall mean any computer, network of computers, mobile device, or internet-enabled or networked telephone, printer, copier or other device, if owned, leased or operated by or on behalf of the **Organization** or any **Subsidiary** in connection with the **Insured's** ordinary business activities, including if operated by a cloud computer provider on behalf of the **Organization** or any **Subsidiary**.

"Data Asset" shall mean software and electronic data, including but not limited to databases, audio files, video files or other image files, maintained by or on behalf of the **Organization** or any **Subsidiary** in connection with the **Organization** or any **Subsidiary's** business operations.

"Data Breach" shall mean the unauthorized access to, loss of control over or disclosure of **Protected Information** maintained by the **Insured** or by those acting on behalf of the **Insured**.

"Data Security Wrongful Act" shall mean an actual or alleged negligent act, error or omission by or on behalf of the **Insured** in the performance of the **Organization** or any **Subsidiary's** business that causes or fails to prevent:



Community Association Solution
Insurance Policy

**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

- (1) the theft of, or unauthorized access to, or disclosure or use of, the **Data Asset** of a client or customer of the **Organization** or any **Subsidiary** stored on the **Computer Systems**;
- (2) unauthorized access to or use of the **Computer Systems** that results in the alteration, corruption, destruction, deletion or damage to **Data Asset** of a client or customer of the **Organization** or any **Subsidiary** stored on the **Computer Systems**;
- (3) the transmission of any virus, worm, trojan horse, backdoor or similar malicious software program or code from the **Computer Systems** to a third party's computer systems;
- (4) unauthorized access to or use of the **Computer Systems** that results in damage or disruption to computer systems of any third party or any **Data Asset** on such third party computer systems, including through a denial-of-service attack or similar action by an unauthorized person; or
- (5) a denial-of-service attack or similar action by any unauthorized person that makes the **Computer Systems** unavailable to authorized clients or customers of the **Organization** or any **Subsidiary**.

"**Privacy Event Expenses**" shall mean the reasonable and necessary:

- (1) legal and forensic fees and costs to investigate the cause of the **Data Breach**, identify persons affected or potentially affected and determine the extent that any law, regulation, statute or contract requires notification of the **Data Breach**;
- (2) costs of notification of the **Data Breach**, if required by law, regulation, statute or contract or voluntarily incurred with the **Insurer's** prior written consent; and
- (3) costs to monitor, freeze or thaw credit or provide credit restoration services for persons affected by the **Data Breach**.

"**Privacy Wrongful Act**" shall mean an actual or alleged negligent act, error or omission by or on behalf of the **Insured** in the performance of the **Organization** or any **Subsidiary's** business that causes or fails to prevent:

- (1) the theft of, or unauthorized access to, or disclosure or use of, **Protected Information** held or maintained by or on behalf of the **Organization** or any **Subsidiary**, including by a cloud service provider or other vendor for the **Organization** or any **Subsidiary**, if such theft, access, disclosure or use:
 - a) results in identity theft or other misuse of such **Protected Information**;
 - or



Community Association Solution
Insurance Policy

**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

- b) violates any federal, state, local or foreign law or regulation, or the **Organization** or any **Subsidiary's** published policies, regarding the maintenance, protection, use or disclosure of **Protected Information**;
- (2) violation of any federal, state, local or foreign law or regulation, or any publicly stated policy of the **Organization** or any **Subsidiary**, relating to **Protected Information** that:
 - a) prohibits or restricts the **Insured's** collection, sharing or selling of **Protected Information**; or
 - b) requires the **Insured** to provide access to **Protected Information** or upon request, correct incomplete or inaccurate **Protected Information**; or
- (3) any fraudulent website or electronic communication, including a phishing email, from impersonating the **Insured** and causing financial loss to any customer or client of the **Organization** or any **Subsidiary**.

"Privacy Regulatory Fines and Penalties" shall mean the sums the **Organization** or any **Subsidiary** is required to pay as part of the settlement or judgment of a covered **Regulatory Action**.

"Protected Information" shall mean:

- (1) any non-public personally identifiable information, including financial, medical or health care information, held or maintained by or on behalf of the **Insured** in connection with the **Organization's** or any **Subsidiary's** business operations, whether in electronic form or otherwise, which is protected from unauthorized access or disclosure by any federal, state, local or foreign law or regulation or by any publicly stated policy of the **Insured**; and
- (2) confidential, non-public business information of a third party that is in the care or custody of the **Organization** or any **Subsidiary** pursuant to a confidentiality agreement between the **Organization** or any **Subsidiary** and such third party.

"Regulatory Action" shall mean a written request for information, civil investigation or administrative proceeding or civil proceeding brought by any local, state, federal or regulatory agency for any **Privacy Wrongful Act** in connection with a **Data Breach**. However, **Regulatory Action** shall not include any written request, investigation or proceeding brought by or on behalf of the Securities and Exchange Commission.



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**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

"Regulatory Restitution Fund" shall mean any sums deposited into a fund and used to provide compensation to individuals affected by a **Privacy Wrongful Act** as part of the settlement or judgment of a **Regulatory Action**.

4. Section III.Q. is amended by the addition of the following:

Wrongful Act shall also mean a **Data Security Wrongful Act** and a **Privacy Wrongful Act**.

AMENDMENT TO EXCLUSIONS

1. Section IV.B. is deleted and replaced with the following:

B. to the extent it is insured in whole or in part by any other valid and collectible policy or policies, (except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies), whether such other policy or policies are stated to be primary, contributory, excess, contingent, or otherwise; provided, however, that coverage for all **Data Breaches** and **Claims for Personal Injury Wrongful Acts, Data Security Wrongful Acts** and/or **Privacy Wrongful Acts** shall be specifically excess of any similar coverage provided pursuant to terms and conditions of any general liability policy, business owner policy or cyber liability policy issued to the **Organization** or any **Subsidiary**.

2. Section IV.D. is deleted and replaced with the following:

D. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: (1) bodily injury, sickness, disease or death of any person, assault or battery; (2) damage to or destruction of any tangible property; or (3) humiliation, mental anguish, or emotional distress; provided, however, that part (3) of this exclusion shall not apply to any **Claim** for a **Privacy Wrongful Act**;

3. The **Insurer** shall not be liable for **Loss, Costs of Defense** or any other payment for any **Claim** made against any **Insured** or any **Data Breach** based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged:



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- (1) mechanical or electrical failure or outage, routine wear and tear, or a disruption or failure of any infrastructure service or utility supplied by a third-party, including but not limited to power, water, gas, communications or connectivity; provided, however, this exclusion shall not apply to a **Claim for a Privacy Wrongful Act**;
- (2) fire, smoke, explosion, lightning, wind, flood, earthquake, volcanic eruption, tidal wave, landslide, hail or act of God or any other physical event, however caused;
- (3) price-fixing, restraint of trade or monopolization;
- (4) violation of any federal, provincial, state, local or foreign statute or regulation prohibiting or restricting unsolicited communications, regardless of whether such communication was transmitted via facsimile, email, text, telephone or otherwise, including but not limited to the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, the Canadian Anti-Spam Law (CASL) and the Telephone Consumer Protection Act (TCPA);
- (5) misappropriation, infringement or theft, or inducement of misappropriation, infringement or theft of trade secrets;
- (6) war including undeclared or civil war, or seizure, confiscation, expropriation, nationalization, or destruction of a **Computer System** by order of any governmental authority;
- (7) potential violation of any federal, state, foreign or local law or regulation and investigated or pursued by a federal, state, foreign or local regulatory agency or other governmental body, provided, however, this exclusion shall not apply to a **Regulatory Action**;
- (8) act, error, omission or circumstance, which was known by the President, Executive Director, Chairman of the Board, Chief Information Officer, Chief Technology Officer, Chief Security Officer, Risk Manager, General Counsel (or the functional equivalent of any of the foregoing) prior to the inception date of the first policy issued by the **Insurer** to the **Organization** and continuously renewed and which could have been reasonably foreseen to be the basis for a **Claim** or **Data Breach**, including, but not limited to, knowledge of security weaknesses, or vulnerabilities in software, hardware or firmware; or
- (9) breach of any express or implied contract, agreement, warranty or guarantee, including, but not limited to, any express or implied contract or agreement to pay royalties or to account for same; provided, however, this exclusion shall not apply to:



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- a) any liability that an **Insured** would have incurred in the absence of such contract, agreement, warranty or guarantee; or
 - b) a **Privacy Wrongful Act** when the actual or alleged breach of contract or agreement is to secure or maintain **Protected Information**.
4. The **Insurer** shall not be liable for **Loss**, **Costs of Defense** or any other payment for any **Claim** made against any **Insured** or any **Data Breach** for:
- (1) any fees or costs to update or improve a **Data Asset** to a level beyond that which existed prior to any **Data Breach** or **Data Security Wrongful Act**;
 - (2) any fees or costs to correct or remediate software program errors or vulnerabilities or deficiencies or problems with any **Computer System** not directly resulting from a **Data Security Wrongful Act**;
 - (3) any amounts incurred by any **Insured** prior to the date a **Claim** is reported to the **Insurer** pursuant to Section VII. or a **Data Breach** is reported pursuant to the Reporting Obligations set below;
 - (4) any overhead expenses of the **Organization** or any **Subsidiary**, including but not limited to compensation or benefits; or
 - (5) the economic or market value of any **Data Asset**.

AMENDMENTS TO LIMITS OF LIABILITY AND RETENTIONS

1. Item 3. of the Declarations is amended by the addition of the following:
- (c) **\$50,000** Sublimit of Liability for all **Privacy Event Expenses** from all **Data Breaches**. This Sublimit is part of and not in addition to the Limit of Liability provided for in 3(a).
 - (d) **\$250,000** Limit of Liability for all **Loss** from all **Claims**, including **Regulatory Actions**, for **Data Security Wrongful Acts** or **Privacy Wrongful Acts**. This limit is part of and not in addition to the Limit of Liability provided for in 3(a).



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2. Item 4. of the Declarations is deleted and replaced with the following:

Item 4. Retentions

Insuring Agreement A:	<u>\$ 0</u>	Each Claim for Privacy Wrongful Acts
Insuring Agreement B and/or C:	<u>\$1,000</u>	Each Claim for Privacy Wrongful Acts
	<u>\$1,000</u>	Each Reimbursement for Privacy Event Expenses pursuant to Section VIII.D. of the Policy

3. Section V. of the Policy is amended by the addition of the following:

The "Each Reimbursement for Privacy Event Expenses" Retention amount stated in Item 4. of the Declarations is the Organization's obligation for all Privacy Event Expenses from each Data Breach.

The "Each Claim for Data Security Wrongful Acts or Privacy Wrongful Acts" Retention stated in Item 4. of the Declarations is the Organization's obligation for each Claim, including any Regulatory Action. If a Claim and Privacy Event Expenses arise out of the same Privacy Wrongful Act or Data Breach, any amounts paid by the Organization in satisfaction of the "Each Reimbursement Privacy Event Expenses" Retention will also erode the "Each Claim for Data Security Wrongful Acts or Privacy Wrongful Acts" Retention with respect to such Claim.

4. Section V.C. is deleted and replaced with the following:

C. Costs of Defense incurred by either the Insurer or Insured shall be subject to applicable Retention and the Limit of Liability for all Claims, including Regulatory Actions, for Data Security Wrongful Acts or Privacy Wrongful Acts.

REPORTING OBLIGATIONS FOR A DATA BREACH

After a Data Breach is first discovered by an Insured, the Insured shall, as a condition precedent to coverage pursuant to this endorsement:

- (a) notify the Insurer of the Data Breach as soon as practicable but in no event later than thirty (30) days after the Data Breach is first discovered;



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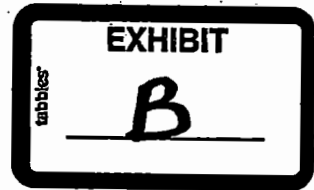
**DATA SECURITY WRONGFUL ACTS AND PRIVACY
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- (b) take reasonable measures to stop or mitigate the damage caused by such **Data Breach**;
- (c) give the **Insurer**, upon request, a detailed proof of the damage caused by such **Data Breach**;
- (d) submit, upon request of the **Insurer**, to examination under oath and give the **Insurer** a signed statement of the **Insured's** answers; and
- (e) cooperate with the **Insurer** in the investigation and settlement of any payments as a result of the **Data Breach**.

For the purposes of coverage extended by this endorsement, a **Data Breach** is "first discovered" when any **Insured** first becomes aware of facts that would cause a reasonable person to assume a **Privacy Wrongful Act** has occurred even though the exact amount or details of loss may not then be known.

Notice of the **Data Breach** shall be given to the **Insurer** at the address indicated in Section VII.D. of the Policy.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.



STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2016-CP-26- **44404**

Jill Keck Humphries, Dennis L. Johnson,
Delona Penny Rice, and Whitmel L. Brown,
Jr., Individually and in a Representative
Capacity on Behalf of All Persons Similarly
Situated Who Own Units in Buildings I, II,
III, IV, V, VI, VII, VIII, IX, X, XI and XII of
the Tilghman Beach and Racquet Club)
Horizontal Property Regime; Gary Steven
Robinson and Elizabeth Erin Humphries;
Dennis L. Johnson, Jr. and Nancy H.)
Johnson,

Plaintiffs,

v.

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

Defendants.

COMPLAINT
(JURY TRIAL REQUESTED)

HORRY COUNTY
2016 JUL -7 AM 8:18
CLERK OF COURT

COME NOW the Plaintiffs, by and through their attorneys, Howell V. Bellamy, III, and
Howell V. Bellamy, Jr., of the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers,

PA., complaining of the Defendants, Tilghman Beach and Racquet Club Condominium Association, Inc. (the "Association"), and James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and in their capacities as directors of the Council of Co-Owners (collectively, the "Directors") state as follows:

JURISDICTION AND VENUE

1. At all times relevant the Plaintiff, Jill Keck Humphries ("Humphries"), was and is an interest owner of fee simple title to Condominium Unit No. 219 in Building IV of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina. Further, Plaintiff Humphries is acting in an individual and also a representative capacity for all other similarly situated co-owners located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII.

2. At all times relevant the Plaintiff, Dennis L. Johnson ("Johnson"), was and is an interest owner of fee simple title to Condominium Unit No. 367 in Building VIII of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina. Further, Plaintiff Johnson is acting in an individual and also a representative capacity for all other similarly situated co-owners located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII.

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

individual and also a representative capacity for all other similarly situated co-owners located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII.

4. At all times relevant the Plaintiff, Whitmel L. Brown, Jr. ("Brown"), was and is an interest owner of fee simple title to Condominium Unit No. 353 in Building XI of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina. Further, Plaintiff Brown is acting in an individual and also a representative capacity for all other similarly situated co-owners located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII.

5. All other similarly situated co-owners, who currently own condominium units located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII, are fairly and adequately represented by the Plaintiffs, Humphries, Johnson, Rice, and Brown, and these Plaintiffs have no interest adverse to that of any individual who might be entitled to the relief sought by this Complaint.

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

7. At all relevant times, the above Plaintiffs were and are shareholders and/or members of the Tilghman Beach and Racquet Club Condominium Association, Inc., when the Defendants failed to act, and/or committed their improper, illegal, and unauthorized conduct as set forth below in the

subsequent paragraphs.

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

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

10. Defendant Steele Brice Windle, III ("Windle") is holder of the fee simple title to Condominium Unit No. 127 in Building I of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. At all times relevant hereto, Defendant Windle acted individually, and as an agent, representative, and member of the Board of Directors of the Defendant Association. Further, the acts of Defendant Windle were "independent acts" as that term is defined under South Carolina law.

11. Defendant Daniel P. Coe ("Coe") is holder of the fee simple title to Condominium Unit No. 361 in Building IX of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. Further, the acts of Defendant Coe were "independent acts" as that term is defined under South Carolina law.

12. Defendant C. Doug Madison ("Madison") is holder of the fee simple title to Condominium Unit No. 106 in Building II of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. Further, the acts of Defendant Madison were "independent acts" as that term is defined under South Carolina law.

13. Defendant George P. White ("White") is holder of the fee simple title to Condominium Unit No. 133 in Building III of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. Further, the acts of Defendant White were "independent acts" as that term is defined under South Carolina law.

14. Defendant, James H. Austin, III ("Austin") is holder of the fee simple title to Condominium Unit No. 357 in Building X of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of

Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. Further, the acts of Defendant Austin were "independent acts" as that term is defined under South Carolina law.

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

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

PHASE I:

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

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

PHASE II:

ALL AND SINGULAR, those certain pieces, parcels, or tracts of land, situate, lying, and being in Little River Township, the City of North Myrtle Beach, Horry County, South Carolina, and being more particularly described and delineated as the remainder of Block 22, and the remainder of Block 2, as shown on that certain plat prepared to set out and delineate the property for

Phase I of the Tilghman Beach and Racquet Club Condominium Project, located on Blocks 2 and 22, Tilghman Estates, as more particularly shown and depicted on a plat of this property prepared by C. B. Berry, R.L.S., South Carolina No. 2075, and dated January 20, 1982, and filed for record in the Office of the Clerk of Court for Horry County, South Carolina, in Real Estate Plat Book 72 at Page 237, which plat contains the most correct and accurate description of the parcels, and which plat description is referred to herein and incorporated by reference herein, for the most full, complete and accurate description of the premises to be submitted to the Horizontal Property Regime for Phase II, Tilghman Beach and Racquet Club.

Derivation of Title:

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

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

BACKGROUND FACTS

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

18. The Tilghman Beach and Racquet Club Horizontal Property Regime ("TB&RC and/or Regime") was established in 1982 in the manner provided for by the South Carolina Horizontal Property Act, as amended, S.C. Code Ann. §§ 27-31-10 *et seq.* (2007) ("Act") by the execution and recording of Master Deed in Deed Book 736 at page 360 on February 2, 1982 in the Office of Clerk of Court for Horry County, South Carolina. The Master Deed and By-Laws are the governing documents of the Regime and define various aspects and duties of the Co-owners, Association, and Property Manager regarding the maintenance, replacement, and repair of the Common Elements. A

copy of the Regime's Master Deed and By-Laws is attached hereto as (Exhibit "A") and incorporated by reference as part of this Complaint.

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

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

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

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

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

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

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

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

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

- (a) The upper boundary of the Unit shall extend to the unfinished surface of the structural slab constituting the ceiling of the Unit. The lower boundary of the

Unit shall extend to the unfinished surface of the structural slab constituting the floor.

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

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

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

- a) **General Common Elements** means and includes:
 - (1) The Real Property (excluding the Limited Common Elements and the Apartments), including but not limited to the land on which the buildings containing the Apartments are constructed;
 - (2) The foundations, main walls, roofs, halls, lobbies, stairways, and entrance and exit or communication ways;

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

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

Limited Common Elements means and includes:

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

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

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

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

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

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

24. Article XXVII of the Master Deed provides remedies for described defaults committed by the Co-owner or Co-owners of any Apartments, or the Association due to their failure to discharge their duties under the governing documents. The following described defaults in Paragraphs A and B of this Article entitles an *aggrieved Co-owner or Co-owners of other*

Apartments to the following legal² and/or equitable relief:

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

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

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

...

- (ii) *To carry out the maintenance, care, upkeep, repair, replacement, operation, . . . and the management of the general and limited elements, services and*

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

facilities or the Regime wherever the same is required to be done and accomplished by the Association for the benefit of its members. (Emphasis

Added.)

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

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

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

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

- (d) The Board of Directors of the Association, in establishing said annual budget for operation, management and maintenance of the project *shall include therein a sum to be collected and maintained as reserve fund for replacement of Common Elements, which reserve fund shall be for the purpose of enabling the Association to replace structural elements and mechanical equipment constituting a part of the Common Elements* as well as the replacement of personal property which may constitute a portion of the

Common Elements held for the joint use and benefit of all of the co-owners of all Apartments. *The amount to be allocated to such reserve fund for replacements shall be established by said Board of Directors so as to accrue and maintain at all times a sum reasonably necessary to anticipate the need for replacements of said Common Elements.* (Emphasis Added.)

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

B. THE GENERAL PLAN OF DEVELOPMENT OF THE PROJECT

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

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

C. EVALUATIONS OF BUILDINGS PRIOR TO 2010

30. Since completion of the Condominium Project, the Board has failed to implement or to require the Manager of the Regime to implement a program for the inspection, maintenance and repair of the Project's Common Elements that would have timely identified and thereby minimized the cost of remediating the current damage to Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII, all in breach of the Board's obligations to the Co-owners under the Master Deed and By-Laws. Further, this factual proposition is supported by the building, inspection, and zoning records of the City of North Myrtle Beach.

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

D. EVALUATIONS OF BUILDINGS SINCE 2010

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

- a. Kyzer & Timmerman Engineers, Inc;
- b. Criterium-Giles Engineers, Inc.;
- c. Martinez & Associates Structural Engineers, PA;
- d. SGA Architecture, LLC;
- e. Procon & Associates, Inc.;
- f. Spann Roofing & Sheet Metal, Inc.;

- g. ABS, Inc.
- h. Keystone R&C, Inc.;
- i. Sutton-Kennerly and Associates, Inc.;
- j. Maxey P. Nolan III, PhD., Entomologist;
- k. A & I Construction;
- l. Shoreline/Stewart Construction; and
- m. Reserve Advisors, Inc.

33. The above listed consultants identified numerous defective and deficient conditions resulting in building distress in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII, which can be separated into structural, building envelope, interior, and roofing conditions. A general summary of the deficient conditions, by category, found by them includes:

Structural Remediation Items of Concern

- a. Balcony railings have corroded at base of supports. Pickets were missing;
- b. Balcony decks exhibited sponginess;
- c. Connection hardware was corroded and delaminating;
- d. Balcony beams are corroded and decayed;
- e. Stair areas exhibited corrosion, rot and decay;
- f. Split Stringers on stairs;
- g. Delaminated and decayed band boards around perimeter of buildings;
- h. Post anchorage connections have severe metal loss and are corroded at the balconies and corridors;
- i. Post to top rail connections have severe metal loss and are corroded at the balconies and corridors;
- j. Wood post base have decayed and corroded at the balconies and corridors;
- k. Connections of cradle beams to wood piling have severe metal loss and are corroded;
- l. Connections of diagonal bracing to timber piling have severe metal loss and are corroded;
- m. Cantilever cradle beams are decayed and delaminating;
- n. Spandrel beams are corroded and decayed at the balcony framing;
- o. Floor joists have deteriorated and are deflecting at the balcony framing;
- p. Module connections to the cradle beams have metal loss and are corroded;
- q. Connectors of the metal connecting plate to the module have corroded;
- r. Soffits are corroded and decayed;
- s. Stairs areas with damaged wood studs at base of walls;
- t. Balcony beams were deflected as much as two (2) inches and showed water

- damage;
- u. Corridor subflooring exhibiting loss of strength and deflecting floor joists; and
- v. Corridor areas retaining excessive amounts of water after storms.

Building Envelope Remediation Items of Concern

- a. Moisture penetration behind exterior siding, trim, and flashing;
- b. Delaminated exterior siding, trim, and flashing;
- c. Delaminating stucco below gable end walls;
- d. Cracking in stucco below gable end walls;
- e. Moisture penetration/leaking ocean side facing windows.
- f. Moisture penetration/leaking ocean side facing sliding glass doors;
- g. Moisture penetration/leaking sliding glass doors;
- h. Corroded window and sliding glass door casings;
- i. Corroded sliding glass door sills;
- j. Moisture affected and rotten wood framing around sliding glass doors.
- k. Rotting fascia boards;
- l. Moisture affected and rotten band boards around perimeter of buildings;
- m. Water penetration at roof including skylights wall to roof interfaces, ridges and gable vents;
- n. Water penetration at building corner units;
- o. Water penetration at sliding glass doors due to corroded door pans and deficient hardware;
- p. Lack of membrane protection at balcony and corridor perimeters;
- q. Lack of flashing protection at post to floor interface;
- r. Lack of flashing or membrane protection at deck to wall interface;
- s. Rusted connections at balcony and corridor post connections;
- t. Deficient corridor guard railing for horizontal thrust;
- u. Absence of drip edge flashing at corridors and balconies; and
- v. Absence of trip edge flashing at roof perimeter.

Interior Remediation Items of Concern

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

Roofing Remediation Items of Concern

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

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

- a. Replacement of the floor sheathing and flashing, and installation of waterproofing on all balconies and corridors;
- b. Replacement of the remaining stucco on the gable ends with fiber cement siding to prevent future water intrusion and reduce maintenance;
- c. Remove and replace deteriorated cedar siding, trim, and flashing on all balconies and corridors;
- d. Remove and replace deteriorated and damaged guardrails on all balconies and corridors;
- e. Replacement of the deteriorated post connections on all balconies and corridors;
- f. Replacement of the delaminated cradle framing on all balconies and corridors;
- g. Replacement of all balcony sliding glass doors that have exceeded their typical

life expectancy (greater than 20 years since installed);

- h. Replacement of all corroded bolts, nuts, and washers with stainless steel;
- i. Remove and replace windows and sliding glass doors and contiguous damaged framing;
- j. Repair or replace distressed exterior trim, siding, and flashing;
- k. Replacement of the roofing systems and/or defective roofing components on all buildings;
- l. Replacement of visible and/or hidden termite damage in all buildings;
- m. Repair and replacement of all leaks currently occurring in all building envelopes; and
- m. Replacement of all existing defective building components in violation of Section 23-129.3(1) of the Zoning Code for the City of North Myrtle Beach.

E. THE BOARD'S SUBSEQUENT ACTIONS IN 2016

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

36. Martinez & Associates' field observations of the maintenance and repair condition of the various building components was itemized in a "Building Summary and Field Itemization Table" for each building and included in its investigative report entitled Phase I: Existing Condition Evaluation of Assessment for Tilghman Beach & Racquet Club Ocean Front & Second Row Buildings, submitted by Martinez & Associates Structural Engineers, PA dated June 2015 ("Investigative Report of Martinez & Associates").

37. In January of 2016, the Board hired Steve Coggins ("Coggins"), AIA of SGA Architecture, LLC, ("SGA") to prepare a comprehensive capital improvement plan³ to complete all the necessary repair and restoration work regarding the documented defective conditions in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII. The scope and extent of SGA's proposed restoration plan for the Project's remaining eleven (11) building was based upon the previous reports issued by the Board's professional engineers that focused on the buildings' failing structural and exterior envelope systems as well as the combined experience and knowledge gained from diagnosing and completing all the necessary repairs to Building III. Lastly, Coggins advised the Board that a comprehensive repair plan for the defective structural and exterior envelope systems in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII would probably exceeded six million and No/100 (\$6,000,000.00) Dollars.

38. In January of 2016, Coggins issued a letter to the Association explaining the urgency needed to deal with the TB&RC's increasing defective structural and exterior envelope systems, which he described as systemic throughout the whole property. Specifically, Coggins advocated a comprehensive repair plan for the entire Regime in order to stabilize the defective buildings and prevent future structural failure and damage to the General Common Elements and Limited Common Elements. For example, Paragraph five (5) of his letter provides in pertinent part:

Given the damage to Building 6, which is similar to Building 2, my concern at this point is that the structural problems are systemic throughout the whole property. The damage to Building 6 is severe. Further delay in curing these problems will

³ Specifically, SGA agreed to provide professional management services to assemble the contract documents, put the project out to competitive bid, and provide construction administration through the duration of the construction. A copy of their AIA Document B101-2007 Standard Form Agreement is attached hereto as (Exhibit "B") and incorporated by reference as part of this Complaint.

lead to further damage, increasingly costly repairs, and ultimately, structural failure. Therefore, I respectfully recommend that the Board convene a meeting to discuss a more comprehensive and expeditious approach to affecting a long term repair and stabilization solution for the entire property. I will make myself as available as possible for such a meeting. Given the issues and damage observed thus far, this matter should be treated with urgency. A copy of the January 2016 letter from SGA to the Association, Inc. is attached hereto as (Exhibit "C") and incorporated by reference as part of this Complaint. (Emphasis Added.)

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

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

40. Further, current board members Madison, Coe and Windle, in February 2016 recommended a construction process⁴ for the Board to follow for identifying and implementing all necessary repair work in the future at TB&RC. Specifically, the construction process proposed for future repair (outlined by Madison, Coe and Windle) included following particulars in pertinent part:

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

41. Notwithstanding the opinions and/or recommendations from Martinez and Goggins, the current Board has failed or otherwise refuses to undertake these necessary repairs to eliminate the major structural and water intrusion damage, the leaks, and to protect TB&RC's General Common Elements and Limited Common Elements from future damage, or even to assess the Co-owners for the necessary repair cost thereof, all as required under the Master Deed and By-Laws.

42. Furthermore, the existing water intrusion problems and defective building conditions at TB&RC are the result of the Defendants' failure to follow their own recommended construction procedure and/or process for determining and completing all necessary repairs to defective and

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

deficient General Common Elements and Limited Common Elements as well as their failure to comply with their affirmative duties under the governing documents and State law.

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

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

TB&RC including corridors and stairwells;

- n. Improperly maintained and/or repaired exterior decks and balconies which are suffering deterioration and damage to the structural components;
- o. Improperly maintained and/or repaired gable end walls and stair tower walls which are suffering deterioration and damage throughout TB&RC;
- p. Failure to maintain and/or repair the buildings in accordance with the applicable building codes and/or in conformance with the product manufacturer's installation instructions; and
- q. Failure to maintain detailed records of repair projects to the common elements to include dates of repair, material brand/type, color, material warranty information, and name and contact information of contractor and contractor warranty information.

44. Actual property damage to TB&RC has been caused by continuous and repeated exposure to moisture and water seeping into and around the walls, terminations, windows, doors, and intersections, resulting from the negligent and grossly negligent maintenance, replacement, and repair of TB&RC's General Common Elements and Limited Common Elements performed by the Defendants. Consequently, continuous and repeated water intrusion has resulted in physical property damage, including severe damage, rot and deterioration of the buildings and their structural components. Due to the lack of proper maintenance, replacement, and repair of TB&RC's General Common Elements and Limited Common Elements in violation of its governing documents, continuous and repeated exposure to harmful conditions, including water intrusion, has occurred, resulting in physical and consequential damages, including but not limited to the following:

- a. Physical injury to tangible property and/or the work of others caused by the continuous and repeated exposure to substantially the same harmful conditions including excessive moisture from water infiltration in and around improperly maintained, replaced, and repaired common elements, including doors and windows; and

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

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

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

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

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

48. The Plaintiffs reiterate each and every allegation set forth above as if fully

incorporated herein.

49. Defendants, as the underlying agents and representatives of the Co-owners, owed a duty to the Plaintiffs and all other similarly situated Co-owners to exercise reasonable care in maintenance, repair, and replacement of TB&RC's General Common Elements and Limited Common Elements, and, to adequately fund the reserves to rectify any defects and deficiencies in the Common Elements, and to prevent similar defects and deficiencies in the future.

50. Defendants, as the underlying agents and representatives of the Co-owners, breached their affirmative duties set forth above, and were negligent, grossly negligent, reckless, willful and wanton in the following particulars, to wit:

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

- f. In failing to assess the Co-owners for the necessary repairs needed to fix the TB&RC's defective and deficient General Common Elements and Limited Common Elements as recommended by their consultants and legal advisors;
- g. In failing to adequately fund the reserves for the necessary maintenance, replacement, and repair of the TB&RC's General Common Elements and Limited Common Elements since its completion and certification of occupancy;
- h. In failing to employ experienced contractors, architects, and engineers to inspect, maintain, and completely repair the TB&RC's defective and deficient General Common Elements and Limited Common Elements prior to 2013;
- i. In failing to pursue a recovery and institute litigation against all responsible parties for the original construction defects and deficiencies associated with the design and construction of the buildings;
- j. In failing to conduct a timely Reserve Study to plan and prepare for the future maintenance, replacement, and repair cost associated with the TB&RC's General Common Elements and Limited Common Elements;
- k. In failing to assess the Co-owners or otherwise adequately fund the reserves so that necessary funds are available to mitigate the substantial damages which have and are occurring from the aforementioned defects and deficiencies in the TB&RC's General Common Elements and Limited Common Elements due to the Board's inadequate maintenance and repairs;
- l. In failing to maintain, repair, and replace all defective building components in accordance with the applicable building codes and zoning ordinance for the City of North Myrtle Beach, and/or in conformance with the product manufacturer's installation instructions;⁵ and
- m. In acting unreasonably in other such ways as may be revealed during the

5 Copies of correspondence from the City of North Myrtle Beach to TB&RC regarding various Building Code Violations: (1) the issuance of February 16, 2016 Letter from City of North Myrtle Beach to TB&RC citing multiple violations on multiple buildings regarding its Zoning Ordinance; (2) the issuance of June 14, 2016 Stop Work Order for permit Nos.: 16-02134 because reconstruction work violates 2012 IBC; (3) the issuance of June 14, 2016 Stop Work Order for reconstruction work performed by the Board without a building permit; and (4) the issuance of June 22, 2016 Stop Work Order for reconstruction work performed by the Board without a building, are attached hereto as (Exhibit "G") and incorporated by reference as part of this Complaint.

discovery and as shown at the trial of this action.

51. As a direct and proximate result and consequence of the negligence and/or gross negligence of the Defendants, the Plaintiffs and all other similarly situated Co-owners have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structures, loss of use, depreciation in value, and such punitive damages as may be appropriate.

FOR A SECOND CAUSE OF ACTION
(Breach of the Master Deed's Covenants and Restrictions)

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

53. The condominium recorded documents, such as declaration or By-Laws, constitute a contract between the TB&RC on the one side and the Co-owners on the other side. The failure of the Association's Board to comply with the provisions of the restrictions and/or the governing documents gives rise to an action for breach of contract by an aggrieved Co-owner.⁶ Specifically, Article XXVII of the Master Deed provides in pertinent part:

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

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

⁶ See Murphy v. Yacht Cove Homeowners Ass'n., 289 S.C. 367, 345 S.E.2d 709 (1986), where the South Carolina Supreme Court held "*that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association*" for failure to discharge its duties under the Bylaws related to the maintenance and repair of the common elements. 289 S.C. at 369, 345 S.E.2d at 710.

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

55. Defendants, as the underlying agents, servants, and representatives of the Co-owners, have violated and continue to violate §§§ 4(j)(ii) and (vii), 7(b)(i), and 11(a)(b) and (e) of the By-Laws and Articles XX, XXI, and XXVII of the Master Deed by failing to discharge their affirmative duties through inadequate maintenance, repair, and replacement of the TB&RC’s General Common Elements and Limited Common Elements, and also failing to adequately fund the reserves to rectify all known defects and deficiencies in the Common Elements, and to prevent similar defects and deficiencies in the future.

56. As a direct and proximate result and consequence of the Defendants’ failure to discharge their above referenced affirmative duties in good faith, the Plaintiffs and all other similarly situated Co-owners have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structures, including depreciation in value; and, therefore, they are entitled to recover from Defendants all their direct, consequential, and actual damages in amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

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

58. This is an action for declaratory judgment relief pursuant to the Uniform Declaratory Judgment Act of South Carolina, as set forth in §15-53-10 et seq., of the South Carolina

Code of Laws, 1976, as amended, to determine the rights, status or other legal relations of the parties regarding the current and future maintenance, repair, and replacement of the Project's defective and deficient General Common Elements and Limited Common Elements.

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

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

60. A justiciable controversy exists between the parties regarding their rights, status, and legal relations with respect to Project's Master Deed and By-Laws, the Act, and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach for the reasons described in Paragraphs 28 through 44 of the Complaint.

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

62. Plaintiffs and all other similarly situated Co-owners who own units in Condominium Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII, are entitled to a determination from this Court declaring one or more of the following decrees as relief:

- a. The TB&RC's governing documents impose an affirmative duty on the Defendants to timely repair and replace all defective and deficient Common Elements and Limited Common Elements identified and currently existing in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII. The Defendants have failed to timely maintain, repair and replace the defective and deficient General Common Elements and Limited Common Elements located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII, and are thereby responsible for the extraordinarily high cost of the repairs or restoration of these deficient buildings, which have and will increase substantially over the

structures' remaining useful life;

- b. The TB&RC's governing documents, as well as State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require the Defendants to take immediate action to effectuate the complete removal and replacement of all defective building components, including, but not limited to:
- (1) All the defective balcony systems in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (2) All the defective corridor structural elements (plywood, joists and beams) in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (3) All the defective corridor railing systems (railings, posts and pickets) in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (4) All the defective connectors with the loss of metal in excess of Twenty-Five (25) percent in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (5) The defective roofing systems on Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (6) All the decayed and rotten exterior wood siding/trim and flashing in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert; and
 - (7) All the defective sliding glass doors in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert.
- c. The TB&RC's governing documents, together with State law, and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require the Board to develop a systematic and comprehensive plan for the timely and economically feasible removal and replacement of all defective building components located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII instead of piecemeal approach that

is currently being utilized by the Defendants which is not cost effective reconstruction;

- d. The TB&RC's governing documents, together with the State law, and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require the Defendants to thoroughly investigate all known and/or reasonably suspected defective and deficient conditions in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII without delay in order to avoid a complete failure of the building systems rendering them unsafe as well as economically unfeasible to reconstruct;
- e. The TB&RC's governing documents impose an affirmative duty on the Defendants to adequately fund reserves for the necessary maintenance, repair and replacement of the Common Elements and Limited Common Elements of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII. The Defendants have failed to adequately fund reserves for the necessary maintenance, repair and replacement of the defective and deficient General Common Elements and Limited Common Elements of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII, and are hereby responsible for the extraordinarily high cost of the repairs or restoration of these deficient buildings, which have and will increase substantially over the structures' remaining useful life;
- f. The TB&RC's governing documents, together with the State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively provide the Plaintiffs with the right to consider and decide whether Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII are repairable from a practical standpoint, as well as whether it is economically feasible to reconstruct these deficient buildings under the current building code;
- g. The Board's bad faith conduct, *ultra vires* acts, and failure to discharge its affirmative duties, related to the maintenance, repair, and replacement of the Regime's Common Elements, are not protected by the business judgment rule; and
- h. Any and all other relief that is deemed to be necessary and proper by the Court.

FOR A FOURTH CAUSE OF ACTION
(Injunctive Relief)

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

64. The Plaintiffs and all other similarly situated Co-owners, who own units in Condominium Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, have suffered injuries, harm, and damages in the amount equal to the extraordinary repair, maintenance and reconstruction cost required to fix their structures, including depreciation in value of their units as a result of the Defendants' continual failure to discharge their affirmative duties related to the inadequate maintenance, repair, and replacement of the Project's defective, deficient, and unsafe General Common Elements and Limited Common Elements. These allegations are supported by the factual findings set forth in the Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs Expert John Simko, P.E., attached hereto as (Exhibits "E" and "F") and incorporated by reference as part of this Complaint.

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

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

Failure to comply with any of the terms of the Master Deed or other restrictions and regulations contained in the Charter, or By-Laws of the Association, . . . *shall be*

grounds for relief which may include, but not be limited to an action to recover sums due for damages, injunctive relief, . . . which relief may be sought, . . . by an aggrieved Co-owner of an Apartment (Emphasis Added.)

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

68. Plaintiffs and all other similarly situated Co-owners who own units in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII seek mandatory injunctive relief from the Court in one or more of the following particulars as set forth below to compel the Defendants:

- a. To comply immediately with their affirmative duties, under the TB&RC's governing documents, State law, and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, to completely replace and/or totally repair all defective building conditions in the Project's Common Elements previously identified by the Defendant's consultants and the Plaintiffs' expert, including, but not limited to:
 - (1) All the defective balcony systems located in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII;
 - (2) All the defective corridor structural elements (plywood, joists and beams) located in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII;
 - (3) All the defective corridor railing systems (railings, posts and pickets) located in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII;
 - (4) All the defective bolts, and/or connectors with the loss of metal in excess of Twenty-Five (25) percent located in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII;

- (5) The defective roofing systems installed on Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII;
 - (6) All the decayed and rotten exterior wood siding/trim and flashing located in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII; and
 - (7) All the defective sliding glass door systems located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII.
- b. To comply immediately with their affirmative duty, under the TB&RC's governing documents, State law, and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, to completely investigate all known and/or reasonable suspected defective conditions currently existing in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII in order to determine the proper scope of repair as well as the actual replacement cost needed for all of the damaged buildings components; and
 - c. For such other and further injunctive relief as this Court may deem just and proper.

FOR A FIFTH CAUSE OF ACTION
(Specific Performance)

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

70. Defendants, through their failure to repair damage to the General Common Elements and Limited Common Elements, have breached affirmative duties and obligations owed to the Plaintiffs and all other similarly situated Co-owners who own units in Condominium Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, as prescribed by the Project's Master Deed and By-Laws.

71. Defendants have further breached their affirmative duties and obligations owed to the Plaintiffs and all other similarly situated Co-owners by failing to effect the repairs to the damaged General Common Elements and Limited Common Elements located in Buildings I, II, III,

IV, V, VI, VII, VIII, IX, X, XI, and XII as evidenced by the factual findings set forth in the Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs Expert John Simko, P.E., attached hereto as (**Exhibits "E" and "F"**) and incorporated by reference as part of this Complaint.

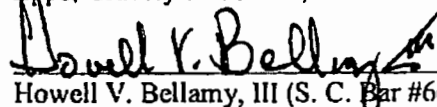
72. Plaintiffs request an Order of the Court entering a judgment on their behalf individually along with other similarly situated Co-owners by requiring the Defendants to specifically perform their affirmative duties and obligations under the Master Deed and By-Laws by repairing and replacing all the defective and deficient General Common Elements and Limited Common Elements located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII.

WHEREFORE, having fully set forth their Complaint, the Plaintiffs and all other similarly situated Co-owners pray for the following relief:

- a. For an Order of the Court finding the Defendants, by and through their agents, servants, and representatives, breached and violated, including, but not limited to, Sections 4(j)(ii) and (vii), 7(b)(I) and 11(a)(b) and (e) of the By-Laws, and Articles XX, XXI, and XXVII of the Master Deed of Tilghman Beach and Racquet Club Property Regime;
- b. As to the **First Cause of Action**, the Plaintiffs and all other similarly situated Co-owners are entitled to an award of actual damages in an amount to be proven at trial; and, also, to an award of punitive damages based upon the Defendants' willful violations of the provisions of the TB&RC's Master Deed and By-Laws and State law;
- c. As to the **Second Cause of Action**, the Plaintiffs and all other similarly situated Co-owners are entitled to an award of actual damages in an amount to be proven at trial;
- d. As to the **Third Cause of Action**, the Plaintiffs and all other similarly situated Co-owners are entitled to declaratory relief as demanded in one or more of the following particulars requested under subparagraphs (a)(b)(c)(d)(e)(f)(g) and (h) of Paragraph Sixty-two (62) of the Complaint;

- e. As to the **Fourth Cause of Action**, the Plaintiffs and all other similarly situated Co-owners who own units in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, are entitled to a mandatory injunction compelling one or more of the following particulars requested under subparagraphs (a) (b) and (c) of Paragraph Sixty-eight (68) of the Complaint;
- f. As to the **Fifth Cause of Action**, the Plaintiffs request an Order of the Court requiring the Defendants to immediately perform their affirmative duties and responsibilities under the Master Deed and By-Laws by repairing and replacing the defective and deficient General Common Elements and the Limited Common Elements located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII as recommended by the Defendants' consultants, legal advisers, and further supported by the findings set forth in the Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs' Expert John Simko, P.E., attached hereto as (**Exhibits "E" and "F"**) and incorporated by reference as part of this Complaint;
- g. For attorneys fees, costs and expenses incurred in bringing this action;
- h. For a trial by Jury; and
- i. For such other and further relief as the Court may deem just and proper.

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


Howell V. Bellamy, III (S. C. Bar #66575)
hbellamyiii@bellamylaw.com
Howell V. Bellamy, Jr. (S.C. Bar #68543)
nrichardson@bellamylaw.com
1000 29th Ave. N.
Myrtle Beach, S. C. 29577
(843)-448-3022 Facsimile
Attorneys for Plaintiffs

July 5, 2016
Myrtle Beach, SC

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Jill Keck Humphries, Dennis L. Johnson,
Delona Penny Rice, and Whitmel L. Brown,
Jr., Individually and in a Representative)
Capacity on Behalf of All Persons Similarly)
Situating Who Own Units in Buildings I, II,
III, IV, V, VI, VII, VIII, IX, X, XI and XII of)
the Tilghman Beach and Racquet Club)
Horizontal Property Regime; Gary Steven)
Robinson and Elizabeth Erin Humphries;)
Dennis L. Johnson, Jr. and Nancy H.)
Johnson,)

Plaintiffs,)

v.)

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

Defendants.)

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

HORRY COUNTY
2016 JUL -7 AM 8:19
MELANIE H. CLARK
CLERK OF COURT

CERTIFICATE OF MAILING

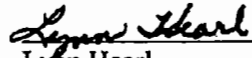
I, Lynn Hearl, employee of the Law Firm of Bellamy, Rutenberg, Copeland, Epps, Gravely

& Bowers, P.A., Counsel for the Plaintiffs, in the above-captioned action, certify that I have this day sent a copy of the following documents, with sufficient postage attached thereto, to the address listed below.

The documents are as follows:

1. Civil Action Cover Sheet;
2. Summons and Complaint;
3. Certificate of Mailing;

K. A. Diehl and Associates, Inc.
Registered Agent for
Tilghman Beach and Racquet Club Horizontal Property Regime
618 Chestnut Road, Suite 210
North Myrtle Beach, SC 29572


Lynn Hearl

Myrtle Beach, South Carolina

July 6, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

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

Jill Keck Humphries, Dennis L. Johnson,
Delona Penny Rice, and Whitmel L. Brown,
Individually and in a Representative Capacity)
on Behalf of All Persons Similarly Situated)
Who Own Units in Buildings I, II, III, IV, V,
VI, VII, VIII, IX, X, XI and XII of the)
Tilghman Beach and Racquet Club)
Horizontal Property Regime; Gary Steven)
Robinson and Elizabeth Erin Humphries;)
Dennis L. Johnson, Jr. and Nancy H.)
Johnson,)

HORRY COUNTY
2016 JUL - 7 AM 8:19
CLERK OF COURT

VERIFICATION

Plaintiffs,)

v.)

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

Defendants.)

PERSONALLY APPEARED BEFORE ME, appeared before me, Dennis L. Johnson,

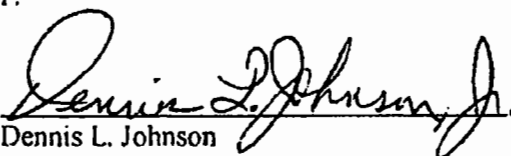
Plaintiff in the foregoing action who, being duly sworn says:

1. At all times relevant the Plaintiff, Dennis L. Johnson, ("Johnson") was and is the owner of fee simple title to Unit No.367 in Condominium Building VIII of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina.
2. This action is brought by the Plaintiff Johnson on his own behalf and on behalf of all other similarly situated Co-owners, who currently own Condominium units located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, of Tilghman Beach Golf and Racquet Club Horizontal Property Regime ("TBGRCHPR") whose properties have been damaged, and/or devalued by the Defendants' acts and omissions in failing to comply with its administrative duties and obligations under the Master Deed, By-Laws, regulations, case law, and the code of Laws of the State of South Carolina asserted in the attached complaint filed as Civil Action No.: 2016-CP-26-_____.
3. The other similarly situated Co-owners, who currently own condominium units located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, of Tilghman Beach Golf and Racquet Club Horizontal Property Regime are fairly and adequately represented by this Plaintiff, and this Plaintiff has no interest adverse to that of any individual who might be entitled to the relief sought by this Complaint.
4. That this Plaintiff has read the allegations of the causes of action contained in the attached Complaint consisting of Thirty-Seven (37) pages filed as Civil Action No.:

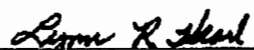
2010-CP-26-_____, including this statement.

5. That the attached Complaint was prepared by this Plaintiff's attorneys based upon information Plaintiff has personally furnished to said attorneys.
6. That the allegations contained in the attached Complaint are true and correct, and are based upon the personal knowledge of this Plaintiff, except for those allegations which are based upon this Plaintiff's information and belief and, as to those, this Plaintiff verily believes the same to be true.
7. That this Plaintiff has authorized said attorneys to file the attached Complaint, to present the same to the Court and secure any necessary Orders and Judgments based thereon, and to secure service upon the adverse party of the attached Complaint and necessary process based thereon.
8. That the Plaintiff, including the three (3) other Plaintiff Representatives, and all other similarly situated Co-owners, have attempted in good faith to resolve all differences with the Defendants, their agents, employees, and representatives, regarding the particular allegations asserted in attached Complaint; however, because of the varied, different, and inconsistent interpretations argued by the parties concerning the proper administration and maintenance of the regime property (based on the Master Deed, By-Laws, regulations, case law, and the Code of Laws of the State of South Carolina), no resolution could be reached on the allegations raised by Plaintiffs in this matter.

FURTHER AFFIANT SAYETH NOT.


Dennis L. Johnson

SWORN to before me this 5th
day of July, 2016.

 (LS)
Notary Public for South Carolina

My Commission Expires: 10-12-21



STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2016-CP-26- 44404

Jill Keck Humphries, Dennis L. Johnson,) Delona Penny Rice, and Whitmel L. Brown,) Individually and in a Representative Capacity) on Behalf of All Persons Similarly Situated) Who Own Units in Buildings I, II, III, IV, V,) VI, VII, VIII, IX, X, XI and XII of the) Tilghman Beach and Racquet Club) Horizontal Property Regime; Gary Steven) Robinson and Elizabeth Erin Humphries;) Dennis L. Johnson, Jr. and Nancy H.) Johnson,)

Plaintiffs,

v.

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

Defendants.

VERIFICATION

CLERK OF COURT
2016 JUL -7 AM 8:19
MELANIE H. COURT

PERSONALLY APPEARED BEFORE ME, Jill Keck Humphries, Plaintiff in the foregoing

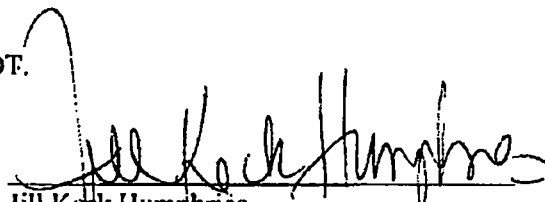
action who, being duly sworn says:

1. At all times relevant the Plaintiff, Jill Keck Humphries, ("Humphries") was and is the owner of fee simple title to Unit No.219 in Condominium Building IV of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina.
2. This action is brought by the Plaintiff Humphries on her own behalf and on behalf of all other similarly situated Co-owners, who currently own Condominium units located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, of Tilghman Beach Golf and Racquet Club Horizontal Property Regime ("TBGRCHPR") whose properties have been damaged, and/or devalued by the Defendants' acts and omissions in failing to comply with its administrative duties and obligations under the Master Deed, By-Laws, regulations, case law, and the code of Laws of the State of South Carolina asserted in th attached complaint filed as Civil Action No.: 2016-CP-26-_____.
3. The other similarly situated Co-owners, who currently own condominium units located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, of Tilghman Beach Golf and Racquet Club Horizontal Property Regime are fairly and adequately represented by this Plaintiff, and this Plaintiff has no interest adverse to that of any individual who might be entitled to the relief sought by this Complaint.
4. That this Plaintiff has read the allegations of the causes of action contained in the attached Complaint consisting of Thirty-Seven (37) pages filed as Civil Action No.:

2010-CP-26-_____, including this statement.

5. That the attached Complaint was prepared by this Plaintiff's attorneys based upon information Plaintiff has personally furnished to said attorneys.
6. That the allegations contained in the attached Complaint are true and correct, and are based upon the personal knowledge of this Plaintiff, except for those allegations which are based upon this Plaintiff's information and belief and, as to those, this Plaintiff verily believes the same to be true.
7. That this Plaintiff has authorized said attorneys to file the attached Complaint, to present the same to the Court and secure any necessary Orders and Judgments based thereon, and to secure service upon the adverse party of the attached Complaint and necessary process based thereon.
8. That the Plaintiff, including the three (3) other Plaintiff Representatives, and all other similarly situated Co-owners, have attempted in good faith to resolve all differences with the Defendants, their agents, employees, and representatives, regarding the particular allegations asserted in attached Complaint; however, because of the varied, different, and inconsistent interpretations argued by the parties concerning the proper administration and maintenance of the regime property (based on the Master Deed, By-Laws, regulations, case law, and the Code of Laws of the State of South Carolina), no resolution could be reached on the allegations raised by Plaintiffs in this matter.

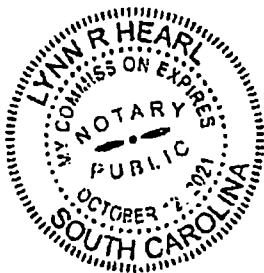
FURTHER AFFIANT SAYETH NOT.


Jill Keck Humphries

SWORN to before me this 5th
day of July, 2016.

Lynn R. Hearl (LS)
Notary Public for South Carolina

My Commission Expires: 10-12-21



STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

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

Jill Keck Humphries, Dennis L. Johnson,) Delona Penny Rice, and Whitmel L. Brown,) Individually and in a Representative Capacity) on Behalf of All Persons Similarly Situated) Who Own Units in Buildings I, II, III, IV, V,) VI, VII, VIII, IX, X, XI and XII of the) Tilghman Beach and Racquet Club) Horizontal Property Regime; Gary Steven) Robinson and Elizabeth Erin Humphries;) Dennis L. Johnson, Jr. and Nancy H.) Johnson,)

CLERK OF COURT
2016 JUL -7 AM 8:19
JERRY COUNTY

VERIFICATION

Plaintiffs,

V.

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

Defendants.

PERSONALLY APPEARED BEFORE ME, Whitmel L. Brown, Plaintiff in the foregoing

action who, being duly sworn says:

1. At all times relevant the Plaintiff, Whitmel L. Brown, ("Brown") was and is the owner of fee simple title to Unit No.353 in Condominium Building XI of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina.
2. This action is brought by the Plaintiff Brown on his own behalf and on behalf of all other similarly situated Co-owners, who currently own Condominium units located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, of Tilghman Beach Golf and Racquet Club Horizontal Property Regime ("TBGRCHPR") whose properties have been damaged, and/or devalued by the Defendants' acts and omissions in failing to comply with its administrative duties and obligations under the Master Deed, By-Laws, regulations, case law, and the code of Laws of the State of South Carolina asserted in th attached complaint filed as Civil Action No.: 2016-CP-26-_____.
3. The other similarly situated Co-owners, who currently own condominium units located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, of Tilghman Beach Golf and Racquet Club Horizontal Property Regime are fairly and adequately represented by this Plaintiff, and this Plaintiff has no interest adverse to that of any individual who might be entitled to the relief sought by this Complaint.
4. That this Plaintiff has read the allegations of the causes of action contained in the attached Complaint consisting of Thirty-Seven (37) pages filed as Civil Action No.: 2010-CP-26-_____, including this statement.

5. That the attached Complaint was prepared by this Plaintiff's attorneys based upon information Plaintiff has personally furnished to said attorneys.
6. That the allegations contained in the attached Complaint are true and correct, and are based upon the personal knowledge of this Plaintiff, except for those allegations which are based upon this Plaintiff's information and belief and, as to those, this Plaintiff verily believes the same to be true.
7. That this Plaintiff has authorized said attorneys to file the attached Complaint, to present the same to the Court and secure any necessary Orders and Judgments based thereon, and to secure service upon the adverse party of the attached Complaint and necessary process based thereon.
8. That the Plaintiff, including the three (3) other Plaintiff Representatives, and all other similarly situated Co-owners, have attempted in good faith to resolve all differences with the Defendants, their agents, servants, and representatives, regarding the particular allegations asserted in attached Complaint; however, because of the varied, different, and inconsistent interpretations argued by the parties concerning the proper administration and maintenance of the regime property (based on the Master Deed, By-Laws, regulations, case law, and the Code of Laws of the State of South Carolina), no resolution could be reached on the allegations raised by Plaintiffs in this matter.

FURTHER AFFIANT SAYETH NOT.

Whitmel L. Brown
Whitmel L. Brown

SWORN to before me this 5th
day of July, 2016.

Lynn R. Hearl (LS)
Notary Public for South Carolina

My Commission Expires: 10-12-21



STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2016-CP-26- *44404*

Jill Keck Humphries, Dennis L. Johnson,) Delona Penny Rice, and Whitmel L. Brown,) Individually and in a Representative Capacity) on Behalf of All Persons Similarly Situated) Who Own Units in Buildings I, II, III, IV, V,) VI, VII, VIII, IX, X, XI and XII of the) Tilghman Beach and Racquet Club) Horizontal Property Regime; Gary Steven) Robinson and Elizabeth Erin Humphries;) Dennis L. Johnson, Jr. and Nancy H.) Johnson,)

Plaintiffs,

Y.

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

Defendants.

VERIFICATION

HURRY COUNTY
2016 JUL -7 AM 8:19
MEL CLERK OF COURT

PERSONALLY APPEARED BEFORE ME, Delona Penny Rice, Plaintiff in the foregoing

action who, being duly sworn says:

1. At all times relevant the Plaintiff, Delona Penny Rice, ("Rice") was and is the owner of fee simple title to Unit No. 227 in Condominium Building I of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina.
2. This action is brought by the Plaintiff Rice on her own behalf and on behalf of all other similarly situated Co-owners, who currently own Condominium units located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, of Tilghman Beach Golf and Racquet Club Horizontal Property Regime ("TBGRCHPR") whose properties have been damaged, and/or devalued by the Defendants' acts and omissions in failing to comply with its administrative duties and obligations under the Master Deed, By-Laws, regulations, case law, and the code of Laws of the State of South Carolina asserted in the attached complaint filed as Civil Action No.: 2016-CP-26-_____.
3. The other similarly situated Co-owners, who currently own condominium units in Buildings, I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII, of Tilghman Beach Golf and Racquet Club Horizontal Property Regime are fairly and adequately represented by this Plaintiff, and this Plaintiff has no interest adverse to that of any individual who might be entitled to the relief sought by this Complaint.
4. That this Plaintiff has read the allegations of the causes of action contained in the attached Complaint consisting of Thirty-Seven (37) pages filed as Civil Action No.: 2016-CP-26_____, including this statement.

5. That the attached Complaint was prepared by this Plaintiff's attorneys based upon information the Plaintiff has personally furnished to said attorneys.
6. That the allegations contained in the attached Complaint are true and correct, and are based upon the personal knowledge of this Plaintiff, except for those allegations which are based upon this Plaintiff's information and belief and, as to those, this Plaintiff verily believes the same to be true.
7. That this Plaintiff has authorized said attorneys to file the attached Complaint, to present the same to the Court and secure any necessary Orders and Judgments based thereon, and to secure service upon the adverse party of the attached Complaint and necessary process based thereon.
8. That the Plaintiff, including the three (3) other Plaintiff Representatives have attempted in good faith to resolve all differences with the Defendants, their agents, servants, and representatives, regarding the particular allegations asserted in the attached Complaint; however, because of the varied, different, and inconsistent interpretations argued by the parties concerning the proper administration and maintenance of the regime property (based on the Master Deed, By-Laws, regulations, case law, and the Code of Laws of the State of South Carolina), no resolution could be reached on the allegations raised by Plaintiffs in this matter.

FURTHER AFFIANT SAYETH NOT.

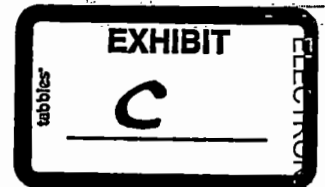
Delona Penny Rice
Delona Penny Rice

SWORN to before me this 5th
day of July, 2016.

Lynne R. Heard (LS)
Notary Public for South Carolina

My Commission Expires





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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2016-CP-260446

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

Plaintiffs,

v.

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

Defendants.

2nd AMENDED COMPLAINT OF
THE PLAINTIFFS, JILL KECK HUMPHRIES,
DENNIS L. JOHNSON, JR., DELONA PENNY
RICE, WHITMEL L. BROWN, JR., GARY
STEVEN ROBINSON, ELIZABETH ERIN
HUMPHRIES, AND NANCY H. JOHNSON
(JURY TRIAL REQUESTED)

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CLERK OF COURT

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

JURISDICTION AND VENUE

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

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

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

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

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

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

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

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

9. At all relevant times, the Plaintiffs above were and are shareholders and/or members of the Tilghman Beach and Racquet Club Condominium Association, Inc., when the Defendants failed to act, and/or committed their improper, illegal, and unauthorized conduct as set forth below in the subsequent paragraphs.

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

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

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

Association. At all times relevant hereto, Defendant Windle acted individually, and as an agent, representative, and member of the Board of Directors of the Defendant Association. Further, the acts of Defendant Windle were "independent acts" as that term is defined under South Carolina law. Upon information and belief, Defendant Windle is a citizen and resident of York County, South Carolina.

13. Defendant Daniel P. Coc ("Coc") is holder of the fee simple title to Condominium Unit No. 361 in Building IX of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. Further, the acts of Defendant Coc were "independent acts" as that term is defined under South Carolina law. Upon information and belief, Defendant Coc is a resident and citizen of Horry County, South Carolina.

14. Defendant C. Doug Madison ("Madison") is holder of the fee simple title to Condominium Unit No. 106 in Building II of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. Further, the acts of Defendant Madison were "independent acts" as that term is defined under South Carolina law. Upon information and belief, Defendant Madison is a citizen and resident of Iredell County, North Carolina.

15. Defendant George P. White ("White") is holder of the fee simple title to Condominium Unit No. 133 in Building III of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant

Association. Further, the acts of Defendant White were "independent acts" as that term is defined under South Carolina law. Upon information and belief, Defendant White is a citizen and resident of Pender County, North Carolina.

16. Defendant, James H. Austin, III ("Austin") is holder of the fee simple title to Condominium Unit No. 357 in Building X of the Tilghman Beach and Racquet Club Horizontal Property Regime, located at Second Avenue North in the City of North Myrtle Beach, County of Horry, State of South Carolina, and is a member of the Board of Directors of the Defendant Association. Further, the acts of Defendant Austin were "independent acts" as that term is defined under South Carolina law. Upon information and belief, Defendant Austin is a citizen and resident of Moore County, North Carolina.

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

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

PHASE I:

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

Horizontal Property Regime for Phase I, Tilghman Beach and Racquet Club.

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

PHASE II:

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

Derivation of Title:

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

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

BACKGROUND FACTS

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

20. The Tilghman Beach and Racquet Club Horizontal Property Regime ("Regime") was established in 1982 in the manner provided for by the South Carolina Horizontal Property Act, as amended, S.C. Code Ann. §§ 27-31-10 et seq. (2007) ("Act") by the execution and recording of Master Deed in Deed Book 736, at page 360 on February 2, 1982 in the Office of Clerk of Court for Horry County, South Carolina. The Master Deed and By-Laws are the governing documents of the Regime and define various aspects and duties of the Co-owners, Association, and Property Manager regarding the maintenance, replacement, and repair of the Common Elements. A copy of Regime's Master Deed and By-Laws is attached hereto as (Exhibit "A") and incorporated by reference as part of this Complaint.

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

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

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

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

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

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

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

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

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

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

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

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

a) **General Common Elements** means and includes:

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

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

public roads and streets of Ocean Drive Section, North Myrtle Beach, to and from U.S. Highway 17, and any other public streets or highways adjoining or abutting such private roads and streets of Ocean Drive Section of North Myrtle Beach;

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

- (1) Those Common Elements which are agreed upon by all the Apartment owners to be reserved for the use of a certain number of Apartments to the exclusion of the other Apartments, such as special corridors, stairways, elevators, balconies, sanitary services common to the Apartments of a particular floor, and the like; and
- (2) The additional improvements designated as Limited Common Elements on **Exhibit "B"** attached hereto. Maintenance and repair of Limited Common Elements rest with the owner(s) of the Apartment to which they abut, adjoin, or service.

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

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

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

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

repair, or replacement of any Common Elements, the Association shall, at its expense, repair such incidental damage.

26. Article XXVII of the Master Deed provides remedies for described defaults committed by the Co-owner or Co-owners of any Apartments, or the Association due to their failure to discharge their duties under the governing documents. The following described defaults in Paragraphs A and B of this Article entitles an *aggrieved Co-owner or Co-owners of other Apartments* to the following legal² and/or equitable relief:

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

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

The Board of Directors shall manage and direct the affairs of the Association and subject to any restrictions imposed by law, by the Master Deed, or these By-Laws . . . The Board of Directors *shall* exercise such duties and responsibilities as *shall* be incumbent upon it by law, the Master Deed, these By-Laws, or as it *may deem*

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

necessary or appropriate in the exercise of its powers and *shall* include, without limited the generality of the foregoing, the following:

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

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

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

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

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

- (d) The Board of Directors of the Association, in establishing said annual budget for operation, management and maintenance of the project *shall include therein a sum to be collected and maintained as reserve fund for replacement of Common Elements, which reserve fund shall be for the purpose of enabling the Association to replace structural elements and mechanical equipment constituting a part of the Common Elements* as

well as the replacement of personal property which may constitute a portion of the Common Elements held for the joint use and benefit of all of the co-owners of all Apartments. The amount to be allocated to such reserve fund for replacements shall be established by said Board of Directors so as to accrue and maintain at all times a sum reasonably necessary to anticipate the need for replacements of said Common Elements.

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

B. THE GENERAL PLAN OF DEVELOPMENT OF THE PROJECT

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

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

C. EVALUATIONS OF BUILDINGS PRIOR TO 2010

32. Since completion of the Condominium Project, the Board has failed to implement or to require the Manager of the Regime to implement a program for the inspection, maintenance and repair of the Project's Common Elements that would have timely identified and thereby minimized the cost of remediating the current damage to Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII, all in breach of the Board's obligations to the Co-owners under the Master Deed and By-Laws. Further, this factual proposition is supported by the building, inspection, and zoning records of the City of North Myrtle Beach.

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

D. EVALUATIONS OF BUILDINGS SINCE 2010

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

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

- k. A & I Construction;
- l. Shoreline/Stewart Construction; and
- m. Reserve Advisors, Inc.

35. The above listed consultants identified numerous defective and deficient conditions resulting in building distress in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII, which can be separated into structural, building envelope, interior, and roofing conditions. A general summary of the deficient conditions, by category, found by them includes:

Structural Items of Concern

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

Building Envelope Items of Concern

- a. Moisture penetration behind exterior siding, trim, and flashing;
- b. Delaminated exterior siding, trim, and flashing;
- c. Delaminating stucco below gable end walls;
- d. Cracking in stucco below gable end walls;
- e. Moisture penetration/leaking ocean side facing windows;
- f. Moisture penetration/leaking ocean side facing sliding glass doors;

- g. Moisture penetration/leaking sliding glass doors;
- h. Corroded window and sliding glass door casings;
- i. Corroded sliding glass door sills;
- j. Moisture affected and rotten wood framing around sliding glass doors;
- k. Rotting fascia boards; and
- l. Moisture affected and rotten band boards around perimeter of buildings.

Interior Items of Concern

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

Roofing Items of Concern

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

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

- a. Replacement of the floor sheathing and flashing, and installation of waterproofing on all balconies and corridors;

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

E. THE BOARD'S SUBSEQUENT ACTIONS IN 2016

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

38. Martinez & Associates' field observations of the maintenance and repair condition of the various building components was itemized in a "Building Summary and Field Itemization Table" for each building included in its investigative report entitled Phase I: Existing Condition Evaluation of Assessment for Tilghman Beach & Racquet Club Ocean Front & Second Row Buildings, submitted by Martinez & Associates Structural Engineers, PA dated June 2015 ("Investigative Report of Martinez & Associates").

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

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

3. Given the damage to Building 6, which is similar to Building 2, *my concern at this point is that the structural problems are systemic throughout the whole property. The damage to Building 6 is severe. Further delay in curing these problems will lead to further damage,*

increasingly costly repairs, and ultimately, structural failure. Therefore, I respectfully recommend that the Board convene a meeting to discuss a more comprehensive and expeditious approach to affecting a long term repair and stabilization solution for the entire property. I will make myself as available as possible for such a meeting. Given the issues and damage observed thus far, this matter should be treated with urgency. A copy of the January 2016 Letter from SGA to the Association, Inc., is attached hereto as (Exhibit "C") and incorporated by reference as part of this Complaint.

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

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

42. Further, current board members Madison, Coe and Windle, in February 2016

recommended a construction process³ for the Board to follow for identifying and implementing all necessary repair work in the future at TB&RC. Specifically, the construction process proposed for future repair (outlined by Madison, Coe and Windle) included following particulars in pertinent part:

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

43. Notwithstanding the opinions and/or recommendations from Martinez and Goggans, the current Board has failed or otherwise refuses to undertake these necessary repairs to eliminate the major structural and water intrusion damage, the leaks, and to protect the General Common Elements and Limited Common Elements from future damage, or even to assess the Co-owners for the necessary repair cost thereof, all as required under the Master Deed and By-Laws.

44. Furthermore, the existing water intrusion problems and defective building conditions at the Project are the result of the Defendants' failure to follow their own recommended construction procedure and/or process for determining and completing all necessary repairs to defective and deficient General Common Elements and Limited Common

³ A copy of the construction process for future repairs to Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII, prepared and recommended by current board members Madison, Coe and Windle, is attached hereto as (Exhibit "D") and incorporated by reference as part of this Complaint.

Elements as well as their failure to comply with their affirmative duties under the governing documents and State law.

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

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

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

46. Actual property damage to the Project has been caused by continuous and repeated exposure to moisture and water seeping into and around the walls, terminations, windows, doors, and intersections, resulting from the negligent and grossly negligent maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements performed by the Defendants. Consequently, continuous, and repeated water intrusion has resulted in physical property damage, including severe damage, rot and deterioration of the buildings and their structural components. Due to the lack of proper maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements in violation of its governing documents, continuous and repeated exposure to harmful conditions, including water intrusion, has occurred, resulting in physical and consequential damages, including but not limited to the following:

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

continuous and repeated exposure to substantially the same harmful conditions including excessive moisture from water infiltration in and around negligently maintained, replaced, and repaired exterior cladding, sealants, joints, caulk, and waterproofing systems.

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

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

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

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

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

51. Defendants, as the underlying agents and representatives of the Co-owners, owed a duty to the Plaintiffs to exercise reasonable care in maintenance, repair, and replacement of the Project's General Common Elements and Limited Common Elements, and, to adequately fund

the reserves to rectify any defects and deficiencies in the Common Elements, and to prevent similar defects and deficiencies in the future.

52. Defendants, as the underlying agents and representatives of the Co-owners, breached their affirmative duties set forth above, and were negligent, grossly negligent, reckless, willful and wanton in the following particulars, to wit:

- a. In failing to plan for the necessary maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements since its inception;
- b. In failing to have a detailed forensic analysis performed on Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII by an architectural/engineering firm to determine all necessary repairs for the Project's General Common Elements and Limited Common Elements;
- c. In failing to have an architectural/engineering firm prepare design drawings and specifications in relation to all necessary repairs for the Project's General Common Elements and Limited Common Elements;
- d. In failing to submit any design drawings and specifications for known defective conditions in the Project's General Common Elements and Limited Common Elements to at least three (3) commercial contractors to obtain proposals from them for the performance of the required repairs;
- e. In failing to completely repair and replace all defective and deficient conditions in the Project's General Common Elements and Limited Common Elements in timely and code compliant manner as recommended by their consultants and legal advisors;
- f. In failing to assess the Co-owners for the necessary repairs needed to fix the Project's defective and deficient General Common Elements and Limited Common Elements as recommended by their consultants and legal advisors;
- g. In failing to adequately fund the reserves for the necessary maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements since its completion and certification of occupancy;
- h. In failing to employ experienced contractors, architects, and engineers to inspect, maintain, and completely repair the Project's defective and

deficient General Common Elements and Limited Common Elements prior to 2013;

- i. In failing to pursue a recovery and institute litigation against all responsible parties for the original construction defects and deficiencies associated with the design and construction of the buildings;
- j. In failing to conduct a timely reserve study to plan and prepare for the future maintenance, replacement, and repair cost associated with the Project's General Common Elements and Limited Common Elements;
- k. In failing to assess the co-owners or otherwise adequately fund the reserves so that necessary funds would be available to mitigate the substantial damages which were and are resulting from the aforementioned defects and deficiencies in the Project's General Common Elements and Limited Common Elements due to inadequate maintenance and repairs;
- l. In failing to maintain, repair, and replace all defective building components in accordance with the applicable building codes and zoning ordinance for the city of North Myrtle Beach, and/or in conformance with the product manufacturer's installation instructions;
- m. In failing to perform timely and necessary repair work to the Project's General Common Elements and Limited Common Elements which has caused substantial and ongoing damages to these buildings stemming from water infiltration;
- n. In failing to levy any assessment or even adequate assessment against all the co-owners needed to fix the defective and deficient General Common Elements and Limited Common Elements for Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII since the reserve fund is currently inadequate to finance the costs for fixing these buildings. This unreasonable delay in facilitating repairs to the regime property has caused substantial and ongoing damages to these buildings' Common Elements stemming from water infiltration;
- o. In failing to fully investigate and obtain reports concerning the structural integrity of Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII as well as a complete forensic analysis and scope of repair addressing all of their water infiltration problems;
- p. In failing to obtain competitive bids from qualified and experienced contractors for the extensive and necessary repair and reconstruction work being performed on the defective and deficient General Common

Elements and Limited Common Elements of Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII. This *ultra vires* action violates State law;

- q. In failing to ensure that current repair and reconstruction work being performed on the defective and deficient General Common Elements and Limited Common Elements for Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII complies with the applicable building codes, regulations, product specifications, and guidelines in the design and reconstruction of these buildings;
- r. In failing to previously identify, reserve for, and implement a more rational and economically palatable program to systematically maintain the buildings' exterior building envelope over time, through normal annual assessment fee collections from the co-owners. This inaction and violation of the governing documents resulted from the mismanagement of the Association;
- s. In acting unreasonably in other such ways as may be revealed during the discovery and as shown at the trial of this action.

53. As a direct and proximate result and consequence of the negligence and/or gross negligence of the Defendants, Plaintiffs have suffered injuries and damages in a pro-rata share of the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structures, or, in the alternative, the loss of use and depreciation in fair market value of their individual units, and such punitive damages as may be appropriate. Furthermore, the Plaintiffs will be subject to economic loss damages due to the budget deficits, inadequate reserves (resulting from failure to plan for future maintenance and repair of building components), and special repair and reconstruction assessment directly resulting from Defendants' negligent and reckless conduct. These monetary damages are a direct and proximate result of the Defendants' errors, omissions, and breaches of duty directly related to its management of the regime property as described above. Accordingly, the Plaintiffs are entitled to recover actual damages from the Defendants in an amount to be proved at trial, and such punitive damages as may be appropriate.

FOR A SECOND CAUSE OF ACTION
(Breach of the Master Deed's Covenants and Restrictions)

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

55. The condominium recorded documents, such as declarations or By-Laws, constitute a contract between the Regime on the one side and the Co-owners on the other side. The failure of the Association's Board to comply with the provisions of the restrictions and/or the governing documents gives rise to an action for breach of contract by an aggrieved Co-owner.⁴ Specifically, Article XXVII of the Master Deed provides in pertinent part:

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

56. Article VIII of the Master Deed makes "[e]ach every apartment and the Common Elements . . . subject to the restrictions, easements, conditions and covenants prescribed and established herein, . . . set[s] forth the obligations and responsibilities incident to ownership of each Apartment. . . ."

57. Defendants, as the underlying agents, servants, and representatives of the Co-owners, have violated and continue to violate §§§ 4(j)(ii) and (vii), 7(b)(I), and 11(a)(b) and (e) of the By-Laws and Articles XX, XXI, and XXVII of the Master Deed by failing to discharge their affirmative duties through inadequate maintenance, repair, and replacement of the Project's General Common Elements and Limited Common Elements, and also failing to adequately fund

⁴ See Murphy v. Yacht Cove Homeowners Ass'n., 289 S.C. 367, 345 S.E.2d 709 (1986), where the South Carolina Supreme Court held "that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association" for failure to discharge its duties under the Bylaws related to the maintenance and repair of the common elements. 289 S.C. at 369, 345 S.E.2d at 710.

the reserves to rectify all known defects and deficiencies in the Common Elements, and to prevent similar defects and deficiencies in the future.

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

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

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

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

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

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

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

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

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

- a. For a declaration that the TB&RC's governing documents impose an affirmative duty on the Defendants to timely repair and replace all defective and deficient General Common Elements and Limited Common Elements identified and currently existing in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII. To find and declare the Defendants have failed to timely maintain, repair and replace the defective and deficient General Common Elements and Limited Common Elements located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII, and thereby are responsible for the extraordinarily high cost of the repairs or restoration of these deficient buildings, which have and will increase substantially over the structures' remaining useful life.
- b. For a declaration that the TB&RC's governing documents, as well as State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require the Defendants to take immediate action to effectuate the complete removal and replacement of all distressed building components, including, but not limited to:
 - (1) All the defective balcony systems in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (2) All the defective corridor structural elements (plywood, joists and beams) in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (3) All the defective corridor railing systems (railings, posts and pickets) in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (4) All the defective connectors with the loss of metal in excess of

Twenty-Five (25) percent in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;

- (5) The defective roofing systems on Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (6) All the decayed and rotten exterior wood siding/trim and flashing in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert; and
 - (7) All the defective sliding glass doors in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert.
- c. For a declaration that the TB&RC's governing documents, together with State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require the Board to develop a systematic and comprehensive plan for the timely and economically feasible removal and replacement of all defective building components located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII instead of piecemeal approach that is currently being utilized by the Defendants which is not cost effective reconstruction.
 - d. For a declaration that the TB&RC's governing documents, together with the State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require the Defendants to thoroughly investigate all known and/or reasonably suspected defective and deficient conditions in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII without delay in order to avoid a complete failure of the building systems rendering them unsafe as well as economically unfeasible to reconstruct.
 - e. For a declaration that the TB&RC's governing documents impose an affirmative duty on the Defendants to adequately fund reserves for the necessary maintenance, repair and replacement of the General Common Elements and Limited Common Elements of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII.
 - f. For a declaration that the Defendants failed to adequately fund reserves for the necessary maintenance, repair and replacement of the General Common Elements and Limited Common Elements of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII. To find and declare that the Defendants have failed to adequately fund reserves for the necessary

maintenance, repair and replacement of the defective and deficient General Common Elements and Limited Common Elements of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII, and thereby are responsible for the extraordinarily high cost of the repairs or restoration of these deficient buildings, which have and will increase substantially over the structures' remaining useful life.

- g. For a Declaration that the TB&RC's governing documents, together with the State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively provide the Plaintiffs with the right to consider and decide whether Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII are repairable from a practical standpoint, as well as whether it is economically feasible to reconstruct these deficient and defective buildings under the current building code.
- h. For a declaration that the Board's bad faith conduct, *ultra vires* acts, and failure to discharge its affirmative duties, regarding the maintenance, repair, and replacement of the regime's General Common Elements and Limited Common Elements, are not protected by the business judgment rule.
- i. For a declaration that the TB&RC's governing documents as well as State law impose an affirmative duty on the Defendants to levy an assessment against all co-owners for establishing the necessary repair funds to fix the defective and deficient General Common Elements and Limited Common Elements of Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII stemming from past and ongoing water infiltration.
- j. Any and all other relief that deemed to be necessary and proper by the Court.

FOR A FOURTH CAUSE OF ACTION
(Injunctive Relief)

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

66. Plaintiffs have suffered injuries, harm, and damages in an amount equal to their pro-rata share of the extraordinary repair, maintenance and reconstruction cost required to fix their structures, including depreciation in value of their units as a result of the Defendants' continual failure to discharge their affirmative duties related to the inadequate maintenance,

repair, and replacement of the Project's defective, deficient, and unsafe General Common Elements and Limited Common Elements. These allegations are supported by the factual findings set forth in the Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs Expert John Simko, P.E., attached hereto as (Exhibits "E" and "F") and incorporated by reference as part of this Second Amended Complaint.

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

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

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

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

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

following particulars:

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

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

FOR A FIFTH CAUSE OF ACTION
(Specific Performance)

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

72. Defendants, through their failure to repair damage to the General Common Elements and Limited Common Elements, have breached affirmative duties and obligations owed to the Plaintiffs, as prescribed by the Project's Master Deed and By-Laws.

73. Defendants have further breached their affirmative duties and obligations owed to Plaintiffs by failing to effect the repairs to the damaged General Common Elements and Limited Common Elements located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII as evidenced by the factual findings set forth in the Affidavits of Saul J. Martinez, P.E. of Martinez & Associates Structural Engineers, PA and Plaintiffs Expert John Simko, P.E., attached hereto as (Exhibits "E" and "F") and incorporated by reference as part of this Second Amended Complaint.

74. Plaintiffs request an Order of the Court entering a judgment on their behalf requiring the Defendants to specifically perform their affirmative duties and obligations under the Master Deed and By-Laws by repairing and replacing all the defective and deficient General Common Elements and Limited Common Elements located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII.

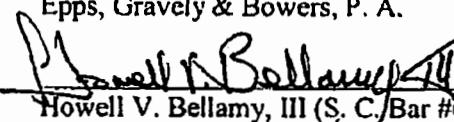
WHEREFORE, having fully set forth their Second Amended Complaint, the Plaintiffs pray for the following relief:

- a. For an Order of the Court finding the Defendants, by and through their agents, servants, and representatives, breached and violated, including, but not limited to, Sections 4(j)(ii) and (vii), 7(b)(i), and 11(a)(b) and (c) of the By-Laws, and Articles XX, XXI, and XXVII of the Master Deed of Tilghman Beach and Racquet Club Property Regime;
- b. As to the First Cause of Action, the Plaintiffs are entitled to an award of actual damages in an amount to be proven at trial; and, also, to an award of punitive damages based upon the Defendants' willful violations of the provisions of the TB&RC's Master Deed and By-Laws and State law;
- c. As to the Second Cause of Action, Plaintiffs are entitled to an award of actual damages in an amount to be proven at trial;
- d. As to the Third Cause of Action, Plaintiffs are entitled to declaratory relief as demanded in one or more of the following particulars requested under subparagraphs (a),(b),(c),(d),(e),(f),(g),(h),(i), and (j) of Paragraph 64 of the Second Amended Complaint.
- e. As to the Fourth Cause of Action, Plaintiffs are entitled to a mandatory injunction compelling one or more of the following particulars requested under subparagraphs (a), (b),(c),(d), and (e) of Paragraph 70 of the Second Amended Complaint.
- f. As to the Fifth Cause of Action, the Plaintiffs request an Order of the Court requiring the Defendants to immediately comply with their affirmative duties and responsibilities under the Master Deed and By-Laws by levying an assessment against all co-owners to repair and replacement of all defective and deficient conditions of the General Common Elements and the Limited Common Elements located in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII as recommended by the Defendants' prior consultants, legal advisers; and, further supported by the findings set forth in the Affidavits of Saul J. Martinez, P.E. of

Martinez & Associates Structural Engineers, PA and John Simko, P.E., attached hereto as (Exhibits "E" and "F") and incorporated by reference as part of this Second Amended Complaint.

- g. For attorneys fees, costs and expenses incurred in bringing this action;
- h. For a trial by Jury; and
- i. For such other and further relief as the Court may deem proper.

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


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Howell V. Bellamy, Jr. (S.C. Bar #68543)
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(843)-448-2400 Phone
(843)-448-3022 Facsimile
Attorneys for Plaintiffs

Myrtle Beach, South Carolina

October 27, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

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

Plaintiffs,)

v.)

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

Defendants.)

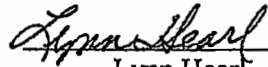
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2016-CP-26-4464

HORRY COUNTY
2016 OCT 28 AM 9:05
MELANIE CLERK OF COURT

CERTIFICATE OF MAILING

I, Lynn Hearl, employee of the Law Firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., Counsel for the Plaintiffs, in the above-captioned action, certify that I have this day sent a copy of the Amended Complaint of The Plaintiffs, Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson, with sufficient postage attached thereto, to the address listed below.

H. Sam Mabry, III, Esquire
Haynsworth Sinkler Boyd, PA
O, I, Box 2048
Greenville, South Carolina 29602


Lynn Heart

Myrtle Beach, South Carolina

October 28, 2016

COPY



STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

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

Plaintiffs,)

vs.)

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

Defendants.)

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

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

(JURY TRIAL REQUESTED)

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CLERK OF COURT
HORRY COUNTY, SC

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

JURISDICTION AND VENUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PHASE I:

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

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

PHASE II:

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

Derivation of Title:

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

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

BACKGROUND FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

B. THE GENERAL PLAN OF DEVELOPMENT OF THE PROJECT

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

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

C. EVALUATIONS OF BUILDINGS PRIOR TO 2010

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

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

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

D. EVALUATIONS OF BUILDINGS SINCE 2010

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

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

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

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

Structural Items of Concern

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

Building Envelope Items of Concern

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

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

1. Moisture affected and rotten band boards around perimeter of buildings.

Interior Items of Concern

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

Roofing Items of Concern

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

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

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

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

E. THE BOARD'S SUBSEQUENT ACTIONS IN 2016

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

throughout the Project including corridors and balconies;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

54. As a direct and proximate result and consequence of the negligence, gross

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

FOR A SECOND CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A THIRD CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

FOR A FOURTH CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

- b. For a declaration that the TB&RC's governing documents, as well as State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to take immediate action to effectuate the complete removal and replacement of all distressed building components, including, but not limited to:
 - (1) All the defective balcony systems in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (2) All the defective corridor structural elements (plywood, joists and beams) in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (3) All the defective corridor railing systems (railings, posts and pickets) in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (4) All the defective connectors with the loss of metal in excess of Twenty-Five (25) percent in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (5) The defective roofing systems on Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII identified by the Defendants' consultants and the Plaintiffs' expert;
 - (6) All the decayed and rotten exterior wood siding/trim and flashing in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert; and
 - (7) All the defective sliding glass doors in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII identified by the Defendants' consultants and the Plaintiffs' expert.
- c. For a declaration that the TB&RC's governing documents, together with State law and the adopted Building Codes and Zoning Ordinance for the City of North Myrtle Beach, affirmatively require the Defendant Association and the Defendants Austin, Coe, Madison, White, and Windle, as the underlying agents and representatives of the Co-owners, to

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

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

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

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

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

FOR A FIFTH CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

following particulars:

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

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

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

FOR A SIXTH CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR AN EIGHTH CAUSE OF ACTION

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR A TENTH CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

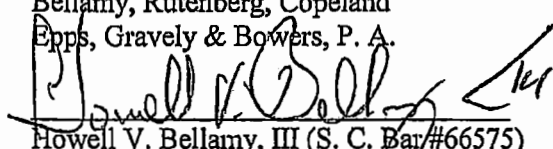
XXI, and XXVII of the Master Deed of Tilghman Beach and Racquet Club Property Regime;

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

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

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

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


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Attorneys for Plaintiffs

Myrtle Beach, South Carolina

March 8, 2017

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

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

Plaintiffs,)

v.)

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

Defendants.)

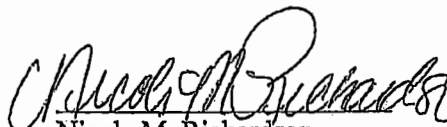
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2016-CP-26-4464

CERTIFICATE OF MAILING

FILED
HORRY COUNTY
17 MAR -8 PM 1:09
CLERK OF COURT
HORRY COUNTY, SC

I, Nicole M. Richardson, employee of the Law Firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., Counsel for the Plaintiffs, in the above-captioned action, certify that I have this day sent a copy of the Third Amended Complaint of the Plaintiffs, Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson (Negligence /Gross Negligence, Breach of Contract, Declaratory Judgment Relief, Injunctive Relief, *Ultra Vires* Conduct, Specific Performance, Indemnification, and Appointment of a Receiver by the Circuit Court) , with sufficient postage attached thereto, to the address listed below.

H. Sam Mabry, III, Esquire
Haynsworth Sinkler Boyd, PA
P. O. Box 2048
Greenville, South Carolina 29602


Nicole M. Richardson

Myrtle Beach, South Carolina

March 8, 2017



THOMAS & BRITTAIN, P.A.

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MAILING ADDRESS:
POST OFFICE BOX 1290
MYRTLE BEACH, SC 29578

August 10, 2016

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED AND EMAIL
(skvisser@gaig.com)

Sandra K. Visser, Esq.
Senior Claims Attorney
Executive Liability Division
Great American Insurance Company
1515 Woodfield Road, Suite 500
Schaumburg, IL 60173

Re: Insurer: Great American Insurance Company
Insured: Tilghman Beach & Racquet Club HOA, Inc.
Policy No.: EPP3654704
Claim No.: A00069549
Policy Period: 2/10/2016 – 2/10/2017

Jill Keck Humphries, Dennis L. Johnson, Delona Penny Rice, and Whitmel L. Brown, Individually and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Building I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII of the Tilghman Beach & Racquet Club Horizontal Property Regime, Gary Steven Robinson and Elizabeth Erin Humphries, Dennis L. Johnson, Jr. and Nancy H. Johnson v. Tilghman Beach & Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White, and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach & Racquet Club Condominium Association, Inc.

Dear Ms. Visser:

Please be advised that this firm has been retained to represent your Insureds regarding Great American Insurance Company's refusal to defend and indemnify your Insureds in the above reference litigation. This letter is in response to your letter dated August 1, 2016 setting forth the basis of Great American Insurance Company's refusal to defend and indemnify your Insureds.

As you are aware, "under South Carolina law, '[q]uestions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the [underlying] complaint.'" *Auto Owners Ins. Co. v. Pers. Touch Med Spa, LLC*, 763 F. Supp. 2d 769, 776 (D.S.C. 2011) (quoting *City of Hartsville v. S.C. Mun. Ins. & Risk Fin.*

Sandra K. Visser, Esq.
 August 10, 2016
 Page 2

Fund, 677 S.E.2d 574, 578 (S.C. 2009)). The duty to defend is broader than the duty to indemnify. *Ross Dev. Corp. v. Fireman's Fund Ins. Co.*, 809 F. Supp. 2d 449, 457 (D.S.C. 2011). If the subject complaint creates "a possibility of coverage under an insurance policy, the insurer is obligated to defend." *City of Hartsville*, 677 S.E.2d at 578 (citing *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 265 S.E.2d 38 (S.C. 1980)) (emphasis added). Therefore, "the duty to defend is triggered where the underlying complaint includes *any allegation* that raises the possibility of coverage." *Auto-Owners Ins. Co. v. Newsome*, No. 4:12-cv-00447-RBH, 2013 WL 3148334, at *4 (D.S.C. June 19, 2013).

An insurer whose duty to defend has been triggered by a lawsuit against the insured "is not justified in refusing to defend the entire case." *Town of Duncan v. State Budget & Control Bd.*, 482 S.E.2d 768, 773-74 (S.C. 1997); see also *Employers Mut. Liab. Ins. Co. v. Hendrix*, 199 F.2d 53, 59 (4th Cir. 1952); *Cincinnati Ins. Co. v. Crossmann Cmty. of N.C., Inc.*, No. 4:09-CV-1379-RBH, 2013 WL 1282017, at *11 (D.S.C. Mar. 27, 2013) ("South Carolina law requires that a triggered insurer with a duty to defend the policyholder in a suit must defend the policyholder against all claims in that suit, even those claims that are not covered under the policy.") Therefore, if there is any allegation in the Complaint filed against your Insureds your decision to deny them a defense in this case is, at a minimum, a breach of your obligations under the Policy.

The following provisions of the Policy are relevant to your duty to defend your Insureds in the litigation:

Section I. Insuring Agreements

- A. If during the Policy Period or the Discovery Period any Claim is the first made against any Insured Persons for a Wrongful Act, the Insurer shall pay on behalf of the Insured Persons, Loss and Costs of Defense resulting from such Claim, except for any Loss and Costs of Defense which the Organization or any Subsidiary actually pays as indemnification.
- B. If during the Policy Period or the Discovery Period any Claim is first made against any Insured Persons for a Wrongful Act, the Insurer shall pay on behalf of the Organization or any Subsidiary, Loss and Costs of Defense resulting from such Claim, but only to the extent the Organization or any Subsidiary is required or permitted by law to indemnify the Insured Persons.
- C. If during the Policy Period or the Discovery Period any Claim is first made against the Organization, any Subsidiary, or the Property Manager for a Wrongful Act, the Insurer shall pay on behalf of the Organization, any Subsidiary, or the Property Manager, Loss and Costs of Defense resulting from such Claim.

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

Sandra K. Visser, Esq.
 August 10, 2016
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Section III. Definitions

A. "Claim" shall mean:

- (1) a written demand for monetary relief made against any **Insured**;
- (2) a civil proceeding, including any appeals therefrom made against any **Insured** seeking monetary or *non-monetary (including injunctive) relief* commenced by service of a complaint or similar pleading; (emphasis supplied)

H. "Insured" shall mean:

- (1) the **Organization**;
- (2) any **Subsidiary**;
- (3) in the event of **Financial Insolvency**, the resulting Debtor in Possession (or foreign equivalent status), if any;
- (4) all **Insured Persons**; and
- (5) any **Property Manager**, but only if such **Property Manager** is acting pursuant to the written authority granted by the **Organization** or on behalf of and at the direction of the **Organization** or any **Subsidiary**.

I. "Insured Persons" shall mean all persons who were, now are, or shall be directors, trustees, officers, employees, leased employees, temporary or seasonal employees, volunteers or staff members of the **Organization or any **Subsidiary**, including any executive board members and committee members, whether salaried or not. It shall also mean all persons who were, now are, or shall be directors, trustees, officers, employees, leased employees, temporary or seasonal employees, volunteers or staff members of any **Property Manager**, but only if such persons are acting within the scope of their employment with the **Property Manager** and on behalf of the **Organization** or any **Subsidiary**.**

O. "Related Wrongful Acts" shall mean **Wrongful Acts which are causally connected by reason of any common fact, circumstance, situation, transaction, casualty, event or decision.**

Q. "Wrongful Act" shall mean:

- (1) any of the following by the **Organization**, and/or any **Subsidiary**, and/or any **Insured Persons** acting in their capacity with the **Organization** or a **Subsidiary**:
 - (a) actual or alleged error, misstatement, misleading statement, act or omission, neglect or breach of duty;
 - (b) **Employment Practice Wrongful Act**;

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 August 10, 2016
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- (2) any matter claimed against any **Insured Persons** solely by reason of their status with the **Organization** or any **Subsidiary**.

Section VII. Notice of Claim

- A.** The **Insureds** shall, as a condition precedent to their rights under this Policy, give the **Insurer** notice in writing of any **Claim** made during the **Policy Period**. Such notice shall be given as soon as practicable after the date a Board Member or an employee of the **Property Manager** has knowledge of the **Claim**, and in no event later than ninety (90) days after the end of the Policy Period.

In your August 1, 2016 letter, you acknowledge that "[a]ll of the Defendants are **Insureds** under the Policy." Therefore, both coverage and the duty to defend under the Policy turn on whether the Complaint asserts a Claim against your Insureds. As stated above, the Policy defines a Claim as follows:

a civil proceeding, including any appeals therefrom made against any Insured seeking monetary or *non-monetary (including injunctive) relief* commenced by service of a complaint or similar pleading; (emphasis supplied)

In their Complaint, Plaintiffs assert the following causes of action against your **Insureds**: Negligence/Gross Negligence; Breach of the Master Deeds Covenants and Restrictions; *Declaratory Judgment*; *Injunctive Relief*; and *Specific Performance*.

In your August 1, 2016 letter, you make the cursory conclusion that even though the Complaint "seeks declaratory judgment relief, injunctive relief and specific performance, these theories of liability do not change the underlying basis of the lawsuit and/or damages sought." Based solely on this self-serving interpretation of the allegations in these three causes of action, Great American concludes that coverage as to all five causes of action is excluded under the Property Damage Exclusion.

In determining whether these Claims are covered and/or your obligation to defend your Insureds in this action, our courts require that the Policy must be broadly construed in favor of your Insureds, and thus, in favor coverage and the defense of your Insureds. *See, e.g., Town of Duncan v. State Budget and Control Bd., Div. of Ins. Services*, 326 S.C. 6, 482 S.E.2d 768 (1997); *Torrington Co. v. Aetna Cas. and Sur. Co.*, 264 S.C. 636, 216 S.E.2d 547 (1975). Further, exclusions of coverage are always to be construed strongly against the insurer. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611 (2005); *Boggs v. Aetna Casualty and Surety Company*, 272 S.C. 460, 252 S.E.2d 565 (1979).

Here, Great American clearly reached its decision by narrowly construing the Policy coverage in its favor. Despite the unambiguous claims by Plaintiff for "non-monetary (including injunctive) relief," Great American chose to ignore the allegations and prayer for non-monetary relief declaring the intent of the Plaintiffs' claims to be something wholly different. Great American

THOMAS & BRITAIN, P.A.

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can point to nothing within the claims for Declaratory Judgment; Injunctive Relief; and Specific Performance to support its decision. As stated above, our courts have held that "[t]he duty to defend is triggered where the underlying complaint includes *any allegation* that raises the *possibility* of coverage." At a very minimum, these claims give rise to Great American's duty to defend its Insureds and nothing within these non-monetary claims or the Prayer for Relief as to the non-monetary claims could possibly be construed as falling within the Property Damage Exclusion.

Similarly, your conclusion that coverage is excluded under the Party Exclusion provision is misplaced. In support of this position you state on page 5 of your letter that "TB&RC's Master Deed gives authority to the Plaintiffs to bring a lawsuit seeking relief for (seq) against the Board for its failure to discharge its duties under the governing documents." Again, Great American chose to ignore the plain language of the Complaint to reach a conclusion in Great American's favor as to coverage. According to the Complaint at paragraph 24(A) such claims may be brought "by an aggrieved Co-owner of an Apartment." Nowhere in the Complaint do Plaintiffs assert that they are bringing an action on behalf of the Organization. Nowhere in the Complaint do Plaintiffs pray for relief on behalf on the Organization. Indeed, Plaintiffs have sued the very Organization you claim Plaintiffs have brought the claims on behalf of. Plaintiffs have prayed that damages be awarded against the Organization in favor of the individual owner Plaintiffs:

- b. As to the **First Cause of Action**, the Plaintiffs and all other similarly situated Co-owners *are entitled to an award of actual damages in an amount to be proven at trial*; and, also, to an award of punitive damages based upon the Defendants' willful violations of the provisions of the TB&RC's Master Deed and By-Laws and State law;
- c. As to the **Second Cause of Action**, the Plaintiffs and all other similarly situated Co-owners *are entitled to an award of actual damages in an amount to be proven at trial*.

In short, despite the unambiguous allegations and prayer, Great American ignores controlling law, narrowly construes the Policy in its own favor, and incorrectly denied your Insureds indemnification and a defense. At a very minimum, Great American is bound by its Policy to provide a defense to our client, your Insureds, in this matter.

On behalf of our clients, we respectfully request that you reconsider your Claim decision, defend your Insureds in this litigation, and provide the indemnification afforded under the clear terms of the Policy.

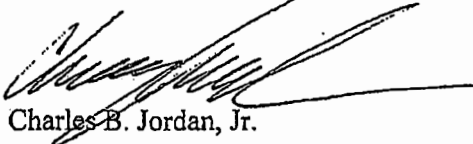
This letter is not intended to constitute a complete list of all the reasons we think your denial of coverage and/or a defense in this matter are wrong. We reserve the right to raise any and all arguments in favor of coverage and/or a defense in future proceedings.

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August 10, 2016
Page 6

Sincerely yours,

THOMAS & BRITTAIN, P.A.



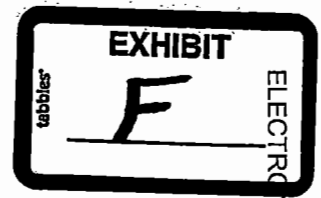
Charles B. Jordan, Jr.

CBJjr/tmm

cc: Board of Directors of Tilghman Beach and Racquet Club

THOMAS & BRITTAIN, P.A.

R-3261



THOMAS & BRITTAIN, P.A.
ATTORNEYS AT LAW

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CHARLES B. JORDAN, JR.
CJordan@MYRlaw.com

MAILING ADDRESS:
POST OFFICE BOX 1290
MYRTLE BEACH, SC 29578

August 25, 2016

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED AND EMAIL
(skvisser@gaig.com)

Sandra K. Visser, Esq.
Senior Claims Attorney
Executive Liability Division
Great American Insurance Company
1515 Woodfield Road, Suite 500
Schaumburg, IL 60173

Re: Insurer: Great American Insurance Company
Insured: Tilghman Beach & Racquet Club HOA, Inc.
Policy No.: EPP3654704
Claim No.: A00069549
Policy Period: 2/10/2016 – 2/10/2017

Jill Keck Humphries, Dennis L. Johnson, Delona Penny Rice, and Whitmel L. Brown, Individually and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Building I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII of the Tilghman Beach & Racquet Club Horizontal Property Regime, Gary Steven Robinson and Elizabeth Erin Humphries, Dennis L. Johnson, Jr. and Nancy H. Johnson v. Tilghman Beach & Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White, and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach & Racquet Club Condominium Association, Inc.

Dear Ms. Visser:

On August 10, 2016, I wrote you a letter on behalf of your Insureds, the Defendants in the above referenced lawsuit, responding to your August 1, 2016, letter denying coverage and a defense to your Insureds under the applicable Great American Directors and Officers policy. As of today's date, I have not received any response from you or anyone else on behalf of Great American.

As set forth in greater detail in my August 10 letter, Great American clearly has a duty to defend your Insureds in the above referenced matter because the Complaint alleges at least one claim which raises the possibility of coverage under the Great American Directors and Officers

Sandra K. Visser, Esq.
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Page 2

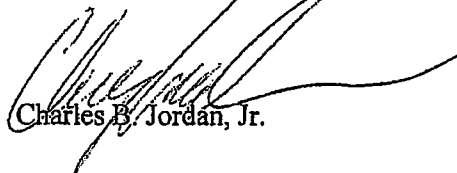
policy in question. Great American's failure to perform its contractual duty to defend has forced your Insureds to hire legal counsel and proceed to defend this case. Your Insureds are presently incurring attorney's fees, expenses, and costs which should be paid for by Great American pursuant to your duty to defend. Among other things, the Defendants have recently removed the case from South Carolina state court to federal court, answered the Complaint on behalf of the Homeowners Association, and filed motions to dismiss certain plaintiffs from the suit.

The Defendants in the above matter will continue to defend the case as they see fit and, by doing so, the Defendants do not discharge Great American from its duty to defend or waive their rights to a defense under the policy in question. The Defendants reserve all rights they have under the policy in question and the law in South Carolina and will seek to recover from Great American all of the damages they have incurred, including but not limited to, all attorney's fees, costs, and expenses incurred by the Defendants in defending the above lawsuit. The Defendants also reserve all rights they have to bring an action against Great American for its bad faith refusal to defend and seek punitive damages against Great American before a jury.

Your Insureds continue to hope that Great American will reconsider its clearly erroneous and bad faith position concerning coverage and the duty to defend in the above lawsuit and that Great American will fulfill its responsibilities under the policy.

Sincerely yours,

THOMAS & BRITTAIN, P.A.



Charles B. Jordan, Jr.

CBJjr/tmm

cc: Board of Directors of Tilghman Beach and Racquet Club

THOMAS & BRITTAIN, P.A.



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November 3, 2016

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED AND EMAIL
(skvisser@gaig.com)

Sandra K. Visser, Esq.
Senior Claims Attorney
Executive Liability Division
Great American Insurance Company
1515 Woodfield Road, Suite 500
Schaumburg, IL 60173

Re: Insurer: Great American Insurance Company
Insured: Tilghman Beach & Racquet Club HOA, Inc.
Policy No.: EPP3654704
Claim No.: A00069549
Policy Period: 2/10/2016 – 2/10/2017
Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, and Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson v. Tilghman Beach & Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White, and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach & Racquet Club Condominium Association, Inc.

Dear Ms. Visser:

As you know, this Firm has been retained to represent your Insureds regarding Great American Insurance Company's refusal to defend and indemnify your Insureds in the above-referenced litigation. I am writing this letter to make one more attempt to get Great American to reconsider the position in your August 1, 2016, and October 12, 2016, letters that Great American has no duty to defend or indemnify your Insureds in the above-referenced case, and to bring to your attention some developments in the litigation.

As set forth in my August 10, 2016 letter, South Carolina law is clear that the question of a liability insurance company's duty to defend a lawsuit brought against its insured is generally determined by the allegations of the underlying complaint. The duty to defend is broader than the duty to indemnify. If some allegations in the complaint create "a possibility of coverage" under the insurance policy, the insurer is obligated to defend its insured. Under South Carolina law, the duty to defend is triggered where the underlying complaint includes any allegation that raises the possibility of coverage. *City of Harleysville v. South Carolina Municipal Ins. Risk*

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Financing Fund, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) (citing references omitted) (“[i]f the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend”). Where an allegation in the complaint raises the possibility of coverage, the insurer has a duty to defend its insured even if there are claims in the complaint which are not covered by the policy. All our clients (your Insureds) need to show is one covered claim alleged in the Complaint, or in any amended complaints subsequently filed. See, e.g., *Liberty Mutual Fire Ins. Co. v. JM Smith Corp.*, 602 Fed.Appx. 115, 119 (4th Cir. 2015) (citing references omitted) (“South Carolina law, like most states, imposes a broad duty to defend on insurers An insurer must defend its insured if there is a ‘possibility of coverage’ under the policy . . . for even just one claim in the complaint.”); *Town of Duncan v. State Budget and Control Board*, 326 S.C. 6, 16, 482 S.E.2d 768, 774 (1997) (citing references omitted) (“where a lawsuit contains several causes of action, some of which are covered under the policy and some of which are not, an insurer is not justified in refusing to defend the entire suit.”). Your October 12, 2016 letter pays lip service to these rules but fails to apply them in analyzing the Complaint, coverage and your duty to defend here.

The Policy in question provides that Great American “has the right and the duty to defend a Claim to which this insurance applies, even if the allegations of such Claim are groundless, false or fraudulent.” Insuring Agreements Section I.A. provides that, “[i]f during the **Policy Period** or the **Discovery Period** any **Claim** is first made against any **Insured Persons** for a **Wrongful Act**, [Great American] shall pay on behalf of the **Insured Persons**, **Loss and Costs of Defense** resulting from such **Claim**, except for any **Loss and Costs of Defense** which the **Organization** or any **Subsidiary** actually pays as indemnification.” As detailed in my August 10, 2016 letter, the original Complaint in this matter contains at least some allegations that raise the possibility of coverage because the original Complaint asserts causes of action for (1) declaratory judgment, (2) injunctive relief and (3) specific performance, each of which constitutes a “Claim” defined by the Great American Policy as “a civil proceeding . . . made against any Insured seeking monetary or non-monetary (including injunctive) relief commenced by service of a complaint or similar proceeding.” (emphasis supplied). Your October 12, 2016 letter acknowledges that the original Complaint constitutes a Claim under the Great American Policy. Great American asserts that it has no duty to defend or provide coverage in this case because of Exclusions D, E and H in its Policy. However, the causes of action for (1) declaratory judgment, (2) injunctive relief and (3) specific performance in the original Complaint allege a number of actual or alleged errors, acts or omissions, neglect or breaches of duty by Insured Persons which fall outside the narrow scope of these Exclusions.

Before discussing the specific Exclusions cited in your August 1, 2016, and October 12, 2016, letters, I want to point out four legal principles which we believe are being ignored in your analysis of Great American’s coverage and defense obligations for the original Complaint. First, under South Carolina law, the underlying complaint is construed liberally in favor of the duty of the insurance company to defend its insured with all doubts resolved in the insured’s favor. *Darwin Nat. Assur. Co. v. Matthews & Megna LLC*, 36 F.Supp.3d 636, 655 (D.S.C. 2014).

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Page 3

Second, because the Insurer drafted the Insurance Policy, any ambiguity in the Policy (particularly any ambiguity in an exclusion) is resolved against the Insurer and in the Insured's favor. *South Carolina Budget and Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991); *Millstead v. Life Ins. Co. Virginia*, 256 S.C. 449, 182 S.E.2d 867 (1971). Third, policy exclusions are construed very narrowly and "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Auto Owners Ins. Co. v. Personal Touch Med. Spa, LLC*, 763 F.Supp.2d 769, 780 (D.S.C. 2011) (citing references omitted). Fourth, an insurer can refuse to defend based on a policy exclusion only if the *only* possible construction of the complaint is that *all* allegations and claims fall *totally* within the express language of the cited exclusion. *Haygood v. Dies*, 174 So. 3d 1211, 1214 (La. App. 2 Cir. 2015) (quoting *Vaughn v. Franklin*, 785 So. 2d 79, 88 (La. App. 1st Cir. 2001)) (stating an "insurer has a duty to defend if there exists a 'single allegation in the plaintiff's [complaint] . . . under which coverage is not unambiguously excluded.'"); *Episcopal Church in South Carolina v. Church Ins. Co. of Vermont*, 993 F.Supp.2d 581, 589 (D.S.C. 2015) ("[a]n insurer has no duty to defend . . . where the damage alleged was caused by a reason unambiguously excluded by the policy").

To avoid Great America's duty to defend, your letters initially rely on Exclusion D.(2), which excludes from coverage Claims involving "damage to or destruction of any tangible property or the loss of use of any tangible property." However, you ignore the fact that the original Complaint, and, specifically, the causes of action for non-monetary relief, allege that the HOA Insured Organization and the Board members committed actual or alleged errors, acts and omissions, negligence and/or breach of duty by failing to maintain adequate repair reserves. South Carolina courts have held that a claim that a homeowners association failed to maintain adequate repair reserves does not implicate a property damage exclusion contained in a liability insurance policy. *Pulliam v. Travelers Indemnity Co.*, 403 S.C. 332, 342, 743 S.E.2d 117, 122 (Ct. App. 2013) ("[t]he failure to establish a reserve fund resulted in [plaintiffs] . . . having to expend more [money] from their own pockets to make the repairs than they might have otherwise had to expend—economic damage"); *Builders Mut. Ins. Co. v. Lacey Constr. Co.* No. CIV.A. 3:11-cv-400-CMC, 2012 WL 1032539, at *9 (D.S.C. Mar. 7, 2012) ("To the extent damages sought in the [underlying action] are for inadequate reserves . . . they do not involve physical injury and, consequently, cannot satisfy the definition of property damage"). Again, an insurer in South Carolina has the duty to defend if there is just one single claim alleged in the complaint that falls within the coverage of the policy and outside the policy exclusions. *Berenyi, Inc. v. Landmark Am. Ins. Co.*, No. C.A. 2:09-CV01556PMD, 2010 WL 233861, at *4 - *8 (D.S.C. Jan. 14, 2010) ("[t]he inclusion of claims which would not be covered by the policy does not abrogate an insurer's duty to defend when the complaint raises at least one claim covered by the policy Therefore, this exclusion, which would only affect coverage as to part of the underlying claim, does not affect whether or not there is a duty to defend"). The allegations in the original Complaint that Insured Persons committed Wrongful Acts with respect to the failure to maintain adequate repair reserves implicates matters outside Exclusion D.(2) and activates Great American's duty to defend. Further, there are numerous other allegations in the

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original Complaint of Wrongful Acts by Insured Persons that do not implicate "damage to or destruction of any tangible property or the loss of use of any tangible property" in Exclusion D.(2), which must be strongly construed against Great American.

Your August 1, 2016, and October 12, 2016, letters next contend that Exclusion G. excludes Plaintiffs' claims and precludes coverage and a duty to defend. However, there are a number of claims in the original Complaint which allege a Wrongful Act by an Insured Person which does not involve "seepage, pollution, radiation, emission, contamination or irritant" including, but not limited to, the claim in the original Complaint against the HOA and its individual Board members for failing to maintain adequate reserves. Moreover, Exclusion G expressly provides that "however, this exclusion shall not apply to coverage provided under Insuring Agreement 1.A." This "however" phrase in Exclusion G clearly is activated here because the original Complaint involves a Claim first made during the Policy Period against an Insured Person for a Wrongful Act. At the very least, the "however" phrase in Exclusion G creates an ambiguity as to whether Exclusion G applies to the claims in the original Complaint and that ambiguity will be resolved by the courts against Great American and in favor of coverage and the duty to defend Great American's Insureds. *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (citing references omitted) ("[a]mbiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer").

Further, the claims in the original Complaint do not fall within Exclusion H because the claims were brought by the Plaintiffs, individually, and on behalf of the co-owners of units of Tilghman Beach and Racquet Club, not for, on behalf of, or for the benefit of Tilghman Beach and Racquet Club (the "Organization") itself. Your October 12, 2016, letter claims that it is "Great American's position . . . that Plaintiffs brought this lawsuit against [TBRC] and the individual defendants by, or for the benefit, of the **Insured Organization**." However, Great American's subjective interpretation of Plaintiffs' motivation does not control its duty to defend. The duty to defend is determined by the allegations in the four corners of the Complaint. The original Complaint contains absolutely no allegation that it was brought on behalf of the Insured Organization, or for the benefit of the Insured Organization. Your contention that a lawsuit, which names the Insured Organization as a defendant, which seeks an award of actual and punitive damages from the Insured Organization to be paid to the Plaintiffs, which seeks to order the Insured Organization to perform certain acts, and which seeks damages solely for the benefit of the Plaintiffs (and the punitive class), is brought "for the benefit of" the Organization is absurd. Your October 12, 2016, letter also suggests that the original Complaint was brought "for the benefit of" the Insured Organization because the Insured Organization will benefit from any repairs to the common or limited common elements. This position is wrong as a matter of law because the Insured Organization (the Homeowners Association) is incorporated and, thus, a separate and distinct legal entity from the unit owners. S.C. Code Ann. § 27-31-90. Under South Carolina law, and the HOA documents attached to the original Complaint, the common

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 November 3, 2016.
 Page 5

elements and limited common elements are owned by the unit owners, and not the Insured Organization. *See, e.g.,* S.C. Code Ann. §§ 27-31-60; 27-31-190.

With this letter, we also wanted to bring to your attention additional developments in the litigation which further demonstrate that Great American's refusal to defend your Insureds is completely misplaced and in bad faith. As mentioned in my August 25, 2016, letter, defense counsel, independently retained and paid by your Insureds, removed the case from South Carolina state court to federal court. As a result of a Motion to Remand filed by Plaintiffs, Plaintiffs and Defendants engaged in negotiations and entered into a Stipulation whereby Defendants agreed to consent to a remand of the case to South Carolina state court in exchange for Plaintiffs agreeing that they are not pursuing this case as a class action or derivative action, and Plaintiffs agreeing to delete any such allegations from future pleadings. A copy of this Stipulation is enclosed. Plaintiffs have since filed an amended Complaint in South Carolina state court, a copy of which is enclosed for your file, in which Plaintiffs deleted any class allegations or any allegation that they are bringing this lawsuit in any type of derivative or representative capacity. Great American's contention that the original Complaint alleged derivative claims which implicated Exclusion H of the Great American Policy was patently wrong. The provisions of the enclosed Stipulation and amended Complaint further demonstrate that Great American's continuing insistence on Exclusion H has absolutely no validity with respect to the allegations in this litigation. *South Carolina Medical Malpractice Liability Insurance Joint Underwriting Assoc. v. Ferry*, 291 S.C. 460, 354 S.E.2d 378 (1997) (although liability carrier had no duty to defend based on allegations in original complaint, the duty to defend held to rise from allegations in amended complaint).

Like the original Complaint, the amended Complaint contains causes of action for declaratory judgment, injunction relief, and specific performance (i.e. "non-monetary (including injunctive) relief"). It also alleges Wrongful Acts by Insured Persons that implicate matters outside Exclusions D.(2) and E of the Great American Policy, all of which must be construed narrowly against Great American and in favor of coverage and the duty to defend your Insureds. In particular, the amended Complaint alleges that through an actual or alleged error, an act or omission, neglect or breach of duty, the Insured Persons failed to maintain adequate reserves. As discussed at length above, under clear South Carolina law, this allegation falls outside the scope of Exclusions D.(2) and E.

Finally, we would note that Great American's interpretation and application of Exclusions D.(2), E and H to conclude it has no coverage for, or duty to defend, the claims in this case renders the Director's and Officer's Policy purchased by the Insured Organization "virtually meaningless" and creates illusory coverage. Since 1986, South Carolina law has provided that a condominium owner may bring an action against the condominium association and its board for failure of the HOA to discharge its duties related to maintenance and repair of the common or limited common elements of the condominium complex. *Murphy v. Yacht Cove Homeowner's Ass'n*, 289 S.C. 367, 369, 345 S.E.2d 709, 710 (1986). This lawsuit involves

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Page 6

exactly that type claim. Indeed, the original Complaint and the amended Complaint rely on *Murphy* as a primary basis for this lawsuit. See original Complaint at p. 12, fn 2; amended Complaint at p. 12, fn 2. Under your interpretation of Great American's Policy, particularly your interpretation of Exclusions D.(2) and H, the Insured Organization and Insured Persons here have absolutely no coverage of any kind for Claims related to repair and maintenance of the common elements, including acts which fall within the definition of Wrongful Acts under the Policy that relate to failing to maintain adequate reserves, having a maintenance plan, or whether the Board acted ultra vires with respect to certain acts related to maintenance and repair. Your interpretation of these Exclusions would make the Great American Policy "virtually meaningless" because the Policy would not provide any coverage at all for Claims related to the Board's repair and maintenance of the common or limited common elements, the primary risk of suit a homeowners association faces in South Carolina and, we believe, the very risk contemplated by the Insured Organization when the Great American Policy was purchased. See, e.g., *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2002) (citing references omitted) ("the literal interpretation of policy language will be rejected where its application would lead to unreasonable results and the definitions as written would be so narrow as to make coverage merely 'illusory'"); *Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 19, 459 S.E.2d 318, 321 (1984) (Ct. App. 1994) (rejecting insurer's interpretation of policy exclusion because "[t]o give effect to the professional liability exclusion would render the policy virtually meaningless, because it would exclude from coverage for all claims arising from [plaintiff's] . . . exterminating services, the very risk contemplated by the parties. . . . The internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very operation sought to be insured renders the policy ambiguous, and we must resolve that ambiguity in favor of coverage").

Great American's bad faith failure to perform its contractual duty to defend has forced your Insureds to hire legal counsel and proceed to defend this case. Your Insureds are presently incurring attorney's fees, expenses, and costs which should be paid for by Great American pursuant to your duty to defend. Your Insureds continue to hope that Great American will reconsider its clearly erroneous and bad faith position concerning coverage and the duty to defend in the above lawsuit and that Great American will fulfill its responsibilities under the policy. Your Insured's demand that Great American respond, and accept its clear duty to defend this case, within ten (10) calendar days from the date of this letter.

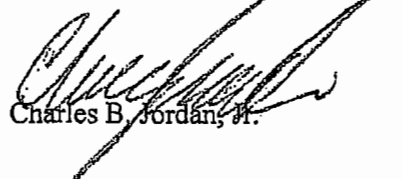
This letter is not intended to constitute a complete list of all the reasons we think Great American's denial of coverage and/or a defense in this matter is wrong. We reserve the right to raise any and all arguments in favor of coverage and/or a defense in future proceedings.

THOMAS & BRITTAIN, P.A.

Sandra K. Visser, Esq.
November 3, 2016
Page 7

Sincerely yours,

THOMAS & BRITTAIN, P.A.



Charles B. Jordan, II.

CBJjr/tmm

Enclosures

cc: Board of Directors of Tilghman Beach and Racquet Club

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R-3270



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Schaumburg, IL 60173

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GreatAmericanInsurance.com

August 1, 2016

VIA EMAIL

vicki.gallagher@kadiehl.com

Tilgham Beach & Racquet Club HOA, Inc.
c/o KA Diehl
Attn: Vicki Gallagher
11822 Highway 17 Bypass, South
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RE: Insurer: Great American Insurance Company
Insured: Tilgham Beach & Racquet Club HOA, Inc.
Policy No.: EPP3654704
Claim No.: A00069549
Policy Period: 2/10/2016 - 2/10/2017

Jill Keck Humphries, Dennis L. Johnson, Delona Penny Rice, and Whitmel L. Brown, Individually and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII of the Tilgham Beach & Racquet Club Horizontal Property Regime, Gary Steven Robinson and Elizabeth Erin Humphries, Dennis L. Johnson, Jr. and Nancy H. Johnson v. Tilgham Beach & Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White, and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilgham Beach & Racquet Club Condominium Association, Inc.

Dear Ms. Gallagher:

On behalf of Great American Insurance Company ("Great American"), I acknowledge receipt of the July 13, 2016 email from Brenda Riska of Risk Partners Insurance Group, giving us notice of the above-referenced matter. We have reviewed the materials provided, as well as the above-referenced Policy, and are writing to advise that, after careful review, Great American respectfully denies coverage for this matter.

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Background

As you are aware, on July 7, 2016, Jill Keck Humphries, Dennis L. Johnson, Delona Penny Rice, and Whitmel L. Brown, Individually and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII of the Tilgham Beach & Racquet Club Horizontal Property Regime, Gary Steven Robinson and Elizabeth Erin Humphries, Dennis L. Johnson, Jr. and Nancy H. Johnson (collectively referred to as "Plaintiffs") filed a Complaint against Tilgham Beach & Racquet Club Condominium Association, Inc. ("TB&RC"), James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White, and Steele Brice Windle, III, individually and as Members of the Board of Directors of the TB&RC (collectively referred to as "Defendants") in the Court of Common Pleas, Fifteenth Judicial Circuit, State of South Carolina, County of Horry. All of the named Defendants are **Insureds**¹ under the Policy. Each of the Plaintiffs is an owner of a unit located within the TB&RC and, pursuant to the Complaint, TB&RC's Master Deed grants individual unit owners authority to bring a lawsuit seeking relief for the Defendants' failure to discharge their duties under the governing documents.

Plaintiffs assert that, since the completion of the TB&RC project in 1982, TB&RC's various Boards of Directors have failed to implement or require its Manager to implement a program for the inspection, maintenance and repair of TB&RC's common and limited common elements, which allegedly would have identified and thereby minimized the cost of remediating the significant current damage to the thirteen buildings that comprise TB&RC. Further, the various Boards of Directors, including the individual named Defendants, allegedly failed to establish a reasonable reserve for the payment of future common expenses arising out of damage to the buildings. It is asserted that, since 2010, thirteen different consultants were retained for the purpose of evaluating and/or developing various repair and reconstruction plans for the deficient and defective conditions of the buildings, which included the need for structural, building envelope, building interior, and roofing remediation. Despite these reports, no action was taken.

It is further asserted that, in June, 2015, TB&RC hired Saul Martinez, P.E., of Martinez & Associates Structural Engineers, PA, to assess the current condition of the TB&RC's buildings and, in January 2016, it hired Steve Coggins, AIA, of SGA Architecture, LLC, to prepare a comprehensive capital improvement plan to complete the necessary repair and restoration work. Based upon his inspection, Mr. Coggins described the damage/defective condition of the buildings as systemic throughout the property and recommended a comprehensive approach to repair each building be taken, at a cost that will likely exceed \$6,000,000.

Despite these reports, It is asserted that the individual Defendants, as current members of the Board of Directors, have failed to undertake the necessary repairs to eliminate the major

¹ All words in bold print represent terms defined in the Policy.

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structural damage, water intrusion damage, and leaks. It is further asserted that these Defendants, failed to protect TB&RC from future damage and failed to assess the owners for the cost of the repairs. It is specifically asserted that the actual property damage to the buildings has been caused by continuous and repeated exposure to moisture and water seeping into and around the buildings' walls, windows, doors, and intersections, resulting from the neglect and failure to maintain, replace and repair TB&RC's general and limited common elements over the course of its 35 plus years of existence.

The Complaint contains the following five Causes of Action: Negligent/Gross Negligence; Breach of Master Deed's Covenants and Restrictions; Declaratory Judgment; Injunctive Relief; and Specific Performance. Each of these Causes of Action assert that the TB&RC, though its Board, was responsible for preventing further damage to the property and its negligence contributed to the significant property damage to the individual buildings and resulting mold growth. We reference Plaintiffs' allegations solely for the purpose of our coverage analysis, and in doing so, we do not intend to imply any merit to them.

Coverage

Great American issued a Community Association Solution Insurance Policy (the "Policy"), Policy No. EPP3654704, insuring the Association, subject to the terms and conditions of and endorsements to the Policy. The **Policy Period** is February 10, 2016 to February 10, 2017.

A. Property Damage Exclusions Preclude Coverage

While this matter constitutes a **Claim** under the Policy, coverage is precluded by the following relevant exclusions under the Policy:

Section IV. Exclusions

This Policy does not apply to any **Claim** made against any **Insured**:

- D.** based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: (1) bodily injury, sickness, disease or death of any person, assault or battery; or (2) *damage to or destruction of any tangible property or the loss of use of any tangible property*; or (3) humiliation, mental anguish, emotional distress, invasion of privacy, wrongful entry, trespassing, eviction, false arrest, false imprisonment, malicious prosecution, abuse of process, libel or slander; provided, however, that part (3) of this exclusion shall not apply to any **Claim** for an **Employment Practice Wrongful Act**;

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- G. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged seepage, pollution, radiation, emission, contamination or irritant of any kind, including but not limited to smoke, vapor, dust, fibers, mold, spores, fungi, germs, soot, fumes, acids, alkalis, asbestos, chemicals or waste of any kind, provided, however, this exclusion shall not apply to coverage provided under Insuring Agreement 1.A;

Although the Complaint alleges negligence and breach of duties under the Master Deed's Covenants and Restrictions against the Defendants, as well as seeks declaratory judgment relief, injunctive relief and specific performance, these theories of liability do not change the underlying basis of the lawsuit and/or damages sought. Plaintiffs seek to find the Defendants negligent and/or in breach of its Master Deed's Covenants for failing to undertake the necessary repairs to eliminate the major structural and water intrusion damage to the TB&RC buildings, as well as not assessing the owners for the costs of the repairs. As such, this **Claim** is based upon, arises out of, is related to and involves damage to property allegedly caused by repeated exposure to moisture and water seeping into the buildings and resulting in significant property damage and mold growth. Pursuant to Exclusions IV.D. and IV.G. coverage for **Claims** brought for property damage and mold growth are specifically excluded from coverage under the Policy and Great American will neither defend nor indemnify the **Insureds** in this matter.

B. Party Exclusion Preclude Coverage

Although the property damage and water damage exclusions, in and of themselves, preclude coverage under the Policy for this **Claim**, we must inform you that coverage is also precluded by the following exclusion in the Policy:

Section IV. Exclusions

This Policy does not apply to any **Claim** made against any **Insured**:

- H. by, or for the benefit of, or at the behest of the **Organization** or any **Subsidiary** or any entity which controls, is controlled by, or is under common control with the **Organization** or any **Subsidiary**, or any person or entity which succeeds to the interest of the **Organization** or any **Subsidiary**, provided, however, this exclusion shall not apply to any **Claim** brought by the receiver, conservator, liquidator, rehabilitator, examiner or similar official of the **Organization**, if any, in the event of **Financial Insolvency**.

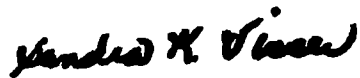
Vicki Gallagher
August 1, 2016
Page Five

TB&RC's Master Deed gives authority to the Plaintiffs to bring a lawsuit seeking relief for against the Board for its failure to discharge its duties under the governing documents. As such, Plaintiffs have brought this lawsuit against TB&RC and the individual Defendants by, or for the benefit, of the **Insured Organization**. Pursuant to Exclusion IV.H., noted above, coverage for **Claims** brought by or for the benefit of the **Organization** is specifically excluded under the Policy. For this additional reason, coverage does not exist for this **Claim**, and Great American will neither defend nor indemnify the **Insureds** in this matter. If the **Insureds** have not already done so, we suggest it place all general liability, umbrella, and other potentially responsible insurers on notice of the **Claim**.

Great American's declination of coverage is based upon the materials received to date. As such, Great American is not waiving its rights under the Policy.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,
GREAT AMERICAN INSURANCE COMPANY



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SKV/alr

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October 12, 2016

VIA EMAIL: cjordan@myrlaw.com

Tilgham Beach & Racquet Club HOA, Inc.
c/o Thomas & Brittain, P. A.
Attn: Charles B. Jordan, Jr.
1314 Professional Drive
Myrtle Beach, SC 29577

RE: Insurer: Great American Insurance Company
Insured: Tilgham Beach & Racquet Club HOA, Inc.
Policy No.: EPP3654704
Claim No.: A00069549
Policy Period: 2/10/2016-2/10/2017

Jill Keck Humphries, et. al. v. Tilgham Beach & Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White, and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilgham Beach & Racquet Club Condominium Association, Inc.

Dear Mr. Jordan:

On behalf of Great American Insurance Company ("Great American"), I acknowledge receipt of your August 10, 2016 and August 25, 2016 letters requesting Great American to reconsider the position we have taken with regard to coverage for this matter. We have reviewed your letters, as well as the above referenced Policy, and are writing to advise that, after careful review, Great American maintains its position with regard to our declination of coverage for this matter.

We do not quarrel with your summary of the basic principles of insurance law applicable to duty to defend policies, especially the principle that the duty to defend is triggered where the underlying complaint includes any allegation that raises a possibility of coverage. You have, however, taken the unsupported position that, because Great American acknowledged that all of the Defendants are **Insureds** under the Policy, "both coverage and the duty to defend turns on whether the Complaint asserts a **Claim** against the **Insureds**." This statement is incorrect. In our August 1, 2016 letter, Great American acknowledged that this matter constitutes a **Claim** under this Policy. However, before determining whether a **Claim** triggers the duty to defend and/or indemnify, both the allegations in the complaint and the entire Policy, including all

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conditions, provisions, and exclusions must be examined. That analysis was undertaken in our August 1, 2016 letter.

Further, you have accused Great American of taking a position based solely on a self-serving interpretation of the allegations in three causes of action (Declaratory Judgment; Injunctive Relief; and Specific Performance), to conclude that coverage for all five causes of action is excluded under the Property Damage Exclusion. A careful review of all the Causes of Action in the Complaint reveals the entirety of the Complaint is based upon and arises out of, in some manner, the failure to timely repair, replace, and fund reserves for defective and deficient Common Elements and Limited Common Elements identified and currently existing in the various buildings that comprise Tilgham. As such, all of the Causes of Action are based upon, arise out of, relate to, directly or indirectly result from or are in consequence of, or in any way involve property damage or loss of use of tangible property. Therefore, Exclusion IV.D., which states "This Policy does not apply to any **Claim** made against any **Insured**: based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving" property damage or the loss of use of tangible property, and/or Exclusion IV.G., which excludes coverage for a **Claim** which is "based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged seepage", including mold, are applicable, as these allegations fall within the exclusions, removing this **Claim** from coverage. An **Insurer** has no duty to defend an **Insured** where the damages are excluded under the Policy.

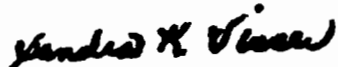
While we assert that the property damage and water damage exclusions, in and of themselves, preclude coverage under the Policy for this **Claim**, we further noted in our August 1, 2016 letter the application of Exclusion IV.H. as an additional coverage issues that arose in our review of this **Claim**. With regard this issue, Great American's position is that Plaintiffs brought this lawsuit against the Tilgham and the individual Defendants by, or for the benefit, of the **Insured Organization**. The damage to the Tilgham property is systemic throughout the property, including the general and limited common elements. The relief sought is to repair and replace the damaged general and limited common areas is for the benefit of Tilgham as a whole, not the individual unit owners. The Plaintiffs have brought the lawsuit on behalf of all similarly situated unit owners of the buildings comprising Tilgham. All units, and the Association as a whole, will benefit from the repairs to the structure and common elements. As such, this **Claim** is being brought by or for the benefit of the **Organization**, and, pursuant to Exclusion IV.H., coverage for **Claims** brought by or for the benefit of the **Organization** is specifically excluded under the Policy.

Great American's declination of coverage in this matter is based upon the information received to date. As such, Great American expressly reserves its rights under the Policy. We understand there may have been an Amended Complaint filed in this action. Great American has not yet been provided a copy of the Amended Complaint. If you have a copy of the Amended Complaint, we ask that you forward a copy to us for further consideration. We also ask that you contact Great American immediately with any additional information if you continue to disagree with our coverage analysis of this matter. We will further evaluate our coverage position in light of any new information.

Charles B. Jordan, Jr.
October 12, 2016
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Should you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,
GREAT AMERICAN INSURANCE COMPANY



Sandra K. Visser
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cc: Brenda Riska / brendar@grpinsurance.com

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

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

Plaintiffs,

vs.

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

Defendants.

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

Third-Party Plaintiffs,

vs.

Great American Insurance Company,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

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

**DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR JUDGMENT ON THE
PLEADINGS AS TO THE FIRST AND FOURTH CAUSES OF ACTION IN
DEFENDANTS'/THIRD-PARTY PLAINTIFFS' THIRD-PARTY COMPLAINT**

PLEASE TAKE NOTICE that, pursuant to Rule 12(c), SCRCP, Defendants/Third-Party Plaintiffs hereby move for judgment on the pleadings as to Third-Party Defendant Great American Insurance Company's (hereinafter "Great American") duty to defend the Defendants/Third-Party Plaintiffs under the First and Fourth causes of action in Defendants'/Third-Party Plaintiffs' Third-Party Complaint. The grounds for this Motion are generally that, in its Amended Answer, Great American admits that it issued a "claims made" directors and officers liability insurance policy which covered the Defendants/Third Party Plaintiffs for claims made against them between February 11, 2016, and February 10, 2017 (hereinafter "the 2016 Great American Policy"). Great American's Amended Answer further admits facts which establish that Great American had a duty to defend its Insureds, Defendants/Third-Party Plaintiffs, from the allegations in the original Complaint filed on July 7, 2016, and the Second Amended Complaint filed on October 28, 2016. Those pleadings alleged at least one (1) claim against an Insured which created "a possibility of coverage" under the 2016 Great American Policy and which was not "unambiguously excluded" by the express terms of an exclusion in the 2016 Great American Policy.

Pursuant to South Carolina Supreme Court Order No. 015-09-10-01 Re: Civil Motions Pilot Program, the grounds for this Motion are set forth with greater particularity in the accompanying Memorandum In Support Of Defendants'/Third-Party Plaintiffs' Motion For Partial Judgment On The Pleadings As To Defendants'/Third-Party Plaintiffs' Third-Party Complaint. Said grounds are all incorporated herein by reference.

SIGNATURE BLOCKS ON FOLLOWING PAGE

Respectfully submitted,

/s/ Charles B. Jordan, Jr.

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January 15, 2018
Myrtle Beach, South Carolina

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January 15, 2018
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

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

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

vs.)

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

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

Third-Party Plaintiffs,)

vs.)

Great American Insurance Company,)
Third-Party Defendant.)

**MEMORANDUM IN SUPPORT OF DEFENDANTS'/THIRD-PARTY PLAINTIFFS'
MOTION FOR JUDGMENT ON THE PLEADINGS AS TO DEFENDANTS'/THIRD-
PARTY PLAINTIFFS' THIRD-PARTY COMPLAINT**

I. INTRODUCTION/SUMMARY OF ARGUMENT

This matter is before the Court on Defendants'/Third-Party Plaintiffs' Motion for Judgment on the Pleadings as to Third-Party Defendant, Great American Insurance Company's ("Great American's") duty to defend Defendants'/Third-Party Plaintiffs under the First and Fourth causes of action in Defendants'/Third-Party Plaintiffs' Third-Party Complaint. The grounds for this Motion are that Great American's Amended Answer to the Third-Party Complaint admits facts which establish, as a matter of law, that Great American had a duty to defend its **Insureds**, the Defendants'/Third-Party Plaintiffs, from the allegations in the original Complaint filed on July 7, 2016, and the Second Amended Complaint filed on October 28, 2016.¹ Those pleadings alleged at least one (1) claim against the **Insureds** that created "a possibility of coverage" under the 2016 Great American Policy and that was not "unambiguously excluded" by the express terms of an exclusion in the 2016 Great American Policy.

A. Great American's Amended Answer Admits Facts Which Establish That Great American Had A Duty To Defend Defendants'/Third-Party Plaintiffs.

Under South Carolina law, the determination of whether a liability carrier has a duty to defend its insured is made by examining the allegations in the complaint against the insured and the policy in question. The duty to defend is triggered if the underlying complaint includes any allegation that raises the "possibility of coverage" under the policy even if the complaint also contains other allegations which would not be covered by the policy. The insurance company has

¹ Plaintiffs filed a Third Amended Complaint in this matter on March 8, 2017. The Third Amended Complaint repeated the same material allegations contained in the original Complaint and Second Amended Complaint, and provided further factual details supposedly supporting the claims against James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III ("Individual Defendants") who are members of the current Board of Directors of Defendant Tilghman Beach and Racquet Club Condominium Association, Inc.

a duty to defend if the underlying complaint has a single allegation that might possibly be covered by the policy. Stated another way, an insurance company can refuse to defend its insured only if the insurance company can show, as a matter of law, that the claims in the underlying complaint do not possibly fall within any coverage provision of the policy. If the complaint contains an allegation which might possibly be covered under the policy, the insurance company has a duty to defend the entire case, including defending the claims which are not possibly covered by the policy. Because the duty to defend under South Carolina law is “broad,” both the underlying complaint and the insurance policy are broadly construed in the insured’s favor and in favor of the duty to defend.

Great American’s Amended Answer here admits: (1) it issued a “claims made” directors and officers liability insurance policy which covered Defendants/Third Party Plaintiffs for claims made against them between February 11, 2016 and February 10, 2017 (hereinafter “the 2016 Great American Policy”); (2) that Defendants/Third-Party Plaintiffs are **Insureds** under the 2016 Great American Policy; (3) the authenticity of Plaintiffs’ Complaints against Great American’s **Insureds**; (4) that Plaintiffs’ Complaints allege a **Claim** during the **Policy Period** within the meaning of the 2016 Great American Policy; and (5) that the Complaints allege **Wrongful Acts** within the meaning of the 2016 Great American Policy. In sum, Great American’s Amended Answer does not dispute that the claims in the underlying Complaints fall within the general coverage provisions of the 2016 Great American Policy and raise the “possibility of coverage” under that Policy.

B. The Four Exclusions Raised by Great American Do Not Excuse Great American from Fulfilling its Duty to Defend Defendants/Third-Party Plaintiffs.

Given Great American's admissions, the issue before this Court is whether any of the (4) exclusions raised by Great American in its Amended Answer excuse Great American from fulfilling its duty to defend Defendants/Third-Party Plaintiffs. Several general legal principles bear mentioning on the question of whether these exclusions excuse Great American's duty to defend. First, because Great American drafted the 2016 Great American Policy, any ambiguity in that policy (particularly any ambiguity in an exclusion) is resolved against Great American and in Defendants'/Third-Party Plaintiffs' favor. Policy exclusions are construed very narrowly and most strongly against the insurance company, which bears the burden of establishing the exclusion's applicability. Second, each exclusion in the policy must be read and applied independently of every other exclusion. Third, an insurer can refuse to defend based on a policy exclusion only if the *only* possible construction of the underlying complaint is that *all* allegations and claims fall *totally* within the express language of the cited exclusion. For an insurer to justify the refusal to defend an insured based on a policy exclusion, all the allegations in the underlying complaint must be unambiguously excluded by the express terms of the cited exclusion.

1. Exclusion D(2)

Exclusion D(2) excludes coverage for "damage to or destruction of any tangible property or the loss of use of any tangible property." The allegations of Plaintiffs' Complaints do not fall exclusively within Exclusion D.(2) because the Complaints include allegations that Defendants/Third-Party Plaintiffs failed to make, levy, collect, and/or maintain adequate reserves to repair and perform maintenance on the common elements at TBRC. South Carolina courts have already held against Great American's position on this issue—finding that the failure of a

homeowners' association's to maintain adequate repair reserves is outside a property damage exclusion that excluded claims related to, or based on, physical damage to tangible property.²

Additionally, Exclusion D.(2) requires damage, destruction or loss of use of "tangible property." However, the Complaints allege that the **Insureds' Wrongful Acts** in failing to adequately maintain the property caused damages to the individual Plaintiffs in the form of diminution in value of their individual condominium units. Diminution in value is economic loss under South Carolina law which is not destruction of, or damage to, "tangible property."

2. Exclusion G

Exclusion G deals with "seepage, pollution, radiation, emission, contamination or irritant." There are a number of claims in Plaintiffs' Complaints which do not involve the foregoing, including, but not limited to, the claim against the insured **Organization** and its individual Board members (the Individual Defendants) that they failed to maintain adequate reserves for repairing and maintaining the common elements.

3. Exclusion H

Exclusion H precludes coverage where a **Claim** is brought "by, or for the benefit of or at the behest of" the insured **Organization**. The Complaints contain no allegation that Plaintiffs' claims were brought on behalf of, or for the benefit of, the insured **Organization** (TBRC). The Complaints are brought by the Plaintiffs as individual unit owners and seek damages from the insured **Organization** to be paid to the Plaintiffs individually. Plaintiffs have signed a

² *Pulliam v. Travelers Indemnity Co.*, 403 S.C. 332, 342, 743 S.E.2d 117, 122 (Ct. App. 2013) ("[t]he failure to establish a reserve fund resulted in [plaintiffs] . . . having to expend more [money] from their own pockets to make the repairs than they might have otherwise had to expend—economic damage"). See also *Builders Mut. Ins. Co. v. Lacey Constr. Co.* No. CIV.A. 3:11-cv-400-CMC, 2012 WL 1032539, at *9 (D.S.C. Mar. 7, 2012) ("To the extent damages sought in the [underlying action] are for inadequate reserves . . . they do not involve physical injury and, consequently, cannot satisfy the definition of property damage").

Stipulation stating that they are not pursuing this case as a class action or derivative action on behalf of the **Organization**.

Moreover, the Complaints expressly allege that Plaintiffs' claims are brought pursuant to *Murphy v. Yacht Cove Homeowners Association*, 289 S.C. 367, 345 S.E.2d 709 (1986), which provides that a member of a condominium association may bring an action in contract or tort against the association for failure to maintain the common elements. *Murphy* does not allow a member to sue on behalf of or for the benefit of the association.

Furthermore, to the extent Great American contends that the insured **Organization** will "benefit" from this lawsuit because any recovery will be used to repair the common elements at TBRC, this position is wrong as a matter of law. The insured **Organization** (TBRC) is incorporated and, thus, a separate and distinct legal entity from the Plaintiffs who are suing and seeking to recover personally. Moreover, the common elements are owned by the unit owners, and not TBRC. Further, *Pulliam* provides the claims in Plaintiffs' Complaints related to inadequate repair reserves directly affect the economic, financial interests of the individual Plaintiffs, not the insured **Organization** (TBRC), and the diminution in value damages sought in the Complaints relate solely to the alleged diminished value of Plaintiffs' individual units, not the common elements.

4. **Exclusion C.(1)**

Exclusion C.(1) excludes certain prior **Claims**. Exclusion C.(1) is inapplicable as Great American waived its right to assert this exclusion because Great American failed to assert this exclusion for over a year after notice of this lawsuit and did not raise it until Great American was faced with the instant coverage dispute. Further, Great American's Amended Answer alleges facts which establish that Exclusion C.(1) does not apply here.

C. Great American's Rescission Counterclaims Do Not Excuse Great American from Fulfilling its Duty to Defend Defendants/Third-Party Plaintiffs.

First, the law is well-settled that, until Great American's Rescission Counterclaims are litigated in its favor and the policies are *declared void ab initio*, the policies remain in effect such that Great American had and has a duty to defend the Defendants/Third-Party Plaintiffs. Second, the basis of Great American's claim that the 2015 and 2016 Great American Policies should be rescinded is that TBRC allegedly misrepresented whether it anticipated any major building renovations in the next year when TBRC's agent applied for the 2015 Great American Policy in or around February 2015. However, Great American's own allegations necessarily admit that it was aware of the building renovations going on as early as April 2015—*approximately two (2) months after* the 2015 Great American Policy was issued. Despite this knowledge, Great American never rescinded the 2015 Great American Policy and, in fact, with knowledge of the on-going renovations, issued the 2016 Great American Policy. Great American's issuance of the 2016 Great American Policy with knowledge of the on-going building renovations, and its failure to rescind the 2015 Great American Policy when it necessarily became aware of the renovations in April 2015, constitutes a waiver of Great American's right to rescind the policies.

Third, in support of its Rescission Counterclaim concerning the 2016 Great American Policy, Great American relies upon an alleged misrepresentation that was contained within a purported "application for coverage" that was completed in February 2015 in conjunction with the issuance of the 2015 Great American Policy. There is no allegation that another application was completed in conjunction with the issuance of the 2016 Great American Policy, much less that there was a misrepresentation contained within such an application.

Fourth, Great American bases both of its Rescission Counterclaims on a representation present in what Great American calls an "application for coverage." While the 2015 and 2016

Great American Policies provide that statements contained in *Proposal Forms* submitted to the **Insurer** are the representations of the **Insured** and are incorporated into the policy, neither policy defines “Proposal Form.” The “application for coverage” that was completed by TBRC was not a “Proposal Form,” but instead a “Community Association Program Quote Form.” As such, any representations contained therein are not incorporated into the 2015 or 2016 Great American Policies and cannot form a basis for rescission of the 2015 or 2016 Great American Policies.

Fifth, Great American’s counterclaims for rescission of its 2015 and 2016 Great American Policies, *exclusively* concern the actions and knowledge of TBRC. Great American’s Amended Answer fails to make any allegation regarding the knowledge or actions of the Individual Defendants who are **Insureds** under the 2016 Policy—particularly that the Individual Defendants were aware that the alleged representation was false, or that the false representation was made to Great American with the intent to deceive. Furthermore, the very language of the 2015 and 2016 Great American Policies prohibits Great American from rescinding the policies as to an **Insured Person** (the Individual Defendants) who did not make the alleged untrue statement or have knowledge of it.

D. The Consequences of Great American’s Failure to Defend.

By breaching its duty to defend the Defendants/Third-Party Plaintiffs from the allegations in the Complaints, Great American has lost its right to control the defense or to select defense counsel in this matter.³ Additionally, Great American is liable to reimburse Defendants/Third-Party Plaintiffs for the attorneys’ fees and expenses they incurred in defending this case since the filing of the original Complaint or, at the very least, since July 13, 2016, the date on which Great

³ *Episcopal Church in South Carolina v. Church Ins. Co. of Vermont*, 53 F. Supp. 3d 816, 826 (D.S.C. 2014).

American admittedly received notice of this lawsuit against Defendants/Third-Party Plaintiffs.⁴ Further, Defendants/Third-Party Plaintiffs are entitled to recover their attorneys' fees incurred in prosecuting the Third-Party Complaint.⁵

II. PROCEDURAL BACKGROUND

On July 7, 2016, Plaintiffs filed their original Complaint in the Horry County Court of Common Pleas against Defendants/Third-Party Plaintiffs, Tilghman Beach and Racquet Club Condominium Association, Inc. ("TBRC" or "insured **Organization**") and the members of its Board of Directors in their individual capacities⁶ ("State Court Action"). The original Complaint alleged numerous causes of action,⁷ all of which were grounded, in part, on the assertion that Defendants/Third-Party Plaintiffs failed to maintain adequate reserves "for the repair of the common elements at the HOA" and otherwise failed to adequately maintain the property. Plaintiffs purported to bring the action "Individually and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units" in buildings at TBRC. The original

⁴ *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962); *Allstate Ins. Co. v. Wilson*, 259 S.C. 586, 592, 193 S.E.2d 527, 530 (1972) (insurer's "obligation to defend existed from the time the actions were instituted and continued until it fulfilled its obligation under its policy"); *Unisun Ins. Co. v. Hertz Rental Corp.*, 312 S.C. 549, 554, 436 S.E.2d 182, 186 (Ct. App. 1993) ("insurer that breaches its duty to defend . . . the insured may be held liable for the expenses the insured incurs in providing for his own defense"); *Episcopal Church in South Carolina*, 53 F. Supp. 3d at 830 (holding "an insurer who breached its duty to defend will be liable for reasonable costs of defense incurred both before and after notice").

⁵ *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 472, 265 S.E.2d 38, 40 (1980) ("Respondent [the insured] was forced to prosecute this action to enforce its rights under the policy with appellant just as the insured in *Hegler* was forced to defend an action to enforce his rights under the policy with his insurer."); *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 550, 243 S.E.2d 443, 444 (1978) (awarding attorneys' fees to insured where the insured was forced to employ counsel to obtain coverage under the policy because the action of the insurer amounts to a wrongful breach of its contractual obligations).

⁶ The Individual Defendants.

⁷ Plaintiffs' original Complaint alleged causes of action for: (1) Negligence/Gross Negligence; (2) Breach of Master Deed's Covenants and Restrictions; (3) Declaratory Judgment; (4) Injunctive Relief, and (5) Specific Performance.

Complaint sought damages against Defendants/Third-Party Plaintiffs, including TBRC, on behalf of the individual unit owners, including alleged diminution in value of the individual units. TBRC and the Individual Defendants sent Great American a copy of the original Complaint on July 13, 2016, but Great American did not step forward to defend TBRC and the Individual Defendants.

TBRC removed the case to the United States District Court for the District of South Carolina, Florence Division on August 19, 2016, primarily on the grounds that the case was brought as a class action and was removable under the Federal Class Action Fairness Act (“CAFA”). Along with the removal, TBRC filed an Answer to Plaintiffs’ original Complaint and asserted counterclaims for civil conspiracy, abuse of process, indemnity, and *ultra vires* acts.⁸

On September 2, 2016, Plaintiffs filed a Motion to Remand in Federal Court. The Parties subsequently reached an agreement concerning the Motion to Remand and memorialized their agreement in a Stipulation filed with the Federal Court on October 5, 2016, which provided that, in exchange for Defendants’/Third-Party Plaintiffs’ consenting to the Motion to Remand, Plaintiffs agreed to maintain this lawsuit solely in their individual capacities and not to seek to maintain this case as a class action or derivative action on remand.

Plaintiffs filed a Second Amended Complaint in State Court which deleted any class allegations. TBRC and the Individual Defendants sent a copy of the Second Amended Complaint to Great American but, again, Great American did not step forward to defend TBRC and the Individual Defendants.

⁸ TBRC also filed a Motion to Dismiss Plaintiffs’, Gary Steven Robinson, Elizabeth Erin Humphries, Dennis L. Johnson, Jr., and Nancy H. Johnson, claims pursuant to Rule 12(b)(1) and 12(b)(6), Fed. R. Civ. P.

Plaintiffs filed a Third Amended Complaint on March 8, 2017.⁹ On March 28, 2017, Defendants/Third-Party Plaintiffs filed a Consent Motion for Leave to file a Third-Party Complaint against Great American which was granted on May 2, 2017. On the same day, Defendants/Third-Party Plaintiffs filed the Third-Party Complaint against Great American, alleging claims for breach of contract, attorney's fees under § 38-59-40 of the South Carolina Code, bad faith, and declaratory judgment. Great American filed an Answer to the Third-Party Complaint and Counterclaim on July 10, 2017. On August 30, 2017, Great American filed an Amended Answer and Counterclaim to Defendants'/Third-Party Plaintiffs' Third-Party Complaint.

III. UNDISPUTED FACTS

1. Great American's Amended Answer admits the authenticity of the "*ExecPro* Community Association Solution Insurance Policy," #EPP3654704-01, issued by Great American to TBRC a/k/a "Tilghman Beach & Racquet Club HOA, Inc.", for policy period February 11, 2016 to February 10, 2017, which is attached as Exhibit A to the Third-Party Complaint (hereinafter "the 2016 Great American Policy").^{10, 11}

2. In its Amended Answer to the Third-Party Complaint, Great American admits the authenticity of the original Complaint, the Second Amended Complaint, and the Third Amended Complaint filed by Plaintiffs in the underlying litigation.¹²

3. Great American's Amended Answer admits that :

⁹ See Footnote 1, *supra*.

¹⁰ Third-Party Def.'s Am. Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl. ¶¶ 5 and 34.

¹¹ In Paragraph 5 of its Amended Answer, Great American admits the existence and authenticity of the 2016 Great American Policy. *Id.* at ¶ 5. Further, in Paragraph 33, Great American affirmatively alleges the existence and authenticity of the 2016 Great American Policy and attaches the same as Exhibit 2. *Id.* at ¶ 34.

¹² See Third-Party Def.'s Am. Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl. ¶¶ 7 & 38.

(a) Defendants/Third-Party Plaintiffs are **Insureds** as defined by the 2016 Great American Policy;¹³

(b) the original Complaint, the Second Amended Complaint, and the Third Amended Complaint (collectively, the “Complaints”) in this matter allege a **Claim**¹⁴ during the **Policy Period**¹⁵ of the 2016 Great American Policy;¹⁶ and

(c) the Complaints in this matter allege **Wrongful Acts** by the **Insureds** within the meaning of the 2016 Great American Policy¹⁷.

4. Great American further admits receiving the demand letters from the Defendants/Third-Party Plaintiffs attached as Exhibits E, F and G to the Third-Party Complaint, and admits that it has denied coverage and a defense to its **Insureds** in this matter.¹⁸

5. Finally, Great American admits the authenticity of an August 1, 2016 letter in which it acknowledges receiving notice of the lawsuit by e-mail dated July 13, 2016.¹⁹ Great American also admits the authenticity of a November 3, 2016 letter in which it was sent a copy of the Second Amended Complaint in this matter.^{20, 21}

IV. LEGAL ARGUMENTS

A. The Standard for a Motion for Judgment on the Pleadings.

¹³ Id. at ¶¶ 5 & 37.

¹⁴ As defined by the 2016 Great American Policy.

¹⁵ As defined by the 2016 Great American Policy.

¹⁶ Id. at ¶ 8.

¹⁷ Id. at ¶ 9.

¹⁸ Id. at ¶ 10.

¹⁹ Id. at ¶ 11.

²⁰ Id. at ¶ 10.

²¹ The law is well-settled that stipulations and admissions contained in a pleading filed and served by a party in a civil lawsuit in South Carolina are binding on the party and preclude the party from taking an inconsistent position in the litigation. *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) (citing *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964)) (“Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions.”)

“After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.”²² “When considering such motion, the court must regard all properly pleaded factual allegations as admitted.”²³ Moreover, the motion does not admit the inferences drawn from the facts, nor does it admit conclusions of law.²⁴ A judgment on the pleadings is proper where there is no issue of fact raised by the pleadings that would entitle Great American to judgment if resolved in Great American’s favor.²⁵ “A Rule 12(c) motion for judgment on the pleadings is appropriate when all material allegations of fact are admitted in the pleadings and only questions of law remain.”²⁶

B. The Standard for the Duty to Defend.

As previously mentioned, Great American’s Amended Answer admits the existence of a “claims made” policy of liability insurance which Great American issued to Defendants/Third-Party Plaintiffs for the period of February 10, 2016 to February 10, 2017, during which a **Claim**, as defined in the 2016 Great American Policy, was admittedly made against Great American’s **Insureds**. Under South Carolina law, a liability insurer like Great American has two (2) separate and distinct duties to its insured. First, the insurer is obligated to pay sums the insured becomes obligated to pay. Second, the insurer must defend any suit or claim possibly payable under the

²² Rule 12(c), SCRCF.

²³ *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000) (citing references omitted).

²⁴ *Firemen's Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co.*, 302 S.C. 234, 236, 394 S.E.2d 855, 856 (Ct. App. 1990) (citing *Russell v. City of Columbia*, 301 S.C. 117, 390 S.E.2d 463 (Ct. App. 1989)).

²⁵ See *Sapp v. Ford Motor Co.*, 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009) (citing *Russell*, 305 S.C. at 89, 406 S.E.2d at 339) (“A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff’s favor.”)

²⁶ *Wells Fargo Equip. Fin., Inc. v. State Farm Fire & Cas. Co.*, 805 F. Supp. 2d 213, 216 (E.D. Va. 2011), *aff'd*, 494 F. App'x 394 (4th Cir. 2012) (quoting *Republic Ins. Co. v. Culbertson*, 717 F.Supp. 415, 418 (E.D.Va.1989)).

terms of the liability policy in question.²⁷ The South Carolina Supreme Court noted in *Nationwide Mutual Ins. Co. v. Simmonds*, 315 S.C. 404, 434 S.E.2d 277 (1993), that “[t]he defense of . . . suits by the insurer is a valuable right of the insured for which [the insured] pays and to which [the insurer] is entitled by the very words of the policy.”²⁸ The duty to defend is distinct from and broader than the duty to indemnify—the duty to pay the judgment against its insured.²⁹

The determination of whether there is a duty to defend is made by examining the allegations of the complaint against the insured.³⁰ The underlying complaint is construed liberally in favor of the duty of the insurance company to defend its insured with all doubts resolved in the insured’s favor.³¹ If the underlying complaint against the insured creates “a possibility of coverage under the policy, the insurer is obligated to defend.”³² Therefore, “the duty to defend is triggered where the underlying complaint includes *any allegation* that raises the possibility of coverage.”³³ If the underlying complaint contains an allegation or allegations which raise the possibility of coverage under the insurance policy in question, the insurer cannot refuse to defend its insured even if there are other allegations in the complaint which are

²⁷ *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009).

²⁸ *Nationwide Mutual Ins. Co.*, 315 S.C. at 407, 434 S.E.2d at 278 (quoting *American Casualty Company v. Howard*, 187 F.2d 322, 327 (4th Cir.1951)).

²⁹ *City of Hartsville*, 382 S.C. at 544; 677 S.E.2d at 578; *Ross Dev. Corp. v. Fireman’s Fund Ins. Co.*, 809 F. Supp. 2d 449, 457 (D.S.C. 2011).

³⁰ *City of Hartsville*, 382 S.C. at 544; 677 S.E.2d at 578; *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327 (1999); *Walterboro Comm. Hosp. v. Meacher*, 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2011).

³¹ *Darwin Nat. Assur. Co. v. Matthews & Megna LLC*, 36 F.Supp.3d 636, 655 (D.S.C. 2014).

³² *City of Hartsville*, 382 S.C. at 543, 677 S.E.2d at 578 (citing *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38 (1980)) (emphasis added).

³³ *Auto-Owners Ins. Co. v. Newsome*, No. 4:12-cv-00447-RBH, 2013 WL 3148334, at *4 (D.S.C. June 19, 2013) (emphasis added).

supposedly not covered by the policy.³⁴ Stated another way, an insurance company can refuse to defend its insured only if the insurance company can show, as a matter of law, that the claims in the underlying complaint do not possibly fall within any coverage provision of the policy.³⁵

In determining whether there is a duty to defend, South Carolina courts require that the policy be broadly construed in favor of the insured, and thus, in favor of the duty to defend the insured.³⁶ The substantive factual allegations of the underlying complaint, not the titles of the causes of action, control whether there is a duty to defend.³⁷ Here, all Defendants/Third-Party Plaintiffs need to show is one (1) covered claim alleged in the original Complaint, or in any amended Complaints subsequently filed by Plaintiffs and Great American has a duty to defend.³⁸

³⁴ *Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct. App. 1994), *aff'd in part*, 321 S.C. 310, 468 S.E.2d 304 (1996) (holding that “[w]hile the complaint also includes allegations . . . which would not be covered by the policy, the inclusion of some non-covered claims does not abrogate an insurer’s duty to defend when a complaint raises claims covered by the policy”). See also *Town of Duncan v. State Budget & Control Bd.*, 326 S.C. 6, 482 S.E.2d 768, 773–74 (1997); *Employers Mut. Liab. Ins. Co. v. Hendrix*, 199 F.2d 53, 59 (4th Cir. 1952); *Cincinnati Ins. Co. v. Crossmann Cmty. of N.C, Inc.*, No. 4:09-CV-1379-RBH, 2013 WL 1282017, at *11 (D.S.C. Mar. 27, 2013) (“South Carolina law requires that a triggered insurer with a duty to defend the policyholder in a suit must defend the policyholder against all claims in that suit, even those claims that are not covered under the policy.”)

³⁵ Vol. 3 Jeffrey E. Thomas, New Appleman on Insurance Law Library Edition, § 17.01[2][a] (LexisNexis); see also *Blackhawk-Cent. City Sanitation Dist. v. Am. Guarantee & Liab. Ins. Co.*, 214 F.3d 1183, 1188 (10th Cir. 2000) (citing references omitted) (with regard to the duty to defend, “the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove that it cannot.”)

³⁶ See, e.g., *Town of Duncan*, 326 S.C. at 12, 482 S.E.2d at 772; *Torrington Co. v. Aetna Cas. and Sur. Co.*, 264 S.C. 636, 216 S.E.2d 547 (1975).

³⁷ *City of Hartsville*, 382 S.C. at 544-45, 677 S.E.2d at 579; *Wadle v. Association Ins. Co.*, 401 S.C. 431, 440, 737 S.E.2d 631, 635 (Ct. App. 2012).

³⁸ See, e.g., *Liberty Mutual Fire Ins. Co. v. JM Smith Corp.*, 602 Fed.Appx. 115, 119 (4th Cir. 2015) (citing references omitted) (“South Carolina law, like most states, imposes a broad duty to defend on insurers An insurer must defend its insured if there is a ‘possibility of coverage’ under the policy . . . for even just one claim in the complaint.”); *Town of Duncan*, 326 S.C. at 16, 482 S.E.2d at 774 (citing references omitted) (“where a lawsuit contains several causes of action, some of which are covered under the policy and some of which are not, an insurer is not justified in refusing to defend the entire suit.”).

As will be discussed later in this Memorandum, Great American's refusal to defend Defendants/Third-Party Plaintiffs in this case is based on four (4) exclusions which appear in the 2016 Great American Policy. Three (3) additional legal principles bear mentioning on the question of whether those policy exclusions excuse Great American's duty to defend Defendants/Third-Party Plaintiffs in this case.

First, because Great American drafted the 2016 Great American Policy, any ambiguity in that policy (particularly any ambiguity in an exclusion) is resolved against Great American and in Defendants'/Third-Party Plaintiffs' favor.³⁹ Policy exclusions are construed very narrowly and "most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability."⁴⁰ Second, each exclusion in the policy must be read and applied independently of every other exclusion.⁴¹

Third, an insurer can refuse to defend based on a policy exclusion only if the *only* possible construction of the underlying complaint is that *all* allegations and claims fall *totally* within the express language of the cited exclusion.⁴² To justify the refusal to defend the insured,

³⁹ *South Carolina Budget and Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991); *Millstead v. Life Ins. Co. Virginia*, 256 S.C. 449, 182 S.E.2d 867 (1971).

⁴⁰ *Auto Owners Ins. Co. v. Personal Touch Med. Spa, LLC*, 763 F.Supp.2d 769, 780 (D.S.C. 2011) (citing references omitted); *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611 (2005); *Boggs v. Aetna Casualty and Surety Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979); *see also M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010) (stating "[p]olicies are construed in favor of coverage, and exclusions in insurance policy are construed against the insurer").

⁴¹ *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009).

⁴² *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 312, 476 N.E.2d 272, 276 (1984) (citing references omitted) (if an insurer is to be "relieved of [its] duty to defend it is obligated to demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation."); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1204-05 (2d Cir. 1989) (citing references omitted) ("To avoid the duty therefore the insurer must demonstrate that the allegations in the underlying complaints are 'solely and entirely' within specific and unambiguous exclusions from the policy's coverage."); *Haygood v. Dies*, 174 So. 3d 1211, 1214

all the claims in the underlying complaint must be “unambiguously excluded” by the express terms of the cited exclusion.⁴³

C. Great American’s Amended Answer Admits that the Complaints in this Matter Constitute Claims and Allege Wrongful Acts Against Its Insureds.

In its Amended Answer, Great American admits the authenticity of the 2016 Great American Policy and, indeed, attached a copy of the policy as Exhibit 2 to its Amended Answer. “Section I. Insuring Agreements” in the 2016 Great American Policy provides that Great American “has the right and duty to defend any **Claim** to which this insurance applies, even if the allegations of such **Claim** are groundless, false or fraudulent.”⁴⁴ Because the term “duty” is not defined in the 2016 Great American Policy, the word is given its plain, ordinary, popular meaning.⁴⁵ The term is to be construed broadly in favor of Defendants/Third Party Plaintiffs and the duty to defend. “Duty” has been defined as a “moral obligation”; “that which is due from a person; that which a person owes to another.... A word of more extensive signification than ‘debt’”; “obligatory tasks, conduct, service, or functions that arise from one’s position”; “a moral or legal obligation”; “ethical, legal or moral accountability owed always or for a certain period of time, specifically to someone who has a right to demand satisfaction of an obligation”.⁴⁶ The word “duty” is synonymous with “charge,” “obligation,” “mission,” and “responsibility.” In other words, the contract language selected and placed by Great American in the 2016 Great

(La. App. 2 Cir. 2015) (quoting *Vaughn v. Franklin*, 785 So. 2d 79, 88 (La. App. 1st Cir. 2001)) (stating an “insurer has a duty to defend if there exists a ‘single allegation in the plaintiff’s [complaint] . . . under which coverage is not unambiguously excluded.’”).

⁴³ *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008).

⁴⁴ Defs.’/Third-Party Pls.’ Third-Party Compl., Ex. A, p. 1 of 11; Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., Ex. 2, p. 1 of 11 (underline emphasis supplied).

⁴⁵ *American Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co.*, 378 S.C. 623, 628, 663 S.E.2d. 492, 495 (2008).

⁴⁶ BusinessDictionary.com; Merriam-Webster; The American Heritage College Dictionary (Third Edition) at 428 (1997); Black’s Law Dictionary (Sixth Edition) at 505 (1990).

American Policy states that Great American has the obligation, charge, and responsibility “to defend any **Claim** to which this insurance applies, even if the allegations of such **Claim** are groundless, false or fraudulent.”

As discussed earlier, the critical document which is examined to determine the duty to defend is the underlying complaint in the lawsuit against the insured. Great American’s Amended Answer admits the authenticity of the Complaints filed by Plaintiffs in the underlying case against Defendants/Third-Party Plaintiffs. Moreover, this Court can take judicial notice of those pleadings because they are specifically filed in this case before this Court.⁴⁷

As previously discussed, Great American’s Amended Answer to the Third-Party Complaint admits that: (1) Defendants/Third-Party Plaintiffs are **Insureds** under the 2016 Great American Policy; (2) the Complaints in this matter allege a **Claim** within the meaning of the 2016 Great American Policy; and (3) the Complaints allege **Wrongful Acts** within the meaning of the 2016 Great American Policy.⁴⁸ Further, Great American’s Amended Answer admits the authenticity of an August 1, 2016 letter sent on behalf of Great American which acknowledges “receipt of the July 13, 2016 email from Brenda Riska of Risk Partners Insurance Group, giving [Great American] notice of [this lawsuit].”⁴⁹ Great American, therefore, admits getting notice of the **Claim** during the **Policy Period** within the “Section VII. Notice of Claim” provision in the 2016 Great American Policy. The Complaints here, when construed broadly in favor of Defendants/Third-Party Plaintiffs, as required by South Carolina law, clearly allege a possibility

⁴⁷ *S.C. Dep’t of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) (quoting *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct.App.1984)) (“a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records.”)

⁴⁸ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl. ¶¶ 6, 8, 9, & 37.

⁴⁹ *Id.* at ¶ 11.

of coverage under the 2016 Great American Policy given the admissions contained in Great American's Amended Answer.⁵⁰ Great American's Amended Answer does not dispute that the claims in the underlying Complaints here fall within the general coverage provisions of the 2016 Great American Policy.

D. The Policy Exclusions Asserted by Great American Do Not Unambiguously Exclude the Claims Alleged in the Complaints.

Great American's Amended Answer alleges that four (4) exclusions in the 2016 Great American Policy exclude all coverage to Defendants/Third-Party Plaintiffs and, thus, relieve Great American of its duty to defend: (1) Exclusion D(2) for "damage to or destruction of any tangible property or the loss of use of any tangible property;" (2) Exclusion G which deals with "seepage;" (3) Exclusion H which provides that the 2016 Great American Policy does not apply to any **Claim** brought "by, or for the benefit of or at the behest of" the insured **Organization**; and (4) Exclusion C(1) which excludes certain prior **Claims**. As previously discussed, each cited exclusion must be read and applied independently of every other exclusion.⁵¹ Exclusions are narrowly construed "most strongly against the insurance company which also bears the burden of establishing the exclusion's applicability."⁵² Further, to avoid the duty to defend based on a policy exclusion, Great American must demonstrate that all the factual allegations in the underlying complaint fall solely and entirely within the cited policy exclusion. A review of the original Complaint (and the subsequent amended complaints) demonstrates, as a matter of law, that none of the foregoing four (4) exclusions exclude all of the claims alleged in the original Complaint or any subsequently amended Complaint.

⁵⁰ *Wilson*, 259 S.C. at 592, 193 S.E.2d at 5 ("it is generally recognized that the insurer is under a duty to defend a suit against the insured where the complaint in such suit alleges a state of facts within the coverage of the policy").

⁵¹ *Newman*, 385 S.C. 187, 684 S.E.2d 541.

⁵² *Auto Owners Ins. Co.*, 763 F. Supp. 2d at 780.

1. Exclusion D.(2)⁵³

Great American's assertion of Exclusion D.(2) ignores the fact that the original Complaint alleges that Defendants/Third-Party Plaintiffs committed actual or alleged errors, acts and omissions, negligence and/or breach of duty by failing to maintain adequate reserves to repair and perform maintenance on the common elements at TBRC.⁵⁴ South Carolina courts have already held against Great American on this issue, finding a claim alleging that a homeowners' association failed to maintain adequate repair reserves is outside a property damage exclusion contained in a liability insurance policy.⁵⁵

Pulliam is fatal to Great American's contention that Exclusion D.(2) excused its duty to defend here. There, individual unit owners (hereinafter the "Respondents") in a horizontal property regime called Kensington Place filed a lawsuit against their Property Owners Association (the "POA") "for breaches of fiduciary duty and negligence in failing to: (1) adequately inspect, repair and maintain the common elements; (2) inform unit owners of the conflict of interest in a developer-controlled POA; and (3) establish a reserve fund to pay for repairs."⁵⁶ A declaratory judgment was filed seeking a determination on whether the insurance policy issued to the POA by Travelers covered the claims alleged against the POA in the

⁵³ Exclusion D.(2) provides as follows: "This Policy does not apply to any **Claim** made against any **Insured**: . . . D. based on, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: . . . (2) damage to or destruction of any tangible property or the loss of use of any tangible property . . ."

⁵⁴ See, e.g., original Complaint ¶¶ 26, 27, 31, 49, 50.g., 50.j., 50.k., 55, and 62.e.

⁵⁵ *Pulliam v. Travelers Indemnity Co.*, 403 S.C. 332, 342, 743 S.E.2d 117, 122 (Ct. App. 2013) ("[t]he failure to establish a reserve fund resulted in [plaintiffs] . . . having to expend more [money] from their own pockets to make the repairs than they might have otherwise had to expend—economic damage"). See also *Builders Mut. Ins. Co. v. Lacey Constr. Co.* No. CIV.A. 3:11-cv-400-CMC, 2012 WL 1032539, at *9 (D.S.C. Mar. 7, 2012) ("To the extent damages sought in the [underlying action] are for inadequate reserves . . . they do not involve physical injury and, consequently, cannot satisfy the definition of property damage").

⁵⁶ *Pulliam*, 403 S.C. at 336-337, 743 S.E.2d at 119.

underlying lawsuit. Similar to the original Complaint here, the underlying complaint in *Pulliam* alleged that the POA “had the duty to create and fund an adequate fund of reserves for the normal replacement of the components of the Common Elements, yet . . . the POA failed to develop and fund an adequate reserve fund.”⁵⁷ Travelers argued that the claims were within a property damage exclusion in the policy and therefore there was no coverage. As with Exclusion D.(2), the property damage exclusion in *Pulliam* purported to exclude claims related to or based on physical damage to tangible property.

On appeal, the South Carolina Court of Appeals held that claims related to the POA’s failure to establish and maintain an adequate repair reserve fund, and claims related to breach of fiduciary duty for failing to warn about conflicts of interest were outside the property damage exclusion and thus covered by the policy in question:

Respondents assert two more allegations not addressed by the prior decisions of *Crossman* or *Eastpoint*. They allege [the Property Owners Association] failed to establish a reserve fund and breached a fiduciary duty to warn of the inherent conflict in developer-controlled associations. ***The duty to establish a reserve fund, while related to the property damage, did not result in physical damage to tangible property as required by the policy.*** The failure to establish a reserve fund resulted in Respondents [the unit owners] having to expend more from their own pockets to make the repairs than they might have otherwise had to expend-economic damages . . . Likewise, allegations that [the POA] breached its fiduciary duty by failing to warn of conflicts of interest . . . did not allege physical injury to tangible property constituting property damage.⁵⁸

Again, an insurer in South Carolina has the duty to defend the entire case if there is ***just one single claim alleged in the complaint that falls within the coverage of the policy and outside the policy exclusions.***⁵⁹ The original Complaint here clearly alleged **Claims** under the

⁵⁷ *Id.* at 337, 743, S.E.2d at 120.

⁵⁸ *Id.* at 342, 743 S.E.2d at 122 (citation omitted) (emphasis added).

⁵⁹ *Palms Pest Control Co.*, 319 S.C. at 15, 459 S.E.2d at 319 (holding “the inclusion of some non-covered claims does not abrogate an insurer’s duty to defend when a complaint raises claims covered by the policy”); *Berenyi, Inc. v. Landmark Am. Ins. Co.*, No. C.A. 2:09-CV01556PMD,

2016 Great American Policy against Defendants/Third-Party Plaintiffs for failing to access and maintain adequate repair reserves. The original Complaint is replete with allegations related to the **Insureds'** failure to make, levy, collect, and/or maintain an appropriate reserve fund for repairs to the common or limited common elements.⁶⁰ The Second Amended Complaint makes similar allegations. The ultimate truth of these allegations is irrelevant because the 2016 Great American Policy expressly provides that Great American has the "duty to defend any **Claim** to which this insurance applies, even if the allegations of such **Claim** are groundless, false or fraudulent."⁶¹ The allegations in the original Complaint, and every amended Complaint in this case since then, assert that the **Insureds** committed **Wrongful Acts** with respect to the failure to maintain adequate repair reserves which implicates matters outside Exclusion D.(2). Therefore, Exclusion D.(2) does not extinguish Great American's duty to defend.

Additionally, Exclusion D.(2) requires damage, destruction or loss of use of "tangible property." The Complaints in this matter allege that the **Insureds' Wrongful Acts** in failing to adequately maintain the property caused damages to the individual Plaintiffs due to the diminution in value of their individual condominium units.⁶² Diminution in value is economic loss under South Carolina law which is not destruction of, or damage to, "tangible property."⁶³ South Carolina's position on this issue is consistent with the law in other states.⁶⁴

2010 WL 233861, at *4 - *8 (D.S.C. Jan. 14, 2010) ("[t]he inclusion of claims which would not be covered by the policy does not abrogate an insurer's duty to defend when the complaint raises at least one claim covered by the policy Therefore, this exclusion, which would only affect coverage as to part of the underlying claim, does not affect whether or not there is a duty to defend").

⁶⁰ See, e.g., original Complaint, ¶¶ 26, 27, 31, 49, 50.g., 50.j., 50.k., 55, and 62.e.

⁶¹ Third-Party Def.'s Am. Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl., Ex. 2, p. 1 of 11.

⁶² See original Complaint, ¶ 51; Second Am. Complaint, ¶ 53; Third Am. Complaint, ¶ 54.

⁶³ *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 163, 588 S.E.2d 112, 115-16 (2003) (finding that homeowners' alleged losses of diminution in value of their property were

If Great American wanted to exclude diminution in value from the coverage of its 2016 Great American Policy, it should have followed the example in *Pulliam* by broadly excluding “property damage” and specifically defining “property damage” to include “diminution in property value”.⁶⁵ Instead, Great American drafted Exclusion D.(2) to only exclude damage to, destruction of, or loss of use of “tangible property” and did not define “tangible property” in the 2016 Great American Policy to include diminution in value of tangible property.⁶⁶

2. Exclusion G⁶⁷

There are a number of claims in the Complaints which allege a **Wrongful Act** by an **Insured** which does not involve “seepage, pollution, radiation, emission, contamination or

not property damages (i.e. physical injury to their property) but, instead, purely economic damages).

⁶⁴ *Id.* at 163-64, 588 S.E.2d at 116; see also *State Farm Fire and Cas. Co. v. Tillerson*, 334 Ill.App.3d 404, 268 Ill.Dec. 63, 777 N.E.2d 986 (2002) (diminution in value is intangible damage, not physical injury, therefore, CGL policy does not provide coverage where injured parties do not allege contractor’s work tortiously injured their home); *L. Ray Packing Co. v. Commercial Union Ins. Co.*, 469 A.2d 832 (Me.1983) (where complaint alleged price-fixing scheme resulting in loss of profits, but no physical injury to merchandise; it failed to allege property damage within CGL policy); *Federated Mut. Ins. Co. v. Concrete Units*, 363 N.W.2d 751 (Minn.1985) (incorporation of defective concrete into grain elevator resulting in diminution in market value of the elevator does not constitute physical injury as required by property damage definition in CGL policy); *Wyoming Sawmills, Inc. v. Transp. Ins. Co.*, 282 Or. 401, 578 P.2d 1253 (1978) (use of term “physical” to define property damage negates possibility policy intended to include consequential or intangible damage such as depreciation in value).

⁶⁵ *Pulliam*, 403 S.C. at 340-41, 743 S.E.2d at 121-22.

⁶⁶ *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (citing references omitted) (“[a]mbiguous or conflicting terms in an insurance policy must be liberally construed in favor of the insured and against the insurer”); *Town of Duncan*, 326 S.C. at 12, 482 S.E.2d at 772 (insurance policy is to be construed broadly in favor of the duty to defend); *M&M Corp. of S.C.*, 390 S.C. at 259, 701 S.E.2d at 35 (“[p]olicies are construed in favor of coverage, and exclusions in insurance policy are construed against the insurer”).

⁶⁷ Exclusion G provides as follows: “This Policy does not apply to any **Claim** made against any **Insured**: . . . G. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged seepage, pollution, radiation, emission, contamination or irritant of any kind, including but not limited to smoke, vapor, dust, fibers, mold, spores, fungi, germs, soot, fumes, acids, alkalis, asbestos, chemicals or waste of any kind, provided, however, this exclusion shall not apply to coverage provided under Insuring Agreement 1.A.”

irritant” including, but not limited to, the claim against the insured **Organization** and its individual Board members (the Individual Defendants) for failing to maintain adequate reserves for repairing and maintaining the common elements. Great American has a duty to defend if even just one part of Plaintiffs’ claim falls outside this exclusion.⁶⁸

3. Exclusion H⁶⁹

The original Complaint contains absolutely no allegation that it was brought on behalf of, or for the benefit of, the insured **Organization** (TBRC). The caption of the original Complaint expressly states that it is brought by Plaintiffs “Individually and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units” in the buildings at Tilghman Beach and Racquet Club and names the insured **Organization** (TBRC) as a Defendant. The contention that a lawsuit, which names the insured **Organization** (TBRC) as a Defendant, which seeks an award of actual and punitive damages from the insured **Organization** (TBRC) to be paid to Plaintiffs, which seeks to order the insured **Organization** (TBRC) to perform certain acts, and which seeks damages solely for the benefit of the individual Plaintiffs (and the punitive class), is brought “for the benefit of” the insured **Organization** is absurd on its face.

⁶⁸ *Berenyi, Inc.*, 2010 WL 233861 at *8 (“this exclusion, which would only affect coverage as to part of the underlying claim, does not affect whether there is a duty to defend”); *USAA Property and Cas. Ins. Co.*, 377 S.C. at 655, 661 S.E.2d at 797 (to avoid the duty to defend, all claims in the underlying complaint must be unambiguously excluded by the express terms of the exclusion in question); *Auto Owners Ins. Co.*, 763 F.Supp.2d at 780 (policy exclusions are construed “most strongly against the insurance company, which bears the burden of establishing the exclusion’s applicability”).

⁶⁹ Exclusion H provides as follows: “This Policy does not apply to any **Claim** made against any **Insured**: . . . H. by, or for the benefit of, or at the behest of the **Organization** or any **Subsidiary** or any entity which controls, is controlled by, or is under common control with the **Organization** or any **Subsidiary**, or any person or entity which succeeds to the interest of the **Organization** or any **Subsidiary**, provided, however, this exclusion shall not apply to any **Claim** brought by the receiver, conservator, liquidator, rehabilitator, examiner or similar official of the **Organization**, if any, in the event of **Financial Insolvency**.”

Moreover, Exclusion H only applies if the **Claim** was brought “by, or for the benefit of, or at the behest of” the insured **Organization** (TBRC). The original Complaint alleges that Plaintiffs’ claims in this case are brought pursuant to *Murphy v. Yacht Cove Homeowners Association*, 289 S.C. 367, 345 S.E.2d 709 (1986).⁷⁰ In *Murphy*, the South Carolina Supreme Court addressed the question of whether a unit owner could sue an HOA for failing to repair the common elements and held “that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association.”⁷¹ Exclusion H does not exclude from coverage a lawsuit brought “against” the insured **Organization**. Nothing in *Murphy*, which is alleged as the basis of Plaintiffs’ claims in the original Complaint and in each of Plaintiffs’ subsequent pleadings, permits a suit by a homeowner by or for the benefit of a homeowner’s association like TBRC.

Additionally, as previously discussed, defense counsel, independently retained and paid by Defendants/Third-Party Plaintiffs, removed the case contained in the original Complaint from South Carolina state court to federal court. As a result of a Motion to Remand filed by Plaintiffs, the Parties engaged in negotiations and entered into a Stipulation, which was filed with the federal court on October 5, 2016, whereby Defendants/Third-Party Plaintiffs agreed to consent to a remand of the case to South Carolina state court in exchange for Plaintiffs’ agreement to not pursue this case as a class action or derivative action, and Plaintiffs’ agreement to delete any such allegations from future pleadings. A copy of this Stipulation was provided to Great American via letter dated November 3, 2016, which Great American admits receiving in its Amended Answer. Plaintiffs filed the Second Amended Complaint in South Carolina state court, from which Plaintiffs deleted any class allegations. Great American’s contention that the

⁷⁰ See, e.g., original Compl. at p. 12, n. 2, p. 28, n. 6; Second Am. Compl. at p. 12, n. 2.

⁷¹ *Murphy*, S.C. at 369, 345 S.E.2d at 710 (emphasis supplied).

original Complaint alleged derivative claims for the benefit of the insured **Organization** (TBRC), which implicated Exclusion H of the Great American Policy, was patently wrong. The provisions of the Stipulation and Second Amended Complaint demonstrate that Great American's continuing insistence on Exclusion H has absolutely no validity with respect to the allegations now in this litigation.⁷²

Great American has also suggested that the original Complaint was brought "for the benefit of" the insured **Organization** (TBRC) because TBRC will benefit from any repairs to the common or limited common elements. This position is wrong as a matter of law because the insured **Organization** (TBRC) is incorporated and, thus, a separate and distinct legal entity from Plaintiffs or other unit owners.⁷³ Moreover, under South Carolina law, and the TBRC documents attached to the original Complaint as Exhibit A, the common elements and limited common elements are owned by the unit owners, and not TBRC.⁷⁴ Further, the claims in Plaintiffs' Complaints related to inadequate repair reserves directly affect the economic, financial interests of the individual Plaintiffs, not the insured **Organization** (TBRC),⁷⁵ and the diminution in value damages sought in the Complaints relate solely to Plaintiffs' individual units, not the common elements.⁷⁶

⁷² *South Carolina Medical Malpractice Liability Insurance Joint Underwriting Assoc. v. Ferry*, 291 S.C. 460, 354 S.E.2d 378 (1997) (although liability carrier had no duty to defend based on allegations in original complaint, the duty to defend held to rise from allegations in amended complaint).

⁷³ S.C. Code Ann. § 27-31-90; *Costas v. First Federal Sav. Loan Ass'n*, 283 S.C. 94, 102, 321 S.E.2d 51, 56 (1984) ("a corporation is an entity separate and distinct from its . . . stockholders").

⁷⁴ See, e.g., S.C. Code Ann. §§ 27-31-60; 27-31-190.

⁷⁵ *Pulliam*, 743 S.E.2d at 122 (stating "failure to establish a reserve fund resulted in Respondents [the unit owners] having to expend more from their own pockets to make the repairs than they might have otherwise had to expend-economic damage") (emphasis supplied)

⁷⁶ *Berenyi, Inc.*, 2010 WL 233861 at *8 ("this exclusion, which would only affect coverage as to part of the underlying claim, does not affect whether there is a duty to defend . . .").

4. Exclusion C(1)⁷⁷

Great American's Amended Answer contends that all coverage under the 2016 Great American Policy is excluded by a prior claims exclusion, Exclusion C.(1).⁷⁸ However, Great American pleads no actual facts that support the application of this exclusion. Great American's reliance on Exclusion C.(1) to exclude coverage is misplaced considering that Great American waived its ability to rely on the foregoing exclusion, and that the exclusion does not even apply to the undisputed facts of this case.

Great American admitted that it received notice of the original Complaint on July 13, 2017.⁷⁹ Nevertheless, and despite lengthy letters denying coverage under the 2016 Great American Policy, which are exhibits to the pleadings, Great American failed to raise Exclusion C.(1) as a basis for its denial in any of these letters.⁸⁰ Instead, it was not until over one (1) year later, in response to the instant coverage action, and through an amended pleading in this litigation (Great American's Amended Answer and Counterclaims), that Great American *first* raised Exclusion C.(1) as a basis for denial of coverage. Great American's failure to assert the foregoing exclusion for over a year, and not until it was faced with the instant coverage dispute, constitutes a waiver of Great American's ability to raise Exclusion C.(1) as a basis for which it may deny coverage.

⁷⁷ Exclusion C.(1) provides as follows: "This Policy does not apply to any **Claim** made against any **Insured**: . . . C. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: (1) any **Wrongful Act** or **Related Wrongful Act** or any fact, circumstance or situation which has been the subject of any notice or **Claim** given under any other policy of which this Policy is a renewal or replacement; . . ."

⁷⁸ Third-Party Def.'s Am. Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl., ¶ 40.

⁷⁹ Third-Party Def.'s Am. Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl., ¶ 11.

⁸⁰ Id.; Defs.'/Third-Party Pls.' Third-Party Compl. ¶ 13 & Exs. H & I.

Applying South Carolina law, the United States District Court for the District of South Carolina found that the insurer was precluded from asserting additional and different grounds for denial than those originally asserted in a denial letter.⁸¹ In reaching its decision, the *Slager* Court relied heavily on the South Carolina Supreme Court case of *Washington v. Nat'l Serv. Fire Ins. Co.*, 252 S.C. 635, 168 S.E.2d 90 (1969) which held that “[i]t is well settled that an insurer which has denied coverage on some other basis is precluded from defending against an action on a liability policy on the ground that the insured failed to comply with its requirements as to notice and forwarding of suit papers.”⁸²

Further, notwithstanding Great American’s waiver of Exclusion C.(1), and despite having the burden of pleading facts establishing the applicability of the exclusion, Great American’s Amended Answer concedes that the exclusion, on its face, is inapplicable. Exclusion C.(1) excludes coverage where any “**Wrongful Act or Related Wrongful Act** or any fact, circumstance or situation which has been the subject of any notice or Claim given under any other policy of which this Policy is a renewal or replacement.”⁸³ Great American specifically alleges that it is denying coverage under Exclusion C.(1) of the 2016 Great American Policy, which is a renewal of the 2015 Great American policy.⁸⁴ Therefore, under the language of the

⁸¹ *Slager v. S. States Police Benevolent Ass’n, Inc.*, No. 2:15-CV-04536-DCN, 2016 WL 4123700, at *3 (D.S.C. Aug. 3, 2016); *see also, e.g., Cox v. Reliance Standard Life Ins. Co.*, 43 Fed.Appx. 606, 610 (4th Cir. 2002) (holding an insurer waived the right to argue the insured’s death was not an accident and, thus, not covered by the policy, given that the insurer’s letter denying the beneficiary’s claim for accidental death benefits stated only that, pursuant to a policy exclusion, the loss was not covered because the insured was engaged in a felony at the time of his death).

⁸² *Washington*, 252 S.C. at 641, 168 S.E.2d at 92.

⁸³ Defs.’/Third-Party Pls.’ Third-Party Compl., Ex. A, Section IV. Exclusions, C.(1), p. 5 of 11; Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., Ex. 2, Section IV. Exclusions, C.(1), p. 5 of 11 (underline emphasis added).

⁸⁴ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., ¶¶ 34 & 40.

exclusion, which is strictly construed against Great American, either a “notice” or **Claim** was required to be made while the 2015 Great American Policy was in effect in order for the exclusion to preclude coverage under the 2016 Great American Policy.

In Paragraph 36 of Great American’s Amended Answer, Great American acknowledges that, in April 2015, TBRC “notified Great American of a potential claim against the [2015 Great American] Policy because of threats of litigation against . . . [TBRC] by Third-Party Plaintiff Steele Brice Windle, III.”⁸⁵ Yet, Great American further alleges that it investigated the matter and determined that it was not a **Claim** as that term is defined by the 2015 Great American Policy.⁸⁶ Therefore, as made plain by Great American’s own allegations, there was no **Claim** under the 2015 Great American Policy – thereby eliminating the existence of a **Claim** under the 2015 Great American Policy as a basis for the exclusion’s applicability under the 2016 Great American Policy.

Exclusion C.(1) also applies where there was a “notice” under the 2015 Great American Policy. The term “notice” is not defined in the 2015 or 2016 Great American Policies, and Exclusion C.(1) fails to specify what kind of “notice” is required in order for the exclusion to apply. As is well established, “[a]mbiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.”⁸⁷ Policy exclusions are construed very narrowly and “most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.”⁸⁸ The very fact that the 2016

⁸⁵ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., ¶ 36.

⁸⁶ Id.

⁸⁷ *Diamond State Ins. Co.*, 318 S.C. at 236, 456 S.E.2d at 915 (citing references omitted).

⁸⁸ *Personal Touch Med. Spa, LLC*, 763 F.Supp.2d at 780 (citing references omitted); *see also M & M Corp. of S.C.*, 390 S.C. at 259, 701 S.E.2d at 35 (stating “[p]olicies are construed in favor of coverage, and exclusions in insurance policy are construed against the insurer”).

Great American Policy uses the term “notice” approximately 16 times in the policy evidences the numerous notices contemplated by the policy and the ambiguous nature of the term.

Furthermore, even if Mr. Windle’s April 2015 letter was a “notice,” it was not a notice of the claims asserted by Plaintiffs. As alleged by Great American, the April 7, 2015 letter was from Steele Brice Windle, III—a Defendant/Third-Party Plaintiff to this action.⁸⁹ The letter was not written by a Plaintiff in this case, and therefore, necessarily, could not have put Great American on notice of Plaintiffs’ claims.

5. Rescission Counterclaims

In its Amended Answer, Great American asserts two (2) counterclaims—one for rescission of the 2015 Great American Policy, and the other for rescission of the 2016 Great American Policy. The basis for Great American’s Counterclaims is that the “HOA, by and through its authorized agent . . .” misrepresented in its “application for coverage” for the 2015 Great American Policy whether “the Association anticipate[d] any major building renovations in the next year.”⁹⁰ As relief, Great American seeks to have both the 2015 and the 2016 Great American Policies rescinded *ab initio*.

a. *Great American’s Rescission Counterclaims Do Not Defeat its Duty to Defend.*

The law is well-settled that an insurer’s present duty to defend the insured under a liability policy is unaffected by an unproven claim for rescission. “[U]ntil . . . [the insurer’s]

⁸⁹ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., ¶ 36.

⁹⁰ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., ¶¶ 43-55.

rescission claims are litigated in its favor and the Policies are declared void ab initio, they remain in effect and bind the parties.”⁹¹

Considering the foregoing case law, the very presence of Great American’s Rescission Counterclaims in no way impacts its duty to defend Defendants/Third-Party Plaintiffs against Plaintiffs’ claims. Great American was, and is, obligated to defend Defendants/Third-Party Plaintiffs until its Rescission Counterclaims are “fully litigated,” and there has been a judicial adjudication that the 2015 and 2016 Great American Policies be rescinded—that has simply not happened and, until that time, Great American has, under its policy, “the duty” to defend Defendants/Third-Party Plaintiffs.

b. *Great American Waived its Right to Rescind the 2015 Great American Policy and the 2016 Great American Policy.*

The basis of Great American’s Rescission claim for the 2015 Great American Policy is that the “HOA, by and through its authorized agent . . .” misrepresented whether “the Association anticipate[d] any major building renovations in the next year” when the HOA’s

⁹¹ *Fed. Ins. Co. v. Tyco Int’l Ltd.*, 2 Misc. 3d 1006(A), 784 N.Y.S.2d 920 (Sup. Ct. 2004); *See also Gon v. First St. Ins. Co.*, 871 F.2d 863, 864–65 (9th Cir. 1989) (affirming district court’s order that insurer pay insured’s defense costs after the district court held insurer’s rescission action “in abeyance”); *Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 654 F.Supp. 1334, 1345–46 (D.D.C. 1986), *rev’d in part on other grounds*, 944 F.2d 940 (D.C.Cir. 1991) (finding that insured’s primary carrier had duty to defend its insured until the insurer proved that the policy was “negated by fraud”); *Natl. Union Fire Ins. Co. of Pitt. v. Brown*, 787 F.Supp. 1424, 1427 n. 8 (S.D.Fla. 1991) (court could not declare directors and officers policy void ab initio until the insurer’s rescission action was “fully litigated”; until then, policy remained in effect); *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F.Supp. 1139, 1151–52 (W.D.Mich. 1988) (when insurer’s motion for summary judgment on rescission claim was denied, due to a genuine dispute as to whether the insured obtained the policy by fraud and misrepresentation, the insurer had duty to defend); *Hoechst Celanese Corp. v. Natl. Union Fire Ins. Co. of Pitt.*, 1994 WL 721618 at *4 (Del.Super.Ct. 1994) (insurer obligated to defend despite its unproven claim that insured procured the policies by fraud); *accord Natl. Union Fire Ins. Co. of Pitt. v. Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690 at *5–*8 (Del.Super.Ct. 1992).

agent applied for the policy in or around February 2015.⁹² However, Great American alleges that it was necessarily aware of the building renovations going on as early as April 2015—*approximately two (2) months after* the 2015 Great American Policy was issued. In Paragraph 36 of Great American's Amended Answer, Great American makes the following allegation:

[i]n April 2015, . . . [TBRC] notified Great American of a potential claim against the Policy because of threats of litigation against . . . [TBRC] by Third-Party Plaintiff Steele Brice Windle, III. Great American *investigated the matter* and determined that Third-Party Windle's threats of litigation did not, as of that time, meet the Policy's definition of a 'Claim.'⁹³

Mr. Windle makes numerous references to the on-going construction at TBRC in his April 7, 2015 letter, attached hereto as **Exhibit A**.⁹⁴ Therefore, through Great American's own allegation that it "investigated the matter," it would necessarily have been aware of the on-going construction.

As for the 2016 Great American Policy, Great American claims that it should be rescinded for the exact same reasons—that there was an alleged misrepresentation on the application completed a year earlier (in February 2015), and in conjunction with a different policy (the 2015 Great American Policy).⁹⁵

⁹² Third-Party Def.'s Am. Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl., ¶¶ 43-55.

⁹³ Third-Party Def.'s Am. Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl., ¶ 36 (emphasis added).

⁹⁴ In *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009), the court held that the trial court did not convert a Rule 12(b)(6) motion into a summary judgment motion by considering a document incorporated into the complaint, but not attached. The court reasoned that "allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based." *Id.*

⁹⁵ Third-Party Def.'s Am. Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl., ¶¶ 57-69.

Despite Great American's knowledge of the ongoing renovations in approximately April 2015, Great American not only failed to rescind the 2015 Great American Policy, but issued another policy the following year (the 2016 Great American Policy)—all with knowledge that there were ongoing repairs at the property.⁹⁶ Great American's issuance of the 2016 Great American Policy with knowledge of the on-going building renovations, and its failure to rescind the 2015 Great American Policy when it necessarily became aware of the renovations in April 2015, constitutes a waiver of Great American's right to rescind the policies.

Where an insurer fails to act after it discovers a ground for rescission, or after it learns facts which would put a reasonably prudent insurer on notice to inquire further, the right to rescind is waived.⁹⁷

The Supreme Court, addressing the situation where the insurer has knowledge of a reason to rescind and accepts premiums without rescinding, has stated: "To hold otherwise would be to maintain that the contract of insurance requires good faith of the insured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens."⁹⁸

The law in the Fourth Circuit is the same, "that upon discovering a basis for rescission, an insurance company must take action to avoid the policy within a reasonable time or it will be deemed to waive the right to do so."⁹⁹ The Fourth Circuit in *Foremost Guar. Corp.* found that an insurer waived its claim for rescission by not rescinding when it gained access to the inconsistent statements.¹⁰⁰ The Court went on to state that "[a]n insurer should not be permitted

⁹⁶ Third-Party Def.'s Am. Answer and Countercl. to Defs.'/Third-Party Pls.' Third-Party Compl., ¶36.

⁹⁷ *Foremost Guar. Corp. v. Meritor Sav. Bank*, 910 F.2d 118, 129 (4th Cir. 1990).

⁹⁸ *Id.* at 129 (quoting *Phoenix Mutual Life Ins. Co. v. Raddin*, 120 U.S. 183, 197, 7 S.Ct. 500, 506 (1887)).

⁹⁹ *Foremost Guar. Corp.*, 910 F.2d at 129 (citing *Bowles v. Mutual Ben. Health and Acc. Ass'n*, 99 F.2d 44 (4th Cir.1938)).

¹⁰⁰ *Foremost Guar. Corp.*, 910 F.2d at 129.

to rescind when it continues to collect premiums, as here, after coming into the knowledge of facts upon which to base rescission.”¹⁰¹ Therefore, with respect to the 2015 Great American Policy, Great American has clearly waived its right to rescind.

With respect to the 2016 Great American Policy—the policy issued by Great American with knowledge that there were on-going renovations at the property and the policy which admittedly covers the claims in this case—Great American has also lost its ability to rescind the policy. It is well-established that “[a]n insurance company cannot avoid liability on the basis of facts known to it at the time the policy was delivered.”¹⁰²

Therefore, according to Great American’s own allegations, Great American has, as a matter of law, waived its right to seek rescission of the 2015 and 2016 Great American Policies. As such, Great American’s Rescission Counterclaims in no way excuses Great American from defending Defendants/Third-Party Plaintiffs against Plaintiffs’ claims in the State Court Action.

c. *Great American Fails to Allege Any Factual Basis for Rescission of the 2016 Great American Policy at Issue in this Coverage Dispute.*

The liability policy at issue here is the 2016 Great American Policy which, it is undisputed, provides coverage for “claims made” during the **Policy Period** of February 10, 2016 to February 10, 2017. Great American’s Amended Answer admits that the original Complaint in

¹⁰¹ Id.

¹⁰² *Foremost Guar. Corp.*, 910 F.2d at 127 (quoting *Rutherford v. John Hancock Mut. Life Ins. Co.*, 562 F.2d 290, 293 (4th Cir.1977)); *see also S. Farm Bureau Cas. Ins. Co. v. Ausborn*, 249 S.C. 627, 636, 155 S.E.2d 902, 907 (1967) (if the insurer, “at the inception of the contract, had knowledge of facts which render the policy void at its option, and the . . . [insurer] delivers the binder as a valid one, it is estopped to assert such ground as a forfeiture.”); *Nationwide Life Ins. Co. v. Attaway*, 254 F.2d 30, 35 (4th Cir. 1958) (“If an insurance company issues a life policy with knowledge that the insured has misrepresented his physical condition and is in fact not in good health, the company is deemed to have waived the right to object and is bound by its contract . . .”). *See also Davis v. Cordell*, 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1960) (party seeking rescission of a contract must promptly and unequivocally provide notice of the intention to demand rescission).

this matter was a **Claim** during the **Policy Period** of the 2016 Great American Policy. However, in support of its Rescission Counterclaim concerning the 2016 Great American Policy, Great American relies upon an alleged misrepresentation that was contained within an “application for coverage” that was purportedly completed in February 2015, before the 2015 Great American Policy was issued.¹⁰³ There is no allegation that another “application for coverage” was completed in 2016 before the 2016 Great American Policy was issued, much less that there was a misrepresentation contained within such an application. Nevertheless, Great American still seeks to have a purported application form that was completed in conjunction with a wholly separate policy serve to rescind the policy at issue in this coverage dispute—the 2016 Great American Policy. Great American’s efforts in this regard are wholly improper and do not provide the factual support necessary to properly allege a Rescission claim regarding the 2016 Great American Policy.

d. *“Proposal Form”*

Great American bases both of its Rescission Counterclaims on a representation present in an “application for coverage” that was completed in or around February 2015.¹⁰⁴ Both the 2015 and 2016 Great American Policies provide that “the particulars and statements contained in *Proposal Forms* submitted to the **Insurer** (and any material submitted therewith) are the representations of the **Insured** and are to be considered as incorporated in and constituting part

¹⁰³ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., ¶¶ 57-58.

¹⁰⁴ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., ¶¶ 43, 44, 57, 58.

of this Policy.”¹⁰⁵ The capitalized term, “Proposal Form,” is not defined by either the 2015 Great American Policy or the 2016 Great American Policy.

The “application for coverage” that forms the basis of Great American’s Rescission Counterclaims is not a “Proposal Form” per the 2015 and 2016 Great American Policies. Instead, the form completed was a completely different form—a “Community Association Program Quote Form.” By the face of the “Community Association Program Quote Form” it is not a “Proposal Form” and, as such, any representations contained therein are not incorporated into the 2015 or 2016 Great American Policies—much less can they form a basis for rescission of the 2015 or 2016 Great American Policies.

- e. *Great American Failed To Allege Rescission of the 2015 Great American Policy and the 2016 Great American Policy as to the Individual Defendants. Therefore, Great American is required to defend the Individual Defendants.*

In its Amended Answer, Great American admits that the Individual Defendants are “**Insured Persons**” as defined in the Great American Policy.¹⁰⁶ Therefore, as **Insured Persons**, Great American has “the duty” to defend and indemnify the Individual Defendants resulting from any **Claim** made under the Great American Policy.¹⁰⁷

While Great American asserts counterclaims for rescission of its 2015 and 2016 Great American Policies, its allegations *exclusively* concern the actions and knowledge of TBRC. Great American’s Amended Answer fails to make any allegation regarding the knowledge or actions of the Individual Defendants. More particularly, Great American made the following

¹⁰⁵ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., Ex. 2, Section IX. General Conditions, B. p. 10 of 11 and Ex. 1, Section IX. General Conditions, B. p. 10 of 11 (*italic emphasis added*).

¹⁰⁶ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., ¶ 5.

¹⁰⁷ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., Ex. 2, p. 1 of 11 and Ex. 1, p. 1 of 11.

allegations, none of which specifically allege, or even reference, the essential elements needed to assert a rescission claim¹⁰⁸ as to the Individual Defendants:

- “In its application for coverage, *Third-Party Plaintiff HOA* was asked, among other things, the following question: “Does the Association anticipate any major building/renovations in the next year?” *HOA, by and through its authorized agent, responded* “No” to this question in its application for coverage.”¹⁰⁹
- “Upon information and belief, *Third-Party Plaintiff HOA, by and through its authorized agent*, acknowledged receipt of the Notice set forth in Paragraph Forty-Five (45) as part of the application process.”¹¹⁰
- “*Third-Party Plaintiff HOA’s* negative response to the question set forth in Paragraph Forty-Four (44) above was material to the risk insured under the Policy.”¹¹¹
- “*Third-Party Plaintiff HOA’s representation*, as set forth in Paragraph Forty-Four (44) above, was made for the purpose of inducing Great American to issue the Policy.”¹¹²
- “Great American relied on *Third-Party Plaintiff HOA’s representations* in the application in deciding whether to issue the Policy.”¹¹³
- “Great American submits that *the Association* made this statement on the application for the policy with the intent to deceive and defraud Great American.”¹¹⁴
- “Based on the *HOA’s material representation* on its application for the Policy, Great American is entitled to the equitable remedy of rescission of the Policy *ab initio*.”¹¹⁵

¹⁰⁸ “In order to rescind a policy of insurance, the insurer must demonstrate: 1) the falsity of the statements complained of; 2) that the falsity was known to the applicant; 3) were material to the risk; and 4) made with intent to defraud the insurer; and 5) relied upon by the insurer in issuing the policy.” *Darwin Nat. Assur. Co. v. Matthews & Megna LLC*, 36 F. Supp. 3d 636, 642–43 (D.S.C. 2014) (citing *Strickland v. Prudential Ins. Co.*, 278 S.C. 82, 292 S.E.2d 301, 304 (1982)).

¹⁰⁹ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., ¶¶ 44 & 58 (emphasis added).

¹¹⁰ *Id.* at ¶ 46 (emphasis added); see also *Id.* at ¶ 60.

¹¹¹ *Id.* at ¶ 47 (emphasis added); see also *Id.* at ¶ 61.

¹¹² *Id.* at ¶ 48 (emphasis added); see also *Id.* at ¶ 62.

¹¹³ *Id.* at ¶¶ 51 & 65 (emphasis added).

¹¹⁴ *Id.* at ¶¶ 53 & 67 (emphasis added).

The result is that Great American failed to allege any elements of a rescission claim against the Individual Defendants. Namely, Great American failed to allege that the Individual Defendants were aware that the alleged representation was false, or that the false representation was made to Great American by the Individual Defendants with the intent to deceive.¹¹⁶

Furthermore, the very language of the 2015 and 2016 Great American Policies prohibits Great American from rescinding the policies as to an **Insured Person** who did not make the alleged untrue statement or had knowledge of it. The 2015 and 2016 Great American Policies both provide as follows: “[h]owever, coverage shall not be excluded as a result of any untrue statement in the Proposal Form, except as to the **Organization**, its **Subsidiaries**, and any **Insured Person making such untrue statement or having knowledge of its falsity.**”¹¹⁷ As a result, Great American, by the language of its own policy, is prohibited from refusing coverage where, as here, the **Insured Persons** did not make the alleged untrue statement or have knowledge of its falsity.

V. CONCLUSION

The facts admitted in Great American’s Amended Answer in this matter establish that, as a matter of law, Great American had a duty to defend Defendants/Third Party Plaintiffs from the date the original Complaint was filed in this matter on July 7, 2016. Great American’s Amended Answer admits: (1) the authenticity of the original Complaint, the Second Amended Complaint, and the Third Amended Complaint; (2) the authenticity of the 2016 Great American Policy in

¹¹⁵ *Id.* at ¶¶ 54 & 68 (emphasis added).

¹¹⁶ *Darwin*, 36 F. Supp. 3d at 642–43 (citing *Strickland*, 278 S.C. at 86, 292 S.E.2d at 304) (noting that for an insurer to rescind a policy of insurance it must demonstrate, among other things, that “the falsity was known to the applicant,” and “made with intent to defraud the insurer”).

¹¹⁷ Third-Party Def.’s Am. Answer and Countercl. to Defs.’/Third-Party Pls.’ Third-Party Compl., Ex. 2, Section IX. General Conditions, B. p. 10 of 11 and Ex. 1, Section IX. General Conditions, B. p. 10 of 11 (italic emphasis added).

question, which is attached to the Third-Party Complaint; (3) that Defendants/Third-Party Plaintiffs are **Insureds** under the 2016 Great American Policy; (4) that the original Complaint in this case alleged a **Claim** against the **Insureds** within the **Policy Period**; and (5) that the original Complaint alleged **Wrongful Acts** by the **Insureds** as defined in the 2016 Great American Policy. The original Complaint alleges at least one **Claim** against the **Insureds** which raises the possibility of coverage under the 2016 Great American Policy and, thus, activated Great American's "duty to defend any **Claim** to which this insurance applies, even if the allegations of such **Claim** are groundless, false or fraudulent." The exclusions cited in Great American's Amended Answer, when viewed individually and in isolation as required by South Carolina law, do not "unambiguously exclude" all of the claims alleged in the original Complaint or Plaintiffs' subsequent complaints. The Complaints allege claims against Defendants/Third-Party Plaintiffs which are outside each of the cited exclusions. Great American's Recession Counterclaims do not provide a basis for Great American to refuse to defend the insured **Organization** or the Individual Defendants who are **Insured Persons** under the 2016 Great American Policy. Because Great American breached its duty to defend its **Insureds** from the allegations in the original Complaint, it is liable to Defendants/Third-Party Plaintiffs for all fees and expenses incurred by Defendants/Third-Party Plaintiffs in defending themselves from the date the original Complaint was filed.

SIGNATURE BLOCKS ON FOLLOWING PAGE

Respectfully submitted,

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January 15, 2018
Greenville, South Carolina

April 7, 2015

Tilghman Beach & Racquet Club Homeowners

Re: -*Steele B. Windle, III*
 -*Building 3 Has Been a Waste of \$250,000.00*
 -*Building 3 is a "Renovation" Project*
 -*The Board Lacks Authority for a "Renovation" Project*
 -*The "Robinson/Humphries Renovation Plan for all of TBRC"*
 -*Immediate Need for (1) Meeting of all Homeowners, (2) Full Disclosure, (3)*
 -*Discussion, and (4) a Vote on any "Renovation" Project*

All:

My name is Steele B. Windle, III. I own Unit 127 at Tilghman Beach & Racquet Club ("TBRC").

This is a lengthy communication, but it is important. Please take the time to read the entire communication.

I am a construction lawyer. For the past 34 years, I have represented owners, general contractors, subcontractors and suppliers in relation to all types of commercial construction projects throughout the Carolinas, including the renovation of multi-story wood framed condominium units, like TBRC.

At the annual meeting on March 7, 2015, after listening to the comments by homeowners, I volunteered to assist the Board with the ongoing work on Building 3 and future construction projects at TBRC.

I want to take this opportunity to inform all of the homeowners at TBRC what I have learned and what I believe. Most importantly, as explained herein, I believe we need an immediate meeting of all homeowners at TBRC to discuss the current Building 3 Renovation Project as well as discuss and vote on any future renovation projects at TBRC before we are committed to paying \$7.5-\$8M for any "renovation" work.

Before I go any further, I want to make several things clear.

First, everything stated herein is stated with all due respect for the opinions and positions of others. After all we are a family of 213 homeowners. Each of us is entitled to our opinions.

Second, I will explain the plan Mr. Steve Robinson and Ms. Jill Humphries have for the "renovation" of TBRC, the increase in the monthly dues, the \$16,000.00 - \$20,000.00 assessment against each homeowner and the total cost of \$7.5-\$8M (hereinafter the "Robinson/Humphries Renovation Plan" or "Renovation Plan"). I will also explain how they

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plan to conduct this "renovation" of all 12 buildings at TBRC under the guise of "repairs" so as to avoid any vote of approval by the homeowners.

Third, I am 100% opposed to implementation of the Robinson/Humphries Renovation Plan, or any similar plan, without full disclosure to all homeowners in advance, an opportunity for consideration and discussion by all homeowners, and a vote of approval by at least 51% of all homeowners. In short, I do not want the 3-member majority of a 5-member Board dictating to a family of 213 homeowners that their property is going to be "renovated" at a cost of \$8M.

Fourth, I want to make it clear that I am not trying to make enemies out of any neighbors. I just feel strongly that all 213 members of the TBRC family deserve the right to full disclosure, in advance, of any and all "renovation" plans for TBRC, the opportunity to see what the results of any plan will be before construction is commenced, an opportunity to discuss any "renovation" plan, and an opportunity to vote on any proposed "renovation" plan before a majority of three (3) Board Members proceed to spend \$8M and expect the remaining homeowners of the TBRC family to fund their "renovation" plan.

Finally, and most importantly, all of our current Board Members are good people and, for the most part, trying to do the best they can under the circumstances. However, they are very inexperienced in regard to construction terms, construction contracts, the typical process of construction projects, managing a \$500,000.00 or \$8,000,000.00 construction project, and managing a contractor. They need substantial help. While most on the Board readily acknowledge that assistance is needed, a few seem to be in denial and simply want to proceed without appropriate assistance in order to push personal agendas.

1. **Keystone Construction:**

Now that I understand what happened with Keystone Construction, I can confirm that the work by Keystone was a mismanaged mess. The mismanagement of this contract and contractor was a waste of approximately \$150,000.00.

Several current Board members have attempted to blame Don Womble for the mismanagement, but that is inappropriate. Nothing occurred in a vacuum out of sight of any Board Member. The entire 2014 Board is responsible for the mismanagement of Keystone Construction and the waste of \$150,000.00 of our money.

2. **The Contract with A&I was not signed in an "emergency:"**

At the March 7, 2015 meeting, the Board represented, no less than five (5) times, that some "emergency" existed and the contract with A&I Construction ("A&I") needed to be signed immediately. In reality, there was no "emergency." The Board, in fact, had been talking with the contractor for three (3) months before the contract was signed.

You should know that I have read emails between Board members discussing the fact that the work was not an "emergency" and to make sure that all homeowners understood that no emergency actually existed in regard to Building 3. However, that is not what the Board represented to the homeowners at the annual meeting on March 7, 2015.

3. The Board's Failure to Obtain Competitive Bids for the Building 3 Work is Inexcusable:

Because there was no emergency, the Board had ample time and opportunity to obtain competitive bids from any number of contractors for the work on Building 3. The Board's failure to do so is inexcusable and, as explained in more detail below, has put TBRC in the position of paying approximately \$100,000.00 too much for the work currently being performed on Building 3.

When you consider the \$150,000.00 wasted with Keystone Construction and the fact that TBRC is contractually obligated to pay A&I approximately \$100,000.00 more than necessary, the inexperience of the current Board has cost the TBRC family in excess of one quarter of a million dollars.

Without a doubt, and for whatever reasons, the 2014 and 2015 Board of TBRC has not fulfilled its obligation to be a good steward of our money.

We, the members of the TBRC family, simply cannot ignore that fact. Something needs to change and the change needs to occur sooner rather than later.

4. The Current Work on Building 3 is Actually a "Renovation" of Building 3 and, in my opinion, The Board Lacks the Authority to Proceed with a "Renovation" of any Building Without Approval of at Least 51% of the Homeowners:

a. The Provision of the Master Deed

The Master Deed authorizes the Board to undertake required "repairs" without first conducting a vote and obtaining approval of at least 51% of the homeowners. However, the Master Deed mandates that before undertaking any "improvement" that exceeds 10% of the prior year's budget, the Board must first conduct a vote and obtain approval of at least 51% of the homeowners.

b. The Work on Building 3 exceeds "Repairs"

The work on Building 3 started as a (1) painting project that evolved into a (2) replace deteriorated boards and paint project, then into a (3) "find and fix" termite damage, replace deteriorated boards and painting project. However, the Building 3 Project is now being touted as a "renovation" project that will "be as the model for the future construction throughout the

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complex" (see email from K.A. Diehl dated March 20, 2015, copy attached, the heading states "Building 3 Renovations"). The future construction projects, as explained below, will cost \$7.5 to \$8.0M and include increase in the monthly dues and an assessment against each homeowner of between \$16,000.00 to \$20,000.00.

The current work on Building 3 does include some repairs, but the work far exceeds normal repairs. For example, the work on Building 3 currently includes:

1. A new roof;
2. New skylights;
3. New gutters;
4. New commercial grade PVC hand railings;
5. New carpet; and
6. Etc... (no one currently knows what other "renovation" work will be performed).

Clearly, all of the above was not in need of "repair." There is no evidence that the roof was leaking, the skylights were not working, the gutters were in need of any repair, all the handrails needed replacement or that all the carpet needed replacement.

Typically, when a "repair" is performed, the repaired structure looks the same. The aesthetics are not changed. However, that is not the case with Building 3. In actuality, Building 3 is being completely "renovated" and will look very different than all other buildings at TBRC. The aesthetics are being substantially changed.

c. The Board's Lack of Authority to Conduct any "Renovation"

Shortly after starting work for the Board, I informed the Board, in writing, that it was not clear to me that the Board had the authority to proceed with a "renovation" without a vote and approval of at least 51% of the homeowners. In that regard, I urged the Board, in writing, to obtain a written legal opinion confirming that the Board has the required authority to undertake a "renovation" project. To date, the Board has failed to obtain any such legal opinion. The failure of the Board to confirm its authority to undertake a "renovation" project concerns me greatly and should concern all homeowners at TBRC.

5. In Regard to the Current "Renovation" of Building 3, the Contract with A&I is a Bad Contract for TBRC:

Unfortunately, the Board failed to have the Contract with A&I reviewed by a construction lawyer before it was executed. Again, there was no emergency. The Board dealt with this contract for approximately three (3) months before it was executed. The Board's failure to have the contract reviewed by a construction lawyer or someone familiar with construction and knowledgeable of AIA contracts is inexcusable.

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Because the Contract with A&I was not reviewed by anyone familiar with construction or AIA contracts, it is a bad contract for TBRC for, among other things, the following reasons:

a. The \$100,000.00 Advance Payment to the Contractor on Building 3 was Unnecessary:

The Contract required TBRC to pay \$100,000.00 to A&I upon execution of the Contract, which is unheard of in commercial contracting. No one gets paid **before** the work is performed. The AIA contract documents are based on the premise that the contractor is paid as he performs the work and earns the payment. Giving \$100,000.00 to A&I before A&I commenced construction was absolutely unnecessary, unheard of in commercial contracting, and an unmitigated risk by the Board;

b. The Building 3 Contract Designates the Wrong Person as the Project Representative for TBRC:

The A&I Contract designates Earl Collins of K.A. Diehl as the Owner's representative in regard to the Project. This means that Mr. Collins is authorized to issue directives and make decisions that would be binding on TBRC, potentially costing TBRC thousands of dollars. Clearly, TBRC does not need a representative of a property management company in a position of issuing binding directives to the contractor or making decisions that would be binding on TBRC. Only a member of the Board should be designated as the Owner's designated representative for the project and preferably the President of the Board. No one should have the authority to bind TBRC to anything other than the President of the Board, certainly not an employee of a property management company.

c. The Building 3 Contract Does Not Contain a Clear Scope of Work for the Contractor:

Typically, the contract document clearly defines the contractor's scope of work so that the owner and contractor know exactly what is to be built, the owner knows exactly what is being paid for and, most importantly, the owner knows exactly what the finished product will look like.

That is not the case with the TBRC/A&I Contract. All TBRC knows is that TBRC is obligated to pay A&I \$525,000.00 for "something."

That is bad for TBRC.

TBRC should know exactly what the end product will be. We, the homeowners, should not be in the position of paying \$525,000.00 and hoping that we will like the final product.

Phil Calabritto (Unit 331) at the March 7, 2015 annual meeting asked the Board to "visualize" for him what our \$525,000.00 is expected to produce. That should not have been

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necessary. A rendering or drawing of the "completed" Building 3 should have been prepared and presented to all homeowners for discussion and a vote before the contract was executed with A&I. Remember, the Board had three (3) months to have a rendering prepared in order to be able to "visualize" the final product before the contract was signed. So far, for whatever reasons, the Board has not obtained any drawing or rendering of what the completed Building 3 will look like. In short, at this point, we still don't know what the completed Building 3 is supposed to look like.

That is bad for TBRC.

d. The Contract Drawings for Building 3, as currently designed, Will Cause Mold to Grow in the End walls of Building 3:

Typically, an HOA Board hires an architect to prepare the design details for a condominium renovation project. The architect, in turn, hires engineers to prepare the design details for the civil, structural, mechanical, and electrical portions of the project.

Typically, the architect prepares the design details for such things as the roof construction, how walls will be constructed, how walls will be waterproofed, how window openings will be constructed and waterproofed, etc...

Typically, the structural engineer prepares the design details for the foundations, columns, beams and how the building will be supported structurally, and, importantly, the structural engineer does not prepare the design details depicting how exterior walls are to be waterproofed.

However, in this case, the Board of TBRC has had the structural engineer, Martinez & Associates, prepare design details showing how the walls will be constructed, including how the waterproofing behind the walls will be constructed. As stated, that design is usually the responsibility of the architect, not the structural engineer. The structural engineer typically does not prepare design details for how buildings will be waterproofed.

I had an experienced architect review the design details for the TBRC Project. This architect has substantial experience preparing design details for the construction and renovation of condominium projects in Charleston, SC, Myrtle Beach, SC and Wilmington, NC. The first thing the architect told me was that if the end walls of Building 3 are constructed as designed, mold will grow behind the walls.

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This design detail must be changed.

e. The Building 3 Contract Does Not Require the Contractor to Provide Lien Waivers:

In normal commercial construction contracting, no owner pays a contractor without receiving a lien waiver in return from the contractor. That practice is universal. However, the A&I Contract does not require A&I to provide lien waivers in return for payments. As a result, both A&I and its subcontractors have the right to file a lien against the real property and, if necessary, foreclose on the lien and take ownership of our property.

The failure of the Board to include a requirement for lien waivers from the Contractor in return for payment in the A&I Contract is inexcusable.

f. The Contractor is Currently in Material Breach of its Contractual Obligations:

The Contract requires the Contractor to provide to the Owner, prior to commencement of the work, (1) a construction schedule, and (2) a Schedule of Values. To date, some five (5) to six (6) weeks after the contract was executed, the Contractor has failed to provide either a construction schedule or Schedule of Values. As a result, the Contractor is in material breach of its contractual obligations.

Without a construction schedule, TBRC has no idea what work is planned or when any planned work is scheduled to be performed. This is exactly why we were caught off guard and surprised when we received a 5-day notice to vacate Building 3. Just as important, without a construction schedule, we have no way of knowing whether the contractor is ahead, on or behind schedule.

The Schedule of Values is used to determine the value of work performed to date and what amounts the contractor has earned and is entitled to be paid based on the percentage of work completed. Without a Schedule of Values there is no way for TBRC to correctly approve any payment to the contractor.

Please note that in each of the Project Engineer's four (4) Observation Reports, the Project Engineer has requested that the contractor provide both a construction schedule and Schedule of Values. The contractor's failure to do so after repeated requests is excusable and constitutes a material breach of the contract.

6. The "Robinson/Humphries Renovation Plan:"

a. Mr. Robinson's "TBRC Restoration" Plan:

Mr. Steve Robinson recently informed me that, (these are Mr. Robinson's written words):

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"The only interest I have in TBRC is money that I gave to Jill [Humphries] and my concern for her investment. I would never have bought a unit at Tilghman, ... Just to repair Building 3 is going to cost \$525,000.00 and this will not completely "restore" it. In my estimation ..., we are now facing \$5M to \$6M to save the place. (emphasis added)

Note that Mr. Robinson did not refer to "repairing" Building 3, Mr. Robinson referred to "restoring" Building 3. "Repairing" and "restoring" are substantially different.

Note also that Mr. Robinson is pushing for a \$5M to \$6M "restoration" project. That is substantially different than just performing any required repairs.

I do not agree with Mr. Robinson for several reasons. First, the structural engineer has confirmed that nothing is "falling down." Second, while some maintenance is required, we should not be considering a \$5M - \$6M "restoration" project without the approval of at least 51% of the homeowners at TBRC.

b. Ms. Humphries' "TBRC Renovation" Plan:

Similarly, one (1) of our Board Members, Ms. Jill Humphries, informed me that her goal and plan is to "renovate" TBRC to look like a similar Tilghman project, called Dunescape Village, in Atlantic Beach, NC. Ms. Humphries has calculated that this overall "renovation" of all 12 buildings at TBRC will cost approximately \$7.5M to \$8M. Ms. Humphries has proposed that this project be funded by a \$3.5M loan (which she has already been to the bank to secure), an increase in the monthly dues and an assessment of between \$16,000.00 to \$20,000.00 per unit (the "Robinson/Humphries Renovation Plan" or the "Renovation Plan").

Alarming though, Ms. Humphries does not plan on presenting the Robinson/Humphries Renovation Plan to all homeowners for discussion and a vote. She plans to proceed with this plan under the guise of "repairs" and, therefore, avoid the requirement of first presenting a drawing or rendering of the proposed renovation, having an open discussion with all homeowners at TBRC, a vote or obtaining the approval of at least 51% of the homeowners.

That is wrong. No one should even consider starting, much less attempt to force such a \$7M-\$8M "renovation" plan and cost on 213 neighbors without full disclosure, an open discussion and a vote, especially when disclosure, discussion and a vote is mandated by the Master Deed of TBRC.

7. DJ Johnson's Support for the "Robinson/Humphries Renovation Plan:"

Although DJ Johnson did not disclose his support for the Robinson/Humphries Renovation Plan when campaigning for a position on the Board, he fully supports the

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Robinson/Humphries Renovation Plan. That is exactly why he was recruited to run for a seat on the Board.

Unfortunately, in my opinion, Mr. Johnson has chosen to ignore the requirements of the Master Deed as well and forego any requirement of disclosure, an opportunity for discussion and a vote of approval of at least 51% of the homeowners.

Mr. Johnson's position, presented to me, in writing, is that the \$7.5M - \$8M "renovation" project contemplated by the Robinson/Humphries Renovation Plan cannot get started and completed soon enough to satisfy him. He further believes, as confirmed in writing, that he does not care when the "renovation" work is performed or whether homeowners must vacate their units, even during the busy season. In his opinion, also confirmed in writing, "it is just too bad for the homeowners who must simply get out of the way" so that the Robinson/Humphries Renovation Plan can proceed.

Mr. Johnson completely ignores the facts that (1) per the requirements of the Master Deed, any "renovation" project needs to be approved by at least 51% of the homeowners at TBRC, (2) many homeowners rent their units and cannot forego the rental income during the busy season, and (3) many homeowners may not be able to afford a \$16,000.00 - \$20,000.00 assessment at all.

Mr. Johnson's seemingly narrow minded approach is, at a minimum, extremely disconcerting, especially for someone who is supposed to be representing 213 homeowners.

8. We Need a Special Meeting of All Homeowners:

The attitudes and positions of these two (2) Board Members cannot be ignored. Action is required now.

We need to conduct a Special Meeting of all homeowners and demand full disclosure of the Robinson/Humphries Renovation Plan, especially the cost that Ms. Humphries is contemplating forcing on each homeowner. We, as a unit of all homeowners, should demand a vote on the Robinson/Humphries Renovation Plan before any attempt to proceed with the Robinson/Humphries Renovation Plan under the guise of "repairs."

The Master Deed contemplates that upon receipt of a request by 51% of the homeowners, the Board shall conduct a special meeting for the purpose of conducting whatever business is required.

We need such a Special Meeting now. We need to stop wasting money now. We need to put procedures in place to maximize the possibility of a successful Building 3 project, on time and on budget. We also need to vote on any future "renovation" of TBRC.

Tilghman Beach & Racquet Club Homeowners
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I urge all homeowners to contact me ASAP and provide your authorization for the request for a Special Meeting of all homeowners. Upon receipt of authorization of at least 51% of all homeowners, we will force the Board to conduct a Special Meeting and disclose all aspects of the Robinson/Humphries Renovation Plan, including all cost ramifications.

9. What Should Happen at TBRC:

a. TBRC Should Immediately Hire a Project Manager for the Building 3 Project:

This is something TBRC, without a doubt, needs to do. No one currently on the Board understands commercial contracting or the construction industry contracts provided by the American Institute of Architects and being utilized on the Building 3 Project by TBRC. Further, no Board Member is available to be on-site on a daily basis. Our Board is not only inexperienced, but also not present and the Contractor is taking advantage of an inexperienced/absent Owner. As a result, TBRC should immediately hire a retired Project Manager from a reputable local commercial contractor with 25-35 years of experience to serve as the Project Manager for TBRC. The cost of hiring a retired Project Manager with 25-30+ years of experience in construction of multimillion dollar commercial construction projects to visit the site for an hour five (5) times a week and be the interface between the Board and general contractor would be minimal (\$5,000.00 - \$10,000.00) and more than worth the cost.

b. In Regard to any Future Construction Projects, TBRC Should Require that the Typical Procedures for any Renovation Project be Implemented and Followed:

Pursuant to the provisions of the Master Deed, typical planning and approval and common sense, the following should take place:

1. Retain an Architectural/Engineering Firm to Perform a Complete Forensic Analysis, Not Just a Structural Engineer:

The current professional for Building 3 is only a structural engineer. Our buildings need to be inspected and remedial design drawings prepared by a multi-disciplined architecture and engineering firm; not just a structural engineer.

A forensic analysis includes removing siding and dry wall as well as limited destructive testing. Martinez & Associates has done a forensic analysis of only Buildings 1 and 3. Martinez & Associates has only done a visual examination of the exterior of the buildings, not a forensic

analysis. TBRC should retain a firm containing both architects and engineers to do a forensic analysis of Building 2 and Buildings 4 thru 12, something Martinez & Associates has not done.

The forensic analysis would involve removing some siding and drywall to determine what needs to be done inside the walls, but the damaged walls would be repaired immediately. They would not be left open for months like on Building 3.

The architectural/engineering firm would then develop a (1) scope of work and (2) specifications in regard to the repair work. This scope of work would clearly state what work was to be done, where the work would be done, how the work would be done, what materials would be used and drawings would be prepared showing or "visualizing" what the finished product would look like. This was not in regard to Building 3.

This "repair" work would not require a vote of at least 51% of the homeowners.

2. Disclose Any Additional "Renovation" Work:

The Board should then present a list of any additional "renovation" work desired. This list of desired "renovation" work should include a rendering or enlarged color drawing and be presented to all homeowners for review, discussion (including a discussion of how much the renovation work would cost and how it would be paid for) and, most importantly, a vote.

3. TBRC Should Hire a Project Manager to Oversee any future Repair/Renovation Work at TBRC:

Assuming the repair/renovation work receives approval of at least 51% of the homeowners, TBRC should hire a retired Project Manager from a commercial general contractor in the area, (such as Dargan Construction in Myrtle Beach or Chancel Construction in Conway), to serve as the Project Manager for TBRC on the TBRC repair/renovation project. These individuals have the knowledge and experience needed to successfully manage

Tilghman Beach & Racquet Club Homeowners
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such a project because that is exactly what they did, although on a larger scale, for 20-30 years of their lives. The estimated cost to TBRC would be \$5,000.00 - \$10,000.00, a lot less than the \$250,000.00 wasted on Building 3 to date.

In closing, I again want to reiterate that all of us are part of the TBRC family of 213 homeowners and that nothing contained herein is intended to be derogatory towards anyone. Everything stated herein is only for the purpose of complete disclosure and transparency.

I urge all homeowners to support a request for a Special Meeting of all homeowners of TBRC. Let's put all the facts on the table, engage in a healthy, positive discussion of all plans and possible alternative plans, as well as the estimated costs, then vote on how we, collectively, want to proceed.

Sincerely,

Steele B. Windle, III
Unit 127

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

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

Plaintiffs,)

vs.)

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

Defendants.)

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

Third-Party Plaintiffs,)

vs.)

Great American Insurance Company,)

Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-26-04464

**THIRD-PARTY DEFENDANT'S
 MEMORANDUM IN OPPOSITION
 TO DEFENDANTS/THIRD-PARTY
 PLAINTIFFS' MOTION FOR
 JUDGMENT ON THE PLEADINGS**

On January 15, 2018, Defendants/Third-Party Plaintiffs ("Defendants") filed a Motion for Judgment on the Pleadings ("Motion"), requesting that this Court enter an order finding Third-Party Defendant Great American Insurance Company ("Great American") owes a duty to defend

Defendants with respect to Plaintiffs' **Claim** against them.¹ For the reasons set forth in this memorandum, the Motion is unwarranted. As a preliminary matter, judgment on the pleadings as to the duty to defend is improper where Great American has asserted counterclaims for rescission of the very insurance policy under which Defendants seek a defense. *See* Great American's Amended Answer & Counterclaim, filed August 30, 2017, at ¶¶ 42-69. A finding by the Court that Great American owes a duty to defend would be moot, or a mere advisory opinion, should Great American succeed on its counterclaim that the policy at issue should be rescinded.

Moreover, Great American does not owe a duty to defend because Plaintiffs' **Claim** against Defendants, seeking recovery for property damage, etc., falls squarely within the express language of certain policy exclusions contained in its directors and officers insurance ("D&O") policy, including (i) the broad "Property Damage Exclusion," and (ii) the "Other Insurance Exclusion," as Defendants' commercial general liability ("CGL") insurer has agreed to defend them against the **Claim**.² Because these exclusions preclude coverage for Plaintiffs' **Claim**, there is no duty to defend under the D&O policy. Respectfully, this Court should deny Defendants' Motion for Judgment on the Pleadings.

ARGUMENT

I. JUDGMENT ON THE PLEADINGS FOR DEFENDANTS IS UNWARRANTED.

Judgment upon the pleadings is reserved for the "proper cases." *Wooten v. Standard Life & Cas. Ins. Co.*, 239 S.C. 243, 248, 122 S.E.2d 637, 639 (1961). Such a motion is only appropriate where the pleading at issue is fatally deficient in substance or raises solely an issue of law. *Id.* In determining the right of a moving party to judgment on the pleadings, "the real question to be determined is the sufficiency of the admitted facts to warrant the judgment

¹ Great American's Policy defines **Claim** in relevant part as a civil proceeding. Section III(A)(2).

² Great American also raised additional coverage defenses.

rendered, and the materiality of those upon which issue is joined.” *Id.* “If there is joined an issue of fact upon which, if supported by the evidence, a valid judgment may be based, a judgment on the pleadings is improper.” *Id.* at 249, 122 S.E.2d at 639; *see also Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014) (“in determining whether a party is entitled to judgment on the pleadings, [the court] accepts as true all material facts alleged in the non-moving party’s pleading, and [it] views those facts in the light most favorable to the non-moving party”). Such a “motion . . . is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader.” *Wooten*, 239 S.C. at 248, 122 S.E.2d at 639. In addition, a motion for judgment on the pleadings “cannot be sustained except where, under the conceded facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced.” *Id.* Moreover, a pleading is sufficient if it states any cause of action or it appears that the pleader is entitled to any relief whatsoever. *Baldwin v. Sanders*, 266 S.C. 394, 223 S.E.2d 602 (1976).

A judgment on the pleadings can only be entered where the pleading at issue is, *in its entirety*, fatally deficient or, *in its entirety*, raises solely an issue of law. *See Wooten*, 239 S.C. at 248, 122 S.E.2d at 639. Here, Defendants are not arguing that there is a fatal deficiency in Great American’s pleading, but rather they assert that the pleadings raise solely issues of law. Defendants are incorrect. Although Defendants present their Motion as limited to the sole question of whether Great American owes a duty to defend, there are other causes of action yet to be determined in this case. Great American has raised counterclaims against Defendants for rescission *ab initio* of the policies issued to Defendants.

Because questions of fact exist as to whether Great American will succeed on its counterclaims for rescission, a finding in favor of Defendants on the issue of Great American’s

duty to defend could very well be rendered moot, or merely an advisory opinion.³ As such, judgment on the pleadings is not permitted because a judgment different from that pronounced in a judgment on the pleadings may yet be rendered. *See Wooten*, 239 S.C. at 248, 122 S.E.2d at 639.

Defendants make sweeping, unsupported arguments in their efforts to turn the Court's attention from the fatal flaw in their Motion. They claim it is "well-settled that, until Great American's Rescission Counterclaims are litigated in its favor and the policies are *declared void ab initio*, the policies remain in effect such that Great American had and has a duty to defend" This contention is unsupported by any citation to South Carolina law. Even if South Carolina countenanced such a proposition, the fact that Great American may prevail upon its rescission counterclaims is an appropriate ground to deny Defendants' Motion. Great American cannot be deemed to owe a duty to defend as a matter of law under a policy that may be void.

Defendants' remaining arguments on this point are similarly misplaced. First, they raise issues with the factual support for Great American's rescission counterclaims, which are clearly inappropriate on a motion for judgment on the pleadings. They end by claiming that a named policyholder's material misrepresentations of fact cannot adversely affect coverage for those meeting the definition of "Insureds" under the policy. This naked assertion has no support in South Carolina law. Moreover, there are at least questions of fact as to the knowledge of the Defendants with respect to rescission and the exclusion in the application/Proposal Form. Therefore, Defendants' Motion should be denied.

³ *See, e.g., Atmel Corp. v. St. Paul Fire Marine Ins. Co.*, 416 F. Supp. 2d 802, 807 (N.D. Cal. 2006) ("[I]f St. Paul is entitled to rescission, then it never owed Atmel a duty to defend. . . . Because a valid rescission voids a policy *ab initio*, and because both plaintiff's attempted enforcement of and defendant's attempted rescission of the policy are being decided in this one action, any preliminary declaration that the policies 'are currently in effect' or that St. Paul is currently 'in breach of its duties' would be inappropriate.")

II. CLEAR AND UNAMBIGUOUS POLICY EXCLUSIONS EXTINGUISH GREAT AMERICAN'S DUTY TO DEFEND.

Significantly, there is no coverage for the **Claim** and no duty to defend in any event because of the Property Damage Exclusion.

Only one Great American policy is implicated by Plaintiffs' **Claim**: Policy No. EPP3654704-00, effective February 10, 2015 to February 10, 2016. *See* certified copy of policy attached hereto as Exhibit A (the "Policy"). Subject to all of the Policy's terms, conditions and limitations, the Policy generally provides coverage for a **Claim** against **Insureds** for a **Wrongful Act**. Ex. B at Section I.⁴ As noted in Defendants' Motion, the parties do not dispute the following facts: (i) the authenticity of the Policy; (ii) that Defendants are "**Insureds**" pursuant to the Policy; and (iii) that Plaintiffs' lawsuit constitutes a "**Claim**" during the "Policy Period" involving "**Wrongful Acts**" by Defendants. *See* Defendants' Motion at pp. 11-12. As more fully set forth in Defendants' Motion, Plaintiffs have filed four Complaints, all stating various iterations of similar factual allegations against Defendants in this case.⁵ *Id.* at pp. 9-11. Defendants acknowledge that "[t]he Complaints . . . constitute a 'Claim' . . . because they involve a civil proceeding" Third-Party Compl. at ¶ 10. *See also* Motion at p. 10 ("a **Claim**, as defined in the . . . Policy, was admittedly made . . .").

However, exclusions in the Policy extinguish Great American's duty to defend. "Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the third party's complaint." *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct. App. 1994), *aff'd*, 321 S.C. 310, 468 S.E.2d 304 (1996). In examining the third-party's allegations,

⁴ Terms in bold are defined in the Policy.

⁵ *See* Complaint, filed July 7, 2016; First Amended Complaint, filed August 24, 2016; Second Amended Complaint, filed October 28, 2016; and Third Amended Complaint, filed March 8, 2017.

the “court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim against the insurer.” *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 379 S.C. 573, 577, 666 S.E.2d 897, 899 (2008). If these alleged acts create “a possibility of coverage under an insurance policy, the insurer is obligated to defend.” *Isle of Palms Pest Control Co.*, 319 S.C. at 15, 459 S.E.2d at 319.

Importantly, exclusions from coverage in the policy may operate to foreclose an insurer’s duty to defend. “Although exclusions in an insurance policy are construed against the insurer, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition.” *B.L.G. Enters. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999) (citing *Boggs*, 272 S.C. 460, 252 S.E.2d 565; *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 377 S.E.2d 569 (1989); *Rhame v. Nat’l Grange Mut. Ins. Co.*, 238 S.C. 539, 121 S.E.2d 94 (1961)). An insurance company bears the burden of establishing the applicability of policy exclusions. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) (citing *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979)).

For the reasons set forth below, Great American does not have a duty to defend Defendants because Plaintiffs’ **Claim** fails to raise the possibility of coverage as the **Claim** is excluded by the clear and unambiguous language of the Policy.

A. Plaintiffs’ Claim is excluded from coverage under the Policy.

Plaintiffs’ **Claim** certainly involves property damage, i.e., damage to the buildings in the Tilghman Beach and Racquet Club Condominium Association allegedly resulting from Defendants’ negligent and grossly negligent conduct. For example, Plaintiffs assert: “Actual

property damage to the Project⁶ has been caused by continuous and repeated exposure to moisture and water seeping into and around the walls, terminations, windows, doors, and intersections, resulting from the negligent and grossly negligent maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements performed by" Defendants. Third Am. Compl. ¶ 47.

1. The Property Damage Exclusion Precludes Coverage, Including a Duty to Defend.

Plaintiffs' **Claim** implicates the Property Damage Exclusion in the Policy, which states in relevant part:

This Policy does not apply to any **Claim**⁷ made against any **Insured**: ... based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: ... (2) damage to or destruction of any tangible property or the loss of use of any tangible property

Ex. B at Section IV(D).⁸

Property damage exclusions similar to this one are frequently found to be unambiguous and enforceable by courts in other jurisdictions. *See, e.g., Eastpointe Condo. I Ass'n v. Travelers Cas. & Sur. Co. of Am.*, 379 F. App'x 906, 908-09 (11th Cir. 2010) (applying narrower property damage exclusion in D&O policy in similar situation); *Huntingdon Ridge Townhouse Homeowners Ass'n v. QBE Ins. Corp.*, No. 3:09-cv-00071, 2009 WL 4060458, 2009 U.S. Dist. LEXIS 108558 (M.D. Tenn. Nov. 20, 2009); *Bd. of Managers of Yardarm Condo. II v. Federal Ins. Co.*, 699 N.Y.S.2d 332, 247 A.D.2d 499 (N.Y. App. Div. 1998).

⁶ Plaintiffs define the "Project" as 12 residential buildings and related common facilities. Third Am. Compl. at ¶ 10.

⁷ Again, **Claim** is defined in relevant part as a "civil proceeding." Ex. B at Section III(A)(2).

⁸ Curiously, Defendants first quote this exclusion in footnote 53 on page 20 of their memorandum to this Court. Defendants misleadingly and very significantly truncate this exclusion in other parts of their memorandum. *See, e.g.*, pp. 4, 19 ("Exclusion D(2) excludes coverage for 'damage to or destruction of any tangible property or the loss of use of any tangible property.'" (emphasis added)).

Plaintiffs' **Claim** is clearly "*based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving ... damage to or destruction of any tangible property or the loss of use of any tangible property.*" *Compare* Third Am. Compl. at ¶¶ 32-50 *with* Ex. B at Section IV(D)(2). For example, Plaintiffs allege Defendants "failed or otherwise refused to undertake . . . necessary repairs to eliminate the major structural and water intrusion damage, the leaks, and to protect the General Common Elements and Limited Common Elements from future damage, or even to assess the Co-owners for the necessary repair cost thereof, all as required under the Master Deed and By-Laws." Third Am. Compl. at ¶ 43. Plaintiffs also allege "the existing and ongoing water intrusion problems and defective building conditions at the Project are the result of [Defendants'] failure to follow their own recommended construction procedure and/or process for determining and completing all necessary repairs to defective and deficient General Common Elements and Limited Common Elements as well as their failure to comply with their expressed affirmative duties under the governing documents and State law." *Id.* at ¶ 45. Plaintiffs outline the numerous "defects in the maintenance, replacement, and repair of the General Common Elements and Limited Common Elements" in ¶ 46(a)-(q) and assert that "[a]ctual property damage to the Project has been caused by continuous and repeated exposure to moisture and water seeping into and around the walls, terminations, windows, doors, and intersections, resulting from the negligent and grossly negligent maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements performed by" Defendants. *Id.* at ¶ 47.

A recent decision by the Eleventh Circuit Court of Appeals directly supports applying the Property Damage Exclusion to Plaintiffs' **Claim**. *Eastpointe Condominium I Association v. Travelers Casualty & Surety Co. of America*, 379 F. App'x 906 (11th Cir. 2010) (applying

Florida law), involved a condominium association's lawsuit for breach of contract and declaratory judgment against its D&O insurer, asserting the insurer had a duty to defend a unit owner's lawsuit against the association. *Id.* at 906. The unit owner alleged the association failed to adequately maintain and repair the roof and air conditioning system of the condominium building before, between, and after two hurricanes, resulting in water intrusion, mold, and other damage to the unit. *Id.* at 907. The unit owner asserted negligence, breach of fiduciary duty, and breach of contract. *Id.* The association's CGL insurer accepted defense of the suit under a reservation of rights, while the D&O insurer denied coverage, including any duty to defend, pursuant to its property damage exclusion. *Id.* The court held that the exclusion for a claim "for or arising out of any damage, destruction, loss of use or deterioration of any tangible property" precluded coverage and the D&O insurer had no duty to defend. *Id.* at 907-08. The court interpreted the phrase "arising out of" broadly. *Id.* at 908.

As in *Eastpointe*, this Court should apply the Property Damage Exclusion as written, without differentiating between losses originating from property damage, and losses originating from breaches of fiduciary duty that ultimately result in property damage. *Eastpointe*, 379 F. App'x at 908. The plain language of the Policy excludes coverage for any **Claim** "*based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving . . . damage to or destruction of any tangible property or the loss of use of any tangible property . . .*" Ex. B at Section IV(D)(2) (emphasis added). In *Eastpointe*, the court held that, because the underlying plaintiff's claim, including alleged breach of fiduciary duty, etc., "fell within the D&O policy's property damage exclusion," the D&O insurer "had no duty to defend" the condominium association against the unit owner's lawsuit. *Id.* at 909. Moreover, the property damage exclusion in *Eastpointe* was narrower (using only "for or arising out of")

than the Property Damage Exclusion in the Great American Policy. Therefore, this Court should similarly find that the Property Damage Exclusion applies to Plaintiffs' **Claim** and deny Defendants' Motion seeking an order that Great American has a duty to defend.

The case relied upon by Defendants, *Pulliam v. Travelers Indemnity Co.*, 403 S.C. 332, 342, 743 S.E.2d 117, 122 (Ct. App. 2013), is plainly distinguishable and inapplicable here, and does not stand for the broad proposition advanced by Defendants that "the failure of a homeowners' association to maintain adequate repair reserves is outside a property damage exclusion," Motion at pp. 4-5. The *Pulliam* court's holding should be limited to that case's facts because the Property Damage Exclusion at issue in this case is much broader than the one at issue in *Pulliam*.

The D&O Endorsement in *Pulliam* stated in pertinent part:

(I).(D.) The insurance provided by this endorsement does not apply to:

(1) "Bodily injury," "property damage,"

(V).(F.) "Property Damage" means:

Physical injury to tangible property, including all resulting use of that property;

Loss of use of tangible property that is not physically injured; or

Diminution of property value.

Pulliam at 340, 743 S.E.2d at 121. Again, the Property Damage Exclusion in this case excludes any **Claim** "*based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: . . . damage to or destruction of any tangible property or the loss of use of any tangible property*" Ex. B at Section IV(D)(2) (emphasis added). None of the italicized phrases were included in the exclusion at issue in *Pulliam*. In other words,

the exclusion in *Pulliam* was very narrow, while the exclusion in the Great American Policy is very broad and comprehensive and applies to the **Claim**.⁹

Another case relied upon by Defendants, *Builders Mutual Insurance Co. v. Lacey Construction Co.*, No. CIV. A. 3:11-cv-400-CMC, 2012 WL 1032539 (D.S.C. Mar. 7, 2012), is also clearly distinguishable. That case addresses different policy language and a different scenario, rendering the case inapplicable. Specifically, the *Builders* court addressed whether the insuring clause of a CGL policy applied to an underlying lawsuit. The CGL policy covered “property damage,” which was defined as “[p]hysical injury to tangible property, including all resulting loss of use of that property.” 2012 WL 1032539, at *9. The case did not involve application of a broad property damage exclusion like the one at issue here.

Plaintiffs’ allegations or causes of action do not change the significant involvement of property damage in the **Claim**. Specifically, Plaintiffs’ allegations of negligence, gross negligence, breach of fiduciary duty, breach of contract, failure to establish reserves, diminution in value, etc. do not change the fact that their lawsuit is a **Claim**¹⁰ “based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving” damage to property.

Defendants’ assertion that Great American breached a duty to defend with respect to Plaintiffs’ **Claim** should be rejected. The Court should find Great American did not have a duty to defend Defendants against Plaintiffs’ **Claim** because it is excluded pursuant to the plain and unambiguous language in the Property Damage Exclusion of the Policy. Therefore, the Court

⁹ Contrary to Defendants’ assertion, Motion at p. 21, the property damage exclusion in *Pulliam* quoted above *did not* purport to exclude claims “related to or based on” physical damage to tangible property.

¹⁰ Defendants cannot rely on the “**Claim**” made to invoke coverage (examples on p. 5 above) and then ignore the term or distort it in the exclusion.

should deny Defendants' motion. Rather, if the Court decides to render judgment on the pleadings, it should be in favor of Great American.

III. EVIDENCE ADDUCED AFTER THE PLEADINGS CLOSED RAISES FACTUAL ISSUES.

Following the filing of Defendants' Reply to Great American's Amended Answer and Counterclaim on August 30, 2017, evidence has been adduced giving rise to additional factual questions regarding the Other Insurance Exclusion in the Policy.

During the relevant time period, February 10, 2015 to February 10, 2017, Defendants carried CGL insurance policies issued by Lexington Insurance Company ("Lexington"). *See* Van Deven Affidavit, attached hereto as Exhibit B. Lexington has agreed to defend Defendants under a reservation of rights, as stated in a September 2017 letter, which Great American received subsequently. *Id.* Therefore, the Other Insurance Exclusion in Great American's Policy applies. That exclusion states in relevant part:

This Policy does not apply to any **Claim** made against any **Insured**: ... to the extent it is insured in whole or in part by any other valid and collectible policy or policies, (except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies), whether such other policy or policies are stated to be primary, contributory, excess, contingent, or otherwise.

Ex. B at Section IV(B).

The other insurance clause in the Lexington policies reads as follows:

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A [Bodily Injury and Property Damage Liability] or B [Personal and Advertising Injury Liability] of this Coverage Part, our obligations are limited as follows:

a. *Primary Insurance*

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other

insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below. [Emphasis added.]

b. Excess Insurance

(1) This insurance is excess over:

- (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
 - (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
 - (iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
 - (iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.
- (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured. . . .

Van Deven Aff., Exs. 3 and 4, Section IV(4). Reading the other insurance provisions in both the Great American Policy and the Lexington policies together, it is clear that Lexington's policies are primary, and Great American's Policy is, at most, excess (although the Property Damage Exclusion eliminates all coverage).¹¹ Furthermore, the Great American Policy states that "**Costs of Defense** shall not include ... any amounts incurred in defense of any **Claim** which any other insurer has a duty to defend, regardless of whether or not such other insurer undertakes such duty." Ex. B at Section III(D).¹²

¹¹ Regarding Lexington's duty to defend, it continues until its policy limits are used up in payment of judgments or settlements. *Id.* at Section I(A)(1). In other words, defense costs are in addition to those limits.

¹² **Costs of Defense** generally include reasonable and necessary legal fees, costs and expenses incurred in the investigation or defense of any **Claim**" Ex. B. at Section III(D). Defendants have quoted the entire **Costs of Defense** provision. Third-Party Compl. at ¶ 8.

“Other-insurance clauses are generally valid and enforceable, *see* 15 Russ & Segalla, *Couch on Insurance* § 219:3” *Horace Mann Ins. Co. v. Gen. Star Nat’l Ins. Co.*, 514 F.3d 327, 330-31 (4th Cir. 2008); *see also Bardsley v. Gov’t Emps. Ins. Co.*, 405 S.C. 68, 81-82, 747 S.E.2d 436, 443 (2013) (describing a frequent “method insurance companies use to indicate whether they intend to provide primary, secondary, or other coverage is to include in their policies ‘other insurance’ clauses that attempt to apportion liability among multiple insurers”). “Generally speaking, in cases where the other-insurance clauses can be reconciled, the clauses will be enforced in accordance with their terms.” *Id.* at 331 (citing *Citgo Petroleum Corp. v. Yeargin, Inc.*, La. App. 95-1574, 690 So. 2d 154, 167 (1997); *Northland Ins. Co. v. Cont’l W. Ins. Co.*, 550 N.W.2d 298, 303 (Minn. Ct. App. 1996)).

Moreover, “other insurance exclusions” in policies are frequently enforced. *See, e.g., Motor Club of Am. Ins. Co. v. Phillips*, 330 A.2d 360, 368 (N.J. 1974) (rejecting “theory that an other insurance exclusion deprives the insured of consideration for the premium paid for the . . . endorsement”); *State Farm Fire & Cas. Co. v. Bd. of Governors*, 50 Ill. Ct. Cl. 304, 309, 1997 Ill. Ct. Cl. LEXIS 54, at *9 (1997) (finding “‘other insurance’ exclusion clause in an insurance policy is the principle, and usually the sole, determinant of whether a particular insurance policy or coverage is primary or excess coverage.”).

The policies at issue do not conflict. Lexington’s CGL policies state that they are primary unless one of several inapplicable conditions is met. Van Deven Aff., Exs. 3 and 4, Section IV.4. On the other hand, Great American’s other insurance provision is an exclusion and indicates that its Policy is excess to all other applicable insurance policies, precluding coverage where other insurance exists to cover the **Claim**, as here. Ex. B at Section IV(B). In addition, **Costs of Defense** do not include amounts incurred where another insurer has a duty to defend, as

here. *Id.* at Section III(D). Accordingly, given the existence of the CGL policies and Lexington's agreement to defend, Great American has no duty to defend.

Based on this recently discovered evidence, Defendants' Motion should be denied.

CONCLUSION

For the above-stated reasons, Defendants' Motion for Judgment on the Pleadings as to Great American's alleged duty to defend should be denied because: (1) the Motion is procedurally improper in view of Great American's counterclaims for rescission; and (2) Plaintiffs' **Claim** is explicitly excluded from coverage under the Policy. Alternatively, if the Court grants judgment on the pleadings, it should be in favor of Great American based on the Property Damage Exclusion.

Respectfully submitted,

ADAMS AND REESE LLP

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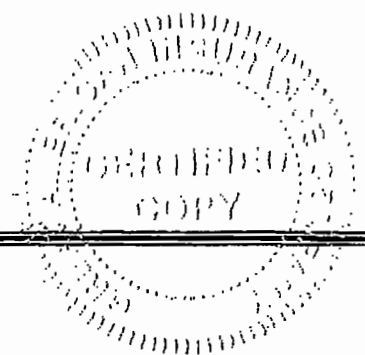
Attorneys for Great American Insurance Company

February 14, 2018



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Community Association Solution



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Great American Insurance Group – Executive Liability Division:
1515 Woodfield Road, Suite 500, Schaumburg, IL 60173

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GREAT AMERICAN INSURANCE GROUP®
Headquarters: 301 E. Fourth Street, Cincinnati, Ohio 45202

THIS IS A CLAIMS MADE POLICY. READ IT CAREFULLY.

In consideration of the payment of the premium and in reliance upon all statements made and information furnished to the company shown in the Declarations (a stock insurance company, hereinafter called the **Insurer**), including the statements made in the Proposal Form and subject to all terms, conditions and limitations of this Policy, the **Insured** and **Insurer** agree:

Section I. Insuring Agreements

- A. If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against any **Insured Persons** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Insured Persons**, **Loss** and **Costs of Defense** resulting from such **Claim**, except for any **Loss** and **Costs of Defense** which the **Organization** or any **Subsidiary** actually pays as indemnification.
- B. If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against any **Insured Persons** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Organization** or any **Subsidiary**, **Loss** and **Costs of Defense** resulting from such **Claim**, but only to the extent the **Organization** or any **Subsidiary** is required or permitted by law to indemnify the **Insured Persons**.
- C. If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against the **Organization**, any **Subsidiary**, or the **Property Manager** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Organization**, any **Subsidiary**, or the **Property Manager**, **Loss** and **Costs of Defense** resulting from such **Claim**.

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

Section II. Discovery Period

- A. If this Policy is not renewed or is cancelled by the **Insurer**, for any reason other than non-payment of premium, then without the requirement of any additional premium, the **Organization** shall receive an automatic ninety (90) day extension of the coverage granted by this Policy with respect to any **Claim** first made against any **Insured** during this extended coverage, but only with respect to **Wrongful Acts** committed prior to the end of the **Policy Period**. This extended coverage shall be referred to as the **Automatic Discovery Period**. In addition, if prior to the end of the **Automatic Discovery Period**, the **Organization** pays the **Insurer** an additional amount equal to forty (40%), seventy-five (75%), or one hundred (100%) percent of the annual premium of this Policy, the **Organization** shall receive an extension of the coverage granted by this Policy for an additional twelve (12), twenty-four (24), or thirty-six (36) months respectively from the end of the **Automatic Discovery Period** with respect to any **Claim** first made against any **Insured** during this extended coverage, but only with respect to **Wrongful Acts** committed prior to the end of the **Policy Period**. This extended coverage shall be referred to as the **Discovery Period**. The **Organization** shall have no right to purchase this **Discovery Period** at any later date or to elect more than one **Discovery Period**.

- B. If this Policy is not renewed or is cancelled by the **Organization**, and if no later than sixty (60) days after the end of the **Policy Period** the **Organization** pays the **Insurer** an additional amount equal to forty (40%), seventy-five (75%), or one hundred (100%) percent of the annual premium of this Policy, the **Organization** shall receive a **Discovery Period** for an additional twelve (12), twenty-four (24), or thirty-six (36) months respectively from the end of the **Policy Period**. The **Organization** shall have no right to purchase this **Discovery Period** at any later date or to elect more than one **Discovery Period**.
- C. The fact that this Policy may be extended by virtue of the **Automatic Discovery Period** or **Discovery Period** shall not in any way increase the Limit of Liability stated in Item 3 of the Declarations. For purposes of the Limit of Liability, the **Automatic Discovery Period** and the **Discovery Period** is considered to be part of and not in addition to the last **Policy Year**.

Section III. Definitions

A. "Claim" shall mean:

- (1) a written demand for monetary relief made against any **Insured**;
- (2) a civil proceeding, including any appeals therefrom made against any **Insured** seeking monetary or non-monetary (including injunctive) relief commenced by service of a complaint or similar pleading;
- (3) a criminal proceeding, including any appeals therefrom made against any **Insured** commenced by the return of an indictment or the filing of notice of charge or similar document; or
- (4) a formal administrative proceeding, including any proceeding before the Equal Employment Opportunity Commission (EEOC) or any similar governmental body, made against any **Insured** commenced by the receipt of charges, formal investigative order, service of summons or similar document.

B. "Claimant" shall mean:

- (1) any past, present, and future **Insured Persons** or applicants for employment with the **Organization** or any **Subsidiary**;
- (2) a government entity or agency, including but not limited to the Equal Employment Opportunity Commission (EEOC) or any similar governmental body, when acting on behalf of or for the benefit of any individual in (1) above; or
- (3) all persons who were, now are, or shall be independent contractors, but only to the extent such individuals perform work or services for or on behalf of the **Organization** or any **Subsidiary** and only to the extent such individuals are indemnified by the **Organization** or any **Subsidiary**.

It is further understood and agreed that **Claimant** shall not include any employee of any **Property Manager**.

- C. **"Construction Defect(s)"** shall mean any actual or alleged defective, faulty or delayed construction or any other matter constituting a construction defect under applicable law regardless of whether it results from:
- (1) defective or incorrect architectural plans or other designs;
 - (2) defective or improper soil testing;
 - (3) defective, inadequate or insufficient protection from subsoil or earth movement or subsidence;
 - (4) construction, manufacture or assembly of any tangible property;
 - (5) the failure to provide or pay for any construction-related goods or services; or
 - (6) the supervision or management of any construction-related activities.
- D. **"Costs of Defense"** shall mean reasonable and necessary legal fees, costs and expenses incurred in the investigation or defense of any **Claim**, including the costs of any appeal or appeal bond, attachment bond or similar bond (but without any obligation on the part of the **Insurer** to apply for or furnish such bonds); provided, however, **Costs of Defense** shall not include: (1) salaries, wages, overhead or benefit expenses associated with any **Insured Persons**, and (2) any amounts incurred in defense of any **Claim** which any other insurer has a duty to defend, regardless of whether or not such other insurer undertakes such duty.
- E. **"Employment Practices Wrongful Act"** shall mean any of the following acts related to employment, but only if alleged by or on behalf of a **Claimant**:
- (1) wrongful dismissal, discharge or termination of employment, whether actual or constructive;
 - (2) misrepresentation;
 - (3) violation of employment laws;
 - (4) sexual or workplace harassment;
 - (5) discrimination;
 - (6) wrongful failure to employ or promote;
 - (7) wrongful discipline;
 - (8) wrongful deprivation of career opportunity including a wrongful failure to hire or promote;
 - (9) failure to grant tenure;
 - (10) negligent employee evaluation;
 - (11) retaliation;
 - (12) failure to provide adequate workplace or employment policies or procedures;
 - (13) defamation (including libel and slander);
 - (14) invasion of privacy;
 - (15) wrongful demotion;
 - (16) negligent reassignment;
 - (17) violation of any federal, state or local civil rights laws;
 - (18) negligent hiring;
 - (19) negligent supervision;
 - (20) negligent training;
 - (21) negligent retention; or
 - (22) acts described in (1) through (21) above arising from the use of the **Organization's** or **Subsidiary's** Internet, e-mail, telecommunication or similar systems, including the failure to provide and enforce adequate policies and procedures relating to such use of the **Organization's** or **Subsidiary's** Internet, e-mail, telecommunication or similar systems.
- F. **"Financial Insolvency"** shall mean the **Organization** becoming a Debtor in Possession, or the appointment of a receiver, conservator, liquidator, trustee, rehabilitator or similar official to control, supervise, manage or liquidate the **Organization**.
- G. **"Fungi"** shall mean any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents, or byproducts produced or released by fungi.

H. **"Insured"** shall mean:

- (1) the **Organization**;
- (2) any **Subsidiary**;
- (3) in the event of **Financial Insolvency**, the resulting Debtor in Possession (or foreign equivalent status), if any;
- (4) all **Insured Persons**; and
- (5) any **Property Manager**, but only if such **Property Manager** is acting pursuant to the written authority granted by the **Organization** or on behalf of and at the direction of the **Organization** or any **Subsidiary**.

I. **"Insured Persons"** shall mean all persons who were, now are, or shall be directors, trustees, officers, employees, leased employees, temporary or seasonal employees, volunteers or staff members of the **Organization** or any **Subsidiary**, including any executive board members and committee members, whether salaried or not. It shall also mean all persons who were, now are, or shall be directors, trustees, officers, employees, leased employees, temporary or seasonal employees, volunteers or staff members of any **Property Manager**, but only if such persons are acting within the scope of their employment with the **Property Manager** and on behalf of the **Organization** or any **Subsidiary**.

J. **"Loss"** shall mean settlements, judgments, pre-judgment and post-judgment interest, front and back pay, compensatory damages, punitive or exemplary damages, the multiple portion of any multiplied damage award, and subject to the provisions of Section V. and VI., **Costs of Defense** incurred by the **Insured**. **Loss** shall not include:

- (1) criminal or civil fines or penalties imposed by law (except as provided pursuant to Section X. H.), or taxes;
- (2) the value of perquisites, deferred compensation or any other type of compensation earned in the course of employment or the equivalent value thereof; and
- (3) any amounts which may be deemed uninsurable under the law pursuant to which this Policy shall be construed.

It is understood and agreed that the enforceability of the foregoing coverage shall be governed by such applicable law which most favors coverage for punitive or exemplary damages or the multiple portion of any multiplied damage award.

K. **"Organization"** shall mean the entity named in Item 1 of the Declarations.

L. **"Policy Year"** shall mean the period of one year following the effective date and hour of this Policy or the period of one year following any anniversary date thereof falling within the **Policy Period**; or if the time between the effective date or any anniversary date and the termination of this Policy is less than one year, such lesser period. Any **Discovery Period** or **Automatic Discovery Period** shall be considered part of and not in addition to the last **Policy Year**.

M. **"Policy Period"** shall mean the period from the inception of this Policy to the expiration date stated in Item 2 of the Declarations or its earlier termination, if applicable.

N. **"Property Manager"** shall mean any entity providing real estate property management services to the **Organization** or any **Subsidiary** pursuant to a written contract.

O. **"Related Wrongful Acts"** shall mean **Wrongful Acts** which are causally connected by reason of any common fact, circumstance, situation, transaction, casualty, event or decision.

P. "Subsidiary" shall mean:

- (1) any entity which qualifies as a not-for-profit organization under the Internal Revenue Code, other than a political committee organized pursuant to Section 432 of the Federal Election Campaign Act of 1971 (and amendments thereto), and for which the **Organization** has or controls the right to elect or appoint more than fifty percent (50%) of the Board of Directors or other governing body of such entity as of the inception date of this Policy;
- (2) any similar entity which was created or acquired by the **Organization** after the inception date of this Policy, if the entity's total assets do not exceed thirty-five percent (35%) of the total consolidated assets of the **Organization** as of the inception date of this Policy; or
- (3) any other entity added as a **Subsidiary** by written endorsement to this Policy.

Coverage shall apply to a **Subsidiary** only for **Wrongful Acts** allegedly committed during the time such entity qualified as a **Subsidiary**.

Q. "Wrongful Act" shall mean:

- (1) any of the following by the **Organization**, and/or any **Subsidiary**, and/or any **Insured Persons** acting in their capacity with the **Organization** or a **Subsidiary**:
 - (a) actual or alleged error, misstatement, misleading statement, act or omission, neglect or breach of duty;
 - (b) **Employment Practices Wrongful Act**;
- (2) any matter claimed against any **Insured Persons** solely by reason of their status with the **Organization** or any **Subsidiary**.

Section IV. Exclusions

This Policy does not apply to any **Claim** made against any **Insured**:

- A. brought about or contributed to by: (1) any **Insured** gaining any profit, advantage or remuneration to which they were not legally entitled; or (2) the deliberate fraudulent or criminal acts of any **Insured**; however, this exclusion shall not apply unless it is finally adjudicated such conduct in fact occurred, nor shall it apply to coverage provided under Insuring Agreement I.B.;
- B. to the extent it is insured in whole or in part by any other valid and collectible policy or policies, (except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies), whether such other policy or policies are stated to be primary, contributory, excess, contingent, or otherwise;
- C. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving:
 - (1) any **Wrongful Act** or **Related Wrongful Act** or any fact, circumstance or situation which has been the subject of any notice or **Claim** given under any other policy of which this Policy is a renewal or replacement;
 - (2) any **Wrongful Act** or any circumstance known by any **Insured Person** prior to the date stated in Item 8 of the Declarations which would indicate the probability of such **Claim** being made, provided, however, this exclusion shall only apply to the **Organization**, its **Subsidiaries** and those **Insured Persons** having such knowledge; or

- (3) any civil, criminal, administrative or investigative proceeding involving any **Insured** pending as of or prior to the date stated in Item 8 of the Declarations, or any fact, circumstance or situation underlying or alleged in such proceeding;
- D. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: (1) bodily injury, sickness, disease or death of any person, assault or battery; (2) damage to or destruction of any tangible property or the loss of use of any tangible property; or (3) humiliation, mental anguish, emotional distress, invasion of privacy, wrongful entry, trespassing, eviction, false arrest, false imprisonment, malicious prosecution, abuse of process, libel or slander; provided, however, that part (3) of this exclusion shall not apply to any **Claim** for an **Employment Practices Wrongful Act**;
- E. for any actual or alleged violation by any **Insured** of the Employee Retirement Income Security Act of 1974, the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Occupational Safety and Health Act or any rules or regulations promulgated under these acts or any similar provisions of any federal, state, local or foreign law, except a **Claim** alleging retaliation for the exercise of any rights under such laws;
- F. for any **Wrongful Act** of any **Insured Persons** in their respective capacity as a director, officer, trustee, or equivalent position of an entity other than the **Organization** or any **Subsidiary**;
- G. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged seepage, pollution, radiation, emission, contamination or irritant of any kind, including but not limited to smoke, vapor, dust, fibers, mold, spores, fungi, germs, soot, fumes, acids, alkalis, asbestos, chemicals or waste of any kind, provided, however, this exclusion shall not apply to coverage provided under Insuring Agreement 1.A.;
- H. by, or for the benefit of, or at the behest of the **Organization** or any **Subsidiary** or any entity which controls, is controlled by, or is under common control with the **Organization** or any **Subsidiary**, or any person or entity which succeeds to the interests of the **Organization** or any **Subsidiary**, provided, however, this exclusion shall not apply to any **Claim** brought by the receiver, conservator, liquidator, trustee, rehabilitator, examiner or similar official of the **Organization**, if any, in the event of **Financial Insolvency**;
- I. other than **Costs of Defense**:
- (1) for any obligation of the **Organization** or any **Subsidiary**, as a result of a **Claim**, seeking relief or redress in any form other than money damages, including but not limited to any obligations of the **Organization** or any **Subsidiary** to modify any building or property;
 - (2) for any obligation of the **Organization** or any **Subsidiary** to pay compensation earned by any **Insured Person** in the course of employment, but not paid by the **Organization** or any **Subsidiary**, including any unpaid salary, bonus, wages, severance pay, retirement benefits, vacation days or sick days, provided, however, this exclusion shall not apply to front pay and back pay;
 - (3) for any actual or alleged violation by any **Insured** of the Fair Labor Standards Act or any similar state or local law, provided, however, this exclusion shall not apply to the Equal Pay Act. **Costs of Defense** provided pursuant to this section, I.(3), shall be subject to the FLSA Defense Sublimit of Liability stated in Item 3 of the Declarations, if any; or
 - (4) for any actual or alleged liability of any **Insured** under any contract or agreement, express or implied, written or oral; provided, however this exclusion shall not apply to employment related obligations which would have attached absent such contract or agreement;

- J. for any obligations under a worker's compensation, disability benefits, insurance benefits or unemployment compensation law, or any similar law; provided, however this exclusion shall not apply to a **Claim** for an **Employment Practices Wrongful Act** involving retaliation with regard to benefits paid or payable;
- K. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving:
 - (1) actual, alleged or threatened:
 - (a) inhalation of, ingestion of, contact with, or exposure to any **Fungi** or bacteria; or
 - (b) existence of or presence of any **Fungi** or bacteria on or within a building or structure including its contents, regardless of whether any other cause, event, material, or product contributed concurrently or in any sequence to any injury or damage; or
 - (2) any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating, disposing of, or in any way responding to, or assessing the effects of **Fungi** or bacteria by any **Insured** or by any other person or entity;
- L. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged **Construction Defect(s)**;
- M. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving any actual or alleged liability of an **Insured**, in whole or in part, in the capacity as a builder or developer, or in the capacity of a sponsor of the **Organization**, or of an **Insured** affiliated with such a builder, developer or sponsor, and which is related to actual or alleged misconduct on the part of such builder, developer or sponsor, including but not limited to actual or alleged conflict of interest, self-dealing, or disputes concerning conversion, construction or development;
- N. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged noise.

With respect to this section of the Policy, no fact pertaining to or conduct by any **Insured Person** shall be imputed to any other **Insured Person**; and only facts pertaining to or conduct by any past, present, or future Executive Director, President, or Chairman of the **Organization** shall be imputed to the **Organization** or any **Subsidiary** to determine if coverage is available.

Section V. Limits of Liability and Retention

- A. The **Insurer** shall be liable to pay one hundred percent (100%) of **Loss** in excess of the Retention stated in Item 4 of the Declarations. The **Insurer's** maximum Limit of Liability for the aggregate amount of **Loss** resulting from all **Claims** deemed to have been made in a **Policy Year** shall be shown in Item 3 of the Declarations.
- B. One Retention shall apply to each and every **Claim**. More than one **Claim** involving the same **Wrongful Act** or **Related Wrongful Acts** of one or more **Insureds** shall be considered a single **Claim**, and only one Retention shall be applicable to such single **Claim**. All such **Claims**, constituting a single **Claim**, shall be deemed to have been made on the earlier of the following dates: (1) the earliest date on which any such **Claim** was first made; or (2) the earliest date on which any such **Wrongful Act** or **Related Wrongful Act** was reported under this Policy or any other policy providing similar coverage.

- C. **Costs of Defense** incurred by the **Insurer** shall be in addition to the Limit of Liability, and such **Costs of Defense** shall not be subject to the Retention amount. If **Costs of Defense** are incurred by the **Insured** with the **Insurer's** consent, such **Costs of Defense** shall be considered **Loss** and thus subject to the Limit of Liability and Retention.
- D. With respect to all **Claims** deemed to have been made in a **Policy Year**, should the Limit of Liability be exhausted by payment of **Loss** resulting from one or more such **Claims**, the **Insurer's** duty to defend shall cease and any and all obligations of the **Insurer** hereunder shall be deemed to be completely fulfilled and extinguished and the **Insurer** shall have no further obligations.
- E. For the purpose of applying the Retention, **Loss** applicable to Insuring Agreement I.B. includes that for which indemnification is legally permissible, regardless of whether actual indemnification is granted. The certificate of incorporation, charter or other organizational document of the **Organization**, including by-laws and resolutions, shall be deemed to require indemnification and advancement of **Loss** to the **Insured Persons** to the fullest extent permitted by law.

Section VI. Costs of Defense and Settlements

- A. The **Insureds** shall not incur **Costs of Defense**, or admit liability, offer to settle, or agree to any settlement in connection with any **Claim** without the express written consent of the **Insurer**, which consent shall not be unreasonably withheld. The **Insureds** shall provide the **Insurer** with full cooperation and all information and particulars it may reasonably request in order to reach a decision as to such consent. Any **Loss** resulting from any admission of liability, agreement to settle, or **Costs of Defense** incurred prior to the **Insurer's** consent shall not be covered hereunder.
- B. The **Insurer** has the right to investigate and settle any **Claim** as it deems expedient. If the **Insurer** recommends a settlement and the **Insured** refuses to consent thereto, the **Insurer's** liability for such **Claim** is limited to the amount in excess of the Retention, which the **Insurer** would have contributed had the **Insured** consented to the settlement, the **Costs of Defense** covered by the Policy and incurred prior to the date of such refusal to settle, and fifty percent (50%) of any additional covered **Loss**, including **Costs of Defense**, incurred subsequent to such refusal and subject to the Limit of Liability.

If the **Insured** refuses to consent to a settlement as contemplated above, **Costs of Defense** shall be subject to the Retention.

Section VII. Notice of Claim

- A. The **Insureds** shall, as a condition precedent to their rights under this Policy, give the **Insurer** notice in writing of any **Claim** made during the **Policy Period**. Such notice shall be given as soon as practicable after the date a Board Member or an employee of the **Property Manager** has knowledge of the **Claim**, and in no event later than ninety (90) days after the end of the **Policy Period**.
- B. If during the **Policy Period** or **Discovery Period**, any **Insured** first becomes aware of a specific **Wrongful Act** and gives notice to the **Insurer** of: (1) the specific **Wrongful Act**; (2) the injury or damage which has or may result therefrom; and (3) the circumstances by which the **Insured** first became aware thereof; then any **Claim** arising out of such **Wrongful Act** which is subsequently made against the **Insured** shall be deemed to have been made at the time the **Insurer** received such written notice from the **Insured**.

- C. In addition to furnishing the notice as provided in Section VII A or B, the **Insured** shall, as soon as practicable, provide the **Insurer** with copies of reports, investigations, pleadings and other documents in connection therewith, and shall provide all information, assistance and cooperation which the **Insurer** reasonably requests and do nothing to prejudice the **Insurer's** position or its potential or actual rights of recovery.
- D. Notice to the **Insurer** as provided in Section VII A or B shall be emailed to **ELDClaims@gaic.com** or mailed to **GREAT AMERICAN INSURANCE GROUP, EXECUTIVE LIABILITY DIVISION, CLAIMS DEPARTMENT, P.O. BOX 66943, CHICAGO, IL 60666.**

Section VIII. Coverage Extensions

A. Spousal/Domestic Partner Provision

The coverage provided by this Policy shall also apply to the lawful spouse or "Domestic Partner" of any **Insured Person**, but only for **Claims** arising out of any actual or alleged **Wrongful Acts** of any **Insured Person**. The term "Domestic Partner" shall mean any natural person qualifying as a domestic partner under the provisions of any applicable federal, state or local law.

B. Worldwide Provision

The coverage provided under this Policy shall apply worldwide. The term **Insured Persons** is deemed to include individuals who serve in equivalent positions in foreign **Subsidiaries**.

C. Estates and Legal Representatives

The coverage provided by this Policy shall also apply to the estates, heirs, legal representatives, or assigns of any **Insured Persons** in the event of their death, incapacity or bankruptcy, but only for **Claims** arising out of any actual or alleged **Wrongful Acts** of any **Insured Persons**.

Section IX. General Conditions

A. Cancellation or Non-Renewal

- (1) This Policy may be cancelled by the **Organization** at any time by written notice to the **Insurer**. In the event the **Organization** cancels this Policy for reasons other than the downgrade of the **Insurer's** rating by A.M. Best, the **Insurer** shall retain the customary short rate portion of the premium. However, if the **Organization** cancels the Policy due to a downgrade of the **Insurer's** rating to below [A-] by A.M. Best, the **Insurer** shall refund any unearned premium on a pro rata basis. Payment of any unearned premium by the **Insurer** shall not be a condition precedent of the effectiveness of cancellation but such payment shall be made as soon as practicable.
- (2) This Policy will only be cancelled by the **Insurer** if the **Organization** does not pay the premium when due.
- (3) If the **Insurer** elects not to renew this Policy, the **Insurer** shall provide the **Organization** with at least sixty (60) days advance notice thereof.

B. Proposal Form

It is agreed the particulars and statements contained in Proposal Forms submitted to the **Insurer** (and any material submitted therewith) are the representations of the **Insured** and are to be considered as incorporated in and constituting part of this Policy. It is also agreed this Policy is issued in reliance upon the truth of such representations. However, coverage shall not be excluded as a result of any untrue statement in the Proposal Form, except as to the **Organization**, its **Subsidiaries**, and any **Insured Person** making such untrue statement or having knowledge of its falsity.

In no event shall Insuring Agreement I.A. of this Policy be rescinded by the **Insurer**.

C. Order of Payments

In the event of **Loss** arising from a covered **Claim** for which payment is due under the provisions of this Policy, the **Insurer** shall first, pay **Loss** for which coverage is provided under Insuring Agreement I.A. of this Policy; and thereafter with respect to whatever remaining amount of the Limit of Liability is available after such payment, pay such other **Loss** for which coverage is provided under any other applicable Insuring Agreements in Section I of this Policy.

D. Merger or Acquisition

If, during the **Policy Period**, the **Organization** acquires the assets of another entity, by merger or otherwise, and the acquired assets of such other entity exceed thirty-five percent (35%) of the assets of the **Organization** as of the inception date of the Policy, written notice thereof shall be given to the **Insurer** as soon as practicable, but in no event later than ninety (90) days from the effective date of the transaction, together with such information as the **Insurer** may request. Premium adjustment and coverage revisions shall be effected as may be required by the **Insurer**.

E. Conversion to Run-Off Coverage

If prior to the end of the **Policy Period**, the **Organization** merges into another organization and the **Organization** is not the surviving entity, another organization or person acquires the right to elect or appoint more than fifty percent (50%) of the Board of Directors or other governing body of the **Organization**, or the **Organization** ceases to qualify as a not-for-profit organization under any federal, provincial and territorial legislation and/or the Internal Revenue Code (such events hereinafter referred to as **Transaction**), then:

- (1) the **Organization** must give written notice of such **Transaction** to the **Insurer** within thirty (30) days after the effective date of such **Transaction**, and provide the **Insurer** with such information as the **Insurer** may deem necessary; and
- (2) this Policy, including the **Discovery Period** if elected, shall apply, but only with respect to any **Wrongful Act** committed prior to the effective date of such **Transaction**.

F. Action Against the Insurer

- (1) No action shall be taken against the **Insurer** unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this Policy, and until the **Insured's** obligation to pay shall have been finally determined by an adjudication against the **Insured** or by written agreement of the **Insured**, those filing the claim, and the **Insurer**.
- (2) No person or organization shall have any right under this Policy to join the **Insurer** as a party to any **Claim** against any **Insured** nor shall the **Insurer** be impleaded by any **Insured** or their legal representative in any such **Claim**.

G. Subrogation

In the event of payment under this Policy, the **Insurer** shall be subrogated to all the **Insureds'** rights of recovery. The **Insureds** shall do everything necessary to secure such rights, including the execution of such documents necessary to enable the **Insurer** to effectively bring suit in the name of any **Insured**. In no event, however, shall the **Insurer** exercise its rights to subrogation against an **Insured Person** under this Policy unless, such **Insured Person**:

- (1) has been convicted of a deliberate criminal act, or
- (2) has been determined by a final adjudication adverse to the **Insured Person** to have committed a deliberate fraudulent act, or to have obtained any profit, advantage or remuneration to which such **Insured Person** was not legally entitled.

In the event the **Insurer** shall for any reason pay indemnifiable **Loss** on behalf of an **Insured Person**, the **Insurer** shall have the contractual right hereunder to recover from the **Organization** or any **Subsidiary** the amount of such **Loss** equal to the amount of the Retention not satisfied by the **Organization** or any **Subsidiary** and shall be subrogated to rights of the **Insured Persons** hereunder.

H. Conformity to Law

Any terms of this Policy which are in conflict with the terms of any applicable laws are hereby amended to conform to such laws.

I. Assignment

Assignment of interest under this Policy shall not bind the **Insurer** until its consent is endorsed hereon.

J. Representative of the Insurer

Great American Insurance Group, Executive Liability Division, Post Office Box 66943, Chicago, Illinois, 60666 shall act on behalf of the **Insurer** for all purposes including, but not limited to, the giving and receiving of all notices and correspondence.

K. Organization Represents Insured

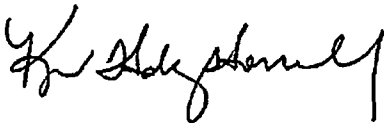
By acceptance of this Policy, the **Organization** shall be designated to act on behalf of the **Insureds** for all purposes including, but not limited to, giving and receiving of all notices and correspondence, the cancellation or non-renewal of this Policy, the payment of premiums, and the receipt of any return premiums that may be due under this Policy.

L. Entire Agreement

By acceptance of this Policy, the **Insured** and the **Insurer** agree that this Policy (including the Proposal Forms submitted to the **Insurer** and any materials submitted therewith) and any written endorsements attached hereto constitute the entire agreement between the parties.

In witness whereof the **Insurer** has caused this Policy to be signed by its President and Secretary and countersigned, if required, on the Declarations page by a duly authorized agent of the **Insurer**.

GREAT AMERICAN INSURANCE COMPANY®



Secretary



President



ExecProsm
DECLARATIONS
for
**Community Association
Solution
Insurance Policy**

Insurance is afforded by the company indicated below: (Each a capital stock corporation)

☒ Great American Insurance Company
Policy Number: **EPP3654704-00**

Policy Form Number: **D26100 (2/10)**

- Item 1. Name of Organization: **Tilghman Beach & Racquet Club HOA Inc.**
Mailing Address: **11822 HIGHWAY 17 BYP**

City, State, Zip Code: **MURRELLS INLET, SC, 29576-9337**
- Item 2. Policy Period: From **02-10-2015** To **02-10-2016**
(Month, Day, Year) (Month, Day, Year)
(Both dates at 12:01 a.m. Standard Time at the address of the Organization as stated in Item 1.)
- Item 3. (a) Limit of Liability for each Policy Year: **\$1,000,000**
(b) FLSA Defense Sublimit of Liability: **\$150,000** – This limit is part of and not in addition to the Limit of Liability provided for in 3(a).
- Item 4. Retentions:
Insuring Agreement A: **\$0** Each Claim
Insuring Agreement B and/or C: **\$1,000** Each Claim
- Item 5. Premium: **\$2,559.00** Annual Taxes/Surcharges: **\$0.00** Annual Fees: **\$0.00**
- Item 6. Endorsements Attached:
ExecPro - Community Association Solution D 26100 (2/10)
Terrorism Coverage Endorsement DTCV_09P (11/09)
Terrorism Coverage Premium Disclosure DTDP_09P (11/09)
Deletion of Noise Exclusion D 26714-2 (11/12)
Terrorism Coverage Policyholder Disclosure NTDN_08P (1/08)
Data Security Wrongful Acts and Privacy Wrongful Acts Coverage Endorsement D26740 (10/14)
- Item 7. Notices: All notices required to be given to the Insurer under this policy shall be addressed to:
Great American Insurance Companies
Executive Liability Division
P.O. Box 66943
Chicago, Illinois 60666
- Item 8. Prior & Pending Litigation Date: **02-10-2015**

These Declarations along with the completed and signed Proposal Form and community Associations Solution Insurance Policy shall constitute the contract between the Insureds and the Insurer.

THIS IS A CLAIMS MADE POLICY. READ IT CAREFULLY.

COVERAGE FOR ACTS OF TERRORISM

It is understood and agreed that the General Conditions of the Policy are amended by the addition of the following:

Act of Terrorism Coverage

Subject to all other terms and conditions of this Policy, coverage is available for Loss caused by an Act of Terrorism as defined below.

"Act of Terrorism" means any act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States -

- (i) to be an act of terrorism;
- (ii) to be a violent act or an act that is dangerous to -
 - (a) human life;
 - (b) property; or
 - (c) infrastructure;
- (iii) to have resulted in damage within the United States, or outside of the United States in the case of -
 - (a) an air carrier or vessel described in Section (5)(B) of the Terrorism Risk Insurance Act; or
 - (b) the premises of a United States mission; and
- (iv) to have been committed by an individual or individuals, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

With respect to any one or more Acts of Terrorism under the Terrorism Risk Insurance Act, as amended in 2007, we will not pay any amounts for which we are not responsible under the terms of that Act (including subsequent action of Congress pursuant to the Act) due to the application of any clause which results in a cap on our liability for payments for terrorism losses.

No act shall be certified by the Secretary as an Act of Terrorism if (i) the act is committed as part of the course of a war declared by the Congress, except that this clause shall not apply with respect to any coverage for workers compensation; or (ii) property and casualty insurance losses resulting from the act, in the aggregate, do not exceed \$5,000,000.

Other than as stated above, nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the Policy to which this endorsement is attached.

Insured: **Tilghman Beach & Racquet Club HOA Inc.**

Policy Period **02-10-2015 - 02-10-2016**

Policy Number: **EPP3654704-00**

Countersigned by: **Not Required**
Authorized Representative

Endorsement Effective Date: **02-10-2015**



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AMENDMENT TO DECLARATIONS PAGE

It is understood and agreed that the Declarations is amended by the addition of the following:

Act of Terrorism Premium: \$0.00

It is further understood and agreed the Policyholder Disclosure of Terrorism Coverage is attached to and is to be considered as incorporated and constituting a part of this Policy.

Other than as stated above, nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the Policy to which this endorsement is attached.

Insured: **Tilghman Beach & Racquet Club HOA Inc.**

Policy Period **02-10-2015 - 02-10-2016**

Policy Number: **EPP3654704-00**

Countersigned by: **Not Required**
Authorized Representative

Endorsement Effective Date: **02-10-2015**



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DELETION OF NOISE EXCLUSION

It is understood and agreed that Section IV.N. of the policy is deleted in its entirety.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.

Insured:

Policy Period

Policy Number:

Countersigned by:

Endorsement Effective Date:

Authorized Representative



POLICYHOLDER DISCLOSURE OF TERRORISM COVERAGE

The Terrorism Risk Insurance Act establishes a program within the Department of the Treasury, under which the federal government shares, with the insurance industry, the risk of loss from future terrorist attacks. The Act applies when the Secretary of the Treasury certifies that an event meets the definition of an Act of Terrorism. The Act provides that, to be certified, an Act of Terrorism must cause losses of at least five million dollars and must have been committed by an individual or individuals as part of an effort to coerce the government or population of the United States.

The United States Government, Department of the Treasury, will pay a share of terrorism losses insured under the federal program. The federal share equals 85% of that portion of the amount of such insured losses that exceeds the applicable insurer retention.

The Terrorism Risk Insurance Act, as amended in 2007, contains a \$100 billion cap that limits U.S. Government reimbursement as well as insurers' liability for losses resulting from certified acts of terrorism when the amount of such losses in any one calendar year exceeds \$100 billion. If the aggregate insured losses for all insurers exceed \$100 billion, your coverage may be reduced.

In accordance with the Terrorism Risk Insurance Act, we are required to offer you coverage for losses resulting from an act of terrorism that is **certified under the federal program** as an Act of Terrorism. All other provisions of this policy will still apply to such an act. That is, a loss will not be excluded or covered just because it was caused by an Act of Terrorism.

The portion of the annual premium that is attributable to coverage for Acts of Terrorism that are certified under the Terrorism Risk Insurance Act is \$0.00.

All other terms and conditions of the policy remain unchanged.

If you would like to reject the coverage for "certified" Acts of Terrorism, please provide Great American written confirmation of such, and an exclusion will be attached to your policy.



Community Association Solution
Insurance Policy

**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

Solely for purposes of coverage provided by this endorsement, it is understood and agreed that the following changes are made to the Policy:

THIRD PARTY COVERAGE

Section I. is deleted and replaced with the following:

Section I. Insuring Agreements

- A. If during the Policy Period or the Discovery Period any Claim, including a Regulatory Action, is first made against any Insured Persons for a Data Security Wrongful Act or a Privacy Wrongful Act, the Insurer shall pay on behalf of the Insured Persons, Loss and Costs of Defense resulting from such Claim, except for any Loss and Costs of Defense which the Organization or any Subsidiary actually pays as indemnification.
- B. If during the Policy Period or the Discovery Period any Claim, including a Regulatory Action, is first made against any Insured Persons for a Data Security Wrongful Act or a Privacy Wrongful Act the Insurer shall pay on behalf of the Organization, Subsidiary or Property Manager, Loss and Costs of Defense resulting from such Claim, but only to the extent the Organization or any Subsidiary is required or permitted by law to indemnify the Insured Persons.
- C. If during the Policy Period or the Discovery Period any Claim, including a Regulatory Action, is first made against the Organization, Subsidiary or Property Manager for a Data Security Wrongful Act or a Privacy Wrongful Act, the Insurer shall pay on behalf of the Organization or any Subsidiary, Loss and Costs of Defense resulting from such Claim.

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

FIRST PARTY COVERAGE FOR ORGANIZATION AND SUBSIDIARIES

Section VIII. is amended by the addition of the following:

D. Privacy Event Expenses Provision

The Insurer shall reimburse or pay on behalf of the Organization or any Subsidiary all Privacy Event Expenses in excess of the applicable Retention stated in Item 4. of the Declarations and up to the applicable Limits of Liability stated in Item 3. of the Declarations that the Organization or any Subsidiary incurs as a direct result of a Data Breach provided:

Insured: Tilghman Beach & Racquet Club HOA Inc.

Policy Period: 02-10-2015 - 02-10-2016

Policy Number: EPP3654704-00

Countersigned by: _____
Authorized Representative

Endorsement Effective Date: 02-10-2015



Community Association Solution
Insurance Policy

**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

- (1) such **Data Breach** is first discovered during the **Policy Period**;
- (2) prior to the inception date of the first policy issued by the **Insurer** to the **Organization** and continuously renewed, no **Insured** had a basis to believe that any such **Data Breach** might reasonably be expected;
- (3) the **Insured** reports such **Data Breach** in accordance with the Reporting Obligations for a **Data Breach** section below; and
- (4) the **Insured** obtains the **Insurer's** advance written consent to incur such **Privacy Event Expenses**.

AMENDMENT TO DEFINITIONS

1. Section III.A. is amended by the addition of the following:

Claim shall also mean a **Regulatory Action**.

2. Section III.J. is amended by the addition of the following:

Loss shall also mean **Privacy Regulatory Fines and Penalties**, **Privacy Event Expenses** and **Regulatory Restitution Funds**.

3. Section III. is amended by the addition of the following:

"Computer Systems" shall mean any computer, network of computers, mobile device, or internet-enabled or networked telephone, printer, copier or other device, if owned, leased or operated by or on behalf of the **Organization** or any **Subsidiary** in connection with the **Insured's** ordinary business activities, including if operated by a cloud computer provider on behalf of the **Organization** or any **Subsidiary**.

"Data Asset" shall mean software and electronic data, including but not limited to databases, audio files, video files or other image files, maintained by or on behalf of the **Organization** or any **Subsidiary** in connection with the **Organization** or any **Subsidiary's** business operations.

"Data Breach" shall mean the unauthorized access to, loss of control over or disclosure of **Protected Information** maintained by the **Insured** or by those acting on behalf of the **Insured**.

"Data Security Wrongful Act" shall mean an actual or alleged negligent act, error or omission by or on behalf of the **Insured** in the performance of the **Organization** or any **Subsidiary's** business that causes or fails to prevent:



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- (1) the theft of, or unauthorized access to, or disclosure or use of, the **Data Asset** of a client or customer of the **Organization** or any **Subsidiary** stored on the **Computer Systems**;
- (2) unauthorized access to or use of the **Computer Systems** that results in the alteration, corruption, destruction, deletion or damage to **Data Asset** of a client or customer of the **Organization** or any **Subsidiary** stored on the **Computer Systems**;
- (3) the transmission of any virus, worm, trojan horse, backdoor or similar malicious software program or code from the **Computer Systems** to a third party's computer systems;
- (4) unauthorized access to or use of the **Computer Systems** that results in damage or disruption to computer systems of any third party or any **Data Asset** on such third party computer systems, including through a denial-of-service attack or similar action by an unauthorized person; or
- (5) a denial-of-service attack or similar action by any unauthorized person that makes the **Computer Systems** unavailable to authorized clients or customers of the **Organization** or any **Subsidiary**.

"Privacy Event Expenses" shall mean the reasonable and necessary:

- (1) legal and forensic fees and costs to investigate the cause of the **Data Breach**, identify persons affected or potentially affected and determine the extent that any law, regulation, statute or contract requires notification of the **Data Breach**;
- (2) costs of notification of the **Data Breach**, if required by law, regulation, statute or contract or voluntarily incurred with the **Insurer's** prior written consent; and
- (3) costs to monitor, freeze or thaw credit or provide credit restoration services for persons affected by the **Data Breach**.

"Privacy Wrongful Act" shall mean an actual or alleged negligent act, error or omission by or on behalf of the **Insured** in the performance of the **Organization** or any **Subsidiary's** business that causes or fails to prevent:

- (1) the theft of, or unauthorized access to, or disclosure or use of, **Protected Information** held or maintained by or on behalf of the **Organization** or any **Subsidiary**, including by a cloud service provider or other vendor for the **Organization** or any **Subsidiary**, if such theft, access, disclosure or use:
 - a) results in identity theft or other misuse of such **Protected Information**;
 - or



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- b) violates any federal, state, local or foreign law or regulation, or the **Organization** or any **Subsidiary's** published policies, regarding the maintenance, protection, use or disclosure of **Protected Information**;
- (2) violation of any federal, state, local or foreign law or regulation, or any publicly stated policy of the **Organization** or any **Subsidiary**, relating to **Protected Information** that:
 - a) prohibits or restricts the **Insured's** collection, sharing or selling of **Protected Information**; or
 - b) requires the **Insured** to provide access to **Protected Information** or upon request, correct incomplete or inaccurate **Protected Information**; or
- (3) any fraudulent website or electronic communication, including a phishing email, from impersonating the **Insured** and causing financial loss to any customer or client of the **Organization** or any **Subsidiary**.

"Privacy Regulatory Fines and Penalties" shall mean the sums the **Organization** or any **Subsidiary** is required to pay as part of the settlement or judgment of a covered **Regulatory Action**.

"Protected Information" shall mean:

- (1) any non-public personally identifiable information, including financial, medical or health care information, held or maintained by or on behalf of the **Insured** in connection with the **Organization's** or any **Subsidiary's** business operations, whether in electronic form or otherwise, which is protected from unauthorized access or disclosure by any federal, state, local or foreign law or regulation or by any publicly stated policy of the **Insured**; and
- (2) confidential, non-public business information of a third party that is in the care or custody of the **Organization** or any **Subsidiary** pursuant to a confidentiality agreement between the **Organization** or any **Subsidiary** and such third party.

"Regulatory Action" shall mean a written request for information, civil investigation or administrative proceeding or civil proceeding brought by any local, state, federal or regulatory agency for any **Privacy Wrongful Act** in connection with a **Data Breach**. However, **Regulatory Action** shall not include any written request, investigation or proceeding brought by or on behalf of the Securities and Exchange Commission.



DATA SECURITY WRONGFUL ACTS AND PRIVACY WRONGFUL ACTS COVERAGE ENDORSEMENT

"Regulatory Restitution Fund" shall mean any sums deposited into a fund and used to provide compensation to individuals affected by a **Privacy Wrongful Act** as part of the settlement or judgment of a **Regulatory Action**.

4. Section III.Q. is amended by the addition of the following:

Wrongful Act shall also mean a **Data Security Wrongful Act** and a **Privacy Wrongful Act**.

AMENDMENT TO EXCLUSIONS

1. Section IV.B. is deleted and replaced with the following:

B. to the extent it is insured in whole or in part by any other valid and collectible policy or policies, (except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies), whether such other policy or policies are stated to be primary, contributory, excess, contingent, or otherwise; provided, however, that coverage for all **Data Breaches** and **Claims for Personal Injury Wrongful Acts, Data Security Wrongful Acts** and/or **Privacy Wrongful Acts** shall be specifically excess of any similar coverage provided pursuant to terms and conditions of any general liability policy, business owner policy or cyber liability policy issued to the **Organization** or any **Subsidiary**.

2. Section IV.D. is deleted and replaced with the following:

D. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: (1) bodily injury, sickness, disease or death of any person, assault or battery; (2) damage to or destruction of any tangible property; or (3) humiliation, mental anguish, or emotional distress; provided, however, that part (3) of this exclusion shall not apply to any **Claim** for a **Privacy Wrongful Act**;

3. The **Insurer** shall not be liable for **Loss, Costs of Defense** or any other payment for any **Claim** made against any **Insured** or any **Data Breach** based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged:



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- (1) mechanical or electrical failure or outage, routine wear and tear, or a disruption or failure of any infrastructure service or utility supplied by a third-party, including but not limited to power, water, gas, communications or connectivity; provided, however, this exclusion shall not apply to a **Claim for a Privacy Wrongful Act**;
- (2) fire, smoke, explosion, lightning, wind, flood, earthquake, volcanic eruption, tidal wave, landslide, hail or act of God or any other physical event, however caused;
- (3) price-fixing, restraint of trade or monopolization;
- (4) violation of any federal, provincial, state, local or foreign statute or regulation prohibiting or restricting unsolicited communications, regardless of whether such communication was transmitted via facsimile, email, text, telephone or otherwise, including but not limited to the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, the Canadian Anti-Spam Law (CASL) and the Telephone Consumer Protection Act (TCPA);
- (5) misappropriation, infringement or theft, or inducement of misappropriation, infringement or theft of trade secrets;
- (6) war including undeclared or civil war, or seizure, confiscation, expropriation, nationalization, or destruction of a **Computer System** by order of any governmental authority;
- (7) potential violation of any federal, state, foreign or local law or regulation and investigated or pursued by a federal, state, foreign or local regulatory agency or other governmental body, provided, however, this exclusion shall not apply to a **Regulatory Action**;
- (8) act, error, omission or circumstance, which was known by the President, Executive Director, Chairman of the Board, Chief Information Officer, Chief Technology Officer, Chief Security Officer, Risk Manager, General Counsel (or the functional equivalent of any of the foregoing) prior to the inception date of the first policy issued by the **Insurer** to the **Organization** and continuously renewed and which could have been reasonably foreseen to be the basis for a **Claim** or **Data Breach**, including, but not limited to, knowledge of security weaknesses, or vulnerabilities in software, hardware or firmware; or
- (9) breach of any express or implied contract, agreement, warranty or guarantee, including, but not limited to, any express or implied contract or agreement to pay royalties or to account for same; provided, however, this exclusion shall not apply to:



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- a) any liability that an **Insured** would have incurred in the absence of such contract, agreement, warranty or guarantee; or
 - b) a **Privacy Wrongful Act** when the actual or alleged breach of contract or agreement is to secure or maintain **Protected Information**.
4. The **Insurer** shall not be liable for **Loss, Costs of Defense** or any other payment for any **Claim** made against any **Insured** or any **Data Breach** for:
- (1) any fees or costs to update or improve a **Data Asset** to a level beyond that which existed prior to any **Data Breach** or **Data Security Wrongful Act**;
 - (2) any fees or costs to correct or remediate software program errors or vulnerabilities or deficiencies or problems with any **Computer System** not directly resulting from a **Data Security Wrongful Act**;
 - (3) any amounts incurred by any **Insured** prior to the date a **Claim** is reported to the **Insurer** pursuant to Section VII. or a **Data Breach** is reported pursuant to the Reporting Obligations set below;
 - (4) any overhead expenses of the **Organization** or any **Subsidiary**, including but not limited to compensation or benefits; or
 - (5) the economic or market value of any **Data Asset**.

AMENDMENTS TO LIMITS OF LIABILITY AND RETENTIONS

1. Item 3. of the Declarations is amended by the addition of the following:
- (c) **\$50,000** Sublimit of Liability for all **Privacy Event Expenses** from all **Data Breaches**. This Sublimit is part of and not in addition to the Limit of Liability provided for in 3(a).
 - (d) **\$250,000** Limit of Liability for all **Loss** from all **Claims**, including **Regulatory Actions**, for **Data Security Wrongful Acts** or **Privacy Wrongful Acts**. This limit is part of and not in addition to the Limit of Liability provided for in 3(a).



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2. Item 4. of the Declarations is deleted and replaced with the following:

Item 4. Retentions

Insuring Agreement A:	\$ <u>0</u>	Each Claim for Privacy Wrongful Acts
Insuring Agreement B and/or C:	<u>\$1,000</u>	Each Claim for Privacy Wrongful Acts
	<u>\$1,000</u>	Each Reimbursement for Privacy Event Expenses pursuant to Section VIII.D. of the Policy

3. Section V. of the Policy is amended by the addition of the following:

The "Each Reimbursement for Privacy Event Expenses" Retention amount stated in Item 4. of the Declarations is the **Organization's** obligation for all **Privacy Event Expenses** from each **Data Breach**.

The "Each Claim for Data Security Wrongful Acts or Privacy Wrongful Acts" Retention stated in Item 4. of the Declarations is the **Organization's** obligation for each **Claim**, including any **Regulatory Action**. If a **Claim** and **Privacy Event Expenses** arise out of the same **Privacy Wrongful Act** or **Data Breach**, any amounts paid by the **Organization** in satisfaction of the "Each Reimbursement Privacy Event Expenses" Retention will also erode the "Each **Claim** for Data Security Wrongful Acts or Privacy Wrongful Acts" Retention with respect to such **Claim**.

4. Section V.C. is deleted and replaced with the following:

C. Costs of Defense incurred by either the **Insurer** or **Insured** shall be subject to applicable Retention and the Limit of Liability for all **Claims**, including **Regulatory Actions**, for **Data Security Wrongful Acts** or **Privacy Wrongful Acts**.

REPORTING OBLIGATIONS FOR A DATA BREACH

After a **Data Breach** is first discovered by an **Insured**, the **Insured** shall, as a condition precedent to coverage pursuant to this endorsement:

- (a) notify the **Insurer** of the **Data Breach** as soon as practicable but in no event later than thirty (30) days after the **Data Breach** is first discovered;



Community Association Solution
Insurance Policy

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**DATA SECURITY WRONGFUL ACTS AND PRIVACY
WRONGFUL ACTS COVERAGE ENDORSEMENT**

- (b) take reasonable measures to stop or mitigate the damage caused by such **Data Breach**;
- (c) give the **Insurer**, upon request, a detailed proof of the damage caused by such **Data Breach**;
- (d) submit, upon request of the **Insurer**, to examination under oath and give the **Insurer** a signed statement of the **Insured's** answers; and
- (e) cooperate with the **Insurer** in the investigation and settlement of any payments as a result of the **Data Breach**.

For the purposes of coverage extended by this endorsement, a **Data Breach** is "first discovered" when any **Insured** first becomes aware of facts that would cause a reasonable person to assume a **Privacy Wrongful Act** has occurred even though the exact amount or details of loss may not then be known.

Notice of the **Data Breach** shall be given to the **Insurer** at the address indicated in Section VII.D. of the Policy.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.



DISTINGUISHED
PROGRAMS



Community Association Program Quote form D&O Liability Coverage ("Claims Made" Basis)

	Yes	No	N/A
Have there been any D&O claims made against the Association in the last 5 years?		X	
Is this the first time the Association has purchased D&O Insurance?		X	
Has the Association's current D&O policy been cancelled or non-renewed by the carrier?		X	
Does the Association anticipate any major building/renovations in the next year?		X	
Is the Developer on the Board?		X	

Association Name:	Tilghman Beach & Racquet Club HOA Inc.		
Street Address:	208 North Ocean Blvd	City/State/Zip:	North Myrtle Beach, SC 29582
How is association managed?	Third Party Management Co		
Property Manager Name:	KA Diehl		
Mailing Address:	11822 HIGHWAY 17 BYP	City/State/Zip:	MURRELLS INLET, SC 29576-9337

Association Type:	Residential Condominium Association (COA)	Number of Employees:	0
Total Unit Count:	213	Commercial Units:	
Residential Units:	213	Units at Completion:	
Average Unit Value:	\$220,000	Owners in Arrears:	0
Limit:	\$1,000,000	Retention:	\$1,000
Developer Controlled Board?:	No	Retail Units:	0
Management Type:	Third Party Management Co	Units Sold:	213
PPL Date:	02/10/2015		

Total Assets:	Total Salaries:

Agent or Broker Name:	Global Risk Partners, LLC	Phone:	(609) 641-6677
Broker Address:	1622 Tilton Rd	City/State/Zip:	Northfield, NJ 08225

KNOWN PRIOR CLAIMS: IT IS UNDERSTOOD AND AGREED THAT THIS POLICY DOES NOT APPLY TO ANY CLAIM MADE AGAINST ANY INSURED BASED UPON, ARISING OUT OF, RELATING TO, DIRECTLY OR INDIRECTLY RESULTING FROM OR IN CONSEQUENCE OF, OR IN ANY WAY INVOLVING ANY WRONGFUL ACT OR ANY FACT, MATTER, CIRCUMSTANCE, SITUATION, TRANSACTION, CASUALTY, EVENT OR DECISION, KNOWN BY ANY INSURED PRIOR TO THE INITIAL COVERAGE DATE WHICH WOULD INDICATE THE PROBABILITY OF SUCH CLAIM BEING MADE. IT IS UNDERSTOOD AND AGREED THAT COVERAGE SHALL NOT BE EXCLUDED AS A RESULT OF ANY UNTRUE STATEMENT ON THIS APPLICATION, EXCEPT AS TO THE ORGANIZATION, ITS SUBSIDIARIES AND THOSE INSURED PERSONS HAVING SUCH KNOWLEDGE. PLEASE OBTAIN A COPY OF THE POLICY THROUGH YOUR BROKER AND READ IT CAREFULLY.

"By selecting 'Yes', I agree with the above notice.": ☒ Yes

FRAUD WARNING: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD AN INSURANCE COMPANY OR OTHER PERSON FILES THIS QUESTIONNAIRE CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME AND WHICH MAY RESULT IN CIVIL OR CRIMINAL FINES OR PENALTIES.

"By selecting 'Yes', I agree with the above notice.": ☒ Yes

Distinguished Programs Group
1180 Ave. of the Americas
New York, NY 10036

Fax: 917-438-6610
Ed. 12/2011

E-mail: info@distinguished.com
Phone: 888-355-4626

STATE OF ILLINOIS)
)
 COUNTY OF COOK)

AFFIDAVIT OF KATHLEEN VAN DEVEN

PERSONALLY appeared before me, Kathleen Van Deven, who deposes and states that the following is based upon her own personal knowledge, except those matters stated upon information and belief, and as to those matters, she believes them to be true.

1. I am a lawyer licensed to practice law in the State of Illinois. Since July 2001, I have worked in the claim department of the Executive Liability Division of Great American Insurance Company ("Great American"). Part of my responsibilities includes handling regulatory compliance issues and **Claims** noticed under Great American policies.

2. I have been assigned to handle the case of *Jill Keck Humphries, et al. v. Tilghman Beach & Racquet Club Condominium Association, Inc., et al. v. Great American Insurance Company*, since the time that Great American was served with the third-party complaint in this matter on May 9, 2017.

3. In the course of handling a **Claim**, it is customary for me to investigate whether an insured may be covered by other policies issued by other insurers. I routinely inquire of the insured's insurance broker as to what other policies exist, and if there is other coverage available, I obtain copies of the policies and maintain them as part of my file.

4. During my investigation of the *Humphries Claim*, I have learned that Tilghman Beach & Racquet Club Home Owners Association is covered by policies of commercial general liability insurance issued by Lexington Insurance Company (a subsidiary of AIG) (Policy Numbers 41-LX-067045193-0 and 41-LX-067045193-1, effective from February 10, 2015 to February 10, 2017), and that Lexington has agreed to defend the Defendants in the *Humphries*

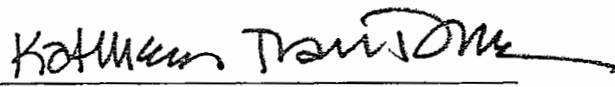
Claim under a reservation of rights. I was provided with the attached reservation of rights letter dated September 6, 2017. *See* Exhibit 1, attached hereto and incorporated herein by reference.

5. Recently, I have communicated with James Hornecker, the claims handler for Lexington/AIG with respect to the *Humphries Claim*, and he confirmed that Lexington/AIG has agreed to pay defense counsel's reasonable fees and expenses. *See* Exhibit 2. I understand that Mr. Hornecker lives and works in Ohio.

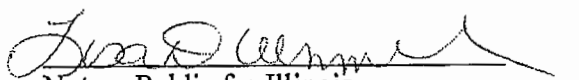
6. I am informed and believe that the documents attached hereto as Exhibits 3 and 4 are true and accurate copies of the applicable Lexington/AIG policies.

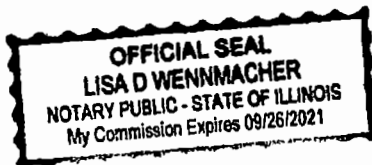
7. I have also learned that Tilghman Beach & Racquet Club Home Owners Association may also be covered for the *Humphries Claim* under a policy of commercial general liability insurance issued by Philadelphia Insurance Company (Policy number PHPK529023) for policy periods spanning from February 10, 2010 to February 10, 2015, although I do not presently have copies of those policies.

FURTHER AFFIANT SAYETH NAUGHT.


Kathleen Van Deven

SWORN to before me this 14th
day of February 2018.


Notary Public for Illinois
My Commission Expires: 9/26/2021



Ms. Karen Jones
Global Risk Partners
4000 South Faber Place Drive, Suite 300
North Charleston, SC 29405



York Risk Services Group, Inc.
Mailing address: PO Box 183188
Columbus, OH 43218-3188

Tel: (973) 404-1289
Fax: (973) 404-9052
James.Hornecker@yorkrsg.com

September 6, 2017

CERTIFIED MAIL – RETURN RECEIPT REQUESTED #7016 3010 0000 4064 1230

Ms. Vickie Gallagher
Tilghman Beach & Racquet Club c/o KA Diehl
11822 Hwy 17 Bypass South
Murrells Inlet, SC 29576

RE: Insured: Tilghman Beach & Racquet Club Home Owners Association
Policy No's.: 41-LX-067045193-0 (Eff. 2/10/15-2/10/16)
41-LX-067045193-1 (Eff. 2/10/16—2/10/17)
York File #: LXCC-3084A1
AIG File No: 6104672568US
Lawsuit Caption:

Jill Keck Humphries, Dennis L. Johnson, Delona Penny Rice, and Whitmel L. Brown, Individually and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XII of the Tilghman Beach and Racquet Club Horizontal Property Regime; Gary Steven Robinson and Elizabeth Erin Humphries; Dennis L. Johnson, Jr. and Nancy H. Johnson, plaintiffs

vs.

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

In the State of South Carolina, County of Horry, Court of Common Pleas | Docket No.: 2016-CP-264464

Dear Ms. Gallagher:

Lexington Insurance Company ("Lexington") issued commercial general liability insurance policy numbers 41-LX-067045193-0 and 41-LX-067045193-1 with effective dates of February 10, 2015 to February 10, 2017 ("The Policies") to Tilghman Beach & Racquet Club Home Owners Association ("Tilghman"). York Risk Services Group, Inc. ("York") is the third-party claims administrator assigned to handle liability claims asserted against Tilghman under the Lexington policies.

We acknowledge receipt of a claim asserted by unit owners of the Home Owners Association ("the Plaintiffs") against Tilghman and several former members of the association board claiming the buildings of the association were not properly maintained and repaired. For the reasons set forth below, we will defend the litigation against the defendants under a reservation of Lexington's rights under the policies.

RX1980

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In consideration of your request for coverage, we carefully reviewed the aforementioned policies and no other policy was considered. If you assert a right to coverage under another policy issued by another carrier for AIG Property Casualty Inc., please submit notice pursuant to the notice provisions contained in that policy. You should notify the carrier(s) immediately if you have any other insurance policies which may be applicable to this claim.

The Suit

The Plaintiffs own condominium units in the Tilghman Beach and Racquet Club ("TBRC"), which was established in 1982. TBRC consists of 213 units in twelve buildings, certified for occupancy in 1982 and 1983.

The Plaintiffs are seeking damages from the Tilghman Beach and Racquet Club Homeowners Association ("HOA") for financial loss and property damage to common elements, limited common elements and unit owner property.

Prior to 2010

The Plaintiffs allege the HOA and its Property Manager failed to conduct proper and timely inspections and repairs to portions of the property they were obligated to inspect and maintain, pursuant to the HOA's obligations set forth in the TBRC Master Deed and By-Laws. The Plaintiffs allege the cost to maintain and/or repair property was greater than it should have been, had it been done in a timely manner.

Since 2010, the following consultants were engaged for the purpose of evaluating and/or developing various repair and reconstruction plans to cure deficient and defective conditions:

- Kyzer & Timmerman Engineers ("Kyzer"),
- Criterium-Giles Engineers ("Criterium"),
- Martinez & Associates Structural Engineers ("Martinez"),
- SGA Architecture ("SGA"),
- Procon & Associates ("Procon"),
- Spann Roofing & Sheet Metal ("Spann"),
- ABS ("ABS"),
- Keystone R&C ("Keystone"),
- Sutton-Kennerly and Associates ("Sutton"),
- Maxey P Nolan ("Nolan"),
- A&I Construction ("A&I"),
- Shoreline/Stewart Construction ("Shoreline"), and
- Reserve Advisers ("Reserve").

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

Structural items needing repair were identified as balconies, exterior staircases, pilings, soffits and framing (including floor joists, cantilever beams spandrel beams, band boards, post anchorage connections, post to top rail connections), etc.

Building envelope issues identified include: moisture penetration (behind exterior siding trim and flashing, windows and sliding glass doors and roof) behind exterior siding trim and flashing; delaminated

exterior siding, trim and flashing; delaminated stucco, rotting fascia boards, etc).

Interior issues identified include: damaged sheetrock, interior paint, microbial growth, floor coverings, carpet/padding, etc.

Roofing remediation issues include: missing shingles, distressed flashing, rotting fascia, skylight leaks, missing hurricane ties, eaves and soffits.

The consultants determined that the above issues and repair items "did not just develop within the past few years."

In June of 2015, the Board hired Saul Martinez, PE ("Martinez") to assess the current condition of structural systems and the exterior envelope of the twelve buildings. Martinez' findings were summarized in a Building Summary and Field Itemization Table for each building.

In January of 2016, the Board hired Steve Coggins, AIA of SGA to prepare a comprehensive capital improvement plan to complete all necessary repairs and restoration work regarding the documented defective conditions in Buildings I, II, IV, V, VI, VII, VIII, IX, X, XI and XII. This repair plan exceeded \$6,000,000.

Notwithstanding the recommendations of Martinez and Coggins, the HOA failed to undertake necessary repairs to eliminate major structural and water intrusion issues, to protect the Common Elements and Limited Common Elements from future damage or even to assess the Co-Owners for necessary repair costs.

The Plaintiffs allege the Defendants are legally liable for damages because of:

- First Cause of Action – Negligence/Gross Negligence
- Second Cause of Action – Breach of the Master Deed's Covenants and Restrictions

The Plaintiffs also seek a Declaratory Judgment (Third Cause of Action), regarding Plaintiff's rights relating to future maintenance, repair and replacement of the defective and deficient General Common Elements, as well as Injunctive Relief (Fourth Cause of Action) in the form of a court order, requiring maintenance, repair and replacement of identified defects and deficiencies with the Common Elements and Limited Common Elements.

The Insurance Policies

We discuss below certain provisions of the Lexington policies. Our discussion involves only a partial recitation of the terms, conditions, limitations and exclusions contained in the policies. It is not intended to supplement, amend, supersede or otherwise alter the policies. Lexington does not intend to waive any provisions of the policies by virtue of its discussion.

Lexington provides Commercial General Liability coverage to Tilghman under policies 41-LX-067045193-0 and 41-LX-067045193-1, with effective dates of February 10, 2015 to February 10, 2017. The Policies contain general liability coverage form CG 00 01 04 13.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM CG 00 01 04

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. **Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III—Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments — Coverages A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an occurrence" that takes place in the "coverage territory";
- (2) The "bodily injury" or "property damage" occurs during the policy period; and

2. **Exclusions.** This insurance does not apply to:

- a. **Expected Or Intended Injury.** "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
- j. **Damage To Property.** "Property damage" to:
- (1) Property you own, rent or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. **Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III—Limits of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to “personal and advertising injury” caused by an offense arising out of your business, but only if the offense was committed in the “coverage territory” during the policy period.

SECTION II - WHO IS AN INSURED

- 1. If you are designated in the Declarations as:
 - d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your “executive officers” and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

SECTION V – DEFINITIONS

- 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
- 6. "Executive officer" means a person holding any of officer positions created by your charter, constitution, by-laws or other similar governing document.
- 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
- 14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
 - a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;
 - c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
 - d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
 - f. The use of another's advertising idea in your "advertisement"; or
 - g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".
- 17. "Property damage" means:
 - a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
 - b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it. . . .
- 18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
 - a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
 - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

The policies contain a **Fungus Exclusion**, form 78689 (7/03), which reads as follows:

This endorsement modifies insurance under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

The insurance does not apply to "bodily injury", "property damage", "personal and advertising injury", or any other loss, cost or expense, including but not limited to, losses, costs or expenses related to, arising from or associated with clean-up, remediation, containment, removal or abatement, caused directly or indirectly, in whole or in part, by:

- a. Any "fungus(i)", "mold(s)", mildew or yeast, or
- b. Any "spore(s)" or toxins created or produced by or emanating from such "fungus(i)", "mold(s)", mildew or yeast, or
- c. Any substance, vapor, gas, or other omission or organic or inorganic body or substance produced by or arising out of any "fungus(i)", "mold(s)", mildew or yeast, or
- d. Any material, product, building component, building or structure, or any concentration of moisture, water or other liquid within such material, product, building component, building or structure, that contains, harbors, nurtures or acts as a medium for any "fungus(i)", "mold(s)", mildew, yeast or "spore(s)" or toxins emanating therefrom.

Regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that "bodily injury", "property damage", "personal and advertising injury", loss, cost or expense.

For the purposes of this exclusion, the following definitions are added to the Policy:

"Fungus(i)" includes, but is not limited to, any of the parts or organisms belonging to the major group fungi, lacking chlorophyll, and including "mold(s)", rusts, mildews, smuts and mushrooms.

"Mold(s)" includes, but is not limited to, any superficial growth produced on damp or decaying organic matter or on living organisms, and any "fungi" that produce molds.

"Spore(s)" means any dormant or reproductive body produced by or arising or emanating out of any "fungus(i)", "mold(s)", mildew, plants, organisms or microorganisms.

It is understood that to the extent any coverage may otherwise be provided under this policy or any of its other endorsements, the provisions of this exclusion will supersede.

ALL OTHER TERMS AND CONDITIONS WILL REMAIN UNCHANGED

THE INSURANCE COMPANY'S POSITION

In order for Commercial General Liability coverage to potentially apply, a claim must be asserted against an insured seeking damages because of "bodily injury" or "property damage" during the policy period and caused by an "occurrence" or "personal and advertising injury" from an enumerated offense that occurs during the policy period.

The Plaintiffs are not seeking damages because of a "bodily injury" or "personal and advertising injury", as these terms are defined in the Policies. These coverages, therefore, are not impacted and do not apply.

The Plaintiff's Complaint seeks damages from Tilghman and/or its Board, including damages that may be considered "property damage." Lexington agrees to provide a defense to Tilghman and its Board of Directors, while reserving its right to deny coverage and refuse to indemnify for damages not covered under the policy.

The vast majority of damages sought by the plaintiffs in the complaint are damages representing the cost to repair common elements that have not been properly maintained over a period of many years. The Complaint also makes reference to resultant damage to individual condominium units, as well. Lexington will not indemnify for "property damage" that occurred prior to the effective date of the first Lexington policy (February 10, 2015) or for "property damage" that was not caused by an "occurrence." These damages fall outside the scope of coverage provided by the Policies' Coverage A. Bodily Injury and Property Damage Liability, 1. Insuring Agreements.

Lexington will not indemnify for damages representing the cost to repair common and limited common area property. Normal wear and tear damages may not be deemed to have been caused by an "occurrence;" may be excluded by Exclusion a., to the extent the damage was expected or intended, and are excluded by Exclusion j(4) above.

With regard to "property damage" to Unit Owners' individual units and personal property, Lexington will not indemnify for certain mold related damages or expenses, to the extent they are excluded from coverage by the Fungus Exclusion cited above.

The Plaintiffs' Complaint also seeks injunctive relief, in the form of an Order requiring maintenance, repair and/or replacement of defective and/or deficient common and limited common elements. Claims seeking injunctive relief do not seek damages and are therefore not covered under the policy.

Tilghman and its Board may be entitled to coverage for this claim under other Commercial General Liability policies of insurance that were issued prior to the Lexington Policies. We hereby request that you immediately notify your prior Commercial General Liability insurers of this matter and request coverage under any such policies issued after 2004.

Lexington's coverage position is based on the information presently available to us. Nothing contained herein should be construed as a waiver of any rights or defenses whether or not stated herein, which Lexington may possess under its policies and/or applicable law. Any investigation conducted by Lexington regarding the above-referenced lawsuit is subject to all terms, conditions, provisions and limitations of the Lexington policies. Any actions taken by Lexington or its agents, representatives or attorneys do not constitute and are not intended as a waiver of any rights or defenses available to Lexington, whether or not stated herein, that may be available now or at any point in time. Lexington reserves its rights to supplement and/or amend their coverage position at any time and to assert any defenses, whether or not enumerated herein, which may now or later be applicable.

If you have any additional information which you feel would either cause us to change our position or would assist us in our investigation or determination, we ask that you advise us as soon as possible. Also, if you are served with any additional demands or complaints or pleadings, please forward them to us immediately, since they could change our analysis of coverage.

You can call me at 973-404-1289, send faxes to 973-404-9052 or send emails to James.Hornecker@yorkrsg.com should you have any questions or problems concerning the coverage position taken by Lexington.

September 6, 2017
Claim No.: LXCC-3084A2
Page 8 of 8

Sincerely,

York Risk Services Group, Inc.

James Hornecker

James Hornecker
Senior Analyst

CC: via email ONLY
NSM, Inc. | Mr. Timothy Greenfield
tbreenfield@nsminc.com

CC: Ms. Karen Jones
Global Risk Partners
4000 South Faber Place Drive, Suite 300
North Charleston, SC 29405

ELECTRONICALLY FILED - 2018 Feb 14 4:31 PM - Horry - COMMON PLEAS - CASE#2016CP2604464

From: Van Deven, Kathleen
Sent: Friday, February 09, 2018 7:11 AM
To: 'Hornecker, James' <James.Hornecker@yorkrsg.com>
Subject: RE: Tilghman Beach & Racquet Club HOA In.

Thank you for the information. While reserving on other applicable exclusions under the Great American policy, the other insurance exclusion applies to this matter. In reviewing the respective other insurance provisions of the AIG and Great American policies, AIG's policy is primary for this matter. So, Great American will not contribute toward defense costs in this matter.

From: Hornecker, James [<mailto:James.Hornecker@yorkrsg.com>]
Sent: Friday, February 09, 2018 5:50 AM
To: Van Deven, Kathleen <kvandeven@GAIG.COM>
Subject: RE: Tilghman Beach & Racquet Club HOA In.

AIG has agreed to pay defense counsel's reasonable fees and expenses.

To the best of my knowledge, Tilghman has not pursued Philadelphia for its share of the expenses. I will be following up with AIG to see if they will pursue/

Will Great American share in paying defense counsels' fees and expenses?

From: Van Deven, Kathleen [<mailto:kvandeven@GAIG.COM>]
Sent: Thursday, February 08, 2018 3:24 PM
To: Hornecker, James
Subject: Tilghman Beach & Racquet Club HOA In.

Hello James:

Have you received the necessary materials from defense counsel regarding AIG's commitment to pay reasonable defense fees in this matter? IF so, do you have an approximate amount AIG has paid/agreed to pay? Also, do you know if the Insured has requested reconsideration of coverage from Philadelphia?

Thanks,
 Kathleen

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CLAIM REPORTING PROCEDURES

All liability and property claims for the NSM's Coastal Condominium Program regardless of severity or location should be reported to the YORK Claims Intake Center. The YORK Claims Intake Center is ready to accept new losses and provides different options for you to submit new loss reports:

Phone: 877-371-9774

Fax: 800-393-8104

Email: 1305LXCC@YORKRSG.COM

**Mail: York Risk Services Group, Inc
Attn. OSC
P.O. Box 183188
Columbus, OH 43218-3188**

To expedite the handling of your new claim, the following information must be provided when reporting a claim:

- 1. York Client Code: 1305**
- 2. Named Insured: _____**
- 3. Policy Number: _____**

The York Claims Intake Center will review all claims notices upon receipt and assign to the York handling branch office. A claim acknowledgement will then be transmitted to the designated individuals advising of the York claim number and the adjuster assigned to the claim.

Key Contacts:

**OSC Contact: Jacob A. Banker, Assistant Vice President
Email: Jacob.Banker@Yorkrsg.com
Contact #: (916) 580-2453**

**York Contact: Dena Noerr, AVP Client Services
Email: dena.noerr@Yorkrsg.com
Contact #: (609)948-5816**

POLICYHOLDER NOTICE

Thank you for purchasing insurance from a member company of American International Group, Inc. (AIG). The AIG member companies generally pay compensation to brokers and independent agents, and may have paid compensation in connection with your policy. You can review and obtain information about the nature and range of compensation paid by AIG member companies to brokers and independent agents in the United States by visiting our website at www.aig.com/producercompensation or by calling 1-800-706-3102.

Common Policy Declarations

DECLARATIONS

NAME AND ADDRESS OF PRODUCER NSM Insurance Group 555 North Lane, Suite 6060 Conshohocken, PA 19428 00000 0000	INSURANCE COMPANY Lexington Insurance Company (a capital stock company) 99 High Street Boston MA 02110
NAME AND MAILING ADDRESS OF INSURED TILGHMAN BEACH & RACQUET CLUB HOA C/O KA DIEHL 11822 HIGHWAY 17 BYPASS SOUTH MYRTLE BEACH SC 29576	POLICY NUMBER 41-LX -067045193-0/000 POLICY PERIOD FROM: 02-10-15 TO: 02-10-16 at 12:01 A.M. standard time at the mailing address shown.

THE NAMED INSURED IS : ASSOCIATION

BUSINESS DESC : RESIDENTIAL CONDOMINIUM

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE INSURANCE AS STATED IN THIS POLICY.

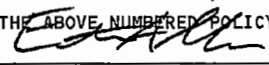
THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

	PREMIUM
COMMERCIAL PROPERTY COVERAGE PART	157,144
COMMERCIAL GENERAL LIABILITY COVERAGE PART	9,920
COMMERCIAL CRIME COVERAGE PART	NOT COVERED
COMMERCIAL INLAND MARINE COVERAGE PART	NOT COVERED
COMMERCIAL AUTO COVERAGE PART	NOT COVERED
GARAGE COVERAGE PART	NOT COVERED
MISCELLANEOUS PROFESSIONAL LIABILITY	NOT COVERED
TOTAL ADVANCED PREMIUM	\$167,064
THE POLICY WRITING NONREFUNDABLE MINIMUM PREMIUM IS \$41,766	

FORMS AND ENDORSEMENTS APPLICABLE TO ALL COVERAGE PARTS

89644 (06-13) IL0017 (11-98) IL0249 (09-08) 52167 (09-08) PR62040(07-06) PR67003(11-09)

THESE DECLARATIONS AND THE COMMON POLICY DECLARATIONS, IF APPLICABLE, TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE FORM(S) AND FORMS AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBERED POLICY.

BY: 

AUTHORIZED REPRESENTATIVE

02-10-15

Page 1 of 6

This company has been approved by the director or his designee of the South Carolina Department of Insurance to write business in this State as an eligible surplus lines insurer, but it is not afforded guaranty fund protection.

ELECTRONICALLY FILED - 2018 Feb 14 4:31 PM - Horry - COMMON PLEAS - CASE#2018CP2804404

Commercial Property

DECLARATIONS

ELECTRONICALLY FILED - 2018 Feb 14 4:11 PM - MORTY - COMMON PLEAS - CASE#2018CP2804404

NAME AND ADDRESS OF PRODUCER NSM Insurance Group 555 North Lane, Suite 6060 Conshohocken, PA 19428 00000 0000	INSURANCE COMPANY Lexington Insurance Company (a capital stock company) 99 High Street Boston MA 02110
NAME AND MAILING ADDRESS OF INSURED TILGHMAN BEACH & RACQUET CLUB HOA C/O KA DIEHL 11822 HIGHWAY 17 BYPASS SOUTH MYRTLE BEACH SC 29576	POLICY NUMBER 41-LX -067045193-0/000 POLICY PERIOD FROM: 02-10-15 TO: 02-10-16 At 12:01 A.M. standard time at the mailing address shown.

BUILDING-1

PREM. NO. 1 BLDG. NO. 1 "LIMIT OF INSURANCE" IS THE TOTAL FOR ALL LOCATIONS INDIVIDUAL BUILDING LIMITS APPLY, PER SCHEDULE ON FILE. BLANKET LIMITS ARE NOT PROVIDED.				
COVERAGES PROVIDED				
INSURANCE AT THE DESCRIBED PREMISES APPLIES ONLY FOR COVERAGES FOR WHICH A LIMIT OF INSURANCE IS SHOWN				
COVERAGE	CAUSE OF LOSS	DED	COINS	LIMIT OF INSURANCE
BUILDING	SPECIAL-Incl theft	5,000		23,192,303
AGREED VALUE: \$ 23,192,303 EXP DATE: 02-10-16				
OPTIONAL COVERAGES				
BUILDING: REPLACEMENT COST ORDINANCE OR LAW COVERAGES: A - LOSS TO THE UNDAMAGED PORTION OF THE BUILDING B - DEMOLITION COST AND C - INCREASED COST OF CONSTRUCTION BLANKET LIMIT OF INSURANCE \$1,000,000 WINDSTORM & HAIL DEDUCTIBLE: 3 % MINIMUM DOLLAR DEDUCTIBLE: \$25,000				

"LIMIT OF INSURANCE" FIGURE IS THE TOTAL FOR ALL LOCATIONS. INDIVIDUAL BUILDING LIMITS APPLY PER SCHEDULE ON FILE.
 BLANKET LIMITS ARE NOT PROVIDED.

Commercial Property

DECLARATIONS

NAME AND ADDRESS OF PRODUCER

NSM Insurance Group
555 North Lane, Suite 6060
Conshohocken, PA 19428

00000 0000

INSURANCE COMPANY

Lexington Insurance Company
(a capital stock company)
99 High Street
Boston MA 02110

NAME AND MAILING ADDRESS OF INSURED

TILGHMAN BEACH & RACQUET CLUB HOA
C/O KA DIEHL
11822 HIGHWAY 17 BYPASS SOUTH
MYRTLE BEACH SC 29576

POLICY NUMBER

41-LX -067045193-0/000

POLICY PERIOD

FROM: 02-10-15 TO: 02-10-16

At 12:01 A.M. standard time at the mailing address shown.

MANUSCRIPT FORMS:

CP0320 (10-92) - MULTIPLE DEDUCTIBLE FORM APPLIES TO BUILDINGS 1-12
\$5,000 DED FOR ALL COVERED PERILS EXCEPT WIND & HAIL

CP0325 - 3% PER BUILDING NAMED STORM WIND & HAIL DEDUCTIBLE
MINIMUM \$25,000 PER OCCURENCE

\$25,000 ALL OTHER WIND & HAIL DEDUCTIBLE
64546 - EARTHQUAKE LIMIT APPLIES TO BUILDINGS 1-19: \$23,192,303
2% EARTHQUAKE DEDUCTIBLE

WDP-1 - \$500,000 WIND DRIVEN PRECIPITATION LIMITS
*SUBJECT TO NAMED STORM DEDUCTIBLE

ELECTRONICALLY FILED - 2018 Feb 14 4:11 PM - Horry - COMMON PLEAS - CASE#1016CP2604464

Commercial Property

DECLARATIONS

NAME AND ADDRESS OF PRODUCER NSM Insurance Group 555 North Lane, Suite 6060 Conshohocken, PA 19428 00000 0000	INSURANCE COMPANY Lexington Insurance Company (a capital stock company) 99 High Street Boston MA 02110
NAME AND MAILING ADDRESS OF INSURED TILGHMAN BEACH & RACQUET CLUB HOA C/O KA DIEHL 11822 HIGHWAY 17 BYPASS SOUTH MYRTLE BEACH SC 29576	POLICY NUMBER 41-LX -067045193-0/000 POLICY PERIOD FROM: 02-10-15 TO: 02-10-16 At 12:01 A.M. standard time at the mailing address shown.

EQUIPMENT BREAKDOWN

Coverage: COMPREHENSIVE - EXCLUDING PRODUCTION MACHINES Program: EQUIPMENT BREAKDOWN

Deductibles:

Property Damage: \$5,000
Business Interruption:
Consequential Damage:
Other:

TERRORISM RISK INSURANCE ACT IS INCLUDED

\$1,556

TOTAL PROPERTY PREMIUM \$157,144

FORMS AND ENDORSEMENTS

APPLYING TO COMMERCIAL PROPERTY COVERAGE PART AND MADE PART OF THIS POLICY AT TIME OF ISSUE:

CP0090 (07-88) IL0194 (10-12) CP0405 (10-12) CP0017 (10-12) CP1030 (10-12) CP0110 (07-88)
CP0320 (10-92) WDP-1 90630 (02-07) PR69137(10-10) CP0325 (06-07) 64546 (12/04)

THESE DECLARATIONS AND THE COMMON POLICY DECLARATIONS, IF APPLICABLE, TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE FORM(S) AND FORMS AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBERED POLICY.

BY: 

AUTHORIZED REPRESENTATIVE

Commercial General Liability

DECLARATIONS

NAME AND ADDRESS OF PRODUCER NSM Insurance Group 555 North Lane, Suite 6060 Conshohocken, PA 19428 00000 0000	INSURANCE COMPANY Lexington Insurance Company (a capital stock company) 99 High Street Boston MA 02110
NAME AND MAILING ADDRESS OF INSURED TILGHMAN BEACH & RACQUET CLUB HOA C/O KA DIEHL 11822 HIGHWAY 17 BYPASS SOUTH MYRTLE BEACH SC 29576	POLICY NUMBER 41-LX -067045193-0/000 POLICY PERIOD FROM: 02-10-15 TO: 02-10-16 At 12:01 A.M. standard time at the mailing address shown.

LIMITS OF INSURANCE

GENERAL AGGREGATE	\$	2,000,000	
PRODUCTS-COMPLETED OPERATIONS AGGREGATE	\$	INCLUDED	
PERSONAL INJURY & ADVERTISING INJURY	\$	1,000,000	
EACH OCCURRENCE	\$	1,000,000	
DAMAGE TO PREMISES RENTED TO YOU	\$	50,000	ANY ONE PREMISES
MEDICAL EXPENSE	\$	5,000	ANY ONE PERSON

STATE - 1

LOCATION OF ALL PREMISES YOU OWN, RENT OR OCCUPY:

LOC # 1: 208 N OCEAN BLVD	NORTH MYRTLE BEACH, SC 29582
LOC # 2: 108 N OCEAN BLVD	NORTH MYRTLE BEACH, SC 29582
LOC # 3: 210 N OCEAN BLVD	NORTH MYRTLE BEACH, SC 29582
LOC # 4: 206 N OCEAN BLVD	NORTH MYRTLE BEACH, SC 29582
LOC # 5: 202 N OCEAN BLVD	NORTH MYRTLE BEACH, SC 29582
LOC # 6: 207 N OCEAN BLVD	NORTH MYRTLE BEACH, SC 29582
LOC # 7: 201 N OCEAN BLVD	NORTH MYRTLE BEACH, SC 29582
LOC # 8: 206 2ND AVE N	NORTH MYRTLE BEACH, SC 29582
LOC # 9: 212 2ND AVE N	NORTH MYRTLE BEACH, SC 29582
LOC # 10: 206 HILLSIDE AVE	NORTH MYRTLE BEACH, SC 29582
LOC # 11: 215 3RD AVE N	NORTH MYRTLE BEACH, SC 29582
LOC # 12: 207 3RD AVE N	NORTH MYRTLE BEACH, SC 29582

Commercial General Liability

DECLARATIONS

ELECTRONICALLY FILED - 2018 Feb 14 4:11 PM - FORTY - COMMON PLEAS - CASE#2018CP1604464

NAME AND ADDRESS OF PRODUCER NSM Insurance Group 555 North Lane, Suite 6060 Conshohocken, PA 19428 00000 0000	INSURANCE COMPANY Lexington Insurance Company (a capital stock company) 99 High Street Boston MA 02110
NAME AND MAILING ADDRESS OF INSURED TILGHMAN BEACH & RACQUET CLUB HOA C/O KA DIEHL 11822 HIGHWAY 17 BYPASS SOUTH MYRTLE BEACH SC 29576	POLICY NUMBER 41-LX -067045193-0/000 POLICY PERIOD FROM: 02-10-15 TO: 02-10-16 At 12:01 A.M. standard time at the mailing address shown.

LOC CLASSIFICATION	CODE	PREMIUM BASIS	PMS RATE	PDT'S RATE
1 CONDOMINIUMS - RESIDENTIAL - (ASSOCIATION RISK ONLY) PRODUCTS-COMPLETED OPERATIONS ARE SUBJECT TO THE GENERAL AGGREGATE LIMIT	62003	UNITS	213	
1 SWIMMING POOLS PRODUCTS-COMPLETED OPERATIONS ARE SUBJECT TO THE GENERAL AGGREGATE LIMIT	48925	EACH	4	
1 PARKS OR PLAYGROUNDS PRODUCTS-COMPLETED OPERATIONS ARE SUBJECT TO THE GENERAL AGGREGATE LIMIT	46671	EACH	2	
HIRED/NON-OWN AUTO LIABILITY LIMIT OF LIABILITY: \$1,000,000 CSL				
ADDITIONAL INSURED				
CONDOMINIUMS - RESIDENTIAL - (ASSOCIATION RISK ONLY)	62003	UNITS	213	
PER FORM: CG2004 (11-85)				
CONDOMINIUM UNIT OWNERS				

TERRORISM RISK INSURANCE ACT IS INCLUDED

\$98

GENERAL LIABILITY PREMIUM

\$9,920

FORMS AND ENDORSEMENTS

APPLYING TO COMMERCIAL GENERAL LIABILITY COVERAGE PART AND MADE PART OF THIS POLICY AT TIME OF ISSUE:

IL0021 (09-08) CG0001 (04-13) CG2106 (05-14) CG2147 (12-07) CG2004 (11-85) 78689 (07-03)
 69928 (03-98) 58332 (07-93) CG0419 (11-85) CG2155 (09-99)

THESE DECLARATIONS AND THE COMMON POLICY DECLARATIONS, IF APPLICABLE, TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE FORM(S) AND FORMS AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBERED POLICY.

BY: _____

E. A. All

AUTHORIZED REPRESENTATIVE

93837 (12/06)

CG DS 01 10 01

Page 6 of 6

EX-11558

FORMS SCHEDULE

NAME AND ADDRESS OF PRODUCER NSM Insurance Group 555 North Lane, Suite 6060 Conshohocken, PA 19428 00000 0000	INSURANCE COMPANY Lexington Insurance Company (a capital stock company) 99 High Street Boston MA 02110
NAME AND MAILING ADDRESS OF INSURED TILGHMAN BEACH & RACQUET CLUB HOA C/O KA DIEHL 11822 HIGHWAY 17 BYPASS SOUTH MYRTLE BEACH SC 29576	POLICY NUMBER 41-LX -067045193-0/000 POLICY PERIOD FROM: 02-10-15 TO: 02-10-16 at 12:01 A.M. standard time at the mailing address shown.

COMMON POLICY PACKAGE

89644 (06-13) ECONOMIC SANCTIONS ENDORSEMENT
IL0017 (11-98) COMMON POLICY CONDITIONS
IL0249 (09-08) SOUTH CAROLINA CHANGES - CANCELLATION & NONRENEWAL
52167 (09-08) SOUTH CAROLINA - AMENDATORY ENDORSEMENT
PRG2040 (07-06) MINIMUM EARNED PREMIUM
PRG7003 (11-09) ESTIMATED TAXES, ASSESSMENTS AND SURCHARGES

COMMERCIAL PROPERTY FORMS

CP0090 (07-88) COMMERCIAL PROPERTY CONDITIONS
IL0194 (10-12) SOUTH CAROLINA CHANGES - LEGAL ACTION AGAINST US
CP0405 (10-12) ORDINANCE OR LAW COVERAGE
CP0017 (10-12) CONDOMINIUM ASSOCIATION COVERAGE FORM
CP1030 (10-12) CAUSES OF LOSS - SPECIAL FORM
CP0110 (07-88) SOUTH CAROLINA CHANGES - VALUATION
CP0320 (10-92) MULTIPLE DEDUCTIBLE FORM
WDP-1
90630 (02-07) ADDITIONAL COVERAGE - EQUIPMENT BREAKDOWN
PRG9137 (10-10) CONDOMINIUM AMENDATORY ENDORSEMENT
CP0325 (06-07) NAMED STORM PERCENTAGE DEDUCTIBLE
64546 (12/04) EARTH MOVEMENT ENDORSEMENT

COMMERCIAL GENERAL LIABILITY FORMS

IL0021 (09-08) NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT
CG0001 (04-13) COMMERCIAL GENERAL LIABILITY COVERAGE FORM (OCCUR)
CG2106 (05-14) EXCL-ACCESS OR DISCLOSURE OF CONFIDENTIAL OR PERSON
CG2147 (12-07) EMPLOYMENT-RELATED PRACTICES EXCLUSION
CG2004 (11-85) ADDITIONAL INSURED - CONDOMINIUM UNIT
78689 (07-03) FUNGUS EXCLUSION REVISED
69928 (03-98) ASBESTOS EXCLUSION ENDORSEMENT
58332 (07-93) TOTAL LEAD EXCLUSION
CG0419 (11-85) HIRED/NON-OWNED AUTO
CG2155 (09-99) TOTAL POLLUTION EXCLUSION WITH A HOSTILE FIRE EXCP

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT
CAREFULLY.**

ENDORSEMENT #

This endorsement, effective 12:01 A.M.

forms a part of Policy

No.

issued to

by

ECONOMIC SANCTIONS ENDORSEMENT

This endorsement modifies insurance provided under the following:

The Insurer shall not be deemed to provide cover and the Insurer shall not be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose the Insurer, its parent company or its ultimate controlling entity to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union or the United States of America.

AUTHORIZED REPRESENTATIVE

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination Of Your Books And Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. Inspections And Surveys

1. We have the right to:
 - a. Make inspections and surveys at any time;

- b. Give you reports on the conditions we find; and
- c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
 - a. Are safe or healthful; or
 - b. Comply with laws, regulations, codes or standards.

3. Paragraphs 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. Premiums

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

F. Transfer Of Your Rights And Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

IL 02 49 09 08

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SOUTH CAROLINA CHANGES – CANCELLATION AND NONRENEWAL

This endorsement modifies insurance provided under the following:

CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART
 COMMERCIAL GENERAL LIABILITY COVERAGE PART
 COMMERCIAL INLAND MARINE COVERAGE PART
 COMMERCIAL PROPERTY COVERAGE PART
 CRIME AND FIDELITY COVERAGE PART
 EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART
 EQUIPMENT BREAKDOWN COVERAGE PART
 FARM COVERAGE PART
 LIQUOR LIABILITY COVERAGE PART
 MEDICAL PROFESSIONAL LIABILITY COVERAGE PART
 POLLUTION LIABILITY COVERAGE PART
 PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

A. Paragraphs 2. and 3. of Cancellation Common Policy Condition are replaced by the following:

2. We may cancel this policy by mailing or delivering to the first Named Insured and the agent, if any, written notice of cancellation at least:

- a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or**
- b. 30 days before the effective date of cancellation if we cancel for any other reason.**

3. We will mail or deliver our notice to the first Named Insured's and agent's last known addresses.

B. The following is added to the Cancellation Common Policy Condition:

7. Cancellation Of Policies In Effect For 120 Days Or More

If this policy has been in effect for 120 days or more, or is a renewal or continuation of a policy we issued, we may cancel this policy only for one or more of the following reasons:

- a. Nonpayment of premium;**

- b. Material misrepresentation of fact which, if known to us, would have caused us not to issue the policy;**

- c. Substantial change in the risk assumed, except to the extent that we should reasonably have foreseen the change or contemplated the risk in writing the policy;**

- d. Substantial breaches of contractual duties, conditions or warranties; or**

- e. Loss of our reinsurance covering all or a significant portion of the particular policy insured, or where continuation of the policy would imperil our solvency or place us in violation of the insurance laws of South Carolina.**

Prior to cancellation for reasons permitted in this Item e., we will notify the Commissioner, in writing, at least 60 days prior to such cancellation and the Commissioner will, within 30 days of such notification, approve or disapprove such action.

Any notice of cancellation will state the precise reason for cancellation.

- C. The following is added and supersedes any provisions to the contrary:

Nonrenewal

1. We will not refuse to renew a policy issued for a term of more than one year, until expiration of its full term, if anniversary renewal has been guaranteed by additional premium consideration.
2. If we decide not to renew this policy, we will:
 - a. Mail or deliver written notice of nonrenewal to the first Named Insured and agent, if any, before:
 - (1) The expiration date of this policy, if the policy is written for a term of one year or less; or
 - (2) An anniversary date of this policy, if the policy is written for a term of more than one year or for an indefinite term; and

- b. Provide at least:

- (1) 60 days' notice of nonrenewal, when nonrenewal is to become effective between November 1 and May 31; or
 - (2) 90 days' notice of nonrenewal, when nonrenewal is to become effective between June 1 and October 31.
3. Any notice of nonrenewal will be mailed or delivered to the first Named Insured's and agent's last known addresses. If notice is mailed, proof of mailing will be sufficient proof of notice.
 4. Any notice of nonrenewal will state the precise reason for nonrenewal.

SOUTH CAROLINA AMENDATORY ENDORSEMENT

This endorsement, effective _____ forms a part of

policy no.: _____ issued to

by:

Wherever used in this endorsement: 1) "Insurer" means the insurance company which issued this policy; and 2) "Insured" means the Named Corporation, Named Entity, Named Organization, Named Sponsor, Named Insured, or Insured stated in the declarations page;

The following is added and supersedes any provision in the policy to the contrary:

CANCELLATION:

This policy may be cancelled by the Insured by surrender thereof to the Insurer or any of its authorized agents or by mailing to the Insurer written notice stating when thereafter the cancellation shall be effective.

If this policy has been in effect for less than 120 days and is not a renewal of a previously existing policy, this policy may be cancelled by the Insurer for any reason by delivering or mailing to the Insured at the address shown in this policy, written notice stating when, not less than thirty (30) days thereafter, such cancellation shall be effective. Where the reason for cancellation is nonpayment of premium however, not less than ten (10) days written notice shall be furnished by the Insurer.

If this policy has been in effect for 120 days or more, or is a renewal of a previously existing policy, this policy may be cancelled by the Insurer by delivering or mailing to the Insured and the agent of record, if any, at the address shown in the policy, written notice stating when, not less than thirty (30) days thereafter, such cancellation shall be effective. Where the reason for cancellation is nonpayment of premium however, not less than ten (10) days written notice shall be furnished by the Insurer.

If this policy applies to property insurance on risks located in the State it may be cancelled by the Insurer by delivering or mailing to the Insured at the address shown in the policy a written notice stating when such cancellation shall be effective:

- (1) not less than sixty (60) days for any cancellation effective between November first and May thirty-first; and
- (2) not less than ninety (90) days for any cancellation effective between June first and October 31st

Any notice of cancellation will state the reason for cancellation. Cancellation under this paragraph shall be based on one or more of the following reasons:

- (1) Nonpayment of premium;
- (2) Material misrepresentation of fact which, if known to the Insurer, would have caused the Insurer not to issue the policy;

- (3) Substantial change in the risk assumed, except to the extent the Insurer should reasonably have foreseen the change or contemplated the risk in writing the policy;
- (4) Substantial breaches of contractual duties, conditions, or warranties;
- (5) Loss of the Insurer's reinsurance covering all or a significant portion of the particular policy insured; or
- (6) Where continuation of the policy would imperil the Insurer's solvency or place the Insurer in violation of the insurance laws of this state.

Prior to cancellation for reasons numbered five (5) and six (6) above, the Insurer shall notify the Insurance Commissioner in writing at least sixty (60) days prior to the effective date of such cancellation.

NONRENEWAL:

If the Insurer shall elect to nonrenew this policy and such policy is for a period of one year or less, than the Insurer shall mail or deliver written notice of nonrenewal to the Insured and the Insured's agent of record, if any, at least:

- (1) sixty days prior to the anniversary date of the policy for any nonrenewal that would be effective between November first and May thirty-first; and
- (2) ninety days prior to the anniversary date of the policy for any nonrenewal that would be effective between June first and October thirty-first.

If the Insurer shall elect to nonrenew this policy and such policy is for a period of more than one year or for an indefinite term, than the Insurer shall mail or deliver written notice of nonrenewal to the Insured and the Insured's agent of record, if any, at least:

- (1) sixty days prior to the anniversary date of the policy for any nonrenewal that would be effective between November first and May thirty-first; and
- (2) ninety days prior to the anniversary date of the policy for any nonrenewal that would be effective between June first and October thirty-first.

Any notice of nonrenewal will be mailed or delivered to the Insured's and the Insured's agent's at their addresses shown in the policy or, if not reflected therein, at their last known addresses. If notice is mailed, proof of mailing will be sufficient proof of notice.

Any notice of nonrenewal will state the precise reason for nonrenewal.

POLICY RENEWAL NOTICE:

If the Insurer intends to renew a policy, the Insurer shall furnish renewal terms and a statement of the amount of premium or estimated premium due for the renewal policy period.

If the policy being renewed (hereinafter "original policy") is written for a term of one year or less, the renewal terms and statement of premium or estimated premium due shall be furnished to the Insured not less than thirty (30) days prior to the expiration date of the original policy.

If the original policy is written for a term of more than one year or for an indefinite term, the renewal terms and statement of premium or estimated premium due shall be furnished to the Insured not less than thirty (30) days prior to the anniversary date of the original policy.

The Insurer may satisfy its obligation to furnish renewal terms and statement of premium or estimated premium due by either of the following methods:

- mailing or delivering renewal terms and statement to the Insured at his address shown in the policy or, if not reflected therein, at his last known address, not less than thirty (30) days prior to expiration or anniversary; or
- mailing or delivering renewal terms and statement to the agent of record, if any, not less than forty-five (45) days prior to the expiration or anniversary, along with instructions that the agent furnish the renewal terms and statement to the Insured not less than thirty (30) days prior to expiration or anniversary.

If the Insurer fails to furnish the renewal terms and statement of premium or estimated premium due, the Insured may elect to cancel the renewal policy within the thirty-day period following receipt of the renewal terms and statement of premium or estimated premium due. Earned premium for any period of coverage shall be calculated pro rata based upon the premium applicable to the original policy and not the premium applicable to the renewal policy.

All other terms, conditions and exclusions shall remain the same.

AUTHORIZED REPRESENTATIVE

ENDORSEMENT

This endorsement, effective 12:01 A.M.,

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

MINIMUM EARNED PREMIUM ENDORSEMENT

This endorsement modifies insurance provided by the policy. The Common Policy Conditions are modified as follows:

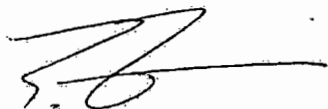
1. Paragraph 5 of Condition A—Cancellation is deleted and replaced with the following paragraph:
 5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Name Insured cancels, earned premium will be computed according to the customary short-rate table and procedure, subject to a Minimum Earned Premium of \$ 41,766. The cancellation will be effective even if we have not made or offered a refund.

Estimated Taxes, Assessments and Surcharges

The taxes, assessments and surcharges shown on the Schedule are based upon our knowledge of the current law in the states involved. If the law changes, or a rate or assessment changes, or a new surcharge is imposed, or a state reinterprets its law, any additional taxes, assessments and surcharges will become part of *Your Payment Obligation*.

ADDENDUM TO THE DECLARATIONS

By signing below, the President and the Secretary of the Insurer agree on behalf of the Insurer to all the terms of this Policy.

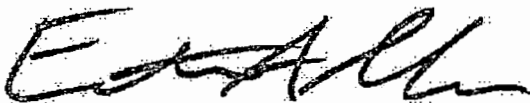


Jeremy Johnson
PRESIDENT



Denis M. Butkovic
SECRETARY

This policy shall not be valid unless signed at the time of issuance by an authorized representative of the Insurer, either below or on the Declarations page of the policy.



Ethan D. Allen
AUTHORIZED REPRESENTATIVE

COMMERCIAL PROPERTY CONDITIONS

This Coverage Part is subject to the following conditions, the Common Policy Conditions and applicable Loss Conditions and Additional Conditions in Commercial Property Coverage Forms.

A. CONCEALMENT, MISREPRESENTATION OR FRAUD

This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:

1. This Coverage Part;
2. The Covered Property;
3. Your interest in the Covered Property; or
4. A claim under this Coverage Part.

B. CONTROL OF PROPERTY

Any act or neglect of any person other than you beyond your direction or control will not affect this insurance.

The breach of any condition of this Coverage Part at any one or more locations will not affect coverage at any location where, at the time of loss or damage, the breach of condition does not exist.

C. INSURANCE UNDER TWO OR MORE COVERAGES

If two or more of this policy's coverages apply to the same loss or damage, we will not pay more than the actual amount of the loss or damage.

D. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and
2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

E. LIBERALIZATION

If we adopt any revision that would broaden the coverage under this Coverage Part without additional premium within 45 days prior to or during the policy period, the broadened coverage will immediately apply to this Coverage Part.

F. NO BENEFIT TO BAILEE

No person or organization, other than you, having custody of Covered Property will benefit from this insurance.

G. OTHER INSURANCE

1. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.
2. If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.

H. POLICY PERIOD, COVERAGE TERRITORY

Under this Coverage Part:

1. We cover loss or damage commencing:
 - a. During the policy period shown in the Declarations; and
 - b. Within the coverage territory.
2. The coverage territory is:
 - a. The United States of America (including its territories and possessions);
 - b. Puerto Rico; and
 - c. Canada.

I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property or Covered Income.
2. After a loss to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:
 - a. Someone insured by this insurance;
 - b. A business firm:
 - (1) Owned or controlled by you; or
 - (2) That owns or controls you; or
 - c. Your tenant.

This will not restrict your insurance.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SOUTH CAROLINA CHANGES – LEGAL ACTION AGAINST US

This endorsement modifies insurance provided under the following:

CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
FARM COVERAGE PART – FARM LIVESTOCK COVERAGE FORM
FARM COVERAGE PART – FARM MOBILE AGRICULTURAL MACHINERY AND EQUIPMENT COVERAGE FORM
FARM COVERAGE PART – FARM PROPERTY – OTHER FARM PROVISIONS FORM – ADDITIONAL COVERAGES, CONDITIONS, DEFINITIONS
STANDARD PROPERTY POLICY

- A. The Legal Action Against Us** Condition, in the Commercial Property Conditions, the Standard Property Policy, the Capital Assets Program Coverage Form (Output Policy), and in the Farm Forms listed above, is replaced by the following:

LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part, Coverage Form or Policy to which this Condition applies unless:

1. There has been full compliance with all of the terms of this Coverage Part, Coverage Form or Policy; and
2. The action is brought within 3 years after the date on which the direct physical loss ("loss") or damage occurred.

- B. Under the Commercial Property Coverage Part, Paragraph (1) of the Legal Action Against Us Condition in the Mortgageholders Errors And Omissions Coverage Form is replaced by the following:**

- (1) No one may bring a legal action against us under Coverages A and B unless:
 - (a) There has been full compliance with all of the terms of Coverages A and B; and
 - (b) The action is brought within 3 years after you discover the error or accidental omission.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 04 05 10 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ORDINANCE OR LAW COVERAGE

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
STANDARD PROPERTY POLICY**SCHEDULE**

Building Number/ Premises Number	Coverage A	Coverage B Limit Of Insurance	Coverage C Limit Of Insurance	Coverage B And C Combined Limit Of Insurance
/	☐	\$	\$	\$ *
/	☐	\$	\$	\$ *
/	☐	\$	\$	\$ *

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.
*Do not enter a Blanket Limit of Insurance if individual Limits of Insurance are selected for Coverages B and C, or if one of these Coverages is not applicable.

A. Each Coverage – Coverage A, Coverage B and Coverage C – is provided under this endorsement only if that Coverage(s) is chosen by entry in the above Schedule and then only with respect to the building identified for that Coverage(s) in the Schedule.

B. Application Of Coverage(s)

The Coverage(s) provided by this endorsement applies only if both **B.1.** and **B.2.** are satisfied and are then subject to the qualifications set forth in **B.3.**

1. The ordinance or law:

- a. Regulates the demolition, construction or repair of buildings, or establishes zoning or land use requirements at the described premises; and
- b. Is in force at the time of loss.

But coverage under this endorsement applies only in response to the minimum requirements of the ordinance or law. Losses and costs incurred in complying with recommended actions or standards that exceed actual requirements are not covered under this endorsement.

2.a. The building sustains direct physical damage that is covered under this policy and as a result of such damage, you are required to comply with the ordinance or law; or

b. The building sustains both direct physical damage that is covered under this policy and direct physical damage that is not covered under this policy, and as a result of the building damage in its entirety, you are required to comply with the ordinance or law.

c. But if the building sustains direct physical damage that is not covered under this policy, and such damage is the subject of the ordinance or law, then there is no coverage under this endorsement even if the building has also sustained covered direct physical damage.

3. In the situation described in **B.2.b.** above, we will not pay the full amount of loss otherwise payable under the terms of Coverages **A**, **B**, and/or **C** of this endorsement. Instead, we will pay a proportion of such loss, meaning the proportion that the covered direct physical damage bears to the total direct physical damage.

(Section **H.** of this endorsement provides an example of this procedure.)

However, if the covered direct physical damage, alone, would have resulted in a requirement to comply with the ordinance or law, then we will pay the full amount of loss otherwise payable under the terms of Coverages **A**, **B** and/or **C** of this endorsement.

- C.** We will not pay under Coverage **A**, **B** or **C** of this endorsement for:

1. Enforcement of or compliance with any ordinance or law which requires the demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by "pollutants" or due to the presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria; or
2. The costs associated with the enforcement of or compliance with any ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants", "fungus", wet or dry rot or bacteria.

D. Coverage

1. Coverage A – Coverage For Loss To The Undamaged Portion Of The Building

With respect to the building that has sustained covered direct physical damage, we will pay under Coverage **A** for the loss in value of the undamaged portion of the building as a consequence of a requirement to comply with an ordinance or law that requires demolition of undamaged parts of the same building.

Coverage **A** is included within the Limit of Insurance shown in the Declarations as applicable to the covered building. Coverage **A** does not increase the Limit of Insurance.

2. Coverage B – Demolition Cost Coverage

With respect to the building that has sustained covered direct physical damage, we will pay the cost to demolish and clear the site of undamaged parts of the same building as a consequence of a requirement to comply with an ordinance or law that requires demolition of such undamaged property.

The Coinsurance Additional Condition does not apply to Demolition Cost Coverage.

3. Coverage C – Increased Cost Of Construction Coverage

- a. With respect to the building that has sustained covered direct physical damage, we will pay the increased cost to:

- (1) Repair or reconstruct damaged portions of that building; and/or
- (2) Reconstruct or remodel undamaged portions of that building, whether or not demolition is required;

when the increased cost is a consequence of a requirement to comply with the minimum standards of the ordinance or law.

However:

- (1) This coverage applies only if the restored or remodeled property is intended for similar occupancy as the current property, unless such occupancy is not permitted by zoning or land use ordinance or law.
- (2) We will not pay for the increased cost of construction if the building is not repaired, reconstructed or remodeled.

The Coinsurance Additional Condition does not apply to Increased Cost of Construction Coverage.

- b. When a building is damaged or destroyed and Coverage **C** applies to that building in accordance with **3.a.** above, coverage for the increased cost of construction also applies to repair or reconstruction of the following, subject to the same conditions stated in **3.a.**:

- (1) The cost of excavations, grading, backfilling and filling;

- (2) Foundation of the building;
- (3) Pilings; and
- (4) Underground pipes, flues and drains.

The items listed in **b.(1)** through **b.(4)** above are deleted from Property Not Covered, but only with respect to the coverage described in this provision, **3.b.**

E. Loss Payment

1. All following loss payment provisions, **E.2.** through **E.5.**, are subject to the apportionment procedures set forth in Section **B.3.** of this endorsement.
2. When there is a loss in value of an undamaged portion of a building to which Coverage **A** applies, the loss payment for that building, including damaged and undamaged portions, will be determined as follows:
 - a. If the Replacement Cost Coverage Option applies and the property is being repaired or replaced, on the same or another premises, we will not pay more than the lesser of:
 - (1) The amount you would actually spend to repair, rebuild or reconstruct the building, but not for more than the amount it would cost to restore the building on the same premises and to the same height, floor area, style and comparable quality of the original property insured; or
 - (2) The Limit Of Insurance shown in the Declarations as applicable to the covered building.
 - b. If the Replacement Cost Coverage Option applies and the property is **not** repaired or replaced, or if the Replacement Cost Coverage Option does **not** apply, we will not pay more than the lesser of:
 - (1) The actual cash value of the building at the time of loss; or
 - (2) The Limit Of Insurance shown in the Declarations as applicable to the covered building.
3. Unless Paragraph **E.5.** applies, loss payment under Coverage **B** – Demolition Cost Coverage will be determined as follows:
We will not pay more than the lesser of the following:
 - a. The amount you actually spend to demolish and clear the site of the described premises; or

- b. The applicable Limit Of Insurance shown for Coverage **B** in the Schedule above.
4. Unless Paragraph **E.5.** applies, loss payment under Coverage **C** – Increased Cost Of Construction Coverage will be determined as follows:
 - a. We will not pay under Coverage **C**:
 - (1) Until the property is actually repaired or replaced, at the same or another premises; and
 - (2) Unless the repair or replacement is made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.
 - b. If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay under Coverage **C** is the lesser of:
 - (1) The increased cost of construction at the same premises; or
 - (2) The applicable Limit Of Insurance shown for Coverage **C** in the Schedule above.
 - c. If the ordinance or law requires relocation to another premises, the most we will pay under Coverage **C** is the lesser of:
 - (1) The increased cost of construction at the new premises; or
 - (2) The applicable Limit Of Insurance shown for Coverage **C** in the Schedule above.
 5. If a Combined Limit Of Insurance is shown for Coverages **B** and **C** in the Schedule above, Paragraphs **E.3.** and **E.4.** of this endorsement do not apply with respect to the building that is subject to the Combined Limit, and the following loss payment provisions apply instead:
The most we will pay, for the total of all covered losses for Demolition Cost and Increased Cost of Construction, is the Combined Limit Of Insurance shown for Coverages **B** and **C** in the Schedule above. Subject to this Combined Limit of Insurance, the following loss payment provisions apply:
 - a. For Demolition Cost, we will not pay more than the amount you actually spend to demolish and clear the site of the described premises.

- b. With respect to the Increased Cost of Construction:
- (1) We will not pay for the increased cost of construction:
 - (a) Until the property is actually repaired or replaced, at the same or another premises; and
 - (b) Unless the repair or replacement is made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.
 - (2) If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay for the increased cost of construction is the increased cost of construction at the same premises.
 - (3) If the ordinance or law requires relocation to another premises, the most we will pay for the increased cost of construction is the increased cost of construction at the new premises.
- F. The terms of this endorsement apply separately to each building to which this endorsement applies.
- G. Under this endorsement we will not pay for loss due to any ordinance or law that:
1. You were required to comply with before the loss, even if the building was undamaged; and
 2. You failed to comply with.
- H. Example of proportionate loss payment for Ordinance Or Law Coverage Losses (procedure as set forth in Section B.3. of this endorsement).

Assume:

- Wind is a Covered Cause of Loss; Flood is an excluded Cause of Loss
- The building has a value of \$200,000
- Total direct physical damage to building: \$100,000
- The ordinance or law in this jurisdiction is enforced when building damage equals or exceeds 50% of the building's value
- Portion of direct physical damage that is covered (caused by wind): \$30,000
- Portion of direct physical damage that is not covered (caused by flood): \$70,000
- Loss under Ordinance Or Law Coverage C o this endorsement: \$60,000

Step 1: Determine the proportion that the covered direct physical damage bears to the total direct physical damage.

$$\$30,000 \div \$100,000 = .30$$

Step 2: Apply that proportion to the Ordinance or Law loss.

$$\$60,000 \times .30 = \$18,000$$

In this example, the most we will pay under this endorsement for the Coverage C loss is \$18,000, subject to the applicable Limit of Insurance and any other applicable provisions.

Note: The same procedure applies to losses under Coverages A and B of this endorsement.

I. The following definition is added:

"Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

CONDOMINIUM ASSOCIATION COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section H. Definitions.

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Part, means the type of property described in this section, **A.1.**, and limited in **A.2.** Property Not Covered, if a Limit Of Insurance is shown in the Declarations for that type of property.

a. Building, meaning the building or structure described in the Declarations, including:

- (1) Completed additions;
- (2) Fixtures, outside of individual units, including outdoor fixtures;
- (3) Permanently installed:
 - (a) Machinery; and
 - (b) Equipment;
- (4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:
 - (a) Fire-extinguishing equipment;
 - (b) Outdoor furniture;
 - (c) Floor coverings; and
 - (d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering that are not contained within individual units;
- (5) If not covered by other insurance:
 - (a) Additions under construction, alterations and repairs to the building or structure;

(b) Materials, equipment, supplies, and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the building or structure; and

(6) Any of the following types of property contained within a unit, regardless of ownership, if your Condominium Association Agreement requires you to insure it:

(a) Fixtures, improvements and alterations that are a part of the building or structure; and

(b) Appliances, such as those used for refrigerating, ventilating, cooking, dishwashing, laundering, security or housekeeping.

But Building does not include personal property owned by, used by or in the care, custody or control of a unit-owner except for personal property listed in Paragraph **A.1.a.(6)** above.

b. Your Business Personal Property located in or on the building or structure described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises, consisting of the following:

- (1) Personal property owned by you or owned indivisibly by all unit-owners;
- (2) Your interest in the labor, materials or services furnished or arranged by you on personal property of others; and
- (3) Leased personal property for which you have a contractual responsibility to insure, unless otherwise provided for under Personal Property Of Others.

But Your Business Personal Property does not include personal property owned only by a unit-owner.

c. Personal Property Of Others that is:

- (1) In your care, custody or control; and
- (2) Located in or on the building or structure described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

However, our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

2. Property Not Covered

Covered Property does not include:

- a. Accounts, bills, currency, food stamps or other evidences of debt, money, notes or securities. Lottery tickets held for sale are not securities;
- b. Animals, unless owned by others and boarded by you;
- c. Automobiles held for sale;
- d. Bridges, roadways, walks, patios or other paved surfaces;
- e. Contraband, or property in the course of illegal transportation or trade;
- f. The cost of excavations, grading, backfilling or filling;
- g. Foundations of buildings, structures, machinery or boilers if their foundations are below:
 - (1) The lowest basement floor; or
 - (2) The surface of the ground if there is no basement;
- h. Land (including land on which the property is located), water, growing crops or lawns (other than lawns which are part of a vegetated roof);
- i. Personal property while airborne or waterborne;
- j. Bulkheads, pilings, piers, wharves or docks;
- k. Property that is covered under this or any other policy in which it is more specifically described, except for the excess of the amount due (whether you can collect on it or not) from that other insurance;
- l. Retaining walls that are not part of a building;
- m. Underground pipes, flues or drains;

- n. Electronic data, except as provided under the Additional Coverage, Electronic Data. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data. This paragraph, n., does not apply to electronic data which is integrated in and operates or controls the building's elevator, lighting, heating, ventilation, air conditioning or security system;
- o. The cost to replace or restore the information on valuable papers and records, including those which exist as electronic data. Valuable papers and records include but are not limited to proprietary information, books of account, deeds, manuscripts, abstracts, drawings and card index systems. Refer to the Coverage Extension for Valuable Papers And Records (Other Than Electronic Data) for limited coverage for valuable papers and records other than those which exist as electronic data;
- p. Vehicles or self-propelled machines (including aircraft or watercraft) that:
 - (1) Are licensed for use on public roads; or
 - (2) Are operated principally away from the described premises.

This paragraph does not apply to:

- (a) Vehicles or self-propelled machines or autos you manufacture or warehouse;
- (b) Vehicles or self-propelled machines, other than autos, you hold for sale;
- (c) Rowboats or canoes out of water at the described premises; or
- (d) Trailers, but only to the extent provided for in the Coverage Extension for Non-owned Detached Trailers; or

q. The following property while outside of buildings:

- (1) Grain, hay, straw or other crops; or
- (2) Fences, radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers, trees, shrubs or plants (other than trees, shrubs or plants which are "stock" or are part of a vegetated roof), all except as provided in the Coverage Extensions.

3. Covered Causes Of Loss

See applicable Causes Of Loss form as shown in the Declarations.

4. Additional Coverages

a. Debris Removal

- (1) Subject to Paragraphs (2), (3) and (4), we will pay your expense to remove debris of Covered Property and other debris that is on the described premises, when such debris is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date of direct physical loss or damage.
- (2) Debris Removal does not apply to costs to:
 - (a) Remove debris of property of yours that is not insured under this policy, or property in your possession that is not Covered Property;
 - (b) Remove any property that is Property Not Covered, including property addressed under the Outdoor Property Coverage Extension;
 - (c) Remove property of others of a type that would not be Covered Property under this Coverage Form;
 - (d) Remove deposits of mud or earth from the grounds of the described premises;
 - (e) Extract "pollutants" from land or water; or
 - (f) Remove, restore or replace polluted land or water.

(3) Subject to the exceptions in Paragraph (4), the following provisions apply:

- (a) The most we will pay for the total of direct physical loss or damage plus debris removal expense is the Limit of Insurance applicable to the Covered Property that has sustained loss or damage.
- (b) Subject to (a) above, the amount we will pay for debris removal expense is limited to 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage. However, if no Covered Property has sustained direct physical loss or damage, the most we will pay for removal of debris of other property (if such removal is covered under this Additional Coverage) is \$5,000 at each location.
- (4) We will pay up to an additional \$25,000 for debris removal expense, for each location, in any one occurrence of physical loss or damage to Covered Property, if one or both of the following circumstances apply:
 - (a) The total of the actual debris removal expense plus the amount we pay for direct physical loss or damage exceeds the Limit of Insurance on the Covered Property that has sustained loss or damage.
 - (b) The actual debris removal expense exceeds 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage.

Therefore, if (4)(a) and/or (4)(b) applies, our total payment for direct physical loss or damage and debris removal expense may reach but will never exceed the Limit of Insurance on the Covered Property that has sustained loss or damage, plus \$25,000.

(5) Examples

The following examples assume that there is no Coinsurance penalty.

Example 1

Limit of Insurance:	\$ 90,000
Amount of Deductible:	\$ 500
Amount of Loss:	\$ 50,000
Amount of Loss Payable:	\$ 49,500
	(\$50,000 - \$500)
Debris Removal Expense:	\$ 10,000
Debris Removal Expense Payable:	\$ 10,000
(\$10,000 is 20% of \$50,000.)	

The debris removal expense is less than 25% of the sum of the loss payable plus the deductible. The sum of the loss payable and the debris removal expense (\$49,500 + \$10,000 = \$59,500) is less than the Limit of Insurance. Therefore, the full amount of debris removal expense is payable in accordance with the terms of Paragraph (3).

Example 2

Limit of Insurance:	\$ 90,000
Amount of Deductible:	\$ 500
Amount of Loss:	\$ 80,000
Amount of Loss Payable:	\$ 79,500
	(\$80,000 - \$500)
Debris Removal Expense:	\$ 40,000
Debris Removal Expense Payable	
Basic Amount:	\$ 10,500
Additional Amount:	\$ 25,000

The basic amount payable for debris removal expense under the terms of Paragraph (3) is calculated as follows: \$80,000 (\$79,500 + \$500) x .25 = \$20,000, capped at \$10,500. The cap applies because the sum of the loss payable (\$79,500) and the basic amount payable for debris removal expense (\$10,500) cannot exceed the Limit of Insurance (\$90,000).

The additional amount payable for debris removal expense is provided in accordance with the terms of Paragraph (4), because the debris removal expense (\$40,000) exceeds 25% of the loss payable plus the deductible (\$40,000 = 50% of \$80,000), and because the sum of the loss payable and debris removal expense (\$79,500 + \$40,000 = \$119,500) would exceed the Limit of Insurance (\$90,000). The additional amount of covered debris removal expense is \$25,000, the maximum payable under Paragraph (4). Thus, the total payable for debris removal expense in this example is \$35,500; \$4,500 of the debris removal expense is not covered.

b. Preservation Of Property

If it is necessary for you to move Covered Property from the described premises to preserve it from loss or damage by a Covered Cause of Loss, we will pay for any direct physical loss or damage to that property:

- (1) While it is being moved or while temporarily stored at another location; and
- (2) Only if the loss or damage occurs within 30 days after the property is first moved.

c. Fire Department Service Charge

When the fire department is called to save or protect Covered Property from a Covered Cause of Loss, we will pay up to \$1,000 for service at each premises described in the Declarations unless a higher limit is shown in the Declarations. Such limit is the most we will pay regardless of the number of responding fire departments or fire units, and regardless of the number or type of services performed.

This Additional Coverage applies to your liability for fire department service charges:

- (1) Assumed by contract or agreement prior to loss; or
- (2) Required by local ordinance.

No Deductible applies to this Additional Coverage.

d. Pollutant Clean-up And Removal

We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs.

This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants". But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water.

The most we will pay under this Additional Coverage for each described premises is \$10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy.

e. Increased Cost Of Construction

- (1) This Additional Coverage applies only to buildings to which the Replacement Cost Optional Coverage applies.
- (2) In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with the minimum standards of an ordinance or law in the course of repair, rebuilding or replacement of damaged parts of that property, subject to the limitations stated in e.(3) through e.(9) of this Additional Coverage.
- (3) The ordinance or law referred to in e.(2) of this Additional Coverage is an ordinance or law that regulates the construction or repair of buildings or establishes zoning or land use requirements at the described premises and is in force at the time of loss.
- (4) Under this Additional Coverage, we will not pay any costs due to an ordinance or law that:
 - (a) You were required to comply with before the loss, even when the building was undamaged; and
 - (b) You failed to comply with.
- (5) Under this Additional Coverage, we will not pay for:
 - (a) The enforcement of or compliance with any ordinance or law which requires demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by "pollutants" or due to the presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria; or
 - (b) Any costs associated with the enforcement of or compliance with an ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants", "fungus", wet or dry rot or bacteria.

- (6) The most we will pay under this Additional Coverage, for each described building insured under this Coverage Form, is \$10,000 or 5% of the Limit of Insurance applicable to that building, whichever is less. If a damaged building is covered under a blanket Limit of Insurance which applies to more than one building or item of property, then the most we will pay under this Additional Coverage, for that damaged building, is the lesser of \$10,000 or 5% times the value of the damaged building as of the time of loss times the applicable Coinsurance percentage.

The amount payable under this Additional Coverage is additional insurance.

- (7) With respect to this Additional Coverage:
 - (a) We will not pay for the Increased Cost of Construction:
 - (i) Until the property is actually repaired or replaced, at the same or another premises; and
 - (ii) Unless the repair or replacement is made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.
 - (b) If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of e.(6) of this Additional Coverage, is the increased cost of construction at the same premises.
 - (c) If the ordinance or law requires relocation to another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of e.(6) of this Additional Coverage, is the increased cost of construction at the new premises.
- (8) This Additional Coverage is not subject to the terms of the Ordinance Or Law Exclusion to the extent that such Exclusion would conflict with the provisions of this Additional Coverage.

- (9) The costs addressed in the Loss Payment and Valuation Conditions and the Replacement Cost Optional Coverage, in this Coverage Form, do not include the increased cost attributable to enforcement of or compliance with an ordinance or law. The amount payable under this Additional Coverage, as stated in e.(6) of this Additional Coverage, is not subject to such limitation.

f. Electronic Data

- (1) Under this Additional Coverage, electronic data has the meaning described under Property Not Covered, Electronic Data. This Additional Coverage does not apply to electronic data which is integrated in and operates or controls the building's elevator, lighting, heating, ventilation, air conditioning or security system.
- (2) Subject to the provisions of this Additional Coverage, we will pay for the cost to replace or restore electronic data which has been destroyed or corrupted by a Covered Cause of Loss. To the extent that electronic data is not replaced or restored, the loss will be valued at the cost of replacement of the media on which the electronic data was stored, with blank media of substantially identical type.
- (3) The Covered Causes of Loss applicable to Your Business Personal Property apply to this Additional Coverage, Electronic Data, subject to the following:
 - (a) If the Causes Of Loss – Special Form applies, coverage under this Additional Coverage, Electronic Data, is limited to the "specified causes of loss" as defined in that form and Collapse as set forth in that form.
 - (b) If the Causes Of Loss – Broad Form applies, coverage under this Additional Coverage, Electronic Data, includes Collapse as set forth in that form.
 - (c) If the Causes Of Loss form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Electronic Data.

- (d) The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for loss or damage caused by or resulting from manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, modify, maintain, repair or replace that system.

- (4) The most we will pay under this Additional Coverage, Electronic Data, is \$2,500 (unless a higher limit is shown in the Declarations) for all loss or damage sustained in any one policy year, regardless of the number of occurrences of loss or damage or the number of premises, locations or computer systems involved. If loss payment on the first occurrence does not exhaust this amount, then the balance is available for subsequent loss or damage sustained in but not after that policy year. With respect to an occurrence which begins in one policy year and continues or results in additional loss or damage in a subsequent policy year(s), all loss or damage is deemed to be sustained in the policy year in which the occurrence began.

5. Coverage Extensions

Except as otherwise provided, the following Extensions apply to property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

If a Coinsurance percentage of 80% or more is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

a. Newly Acquired Or Constructed Property

(1) Buildings

You may extend the insurance that applies to Building to apply to:

- (a) Your new buildings while being built on the described premises; and

- (b) Buildings you acquire at locations, other than the described premises, intended for:

- (i) Similar use as the building described in the Declarations; or
- (ii) Use as a warehouse.

The most we will pay for loss or damage under this Extension is \$250,000 at each building.

(2) Your Business Personal Property

- (a) If this policy covers Your Business Personal Property, you may extend that insurance to apply to:

- (i) Business personal property, including such property that you newly acquire, at any location you acquire other than at fairs, trade shows or exhibitions; or
- (ii) Business personal property, including such property that you newly acquire, located at your newly constructed or acquired buildings at the location described in the Declarations.

The most we will pay for loss or damage under this Extension is \$100,000 at each building.

- (b) This Extension does not apply to:

- (i) Personal property of others that is temporarily in your possession in the course of installing or performing work on such property; or
- (ii) Personal property of others that is temporarily in your possession in the course of your manufacturing or wholesaling activities.

(3) Period Of Coverage

With respect to insurance provided under this Coverage Extension for Newly Acquired Or Constructed Property, coverage will end when any of the following first occurs:

- (a) This policy expires;

- (b) 30 days expire after you acquire the property or begin construction of that part of the building that would qualify as covered property; or

- (c) You report values to us.

We will charge you additional premium for values reported from the date you acquire the property or begin construction of that part of the building that would qualify as covered property.

b. Personal Effects And Property Of Others

You may extend the insurance that applies to Your Business Personal Property to apply to:

- (1) Personal effects owned by you, your officers, your partners or members, your managers or your employees. This Extension does not apply to loss or damage by theft.
- (2) Personal property of others in your care, custody or control.

The most we will pay for loss or damage under this Extension is \$2,500 at each described premises. Our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

c. Valuable Papers And Records (Other Than Electronic Data)

- (1) You may extend the insurance that applies to Your Business Personal Property to apply to the cost to replace or restore the lost information on valuable papers and records for which duplicates do not exist. But this Extension does not apply to valuable papers and records which exist as electronic data. Electronic data has the meaning described under Property Not Covered, Electronic Data.
- (2) If the Causes Of Loss – Special Form applies, coverage under this Extension is limited to the "specified causes of loss" as defined in that form and Collapse as set forth in that form.
- (3) If the Causes Of Loss – Broad Form applies, coverage under this Extension includes Collapse as set forth in that form.

- (4) Under this Extension, the most we will pay to replace or restore the lost information is \$2,500 at each described premises, unless a higher limit is shown in the Declarations. Such amount is additional insurance. We will also pay for the cost of blank material for reproducing the records (whether or not duplicates exist) and (when there is a duplicate) for the cost of labor to transcribe or copy the records. The costs of blank material and labor are subject to the applicable Limit of Insurance on Your Business Personal Property and, therefore, coverage of such costs is not additional insurance.

d. Property Off-premises

- (1) You may extend the insurance provided by this Coverage Form to apply to your Covered Property while it is away from the described premises, if it is:
- (a) Temporarily at a location you do not own, lease or operate;
 - (b) In storage at a location you lease, provided the lease was executed after the beginning of the current policy term; or
 - (c) At any fair, trade show or exhibition.
- (2) This Extension does not apply to property:
- (a) In or on a vehicle; or
 - (b) In the care, custody or control of your salespersons, unless the property is in such care, custody or control at a fair, trade show or exhibition.
- (3) The most we will pay for loss or damage under this Extension is \$10,000.

e. Outdoor Property

You may extend the insurance provided by this Coverage Form to apply to your outdoor fences, radio and television antennas (including satellite dishes), trees, shrubs and plants (other than trees, shrubs or plants which are "stock" or are part of a vegetated roof), including debris removal expense, caused by or resulting from any of the following causes of loss if they are Covered Causes of Loss:

- (1) Fire;
- (2) Lightning;

- (3) Explosion;
- (4) Riot or Civil Commotion; or
- (5) Aircraft.

The most we will pay for loss or damage under this Extension is \$1,000, but not more than \$250 for any one tree, shrub or plant. These limits apply to any one occurrence, regardless of the types or number of items lost or damaged in that occurrence.

Subject to all aforementioned terms and limitations of coverage, this Coverage Extension includes the expense of removing from the described premises the debris of trees, shrubs and plants which are the property of others.

f. Non-owned Detached Trailers

- (1) You may extend the insurance that applies to Your Business Personal Property to apply to loss or damage to trailers that you do not own, provided that:
- (a) The trailer is used in your business;
 - (b) The trailer is in your care, custody or control at the premises described in the Declarations; and
 - (c) You have a contractual responsibility to pay for loss or damage to the trailer.
- (2) We will not pay for any loss or damage that occurs:
- (a) While the trailer is attached to any motor vehicle or motorized conveyance, whether or not the motor vehicle or motorized conveyance is in motion;
 - (b) During hitching or unhitching operations, or when a trailer becomes accidentally unhitched from a motor vehicle or motorized conveyance.
- (3) The most we will pay for loss or damage under this Extension is \$5,000, unless a higher limit is shown in the Declarations.
- (4) This insurance is excess over the amount due (whether you can collect on it or not) from any other insurance covering such property.

g. Business Personal Property Temporarily In Portable Storage Units

- (1) You may extend the insurance that applies to Your Business Personal Property to apply to such property while temporarily stored in a portable storage unit (including a detached trailer) located within 100 feet of the described premises.
- (2) If the applicable Covered Causes of Loss form or endorsement contains a limitation or exclusion concerning loss or damage from sand, dust, sleet, snow, ice or rain to property in a structure, such limitation or exclusion also applies to property in a portable storage unit.
- (3) Coverage under this Extension:
 - (a) Will end 90 days after the business personal property has been placed in the storage unit;
 - (b) Does not apply if the storage unit itself has been in use at the described premises for more than 90 consecutive days, even if the business personal property has been stored there for 90 or fewer days as of the time of loss or damage.
- (4) Under this Extension, the most we will pay for the total of all loss or damage to business personal property is \$10,000 (unless a higher limit is indicated in the Declarations for such Extension) regardless of the number of storage units. Such limit is part of, not in addition to, the applicable Limit of Insurance on Your Business Personal Property. Therefore, payment under this Extension will not increase the applicable Limit of Insurance on Your Business Personal Property.
- (5) This Extension does not apply to loss or damage otherwise covered under this Coverage Form or any endorsement to this Coverage Form or policy, and does not apply to loss or damage to the storage unit itself.

Each of these Extensions is additional insurance unless otherwise indicated. The Additional Condition, Coinsurance, does not apply to these Extensions.

B. Exclusions And Limitations

See applicable Causes Of Loss form as shown in the Declarations.

C. Limits Of Insurance

The most we will pay for loss or damage in any one occurrence is the applicable Limit Of Insurance shown in the Declarations.

The most we will pay for loss or damage to outdoor signs, whether or not the sign is attached to a building, is \$2,500 per sign in any one occurrence.

The amounts of insurance stated in the following Additional Coverages apply in accordance with the terms of such coverages and are separate from the Limit(s) Of Insurance shown in the Declarations for any other coverage:

1. Fire Department Service Charge;
2. Pollutant Clean-up And Removal;
3. Increased Cost Of Construction; and
4. Electronic Data.

Payments under the Preservation Of Property Additional Coverage will not increase the applicable Limit of Insurance.

D. Deductible

In any one occurrence of loss or damage (hereinafter referred to as loss), we will first reduce the amount of loss if required by the Coinsurance Condition or the Agreed Value Optional Coverage. If the adjusted amount of loss is less than or equal to the Deductible, we will not pay for that loss. If the adjusted amount of loss exceeds the Deductible, we will then subtract the Deductible from the adjusted amount of loss and will pay the resulting amount or the Limit of Insurance, whichever is less.

When the occurrence involves loss to more than one item of Covered Property and separate Limits of Insurance apply, the losses will not be combined in determining application of the Deductible. But the Deductible will be applied only once per occurrence.

Example 1

(This example assumes there is no Coinsurance penalty.)

Deductible:	\$ 250
Limit of Insurance – Building 1:	\$ 60,000
Limit of Insurance – Building 2:	\$ 80,000
Loss to Building 1:	\$ 60,100
Loss to Building 2:	\$ 90,000

The amount of loss to Building 1 (\$60,100) is less than the sum (\$60,250) of the Limit of Insurance applicable to Building 1 plus the Deductible.

The Deductible will be subtracted from the amount of loss in calculating the loss payable for Building 1:

\$ 60,100
 - 250

\$ 59,850 Loss Payable – Building 1

The Deductible applies once per occurrence and therefore is not subtracted in determining the amount of loss payable for Building 2. Loss payable for Building 2 is the Limit of Insurance of \$80,000.

Total amount of loss payable:

\$59,850 + \$80,000 = \$139,850

Example 2

(This example, too, assumes there is no Coinsurance penalty.)

The Deductible and Limits of Insurance are the same as those in Example 1.

Loss to Building 1:	\$ 70,000
(Exceeds Limit of Insurance plus Deductible)	
Loss to Building 2:	\$ 90,000
(Exceeds Limit of Insurance plus Deductible)	
Loss Payable – Building 1:	\$ 60,000
(Limit of Insurance)	
Loss Payable – Building 2:	\$ 80,000
(Limit of Insurance)	
Total amount of loss payable:	\$ 140,000

E. Loss Conditions

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions:

1. Abandonment

There can be no abandonment of any property to us.

2. Appraisal

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

a. Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

3. Duties In The Event Of Loss Or Damage

a. You must see that the following are done in the event of loss or damage to Covered Property:

- (1) Notify the police if a law may have been broken.
- (2) Give us prompt notice of the loss or damage. Include a description of the property involved.
- (3) As soon as possible, give us a description of how, when and where the loss or damage occurred.
- (4) Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.
- (5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.
- (6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.
 Also, permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.
- (7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
- (8) Cooperate with us in the investigation or settlement of the claim.

- b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

4. Loss Payment

- a. In the event of loss or damage covered by this Coverage Form, at our option, we will either:

- (1) Pay the value of lost or damaged property;
- (2) Pay the cost of repairing or replacing the lost or damaged property, subject to b. below;
- (3) Take all or any part of the property at an agreed or appraised value; or
- (4) Repair, rebuild or replace the property with other property of like kind and quality, subject to b. below.

We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

- b. The cost to repair, rebuild or replace does not include the increased cost attributable to enforcement of or compliance with any ordinance or law regulating the construction, use or repair of any property.
- c. We will give notice of our intentions within 30 days after we receive the sworn proof of loss.
- d. We will not pay you more than your financial interest in the Covered Property.
- e. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payments will satisfy your claims against us for the owners' property. We will not pay the owners more than their financial interest in the Covered Property.
- f. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense.

- g. We will pay for covered loss or damage to Covered Property within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part, and:

- (1) We have reached agreement with you on the amount of loss; or
- (2) An appraisal award has been made.

If you name an insurance trustee, we will adjust losses with you, but we will pay the insurance trustee. If we pay the trustee, the payments will satisfy your claims against us.

- h. A party wall is a wall that separates and is common to adjoining buildings that are owned by different parties. In settling covered losses involving a party wall, we will pay a proportion of the loss to the party wall based on your interest in the wall in proportion to the interest of the owner of the adjoining building. However, if you elect to repair or replace your building and the owner of the adjoining building elects not to repair or replace that building, we will pay you the full value of the loss to the party wall, subject to all applicable policy provisions including Limits of Insurance, the Valuation and Coinsurance Conditions and all other provisions of this Loss Payment Condition. Our payment under the provisions of this paragraph does not alter any right of subrogation we may have against any entity, including the owner or insurer of the adjoining building, and does not alter the terms of the Transfer Of Rights Of Recovery Against Others To Us Condition in this policy.

5. Recovered Property

If either you or we recover any property after loss settlement, that party must give the other prompt notice. At your option, the property will be returned to you. You must then return to us the amount we paid to you for the property. We will pay recovery expenses and the expenses to repair the recovered property, subject to the Limit of Insurance.

6. Unit-owner's Insurance

A unit-owner may have other insurance covering the same property as this insurance. This insurance is intended to be primary and not to contribute with such other insurance.

7. Vacancy**a. Description Of Terms**

- (1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:
- (a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.
- (b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:
- (i) Rented to a lessee or sublessee and used by the lessee or sublessee to conduct its customary operations; and/or
 - (ii) Used by the building owner to conduct customary operations.
- (2) Buildings under construction or renovation are not considered vacant.

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

- (1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:
- (a) Vandalism;
 - (b) Sprinkler leakage, unless you have protected the system against freezing;
 - (c) Building glass breakage;
 - (d) Water damage;
 - (e) Theft; or
 - (f) Attempted theft.
- (2) With respect to Covered Causes of Loss other than those listed in b.(1)(a) through b.(1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

8. Valuation

We will determine the value of Covered Property in the event of loss or damage as follows:

- a. At actual cash value as of the time of loss or damage, except as provided in b. and c. below.
- b. If the Limit of Insurance for Building satisfies the Additional Condition, Coinsurance, and the cost to repair or replace the damaged building property is \$2,500 or less, we will pay the cost of building repairs or replacement.

The cost of building repairs or replacement does not include the increased cost attributable to enforcement of or compliance with any ordinance or law regulating the construction, use or repair of any property. However, the following property will be valued at the actual cash value, even when attached to the building:

- (1) Awnings or floor coverings;
- (2) Appliances for refrigerating, ventilating, cooking, dishwashing or laundering; or
- (3) Outdoor equipment or furniture.

- c. Glass at the cost of replacement with safety-glazing material if required by law.

9. Waiver Of Rights Of Recovery

We waive our rights to recover payment from any unit-owner of the condominium that is shown in the Declarations.

F. Additional Conditions

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions:

1. Coinsurance

If a Coinsurance percentage is shown in the Declarations, the following condition applies:

- a. We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property.

Instead, we will determine the most we will pay using the following steps:

- (1) Multiply the value of Covered Property at the time of loss by the Coinsurance percentage;
- (2) Divide the Limit of Insurance of the property by the figure determined in Step (1);

(3) Multiply the total amount of loss, before the application of any deductible, by the figure determined in Step (2); and

(4) Subtract the deductible from the figure determined in Step (3).

We will pay the amount determined in Step (4) or the Limit of Insurance, whichever is less. For the remainder, you will either have to rely on other insurance or absorb the loss yourself.

Example 1 (Underinsurance)

When: The value of the property is: \$ 250,000
 The Coinsurance percentage for it is: 80%
 The Limit of Insurance for it is: \$ 100,000
 The Deductible is: \$ 250
 The amount of loss is: \$ 40,000

Step (1): $\$250,000 \times 80\% = \$200,000$
 (the minimum amount of insurance to meet your Coinsurance requirements)

Step (2): $\$100,000 \div \$200,000 = .50$

Step (3): $\$40,000 \times .50 = \$20,000$

Step (4): $\$20,000 - \$250 = \$19,750$

We will pay no more than \$19,750. The remaining \$20,250 is not covered.

Example 2 (Adequate Insurance)

When: The value of the property is: \$ 250,000
 The Coinsurance percentage for it is: 80%
 The Limit of Insurance for it is: \$ 200,000
 The Deductible is: \$ 250
 The amount of loss is: \$ 40,000

The minimum amount of insurance to meet your Coinsurance requirement is \$200,000 ($\$250,000 \times 80\%$). Therefore, the Limit of Insurance in this example is adequate and no penalty applies. We will pay no more than \$39,750 (\$40,000 amount of loss minus the deductible of \$250).

- b. If one Limit of Insurance applies to two or more separate items, this condition will apply to the total of all property to which the limit applies.

Example 3

When: The value of the property is:
 Building at Location 1: \$ 75,000
 Building at Location 2: \$ 100,000
 Personal Property at Location 2: \$ 75,000
 \$ 250,000

The Coinsurance percentage for it is: 90%

The Limit of Insurance for Buildings and Personal Property at Locations 1 and 2 is: \$ 180,000

The Deductible is: \$ 1,000

The amount of loss is:
 Building at Location 2: \$ 30,000
 Personal Property at Location 2: \$ 20,000
 \$ 50,000

Step (1): $\$250,000 \times 90\% = \$225,000$
 (the minimum amount of insurance to meet your Coinsurance requirements and to avoid the penalty shown below)

Step (2): $\$180,000 \div \$225,000 = .80$

Step (3): $\$50,000 \times .80 = \$40,000$

Step (4): $\$40,000 - \$1,000 = \$39,000$

We will pay no more than \$39,000. The remaining \$11,000 is not covered.

2. Mortgageholders

- a. The term mortgageholder includes trustee.
- b. We will pay for covered loss of or damage to buildings or structures to each mortgageholder shown in the Declarations in their order of precedence, as interests may appear.
- c. The mortgageholder has the right to receive loss payment even if the mortgageholder has started foreclosure or similar action on the building or structure.
- d. If we deny your claim because of your acts or because you have failed to comply with the terms of this Coverage Part, the mortgageholder will still have the right to receive loss payment if the mortgageholder:
 - (1) Pays any premium due under this Coverage Part at our request if you have failed to do so;

- (2) Submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so; and
- (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgageholder.

All of the terms of this Coverage Part will then apply directly to the mortgageholder.

- e. If we pay the mortgageholder for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:

- (1) The mortgageholder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and
- (2) The mortgageholder's right to recover the full amount of the mortgageholder's claim will not be impaired.

At our option, we may pay to the mortgageholder the whole principal on the mortgage plus any accrued interest. In this event, your mortgage and note will be transferred to us and you will pay your remaining mortgage debt to us.

- f. If we cancel this policy, we will give written notice to the mortgageholder at least:

- (1) 10 days before the effective date of cancellation if we cancel for your nonpayment of premium; or
- (2) 30 days before the effective date of cancellation if we cancel for any other reason.

- g. If we elect not to renew this policy, we will give written notice to the mortgageholder at least 10 days before the expiration date of this policy.

G. Optional Coverages

If shown as applicable in the Declarations, the following Optional Coverages apply separately to each item:

1. Agreed Value

- a. The Additional Condition, Coinsurance, does not apply to Covered Property to which this Optional Coverage applies. We will pay no more for loss of or damage to that property than the proportion that the Limit of Insurance under this Coverage Part for the property bears to the Agreed Value shown for it in the Declarations.

- b. If the expiration date for this Optional Coverage shown in the Declarations is not extended, the Additional Condition, Coinsurance, is reinstated and this Optional Coverage expires.

- c. The terms of this Optional Coverage apply only to loss or damage that occurs:

- (1) On or after the effective date of this Optional Coverage; and
- (2) Before the Agreed Value expiration date shown in the Declarations or the policy expiration date, whichever occurs first.

2. Inflation Guard

- a. The Limit of Insurance for property to which this Optional Coverage applies will automatically increase by the annual percentage shown in the Declarations.

- b. The amount of increase will be:

- (1) The Limit of Insurance that applied on the most recent of the policy inception date, the policy anniversary date, or any other policy change amending the Limit of Insurance, times
- (2) The percentage of annual increase shown in the Declarations, expressed as a decimal (example: 8% is .08), times
- (3) The number of days since the beginning of the current policy year or the effective date of the most recent policy change amending the Limit of Insurance, divided by 365.

Example

If: The applicable Limit of Insurance is: \$ 100,000
 The annual percentage increase is: 8%
 The number of days since the beginning of the policy year (or last policy change) is: 146
 The amount of increase is:
 $\$100,000 \times .08 \times 146 \div 365 =$ \$ 3,200

3. Replacement Cost

- a. Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Loss Condition, Valuation, of this Coverage Form.
- b. This Optional Coverage does not apply to:
 - (1) Personal property of others;
 - (2) Contents of a residence; or
 - (3) Works of art, antiques or rare articles, including etchings, pictures, statuary, marbles, bronzes, porcelains and bric-a-brac.

Under the terms of this Replacement Cost Optional Coverage, personal property owned indivisibly by all unit-owners, and the property covered under Paragraph **A.1.a.(6)** of this Coverage Form, are not considered to be the personal property of others.

- c. You may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the loss or damage.
- d. We will not pay on a replacement cost basis for any loss or damage:
 - (1) Until the lost or damaged property is actually repaired or replaced; and
 - (2) Unless the repair or replacement is made as soon as reasonably possible after the loss or damage.
- e. We will not pay more for loss or damage on a replacement cost basis than the least of (1), (2) or (3), subject to f. below:
 - (1) The Limit of Insurance applicable to the lost or damaged property;
 - (2) The cost to replace the lost or damaged property with other property:
 - (a) Of comparable material and quality; and
 - (b) Used for the same purpose; or
 - (3) The amount actually spent that is necessary to repair or replace the lost or damaged property.

If a building is rebuilt at a new premises, the cost described in e.(2) above is limited to the cost which would have been incurred if the building had been rebuilt at the original premises.

- f. The cost of repair or replacement does not include the increased cost attributable to enforcement of or compliance with any ordinance or law regulating the construction, use or repair of any property.

4. Extension Of Replacement Cost To Personal Property Of Others

- a. If the Replacement Cost Optional Coverage is shown as applicable in the Declarations, then this Extension may also be shown as applicable. If the Declarations show this Extension as applicable, then Paragraph **3.b.(1)** of the Replacement Cost Optional Coverage is deleted and all other provisions of the Replacement Cost Optional Coverage apply to replacement cost on personal property of others.

- b. With respect to replacement cost on the personal property of others, the following limitation applies:

If an item(s) of personal property of others is subject to a written contract which governs your liability for loss or damage to that item(s), then valuation of that item(s) will be based on the amount for which you are liable under such contract, but not to exceed the lesser of the replacement cost of the property or the applicable Limit of Insurance.

H. Definitions

- 1. "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.
- 2. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
- 3. "Stock" means merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping.

CAUSES OF LOSS – SPECIAL FORM

Words and phrases that appear in quotation marks have special meaning. Refer to Section **G**, Definitions.

A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance Or Law

The enforcement of or compliance with any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

- (a) An ordinance or law that is enforced even if the property has not been damaged; or
- (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

b. Earth Movement

- (1) Earthquake, including tremors and aftershocks and any earth sinking, rising or shifting related to such event;
- (2) Landslide, including any earth sinking, rising or shifting related to such event;
- (3) Mine subsidence, meaning subsidence of a man-made mine, whether or not mining activity has ceased;

- (4) Earth sinking (other than sinkhole collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

But if Earth Movement, as described in **b.(1)** through **(4)** above, results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

- (5) Volcanic eruption, explosion or effusion. But if volcanic eruption, explosion or effusion results in fire, building glass breakage or Volcanic Action, we will pay for the loss or damage caused by that fire, building glass breakage or Volcanic Action.

Volcanic Action means direct loss or damage resulting from the eruption of a volcano when the loss or damage is caused by:

- (a) Airborne volcanic blast or airborne shock waves;
- (b) Ash, dust or particulate matter; or
- (c) Lava flow.

With respect to coverage for Volcanic Action as set forth in **(5)(a)**, **(5)(b)** and **(5)(c)**, all volcanic eruptions that occur within any 168-hour period will constitute a single occurrence.

Volcanic Action does not include the cost to remove ash, dust or particulate matter that does not cause direct physical loss or damage to the described property.

This exclusion applies regardless of whether any of the above, in Paragraphs **(1)** through **(5)**, is caused by an act of nature or is otherwise caused.

c. Governmental Action

Seizure or destruction of property by order of governmental authority.

But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part.

d. Nuclear Hazard

Nuclear reaction or radiation, or radioactive contamination, however caused.

But if nuclear reaction or radiation, or radioactive contamination, results in fire, we will pay for the loss or damage caused by that fire.

e. Utility Services

The failure of power, communication, water or other utility service supplied to the described premises, however caused, if the failure:

- (1) Originates away from the described premises; or
- (2) Originates at the described premises, but only if such failure involves equipment used to supply the utility service to the described premises from a source away from the described premises.

Failure of any utility service includes lack of sufficient capacity and reduction in supply.

Loss or damage caused by a surge of power is also excluded, if the surge would not have occurred but for an event causing a failure of power.

But if the failure or surge of power, or the failure of communication, water or other utility service, results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

Communication services include but are not limited to service relating to Internet access or access to any electronic, cellular or satellite network.

f. War And Military Action

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

g. Water

- (1) Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);
- (2) Mudslide or mudflow;
- (3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;
- (4) Water under the ground surface pressing on, or flowing or seeping through:
 - (a) Foundations, walls, floors or paved surfaces;
 - (b) Basements, whether paved or not; or
 - (c) Doors, windows or other openings; or
- (5) Waterborne material carried or otherwise moved by any of the water referred to in Paragraph (1), (3) or (4), or material carried or otherwise moved by mudslide or mudflow.

This exclusion applies regardless of whether any of the above, in Paragraphs (1) through (5), is caused by an act of nature or is otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.

But if any of the above, in Paragraphs (1) through (5), results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage (if sprinkler leakage is a Covered Cause of Loss).

h. "Fungus", Wet Rot, Dry Rot And Bacteria

Presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria.

But if "fungus", wet or dry rot or bacteria result in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion does not apply:

- (1) When "fungus", wet or dry rot or bacteria result from fire or lightning; or
- (2) To the extent that coverage is provided in the Additional Coverage, Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria, with respect to loss or damage by a cause of loss other than fire or lightning.

Exclusions **B.1.a.** through **B.1.h.** apply whether or not the loss event results in widespread damage or affects a substantial area.

2. We will not pay for loss or damage caused by or resulting from any of the following:

a. Artificially generated electrical, magnetic or electromagnetic energy that damages, disturbs, disrupts or otherwise interferes with any:

- (1) Electrical or electronic wire, device, appliance, system or network; or
- (2) Device, appliance, system or network utilizing cellular or satellite technology.

For the purpose of this exclusion, electrical, magnetic or electromagnetic energy includes but is not limited to:

- (a) Electrical current, including arcing;
- (b) Electrical charge produced or conducted by a magnetic or electromagnetic field;
- (c) Pulse of electromagnetic energy; or
- (d) Electromagnetic waves or microwaves.

But if fire results, we will pay for the loss or damage caused by that fire.

- b. Delay, loss of use or loss of market.**
- c. Smoke, vapor or gas from agricultural smudging or industrial operations.**
- d.(1) Wear and tear;**
- (2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;**
- (3) Smog;**
- (4) Settling, cracking, shrinking or expansion;**

- (5) Nesting or infestation, or discharge or release of waste products or secretions, by insects, birds, rodents or other animals.**

- (6) Mechanical breakdown, including rupture or bursting caused by centrifugal force. But if mechanical breakdown results in elevator collision, we will pay for the loss or damage caused by that elevator collision.**

- (7) The following causes of loss to personal property:**

- (a) Dampness or dryness of atmosphere;**
- (b) Changes in or extremes of temperature; or**
- (c) Marring or scratching.**

But if an excluded cause of loss that is listed in **2.d.(1)** through **(7)** results in a "specified cause of loss" or building glass breakage, we will pay for the loss or damage caused by that "specified cause of loss" or building glass breakage.

- e. Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under your control. But if explosion of steam boilers, steam pipes, steam engines or steam turbines results in fire or combustion explosion, we will pay for the loss or damage caused by that fire or combustion explosion. We will also pay for loss or damage caused by or resulting from the explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.**
- f. Continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.**
- g. Water, other liquids, powder or molten material that leaks or flows from plumbing, heating, air conditioning or other equipment (except fire protective systems) caused by or resulting from freezing, unless:**
 - (1) You do your best to maintain heat in the building or structure; or**

(2) You drain the equipment and shut off the supply if the heat is not maintained.

- h. Dishonest or criminal act (including theft) by you, any of your partners, members, officers, managers, employees (including temporary employees and leased workers), directors, trustees or authorized representatives, whether acting alone or in collusion with each other or with any other party; or theft by any person to whom you entrust the property for any purpose, whether acting alone or in collusion with any other party.

This exclusion:

- (1) Applies whether or not an act occurs during your normal hours of operation;
 - (2) Does not apply to acts of destruction by your employees (including temporary employees and leased workers) or authorized representatives; but theft by your employees (including temporary employees and leased workers) or authorized representatives is not covered.
- i. Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense.
- j. Rain, snow, ice or sleet to personal property in the open.
- k. Collapse, including any of the following conditions of property or any part of the property:
- (1) An abrupt falling down or caving in;
 - (2) Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or
 - (3) Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to (1) or (2) above.

But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion, k., does not apply:

- (a) To the extent that coverage is provided under the Additional Coverage, Collapse; or

(b) To collapse caused by one or more of the following:

- (i) The "specified causes of loss";
- (ii) Breakage of building glass;
- (iii) Weight of rain that collects on a roof; or
- (iv) Weight of people or personal property.

- l. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion, l., does not apply to damage to glass caused by chemicals applied to the glass.

- m. Neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss.
3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
- a. Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in Paragraph 1. above to produce the loss or damage.
 - b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.
 - c. Faulty, inadequate or defective:
 - (1) Planning, zoning, development, surveying, siting;
 - (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
 - (3) Materials used in repair, construction, renovation or remodeling; or
 - (4) Maintenance;

of part or all of any property on or off the described premises.

4. Special Exclusions

The following provisions apply only to the specified Coverage Forms:

a. Business Income (And Extra Expense) Coverage Form, Business Income (Without Extra Expense) Coverage Form, Or Extra Expense Coverage Form

We will not pay for:

- (1) Any loss caused by or resulting from:
 - (a) Damage or destruction of "finished stock"; or
 - (b) The time required to reproduce "finished stock".

This exclusion does not apply to Extra Expense.

- (2) Any loss caused by or resulting from direct physical loss or damage to radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers.

- (3) Any increase of loss caused by or resulting from:

- (a) Delay in rebuilding, repairing or replacing the property or resuming "operations", due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or

- (b) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the "suspension" of "operations", we will cover such loss that affects your Business Income during the "period of restoration" and any extension of the "period of restoration" in accordance with the terms of the Extended Business Income Additional Coverage and the Extended Period Of Indemnity Optional Coverage or any variation of these.

- (4) Any Extra Expense caused by or resulting from suspension, lapse or cancellation of any license, lease or contract beyond the "period of restoration".

- (5) Any other consequential loss.

b. Leasehold Interest Coverage Form

- (1) Paragraph B.1.a., Ordinance Or Law, does not apply to insurance under this Coverage Form.

- (2) We will not pay for any loss caused by:

- (a) Your cancelling the lease;
- (b) The suspension, lapse or cancellation of any license; or
- (c) Any other consequential loss.

c. Legal Liability Coverage Form

- (1) The following exclusions do not apply to insurance under this Coverage Form:

- (a) Paragraph B.1.a. Ordinance Or Law;
- (b) Paragraph B.1.c. Governmental Action;
- (c) Paragraph B.1.d. Nuclear Hazard;
- (d) Paragraph B.1.e. Utility Services; and
- (e) Paragraph B.1.f. War And Military Action.

- (2) The following additional exclusions apply to insurance under this Coverage Form:

(a) Contractual Liability

We will not defend any claim or "suit", or pay damages that you are legally liable to pay, solely by reason of your assumption of liability in a contract or agreement. But this exclusion does not apply to a written lease agreement in which you have assumed liability for building damage resulting from an actual or attempted burglary or robbery, provided that:

- (i) Your assumption of liability was executed prior to the accident; and
- (ii) The building is Covered Property under this Coverage Form.

(b) Nuclear Hazard

We will not defend any claim or "suit", or pay any damages, loss, expense or obligation, resulting from nuclear reaction or radiation, or radioactive contamination, however caused.

5. Additional Exclusion

The following provisions apply only to the specified property:

Loss Or Damage To Products

We will not pay for loss or damage to any merchandise, goods or other product caused by or resulting from error or omission by any person or entity (including those having possession under an arrangement where work or a portion of the work is outsourced) in any stage of the development, production or use of the product, including planning, testing, processing, packaging, installation, maintenance or repair. This exclusion applies to any effect that compromises the form, substance or quality of the product. But if such error or omission results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

C. Limitations

The following limitations apply to all policy forms and endorsements, unless otherwise stated:

1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section.
 - a. Steam boilers, steam pipes, steam engines or steam turbines caused by or resulting from any condition or event inside such equipment. But we will pay for loss of or damage to such equipment caused by or resulting from an explosion of gases or fuel within the furnace of any fired vessel or within the flues or passages through which the gases of combustion pass.
 - b. Hot water boilers or other water heating equipment caused by or resulting from any condition or event inside such boilers or equipment, other than an explosion.
 - c. The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:
 - (1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or
 - (2) The loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure.
- d. Building materials and supplies not attached as part of the building or structure, caused by or resulting from theft.

However, this limitation does not apply to:

 - (1) Building materials and supplies held for sale by you, unless they are insured under the Builders Risk Coverage Form; or
 - (2) Business Income Coverage or Extra Expense Coverage.
- e. Property that is missing, where the only evidence of the loss or damage is a shortage disclosed on taking inventory, or other instances where there is no physical evidence to show what happened to the property.
- f. Property that has been transferred to a person or to a place outside the described premises on the basis of unauthorized instructions.
- g. Lawns, trees, shrubs or plants which are part of a vegetated roof, caused by or resulting from:
 - (1) Dampness or dryness of atmosphere or of soil supporting the vegetation;
 - (2) Changes in or extremes of temperature;
 - (3) Disease;
 - (4) Frost or hail; or
 - (5) Rain, snow, ice or sleet.
2. We will not pay for loss of or damage to the following types of property unless caused by the "specified causes of loss" or building glass breakage:
 - a. Animals, and then only if they are killed or their destruction is made necessary.
 - b. Fragile articles such as statuary, marbles, chinaware and porcelains, if broken. This restriction does not apply to:
 - (1) Glass; or
 - (2) Containers of property held for sale.
 - c. Builders' machinery, tools and equipment owned by you or entrusted to you, provided such property is Covered Property.

However, this limitation does not apply:

 - (1) If the property is located on or within 100 feet of the described premises, unless the premises is insured under the Builders Risk Coverage Form; or
 - (2) To Business Income Coverage or to Extra Expense Coverage.

3. The special limit shown for each category, a. through d., is the total limit for loss of or damage to all property in that category. The special limit applies to any one occurrence of theft, regardless of the types or number of articles that are lost or damaged in that occurrence. The special limits are (unless a higher limit is shown in the Declarations):

- a. \$2,500 for furs, fur garments and garments trimmed with fur.
- b. \$2,500 for jewelry, watches, watch movements, jewels, pearls, precious and semiprecious stones, bullion, gold, silver, platinum and other precious alloys or metals. This limit does not apply to jewelry and watches worth \$100 or less per item.
- c. \$2,500 for patterns, dies, molds and forms.
- d. \$250 for stamps, tickets, including lottery tickets held for sale, and letters of credit.

These special limits are part of, not in addition to, the Limit of Insurance applicable to the Covered Property.

This limitation, C.3., does not apply to Business Income Coverage or to Extra Expense Coverage.

4. We will not pay the cost to repair any defect to a system or appliance from which water, other liquid, powder or molten material escapes. But we will pay the cost to repair or replace damaged parts of fire-extinguishing equipment if the damage:

- a. Results in discharge of any substance from an automatic fire protection system; or
- b. Is directly caused by freezing.

However, this limitation does not apply to Business Income Coverage or to Extra Expense Coverage.

D. Additional Coverage – Collapse

The coverage provided under this Additional Coverage, Collapse, applies only to an abrupt collapse as described and limited in D.1. through D.7.

1. For the purpose of this Additional Coverage, Collapse, abrupt collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.

2. We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:

- a. Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;
- b. Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;
- c. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs during the course of the construction, remodeling or renovation.
- d. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs after the construction, remodeling or renovation is complete, but only if the collapse is caused in part by:
 - (1) A cause of loss listed in 2.a. or 2.b.;
 - (2) One or more of the "specified causes of loss";
 - (3) Breakage of building glass;
 - (4) Weight of people or personal property; or
 - (5) Weight of rain that collects on a roof.

3. This **Additional Coverage – Collapse** does not apply to:

- a. A building or any part of a building that is in danger of falling down or caving in;
- b. A part of a building that is standing, even if it has separated from another part of the building; or
- c. A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

4. With respect to the following property:

- a. Outdoor radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers;

- b. Awnings, gutters and downspouts;
 - c. Yard fixtures;
 - d. Outdoor swimming pools;
 - e. Fences;
 - f. Piers, wharves and docks;
 - g. Beach or diving platforms or appurtenances;
 - h. Retaining walls; and
 - i. Walks, roadways and other paved surfaces;
- if an abrupt collapse is caused by a cause of loss listed in 2.a. through 2.d., we will pay for loss or damage to that property only if:

- (1) Such loss or damage is a direct result of the abrupt collapse of a building insured under this Coverage Form; and
- (2) The property is Covered Property under this Coverage Form.

5. If personal property abruptly falls down or caves in and such collapse is **not** the result of abrupt collapse of a building, we will pay for loss or damage to Covered Property caused by such collapse of personal property only if:

- a. The collapse of personal property was caused by a cause of loss listed in 2.a. through 2.d.;
- b. The personal property which collapses is inside a building; and
- c. The property which collapses is not of a kind listed in 4., regardless of whether that kind of property is considered to be personal property or real property.

The coverage stated in this Paragraph 5. does not apply to personal property if marring and/or scratching is the only damage to that personal property caused by the collapse.

- 6. This Additional Coverage, Collapse, does not apply to personal property that has not abruptly fallen down or caved in, even if the personal property shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.
- 7. This Additional Coverage, Collapse, will not increase the Limits of Insurance provided in this Coverage Part.
- 8. The term Covered Cause of Loss includes the Additional Coverage, Collapse, as described and limited in D.1. through D.7.

E. Additional Coverage – Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria

1. The coverage described in E.2. and E.6. only applies when the "fungus", wet or dry rot or bacteria are the result of one or more of the following causes that occur during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence:

- a. A "specified cause of loss" other than fire or lightning; or
- b. Flood, if the Flood Coverage Endorsement applies to the affected premises.

This Additional Coverage does not apply to lawns, trees, shrubs or plants which are part of a vegetated roof.

2. We will pay for loss or damage by "fungus", wet or dry rot or bacteria. As used in this Limited Coverage, the term loss or damage means:

- a. Direct physical loss or damage to Covered Property caused by "fungus", wet or dry rot or bacteria, including the cost of removal of the "fungus", wet or dry rot or bacteria;
- b. The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungus", wet or dry rot or bacteria; and
- c. The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungus", wet or dry rot or bacteria are present.

3. The coverage described under E.2. of this Limited Coverage is limited to \$15,000. Regardless of the number of claims, this limit is the most we will pay for the total of all loss or damage arising out of all occurrences of "specified causes of loss" (other than fire or lightning) and Flood which take place in a 12-month period (starting with the beginning of the present annual policy period). With respect to a particular occurrence of loss which results in "fungus", wet or dry rot or bacteria, we will not pay more than a total of \$15,000 even if the "fungus", wet or dry rot or bacteria continue to be present or active, or recur, in a later policy period.

4. The coverage provided under this Limited Coverage does not increase the applicable Limit of Insurance on any Covered Property. If a particular occurrence results in loss or damage by "fungus", wet or dry rot or bacteria, and other loss or damage, we will not pay more, for the total of all loss or damage, than the applicable Limit of Insurance on the affected Covered Property.

If there is covered loss or damage to Covered Property, not caused by "fungus", wet or dry rot or bacteria, loss payment will not be limited by the terms of this Limited Coverage, except to the extent that "fungus", wet or dry rot or bacteria cause an increase in the loss. Any such increase in the loss will be subject to the terms of this Limited Coverage.

5. The terms of this Limited Coverage do not increase or reduce the coverage provided under Paragraph F.2. (Water Damage, Other Liquids, Powder Or Molten Material Damage) of this Causes Of Loss form or under the Additional Coverage, Collapse.
6. The following, 6.a. or 6.b., applies only if Business Income and/or Extra Expense Coverage applies to the described premises and only if the "suspension" of "operations" satisfies all terms and conditions of the applicable Business Income and/or Extra Expense Coverage Form:
 - a. If the loss which resulted in "fungus", wet or dry rot or bacteria does not in itself necessitate a "suspension" of "operations", but such "suspension" is necessary due to loss or damage to property caused by "fungus", wet or dry rot or bacteria, then our payment under Business Income and/or Extra Expense is limited to the amount of loss and/or expense sustained in a period of not more than 30 days. The days need not be consecutive.
 - b. If a covered "suspension" of "operations" was caused by loss or damage other than "fungus", wet or dry rot or bacteria but remediation of "fungus", wet or dry rot or bacteria prolongs the "period of restoration", we will pay for loss and/or expense sustained during the delay (regardless of when such a delay occurs during the "period of restoration"), but such coverage is limited to 30 days. The days need not be consecutive.

F. Additional Coverage Extensions

1. Property In Transit

This Extension applies only to your personal property to which this form applies.

- a. You may extend the insurance provided by this Coverage Part to apply to your personal property (other than property in the care, custody or control of your salespersons) in transit more than 100 feet from the described premises. Property must be in or on a motor vehicle you own, lease or operate while between points in the coverage territory.
- b. Loss or damage must be caused by or result from one of the following causes of loss:
 - (1) Fire, lightning, explosion, windstorm or hail, riot or civil commotion, or vandalism.
 - (2) Vehicle collision, upset or overturn. Collision means accidental contact of your vehicle with another vehicle or object. It does not mean your vehicle's contact with the roadbed.
 - (3) Theft of an entire bale, case or package by forced entry into a securely locked body or compartment of the vehicle. There must be visible marks of the forced entry.
- c. The most we will pay for loss or damage under this Extension is \$5,000.

This Coverage Extension is additional insurance. The Additional Condition, Coinsurance, does not apply to this Extension.

2. Water Damage, Other Liquids, Powder Or Molten Material Damage

If loss or damage caused by or resulting from covered water or other liquid, powder or molten material damage loss occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes. This Coverage Extension does not increase the Limit of Insurance.

3. Glass

- a. We will pay for expenses incurred to put up temporary plates or board up openings if repair or replacement of damaged glass is delayed.

- b. We will pay for expenses incurred to remove or replace obstructions when repairing or replacing glass that is part of a building. This does not include removing or replacing window displays.

This Coverage Extension F.3. does not increase the Limit of Insurance.

G. Definitions

1. "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.
2. "Specified causes of loss" means the following: fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire-extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.
 - a. Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite. This cause of loss does not include:
 - (1) The cost of filling sinkholes; or
 - (2) Sinking or collapse of land into man-made underground cavities.
 - b. Falling objects does not include loss or damage to:
 - (1) Personal property in the open; or
 - (2) The interior of a building or structure, or property inside a building or structure, unless the roof or an outside wall of the building or structure is first damaged by a falling object.

c. Water damage means:

- (1) Accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam; and
- (2) Accidental discharge or leakage of water or waterborne material as the direct result of the breaking apart or cracking of a water or sewer pipe that is located off the described premises and is part of a municipal potable water supply system or municipal sanitary sewer system, if the breakage or cracking is caused by wear and tear.

But water damage does not include loss or damage otherwise excluded under the terms of the Water Exclusion. Therefore, for example, there is no coverage under this policy in the situation in which discharge or leakage of water results from the breaking apart or cracking of a pipe which was caused by or related to weather-induced flooding, even if wear and tear contributed to the breakage or cracking. As another example, and also in accordance with the terms of the Water Exclusion, there is no coverage for loss or damage caused by or related to weather-induced flooding which follows or is exacerbated by pipe breakage or cracking attributable to wear and tear.

To the extent that accidental discharge or leakage of water falls within the criteria set forth in c.(1) or c.(2) of this definition of "specified causes of loss," such water is not subject to the provisions of the Water Exclusion which preclude coverage for surface water or water under the surface of the ground.

POLICY NUMBER:

COMMERCIAL PROPERTY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SOUTH CAROLINA CHANGES – VALUATION

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
BUILDERS' RISK COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE*

Prem. No.	Bldg. No.	Agreed Value of Buildings	Total Amount of Insurance to be Carried

- A. When this endorsement is attached to the STANDARD PROPERTY POLICY CP 00 99 the term Coverage Part in this endorsement is replaced by the term Policy.
- B. The following is added to VALUATION Loss Condition:
1. For loss or damage to buildings caused by or resulting from fire or lightning, you and we agree that:
 - a. The value of buildings described in this Coverage Part; and
 - b. The total amount of insurance to be carried on the buildings, including this Coverage Part; are the amounts shown in the Schedule.
 2. The following applies to the Builders' Risk Coverage Form, or the Builders' Risk Changes – Standard Property Policy, if applicable:
The Agreed Value of Buildings represents the value of the building when it is completed.

*Information required to complete this Schedule, if not shown on this endorsement, will be shown in the Declarations.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 03 20 10 92

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

MULTIPLE DEDUCTIBLE FORM

(FIXED DOLLAR DEDUCTIBLES)

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
BUILDERS' RISK COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY
TOBACCO SALES WAREHOUSES COVERAGE FORM

SCHEDULE *

The Deductibles applicable to any one occurrence are shown below:

Prem. No.	Bldg. No.	Deductible	Covered Causes of Loss **

* Information required to complete this Schedule, if not shown on this endorsement, will be shown in the Declarations.

** For each deductible listed in this Schedule, enter the number corresponding to the Covered Cause(s) of Loss to which that deductible applies (or enter the description):

- (1) All Covered Causes of Loss
- (2) All Covered Causes of Loss **except** Windstorm or Hail
- (3) All Covered Causes of Loss **except** Theft
- (4) All Covered Causes of Loss **except** Windstorm or Hail and Theft
- (5) Windstorm or Hail
- (6) Theft

The following is added to the DEDUCTIBLE section:

- A. In the event that loss or damage occurs to Covered Property at more than one building location as a result of one occurrence, the largest applicable deductible for that Covered Cause of Loss, shown in the Schedule above or in the Declarations, will apply.
- B. The terms of this endorsement do not apply to any Earthquake Deductible or to any Windstorm or Hail Percentage Deductible provided elsewhere in this policy.

POLICY NUMBER:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL COVERAGE ENDORSEMENT
(WIND DRIVEN PRECIPITATION)**

This endorsement modifies insurance provided under the following:

CAUSE OF LOSS - SPECIAL FORM

Sublimit:

The sublimit for WIND DRIVEN PRECIPITATION is included within the Limit of Insurance shown in the Declarations as applicable to the covered Building Property. This sublimit does not increase the Limit of Insurance.

Sublimit: \$

Covered Cause of Loss:

The term Covered Cause of Loss includes the Additional Coverage - Wind Driven Precipitation as described and limited below.

We will pay for direct physical loss or damage to the interior of any building or structure, or to personal property in the building or structure caused by or resulting from rain, snow, sleet or ice, when driven by wind.

Additional Exclusions:

We will not pay for loss or damage caused directly or indirectly by any of the following:

- (1) Sand or dust, unless the building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the sand or dust enters;
- (2) Thawing of snow, sleet or ice on the building or structure; or
- (3) Faulty, inadequate or defective:
 - (a) Planning, zoning, development, surveying, siting;
 - (b) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
 - (c) Materials used in repair, construction, renovation or remodeling; or
 - (d) Maintenance;

of part or all of any property on or off the described premises.

ELECTRONICALLY FILED - 2018 Feb 14 4:31 PM - Horry - COMMON PLEAS - CASE#2016CP2604464

ENDORSEMENT

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement, effective at 12:01 A.M. forms a part of

Policy No. Issued to:

By:

ADDITIONAL COVERAGE - EQUIPMENT BREAKDOWN

In consideration of the premium charged, it is hereby understood and agreed that the following amendments to the policy shall apply:

A. The following is added as an Additional Coverage:

Additional Coverage-- Equipment Breakdown

The term Covered Cause of Loss includes the Additional Coverage - Equipment Breakdown as described below.

1. We will pay for direct physical loss or damage to Covered Property that is the direct result of an "accident". As used in this Additional Coverage – Equipment Breakdown endorsement, "accident" means a fortuitous event that causes direct physical damage to "covered equipment" as a result of any of the following:
 - a. mechanical breakdown, including rupture or bursting caused by centrifugal force;
 - b. artificially generated electrical current, including electric arcing, that disturbs electrical devices, appliances, or wires;
 - c. explosion of steam boilers, steam pipes, steam engines, or steam turbines owned or leased by you, or operated under your control;
 - d. loss or damage to steam boilers, steam pipes, steam engines, or steam turbines caused by or resulting from any condition or event inside such equipment; or
 - e. loss or damage to hot water boilers or other water heating equipment caused by or resulting from any condition or event inside such boilers or equipment.
2. Unless otherwise shown in the Additional Coverage – Equipment Breakdown Schedule, we will pay for the following when they are the direct result of an "accident". The limits for these coverages are within, and do not increase, the Equipment Breakdown limit.
 - a. **Expediting Expenses**
 With respect to your damaged Covered Property, unless otherwise shown in the Additional Coverage – Equipment Breakdown Schedule, we will pay up to \$25,000 of the reasonable additional expense to:
 - (1) make temporary repairs; and
 - (2) expedite permanent repairs or permanent replacement.

b. Hazardous Substances

We will pay for the "additional expenses" to repair or replace Covered Property because of contamination by a "hazardous substance". This includes the "additional expense" to clean up or dispose of such property. As used in this Section 2.b., "additional expense" means those amounts beyond what would have been payable under this Equipment Breakdown Coverage had no "hazardous substance" been involved. Unless otherwise shown in the Additional Coverage – Equipment Breakdown Schedule, \$25,000 is the most we will pay under this Section 2.b., including actual loss of Business Income you sustain and necessary Extra Expense you incur, if shown as covered.

c. Spoilage

- (1) We will pay for physical damage to "perishable goods" that occurs as a result of an "accident".
- (2) We will pay for physical damage to "perishable goods" due to contamination from the release of refrigerant, including but not limited to ammonia;
- (3) We will also pay any necessary expenses you incur to reduce the amount of loss under the coverage provided by this Section 2.c., to the extent that such expenses do not exceed the amount of loss that otherwise would have been payable under this coverage.
- (4) If you are unable to replace the "perishable goods" before their anticipated sale, the amount of our payment will be determined on the basis of the sales price of the "perishable goods" at the time of the "accident", less discounts and expenses you otherwise would have incurred. Otherwise our payment will be determined in accordance with the Valuation condition.
- (5) Unless otherwise shown in the Additional Coverage – Equipment Breakdown Schedule, the most we will pay for loss, damage, or expense under this Section 2.c. is \$25,000.

d. Computer Equipment

We will pay for loss, damage, or expense resulting from an "accident" to "computer equipment".

Unless otherwise shown in the Additional Coverage – Equipment Breakdown Schedule, the most we will pay for loss, damage, or expense under this Section 2.d., including actual loss of Business Income you sustain and necessary Extra Expense you incur, if shown as covered, is \$25,000. "Computer equipment" used primarily to control or operate "covered equipment" is not subject to this limit.

e. Data Restoration

We will pay for your reasonable and necessary cost to research, replace, and restore "data" lost as a result of an "accident".

Unless otherwise shown in the Additional Coverage – Equipment Breakdown Schedule, the most we will pay for loss, damage, or expense under this Section 2.e., including actual loss of Business Income you sustain and necessary Extra Expense you incur, if shown as covered, is \$25,000.

f. Service Interruption Coverage

- (1) Any insurance provided for Business Income, Extra Expense, or Spoilage is extended to apply to your loss, damage, or expense caused by an "accident" to equipment that is owned by a utility, landlord, or other supplier with whom you have a contract to supply you with any of the following services: electrical power, waste disposal, air conditioning, refrigeration, heating, natural gas, compressed air, water, steam, internet access, telecommunications services, wide area networks, or data transmission. The equipment must meet the definition of "covered equipment".
- (2) Unless otherwise shown in the Additional Coverage - Equipment Breakdown Schedule, Service Interruption coverage will not apply unless the failure or disruption of service exceeds 24 hours immediately following the "accident".
- (3) The most we will pay under this Section 2.f. is either the Business Income, Extra Expense limit or Spoilage limit that applies to the coverage provided under this Additional Coverage - Equipment Breakdown endorsement if such loss, damage, or expense is covered under the policy, except that if a Service Interruption limit is shown in the Additional Coverage - Equipment Breakdown Schedule, that limit will apply to the Business Income and Extra Expense loss under this Section 2.f.

g. Business Income and Extra Expense

Any insurance provided under this policy for Business Income or Extra Expense is extended to the coverages provided by this Additional Coverage - Equipment Breakdown endorsement. Unless a different limit is shown in the Additional Coverage - Equipment Breakdown Schedule, the most we will pay for loss of Business Income you sustain or necessary Extra Expense you incur is the limit shown in the Declarations for such coverages.

3. EXCLUSIONS

All exclusions in the Causes of Loss provision(s) of the Coverage Forms attached to and forming a part of this policy apply, except as modified below and to the extent that coverage is specifically provided by this Additional Coverage - Equipment Breakdown endorsement.

a. Notwithstanding any other exclusions in the applicable Covered Causes of Loss form, if an "accident" results from the following, we will pay for such resulting loss, damage, or expense:

- (1) Wear and tear;
- (2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
- (3) Settling, cracking, shrinking or expansion; or
- (4) Dampness or dryness of atmosphere, changes or extremes in temperature or marring or scratching.

b. As respects any Water and/or Flood exclusion included in this policy, the following is added:

However, if electrical "covered equipment" requires drying out because of Water and/or Flood, we will pay for the direct expenses of such drying out subject to the applicable Limit of Insurance and deductible for Building or Business Personal Property, whichever applies.

- c. We will not pay under this Additional Coverage – Equipment Breakdown endorsement for loss, damage, or expense caused by or resulting from:
 - (1) your failure to use all reasonable means to protect Covered Property from damage following an "accident";
 - (2) any defect, programming error, programming limitation, computer virus, malicious code, loss of "data", loss of access, loss of use, loss of functionality, or other condition within or involving "data" or "media" of any kind; or
 - (3) any of the following tests:
 - a hydrostatic, pneumatic, or gas pressure test of any boiler or pressure vessel, or an electrical insulation breakdown test of any type of electrical equipment.
- d. With respect to Service Interruption coverage, we will also not pay for an "accident" caused by or resulting from: fire; lightning; windstorm or hail; explosion (except as specifically provided in A.1.c. above); smoke; aircraft or vehicles; riot or civil commotion; vandalism; sprinkler leakage; falling objects; weight of snow, ice, or sleet; freezing; collapse; flood or earth movement.
- e. With respect to Business Income, Extra Expense, and Service Interruption coverages, we will also not pay for:
 - (1) loss caused by your failure to use due diligence and dispatch and all reasonable means to resume business; or
 - (2) any increase in loss resulting from an agreement between you and your customer or supplier.
- f. We will not pay for loss, damage, or expense caused directly or indirectly by the following, whether or not caused by or resulting from an "accident": Any mold, fungus, mildew, or yeast, including any spores or toxins produced by or emanating from such mold, fungus, mildew, or yeast. This includes, but is not limited to, costs arising from clean up, removal, or abatement of such mold, fungus, mildew, yeast, spores, or toxins. However, this exclusion does not apply to spoilage of personal property that is "perishable goods", to the extent that spoilage is covered under the Spoilage coverage provided by this Additional Coverage – Equipment Breakdown endorsement.
- g. We will not pay under this Additional Coverage – Equipment Breakdown endorsement for any loss or damage to animals.

4. DEFINITIONS

The following definitions are added as respects this Additional Coverage - Equipment Breakdown endorsement:

- a. "Boilers and Vessels" means:
 - (1) Any boiler, including attached steam, condensate, and feedwater piping; and
 - (2) Any fired or unfired pressure vessel subject to vacuum or internal pressure other than the static pressure of its contents.

This term does not appear elsewhere in this Additional Coverage - Equipment Breakdown endorsement, but may appear in the Additional Coverage – Equipment Breakdown Schedule.

- b. "Computer equipment" means Covered Property that is electronic computer or other data processing equipment, including "media" and peripherals used in conjunction with such equipment.
- c. "Covered Equipment"
 - (1) "Covered equipment" means, unless otherwise specified in the Additional Coverage – Equipment Breakdown Schedule, Covered Property:
 - (a) that generates, transmits, or utilizes energy, including electronic communications and data processing equipment; or
 - (b) which, during normal usage, operates under vacuum or pressure, other than the weight of its contents.
 - (2) None of the following is "covered equipment":
 - (a) structure, foundation, cabinet, compartment, or air supported structure or building;
 - (b) insulating or refractory material;
 - (c) sewer piping, underground vessels or piping, or piping forming a part of a sprinkler system;
 - (d) water piping other than boiler feedwater piping, boiler condensate return piping, or water piping forming a part of a refrigerating or air conditioning system;
 - (e) "vehicle" or any equipment mounted on a "vehicle";
 - (f) satellite, spacecraft, or any equipment mounted on a satellite or spacecraft;
 - (g) dragline, excavation, or construction equipment; or
 - (h) equipment manufactured by you for sale.
- d. "Data" means information or instructions stored in digital code capable of being processed by machinery.
- e. "Hazardous substance" means any substance that is hazardous to health or has been declared to be hazardous to health by a governmental agency.
- f. "Media" means material on which "data" is recorded, such as magnetic tapes, hard disks, optical disks, or floppy disks.
- g. "One accident" means: If an initial "accident" causes other "accidents", all will be considered "one accident". All "accidents" resulting from the same event will be considered "one accident".
- h. "Perishable Goods" means personal property maintained under controlled conditions for its preservation, and susceptible to loss or damage if the controlled conditions change.
- i. "Production Machinery" means any machine or apparatus that processes or produces a product intended for eventual sale. However, "production machinery" does not mean any fired or unfired pressure vessel other than a cylinder containing a movable plunger or piston.

This term does not appear elsewhere in this Additional Coverage - Equipment Breakdown endorsement, but may appear in the Additional Coverage – Equipment Breakdown Schedule.

- j. "Vehicle" means, as respects this Additional Coverage – Equipment Breakdown endorsement only, any machine or apparatus that is used for transportation or moves under its own power. "Vehicle" includes, but is not limited to, car, truck, bus, trailer, train, aircraft, watercraft, forklift, bulldozer, tractor, or harvester. However, any property that is stationary, permanently installed at a covered location, and that receives electrical power from an external power source will not be considered a "vehicle".

- B. The policy to which this Additional Coverage - Equipment Breakdown endorsement is attached is modified as follows.

The definitions stated above also apply to this section B.

1. DEDUCTIBLE

The deductible in the Declarations applies unless a separate Equipment Breakdown deductible is shown in the Additional Coverage – Equipment Breakdown Schedule. When a separate Equipment Breakdown deductible is shown in the Additional Coverage – Equipment Breakdown Schedule, the following applies:

Only as regards Equipment Breakdown Coverage, the DEDUCTIBLE provision of the policy is deleted and replaced with the following:

- a. Deductibles for Each Coverage
 - (1) Unless the Additional Coverage – Equipment Breakdown Schedule indicates that your deductible is combined for all coverages, multiple deductibles may apply to any "one accident".
 - (2) We will not pay for loss, damage, or expense under any coverage until the amount of the covered loss, damage, or expense exceeds the deductible amount indicated for that coverage in the Additional Coverage – Equipment Breakdown Schedule. We will then pay the amount of loss, damage, or expense in excess of the applicable deductible amount, subject to the applicable limit.
 - (3) If deductibles vary by type of "covered equipment" and more than one type of "covered equipment" is involved in any "one accident", only the highest deductible for each coverage will apply.
- b. Direct and Indirect Coverages
 - (1) Direct Coverages Deductibles and Indirect Coverages Deductibles may be indicated in the Additional Coverage – Equipment Breakdown Schedule.
 - (2) Unless more specifically indicated in the Additional Coverage – Equipment Breakdown Schedule:
 - (a) Indirect Coverages Deductibles apply to Business Income and Extra Expense loss as defined in any Business Income coverage that is part of this policy; and
 - (b) Direct Coverages Deductibles apply to all remaining loss, damage, or expense covered by this Additional Coverage – Equipment Breakdown endorsement.

c. Application of Deductibles

(1) Dollar Deductibles

We will not pay for loss, damage, or expense resulting from any "one accident" until the amount of loss, damage, or expense exceeds the applicable Deductible shown in the Additional Coverage – Equipment Breakdown Schedule. We will then pay the amount of loss, damage, or expense in excess of the applicable Deductible or Deductibles, up to the applicable Limit of Insurance.

(2) Time Deductible

If a time deductible is shown in the Additional Coverage – Equipment Breakdown Schedule, we will not be liable for any loss occurring during the specified number of hours or days immediately following the "accident". If a time deductible is expressed in days, each day shall mean twenty-four consecutive hours.

(3) Multiple of Average Daily Value (ADV)

If a deductible is expressed as a number times ADV, that amount will be calculated as follows:

The ADV (Average Daily Value) will be the Business Income (as defined in any Business Income coverage that is part of this policy) that would have been earned during the period of interruption of business had no "accident" occurred, divided by the number of working days in that period. No reduction shall be made for the Business Income not being earned, or in the number of working days, because of the "accident" or any other scheduled or unscheduled shutdowns during the period of interruption. The ADV applies to the Business Income value of the entire location, whether or not the loss affects the entire location. If more than one location is included in the valuation of the loss, the ADV will be the combined value of all affected locations. For purposes of this calculation, the period of interruption may not extend beyond the period of restoration.

The number indicated in the Additional Coverage – Equipment Breakdown Schedule will be multiplied by the ADV as determined above. The result shall be used as the applicable deductible.

(4) Percentage of Loss Deductibles

If a deductible is expressed as a percentage of loss, we will not be liable for the indicated percentage of the gross amount of loss, damage, or expense (prior to any applicable deductible or coinsurance) insured under the applicable coverage. If the dollar amount of such percentage is less than the indicated minimum deductible, the minimum deductible will be the applicable deductible.

2. CONDITIONS

The following conditions are added as respects this Additional Coverage - Equipment Breakdown endorsement:

a. Suspension

Whenever "covered equipment" is found to be in, or exposed to, a dangerous condition, any of our representatives may immediately suspend the insurance against loss from an "accident" to that "covered equipment". This can be done by mailing or delivering a written notice of suspension to:

- (1) your last known address; or
- (2) the address where the "covered equipment" is located.

Once suspended in this way, your insurance can be reinstated only by an endorsement for that "covered equipment". If we suspend your insurance, you will get a pro rata refund of premium for that "covered equipment" for the period of suspension. But the suspension will be effective even if we have not yet made or offered a refund.

b. Jurisdictional Inspections

If any property that is "covered equipment" under this Additional Coverage – Equipment Breakdown endorsement requires inspection to comply with state or municipal boiler and pressure vessel regulations, we agree to perform such inspection on your behalf. We do not warrant that conditions are safe or healthful.

c. Environmental, Safety, and Efficiency Improvements

If "covered equipment" requires replacement due to an "accident", we will pay your additional cost to replace with equipment that is better for the environment, safer, or more efficient than the equipment being replaced.

However, we will not pay more than 125% of what the cost would have been to repair or replace with like kind and quality. This condition does not increase any of the applicable limits. This condition does not apply to any property to which Actual Cash Value applies.

d. Coinsurance Additional Coverage – Equipment Breakdown

If a coinsurance percentage is shown in the Additional Coverage – Equipment Breakdown Schedule for specified coverages, the following condition applies:

We will not pay for the full amount of your loss if the applicable limit is less than the product of the specified coinsurance percentage times the value of the property subject to the coverage at the time of the loss. Instead, we will determine what percentage this calculated product is compared to the applicable limit and apply that percentage to the gross amount of loss. We will then subtract the applicable deductible. The most we will pay is the lesser of the resulting amount, or the applicable limit. We will not pay for the remainder of the loss. Coinsurance applies separately to each insured location.

The most we will pay for loss, damage, or expense under this Additional Coverage – Equipment Breakdown endorsement arising from any "one accident" is the applicable Limit of Insurance in the Declarations unless otherwise shown in the Additional Coverage – Equipment Breakdown Schedule. Coverage provided under this Additional Coverage – Equipment Breakdown endorsement does not provide an additional amount of insurance.

ENDORSEMENT

This endorsement, effective at 12:01 A.M. forms a part of

Policy No. Issued to:

By:

CONDOMINIUM AMENDATORY ENDORSEMENT

This endorsement modifies insurance provided under the following:

CONDOMINIUM ASSOCIATION COVERAGE FORM**CAUSES OF LOSS – SPECIAL FORM**

If any coverage provided by this endorsement is afforded elsewhere in this policy by any other coverage form or endorsement, then applicable limit of insurance shall be the highest single limit provided by this policy. Coverage as respects the coverage form or endorsement that provides a lesser limit for any such duplicate coverage shall not apply.

The **CONDOMINIUM ASSOCIATION COVERAGE FORM** is amended as follows:

- I. Subparagraph e. **Increased Cost of Construction** of Paragraph 4. **Additional Coverages** (Section A. **Coverage**) is deleted in its entirety and replaced with the following:

e. **Ordinance or Law**

- (1) This Additional Coverage applies only to buildings to which the Replacement Cost Coverage applies.
- (2) In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with enforcement of an ordinance or law that requires you to demolish and clear the site of undamaged parts of the building, subject to the limitations stated in e.(4) through e.(10) of this Additional Coverage.
- (3) In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with enforcement of an ordinance or law in the course of repair, rebuilding or replacement of damaged parts of that property, subject to the limitations stated in e.(4) through e.(10) of this Additional Coverage.
- (4) The ordinance or law referred to in e.(2) and e.(3) of this Additional Coverage is an ordinance or law that regulates the construction or repair of buildings or establishes zoning or land use requirements at the described premises, and is in force at the time of loss.
- (5) Under this Additional Coverage, we will not pay any costs due to an ordinance or law that:
 - (a) You were required to comply with before the loss, even when the building was undamaged; and
 - (b) You failed to comply with.
- (6) Under this Additional Coverage, we will not pay for:
 - (a) The enforcement of any ordinance or law which requires demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by "pollutants" or due to the presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria; or

- (b) Any costs associated with the enforcement of an ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants", "fungus", wet or dry rot or bacteria.
- (7) The most we will pay under this Additional Coverage, for each described building insured under this Coverage Form, is the lesser of 10% of the Limit of Insurance applicable to that building or \$250,000. The amount payable under this Additional Coverage is in addition to the Limits of Insurance.
- (8) With respect to this Additional Coverage:
 - (a) We will not pay for the Increased Cost of Construction:
 - (i) Until the property is actually repaired or replaced, at the same or another premises; and
 - (ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.
 - (b) If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of e.(7) of this Additional Coverage, is the increased cost of construction at the same premises.
 - (c) If the ordinance or law requires relocation to another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of e.(7) of this Additional Coverage, is the increased cost of construction at the new premises.
- (9) This Additional Coverage is not subject to the terms of the Ordinance or Law Exclusion, to the extent that such Exclusion would conflict with the provisions of this Additional Coverage.
- (10) The costs addressed in the Loss Payment and Valuation Conditions, and the Replacement Cost Optional Coverage, in this Coverage Form, do not include the increased cost attributable to enforcement of an ordinance or law. The amount payable under this Additional Coverage, as stated in e.(7) of this Additional Coverage, is not subject to such limitation.

II. Subparagraph g. is added to Paragraph 4. **Additional Coverages** (Section A. Coverage) as follows:

g. Unscheduled Business Personal Property

We will pay for direct physical loss or damage to your unscheduled business personal property. The most we will pay under this Additional Coverage is \$25,000 in any one occurrence.

The amount payable under this Additional Coverage is in addition to the Limits of Insurance.

III. Subparagraph e. **Outdoor Property** of Paragraph 5. **Coverage Extensions** (Section A. Coverage) is deleted in its entirety and replaced with the following:

e. Outdoor Property

You may extend the insurance provided by this Coverage Form to apply to your outdoor fences, radio and television antennas (including satellite dishes), signs (other than signs attached to buildings), trees, shrubs and plants, (other than "stock" of trees, shrubs or plants), including debris removal expense.

The most we will pay for loss or damage under this Extension is \$25,000, but not more than \$250 for any one tree, shrub or plant. These limits apply to any one occurrence, regardless of the types or number of items lost or damaged in that occurrence. The deductible(s) applicable to your business personal property shall apply to this Coverage Extension.

IV. Subparagraph g. is added to Paragraph 5. **Coverage Extensions** (Section A. Coverages) as follows:

g. Loss of Condominium Association Fees and Extra Expense

You may extend the insurance provided by this Coverage Form to apply to loss of "condominium association fees" sustained by you resulting directly from the necessary untenability of any unit, during the "period of restoration", caused by direct physical loss or damage to Covered Property by a Covered Cause of Loss. However, the loss of "condominium association fees" does not include "loss assessment charges".

You may extend the insurance provided by this Coverage Form to apply to "extra expense" you incur as a result of direct physical loss or damage to Covered Property by a Covered Cause of Loss.

As used in this Subparagraph 5.g., these terms are defined as follows:

- (1) "Condominium association fees" mean fees payable to you in accordance with the Condominium Association agreement between you and a unit owner, and in accordance with the terms of your association by-laws.
 - (2) "Extra expense" means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property. Coverage pertains to expenses (other than the expense to repair or replace property) which are incurred to:
 - (a) To continue "operations" at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location; or
 - (b) To meet contractual obligations to any property manager.
 - (3) "Loss assessment charges" mean assessments charged to all unit owners, by the Condominium Association, due to additional costs incurred by the association as a result of physical loss or damage to Covered Property.
- a. "Period of restoration" means the period of time that:
- a. Begins on the date of direct physical loss or damage to Covered Property by a Covered Cause of Loss; and
 - b. Ends on the date when Covered Property should be repaired, rebuilt or replaced with reasonable speed and similar quality;

The most we will pay under this Coverage Extension is \$50,000 in any one occurrence. The amount payable under this Coverage Extension is in addition to the Limits of Insurance.

V. Subparagraph h. is added to Paragraph 5. Coverage Extensions (Section A. Coverages) as follows:

a. Coverage for Loss to Portion of Undamaged Building

This Coverage Extension applies only to buildings to which the Replacement Cost Coverage applies.

In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay for the loss in value of the undamaged portion of the damaged building as a consequence of enforcement of an ordinance or law that requires demolition of undamaged parts of the same building.

VI. Subparagraph a. of Paragraph 4. Loss Payment (Section E. Loss Conditions) is deleted in its entirety and replaced with the following:

- a. In the event of loss or damage covered by this Coverage Form, at our option, we will either:
- (1) Pay the value of lost or damaged property;
 - (2) Pay the cost of repairing or replacing the lost or damaged property, subject to b. below;
 - (3) Take all or any part of the property at an agreed or appraised value; or
 - (4) Repair, rebuild or replace the property with other property of like kind and quality, subject to b. below.

We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

In addition, in the event of a covered loss hereunder, we will pay the actual adjusted amount of loss, less applicable deductible(s), but in no event more than the total stated value for all covered property plus 15% of such value, less applicable deductible(s).

For purposes of this subparagraph 4.a., the total stated value shall be the amount(s) corresponding to each premises involved in the loss, shown as Limits of Insurance in the Declarations, or on the latest

Statement of Values on file with us. In the event of any loss in excess of the total stated value, you shall pay us the annual additional premium calculated for such excess amount at the policy rate for that premises.

The **CAUSES OF LOSS – SPECIAL FORM** is amended as follows:

Paragraph 4. is added to Section F. **Additional Coverage Extensions** as follows:

4. Sewer Back-Up

We will pay for direct physical loss or damage to Covered Property solely caused by water or other materials that back up, overflow, or discharge from a sewer or drain.

However, we will not pay for any loss or damage caused by water or other materials that back up, overflow, or discharge from a sewer or drain when such back up, overflow, or discharge is caused by any flood. As used in this Paragraph **4.Sewer Back-Up**, "flood" means accumulation of surface water, mudslide, mudflow, waves, tides, tidal waves and the rising, including overflowing or breaking of boundaries of any body of water, all whether wind driven or not.

The most we will pay for loss or damage by back up, overflow, or discharge from a sewer or drain is \$50,000 in any one occurrence. Payments under this Additional Coverage Extension will not increase the applicable Limit of Insurance shown in the Declarations.

All other terms and conditions remain the same.

Authorized Representative

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 03 25 06 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NAMED STORM PERCENTAGE DEDUCTIBLE

This endorsement modifies insurance provided under the following:

BUILDERS' RISK COVERAGE FORM
BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY
TOBACCO SALES WAREHOUSES COVERAGE FORM

SCHEDULE

Premises Number	Building Number	Named Storm Deductible Percentage – Enter 1%, 2% Or 5%
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

A Named Storm is a storm system that has been identified as a tropical storm or hurricane and assigned a name by the National Hurricane Center or the Central Pacific Hurricane Center of the National Weather Service (hereafter referred to as NHC and CPHC). Under the terms of this endorsement, a Named Storm begins at the time a Watch or Warning is issued by the NHC or CPHC for the area in which the affected premises are located, and ends 72 hours after the termination of the last Watch or Warning issued for that area by the NHC or CPHC.

The Named Storm Deductible, as shown in the Schedule and set forth in this endorsement, applies to covered loss or damage caused directly or indirectly by each Named Storm. If there is covered loss or damage from a windstorm that is not a Named Storm, the applicable deductible is the same deductible that applies to Fire, unless a different deductible is stated elsewhere in this policy for such loss or damage.

Nothing in this endorsement implies or affords coverage for any loss or damage that is excluded under the terms of the Water Exclusion or any other exclusion in this policy. If this policy is endorsed to cover Flood under the Flood Coverage Endorsement (or if you have a flood insurance policy), a separate Flood Deductible applies to loss or damage attributable to Flood, in accordance with the terms of that endorsement or policy.

As used in this endorsement, the terms "specific insurance" and "blanket insurance" have the following meanings: Specific insurance covers each item of insurance (for example, each building or personal property in a building) under a separate Limit of Insurance. Blanket insurance covers two or more items of insurance (for example, a building and personal property in that building, or two buildings) under a single Limit of Insurance. Items of insurance and corresponding Limit(s) of Insurance are shown in the Declarations.

NAMED STORM DEDUCTIBLE CALCULATIONS**A. Calculation Of The Deductible – All Policies**

1. A Deductible is calculated separately for, and applies separately to:
 - a. Each building that sustains loss or damage;
 - b. The personal property at each building at which there is loss or damage to personal property;
 - c. Personal property in the open.

If there is damage to both a building and personal property in that building, separate deductibles apply to the building and to the personal property.

2. We will not pay for loss or damage until the amount of loss or damage exceeds the applicable Deductible. We will then pay the amount of loss or damage in excess of that Deductible, up to the applicable Limit of Insurance, after any reduction required by any of the following: Coinsurance Condition; Agreed Value Optional Coverage; any provision in a Value Reporting Form relating to full reporting or failure to submit reports.
3. When property is covered under the Coverage Extension for Newly Acquired or Constructed Property: In determining the amount, if any, that we will pay for loss or damage, we will deduct an amount equal to a percentage of the value(s) of the property at time of loss. The applicable percentage for Newly Acquired or Constructed Property is the highest percentage shown in the Schedule for any described premises.

B. Calculation Of The Deductible – Specific Insurance Other Than Builders' Risk**1. Property Not Subject To Value Reporting Forms**

In determining the amount, if any, that we will pay for loss or damage, we will deduct an amount equal to 1%, 2% or 5% (as shown in the Schedule) of the Limit(s) of Insurance applicable to the property that has sustained loss or damage.

2. Property Subject To Value Reporting Forms

In determining the amount, if any, that we will pay for loss or damage, we will deduct an amount equal to 1%, 2% or 5% (as shown in the Schedule) of the value(s) of the property that has sustained loss or damage. The value(s) to be used are the latest value(s) shown in the most recent Report of Values on file with us.

However:

- a. If the most recent Report of Values shows less than the full value(s) of the property on the report dates, we will determine the deductible amount as a percentage of the full value(s) as of the report dates.
- b. If the first Report of Values is not filed with us prior to loss or damage, we will determine the deductible amount as a percentage of the applicable Limit(s) of Insurance.

C. Calculation Of The Deductible – Blanket Insurance Other Than Builders' Risk**1. Property Not Subject To Value Reporting Forms**

In determining the amount, if any, that we will pay for loss or damage, we will deduct an amount equal to 1%, 2% or 5% (as shown in the Schedule) of the value(s) of the property that has sustained loss or damage. The value(s) to be used are those shown in the most recent Statement of Values on file with us.

2. Property Subject To Value Reporting Forms

In determining the amount, if any, that we will pay for property that has sustained loss or damage, we will deduct an amount equal to 1%, 2% or 5% (as shown in the Schedule) of the value(s) of that property as of the time of loss or damage.

D. Calculation Of The Deductible – Builders' Risk Insurance**1. Builders' Risk Other Than Reporting Form**

In determining the amount, if any, that we will pay for loss or damage, we will deduct an amount equal to 1%, 2% or 5% (as shown in the Schedule) of the actual cash value(s) of that property as of the time of loss or damage.

2. Builders' Risk Reporting Form

In determining the amount, if any, that we will pay for loss or damage, we will deduct an amount equal to 1%, 2% or 5% (as shown in the Schedule) of the value(s) of the property that has sustained loss or damage. The value(s) to be used are the actual cash value(s) shown in the most recent Report of Values on file with us.

However:

- a. If the most recent Report of Values shows less than the actual cash value(s) of the property on the report date, we will determine the deductible amount as a percentage of the actual cash value(s) as of the report date.

- b. If the first Report of Values is not filed with us prior to loss or damage, we will determine the deductible amount as a percentage of the actual cash value(s) of the property as of the time of loss or damage.

EXAMPLES – APPLICATION OF DEDUCTIBLE

EXAMPLE #1 – SPECIFIC INSURANCE (B.1.)

The amount of loss to the damaged building is \$60,000.

The value of the damaged building at time of loss is \$100,000. The Coinsurance percentage shown in the Declarations is 80%; the minimum Limit of Insurance needed to meet the coinsurance requirement is \$80,000 (80% of \$100,000).

The **actual** Limit of Insurance on the damaged building is \$70,000.

The Deductible is 1%.

Step (1): $\$70,000 \div \$80,000 = .875$

Step (2): $\$60,000 \times .875 = \$52,500$

Step (3): $\$70,000 \times 1\% = \$700$

Step (4): $\$52,500 - \$700 = \$51,800$

The most we will pay is \$51,800. The remainder of the loss, \$8,200, is not covered due to the Coinsurance penalty for inadequate insurance (Steps (1) and (2)) and the application of the Deductible (Steps (3) and (4)).

EXAMPLE #2 – SPECIFIC INSURANCE (B.1.)

The amounts of loss to the damaged property are \$60,000 (building) and \$40,000 (personal property in building).

The value of the damaged building at time of loss is \$100,000. The value of the personal property in that building is \$80,000. The Coinsurance percentage shown in the Declarations is 80%; the minimum Limits of Insurance needed to meet the coinsurance requirement are \$80,000 (80% of \$100,000) for the building and \$64,000 (80% of \$80,000) for the personal property.

The **actual** Limits of Insurance on the damaged property are \$80,000 on the building and \$64,000 on the personal property (therefore no Coinsurance penalty).

The Deductible is 2%.

BUILDING

Step (1): $\$80,000 \times 2\% = \$1,600$

Step (2): $\$60,000 - \$1,600 = \$58,400$

PERSONAL PROPERTY

Step (1): $\$64,000 \times 2\% = \$1,280$

Step (2): $\$40,000 - \$1,280 = \$38,720$

The most we will pay is \$97,120. The portion of the total loss not covered due to application of the Deductible is \$2,880.

EXAMPLE #3 – BLANKET INSURANCE (C.1.)

The sum of the values of Building #1 (\$500,000), Building #2 (\$500,000) and Building #3 (\$1,000,000), as shown in the most recent Statement of Values on file with us, is \$2,000,000.

The Coinsurance percentage shown in the Declarations is 90%; the minimum Blanket Limit of Insurance needed to meet the coinsurance requirement is \$1,800,000 (90% of \$2,000,000).

The **actual** Blanket Limit of Insurance covering Buildings #1, #2, and #3, shown in the Declarations, is \$1,800,000 (therefore no Coinsurance penalty).

Buildings #1 and #2 have sustained damage; the amounts of loss to these buildings are \$40,000 (Building #1) and \$20,000 (Building #2).

The Deductible is 2%.

BUILDING #1

Step (1): $\$500,000 \times 2\% = \$10,000$

Step (2): $\$40,000 - \$10,000 = \$30,000$

BUILDING #2

Step (1): $\$500,000 \times 2\% = \$10,000$

Step (2): $\$20,000 - \$10,000 = \$10,000$

The most we will pay is \$40,000. The portion of the total loss that is not covered due to application of the Deductible is \$20,000.

EXAMPLE #4 – BLANKET INSURANCE (C.1.)

The sum of the values of Building #1 (\$500,000), Building #2 (\$500,000), Personal Property at Building #1 (\$250,000) and Personal Property at Building #2 (\$250,000), as shown in the most recent Statement of Values on file with us, is \$1,500,000.

The Coinsurance percentage shown in the Declarations is 90%; the minimum Blanket Limit of Insurance needed to meet the coinsurance requirement is \$1,350,000 (90% of \$1,500,000).

The **actual** Blanket Limit of Insurance covering Buildings #1 and #2 and Personal Property at Buildings #1 and #2, shown in the Declarations, is \$1,350,000. Therefore there is no Coinsurance penalty.

Building #1 and Personal Property at Building #1 have sustained damage; the amounts of loss are \$95,000 (Building) and \$5,000 (Personal Property).

The Deductible is 5%.

BUILDING

Step (1): $\$500,000 \times 5\% = \$25,000$

Step (2): $\$95,000 - \$25,000 = \$70,000$

PERSONAL PROPERTY

Step (1): $\$250,000 \times 5\% = \$12,500$

The loss, \$5,000, does not exceed the Deductible.

The most we will pay is \$70,000. The remainder of the building loss, \$25,000, is not covered due to application of the Deductible. There is no loss payment for the personal property.

THIS ENDORSEMENT EFFECTIVE 12:01 AM ON

FORMS A PART OF

POLICY NO.

ISSUED TO:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PROPERTY COVERAGE FORM - EARTH MOVEMENT ENDORSEMENT

This endorsement modifies insurance provided under the following:

PROPERTY COVERAGE FORM

The policy is hereby amended as follows:

Section VI. EXCLUSIONS, Paragraph S. **Earth Movement**, is deleted in its entirety.

Section IV. SUPPLEMENTAL COVERAGES, Paragraph B. **The Limits of Insurance for the following Supplemental Coverages are WITHIN the Limits of Insurance for Covered Property indicated in the Declarations**, is amended to include the following:

Earth Movement

- a. We shall pay for direct physical loss or damage to Covered Property caused by **earth movement** at the premises described in the Declarations, except:
 1. Coverage shall not apply to any unnamed location, unscheduled location or **Covered Property Not On Premises**, whether described in the Declarations or not;
 2. Coverage shall not apply to any location described in the schedule below.
- b. We shall be liable for any loss occurring for a period of up to seventy two (72) consecutive hours after the expiration of this Policy provided that the first **earth movement** damage commences prior to the expiration of this Policy.
- c. All loss arising from **earth movement** during a continuous period of seventy two (72) consecutive hours shall be considered one loss.

ANNUAL AGGREGATE LIMIT

The total for all **earth movement** loss or damage in any one policy year shall not exceed:

\$ _____ in the aggregate at all premises for which SUPPLEMENTAL COVERAGES, **Earth Movement**, is provided by this endorsement.

DEDUCTIBLE

\$ _____ deductible each loss by **earth movement** .

SCHEDULE

Prem. No. Bldg. No.

___(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

All other terms, conditions, and exclusions shall remain unchanged.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT (Broad Form)

This endorsement modifies insurance provided under the following:

COMMERCIAL AUTOMOBILE COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
MEDICAL PROFESSIONAL LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

1. The insurance does not apply:

A. Under any Liability Coverage, to "bodily injury" or "property damage":

- (1) With respect to which an "insured" under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
- (2) Resulting from the "hazardous properties" of "nuclear material" and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the "insured" is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments coverage, to expenses incurred with respect to "bodily injury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization.

C. Under any Liability Coverage, to "bodily injury" or "property damage" resulting from "hazardous properties" of "nuclear material", if:

- (1) The "nuclear material" (a) is at any "nuclear facility" owned by, or operated by or on behalf of, an "insured" or (b) has been discharged or dispersed therefrom;
- (2) The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of, by or on behalf of an "insured"; or
- (3) The "bodily injury" or "property damage" arises out of the furnishing by an "insured" of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility", but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to "property damage" to such "nuclear facility" and any property thereat.

2. As used in this endorsement:

"Hazardous properties" includes radioactive, toxic or explosive properties.

"Nuclear material" means "source material", "special nuclear material" or "by-product material".

"Source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

"Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor".

"Waste" means any waste material (a) containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content, and (b) resulting from the operation by any person or organization of any "nuclear facility" included under the first two paragraphs of the definition of "nuclear facility".

"Nuclear facility" means:

- (a) Any "nuclear reactor";
- (b) Any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing "spent fuel", or (3) handling, processing or packaging "waste";

- (c) Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the "insured" at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

- (d) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

"Property damage" includes all forms of radioactive contamination of property.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

- (2) The "bodily injury" or "property damage" occurs during the policy period; and

- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

- (a) The supervision, hiring, employment, training or monitoring of others by that insured; or
- (b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph (1), (2) or (3) above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
 - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:
 - (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;
 - (ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";
 - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
 - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:
 - (i) Any insured; or
 - (ii) Any person or organization for whom you may be legally responsible; or
 - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:
 - (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
 - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
 - (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".